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MILITARY LAW REVIEW VOL. 33

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PREFACE

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

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IN MEMORIAM
MAJOR GENERAL MYRON C. CRAMER

The Judge Advocate General
1941–1945

Myron C. Craiiier was born in Portland, Connecticut, on 6 November 1881. During 1899–1900 Cranier attended the Cazenovia Seminary in New York. He graduated from Wesleyan University in 1904 and received his LL.B. from Harvard in 1907. In 1943 he received his LL.D. from Wesleyan.

He practiced law in Sew York City from 1907 until 1910. He then nioved to Tacoma, Washington, where he practiced until World War I. While in Washington, he acted as Deputy Prosecuting Attorney for Pierce County.

General Cranier joined the Washington National Guard in 1911 arid when that unit was called to federal service in 1916, he was a First Lieutenant in Troop B, 1st U.S. Cavalry. In addition to his conibat service in the Mexican Border Expedition, he served in World War I as a Colonel in the 41st Infantry Division. He was acting chief of staff of this division when the armistice was declared in 1919. In 1920, he was conimissioned a Major in The Judge Advocate General's Department. The General attended the Command and General Staff College froni 1928 to 1930.

On 1 December 1941, General Cranier was appointed The Judge Advocate General, United States Army. He instigated the immense expansion of the Judge Advocate General's Corps, which the declaration of war niade necessary. In 1941 there were 190 judge advocates in the active Army. By 1945 the Corps had been expanded to 2,162. The workload of all areas within the Corps was tremendously increased. In military justice alone, over 82,000 general court-martial records were reviewed. In addition to his administrative duties as The Judge Advocate General he also served as co-prosecutor of the eight German saboteurs who landed in Florida and on Long Island in 1943 by submarine.

General Cranier retired on 30 Soveiiiber 1945. During his military 'career he had received the Distinguished Service Medal, Legion of Merit, and the Ordre de l'Etoile of France.

In **1946,** General Cranier was recalled to active duty to act as the United States' member of the eleven-nation military tribunal for Japanese War Crimes. After the War trials he returned to enter private practice in Washington, D.C.

General Cramer died on 25 March 1966, in Washington, D.C.

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JUDICIAL REVIEW IN MILITARY DISABILITY RETIREMENT CASES*

By Major Daniel J. Meador**

During the last twenty years, the number of court decisions challenging disability retirement pay rulings by the Executive Department of the U.S. Government has greatly increased. This increase has constantly raised the question: What is the proper scope of judicial review in disability retirement cases? In this article, the author traces and analyzes the development of review by the courts of administrative rulings in these cases and the auihority of the U.S. district courts and the Court of Claim in particular to afford remedies in disability retirement cases.

I. INTRODUCTION

Litigation over the retirement of military personnel for physical disability is a post-World War II phenonienon in our jurisprudence. Although statutory provisions for retirement of disabled servicemen have always existed, almost no disputes were reported in the judicial decisions prior to 1948. Two events probably set the stage for the modern litigation. One was the Act of Congress in 1939 which extended to reservists the same physical disability retirement benefits enjoyed by regulars;[1] the other was the massive build-up of a citizen army during the Second World War, revived on a lesser scale in response to Korea and continued now in a somewhat different form in the context of an indefinite semi-cold war. This mobilization has produced millions of veterans. Moreover, the character of the armed services and the men who serve in theni have changed substantially over the past quarter-century. At the same time, and perhaps as a result of these developments, a more hospitable judicial attitude has emerged toward claims by military personnel that congressionally authorized benefits have been wrongfully

*This article is adapted from a paper presented to The Judge Advocate General's School, U.S. Army, under the military legal thesis program. The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agenry.

**JAGC, USAR; Dean and Professor of Law, University of Alabama Law School; LL.B., 1951, University of Alabama; LL.M., 1954, Harvard University; member of the bars of the Supreme Court of Appeals of Virginia, Supreme Court of Alabama, United States Supreme Court.

[1] See Act of 3 April 1939, ch. 35, § 5, 53 Stat. 557.

withheld. Whatever the explanation, suits by individuals challenging a refusal by the military to grant disability retirement pay have become commonplace.

One of the troublesome questions posed for the courts by these cases is that of the appropriate scope of judicial review, that is, to what extent, if at all, should the judiciary examine, and perhaps overturn, a military decision denying disability retirement to a serviceman. This article will undertake to analyze that problem, firs+ in general and then in light of the peculiar differences between the remedial authority of the two forums in which this litigation can take place—the Court of Claims and the federal district courts.

II. THE PROBLEM AND A BIT OF HISTORY

The problem posed for judicial review over military retirement decisions today can be seen best by comparing the disability retirement statutes with other types of military retirement statutes, and by taking a brief look at the pre-1948 litigation.

An important difference between the two general types of retirement statutes lies in the role assigned by them to the niilitary authorities. Normally, the Secretary of the appropriate military department is vested with considerably niore discretion in administering disability retirement statutes. One of the simpler nondisability provisions, for example, reads:

> A regular enlisted member of the Army who has at least 30 years of service computed under section 3925 of this title shall be retired upon his request [2]

Compare that with the basic provision on disability retirement:

> Upon a determination by the Secretary concerned that a member of the armed forces. . . is unfit to perform the duties of his office, grade, rank, *or* rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, . . . if the Secretary also determines that—
>
> (1) based upon accepted medical principles, the disability is of a permanent nature;
>
> (2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
>
> (3) either—
>
> **(A)** the member has at least 20 years of service computed under section 1208 of this title; or
>
> (B) the disability is at least **30** percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either—
>
> (i) the member has at least eight years of service computed under section1208 of this title;
>
> (ii) the disability is the proximate result of performing active duty; or

[2] **10** U.S.C. § **3917 (1964).**

(iii) the disability was incurred in line of duty in time of war or national emergency.[3]

A mere reading of this statute shows that for a man to be retired for physical disability a secretarial determination must be made on at least a half-dozen different questions over which there may be considerable room for difference of opinion. Some of these questions are largely factual; most of them involve a mixture of law, medicine, and fact. In other words, Congress here has interposed the Secretary's determination between the serviceman and retirement. A secretarial determination is not merely a procedure for effectuating a right to retirement; the determination is an integral part of the right. Indeed no "right" would appear to exist apart from the requisite action by the Secretary.

By contrast, under the first-quoted, nondisability statute the Secretary is not expressly required to determine anything; the statute itself directly grants retirement upon request after 30 years, service. If retirement under such a provision should be refused and suit filed, the court would not have the problem of reviewing the Secretary's judgment formed pursuant to congressional authorization and direction. The judicial task would be simply that of deciding whether the facts of the plaintiff's case fall within the coverage of the statute. Until 1948 the cases presented largely questions of that sort.

In a 1934 retirement case, *Miguel v. McCarl*,[4] one of the few ever decided by the Supreme Court, the plaintiff was a Philippine scout who had served 30 years. The question was whether he was "an enlisted man" within the meaning of a statute similar to the one quoted above. The Court undertook to decide this question, and held for the plaintiff. In a case before the Court of Claims in the nineteen thirties a master sergeant had applied for retirement in that grade under the 30-year statute. The Army, however, reduced him and retired hini in a lower grade. Claiming a right to be retired as a master sergeant, he brought suit; the court reviewed the question and held for the plaintiff, saying: "The right granted by Congress was without condition and absolute. . . . The words of the act are plain, and their meaning simple. The act imposed an imperative duty and not a discretionary power." [5]

Several other cases in that era presented similar questions and drew a similar type of review, that is, a review in which the court undertook to apply the retirement statute to the facts of the case where the congressional scheme did not make an administrative determination integral to

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[3] 10 U.S.C. § 1201 (1964).
[4] 291 U.S. 442 (1934).
[5] Blackett v. United States, 81 Ct. Cl. 884, 891 (1935).

the retirement right.[6] None of those cases involved retirenient fdr physical disability.

The disability cases were edged into gradually by the courts. The first reported decision arising out of a disability retirement dispute appears to be the 1923 Supreme Court case of *Denby v. Berry*.[7] It has been the source of much confusion, particularly in connection with the use of the writ of mandamus. A naval officer there sought to compel the Secretary of the Navy (a) to revoke an order releasing the plaintiff from active service and (b) to make an order sending him before a retiring board with a view to retirement for disability by the President. After reviewing the pertinent statutory complex, the Supreme Court held that the Secretary had discretion to convene or not convene a board; evidently not caring to review the exercise of that discretion in that particular case, the Court concluded that because this was a discretionary matter for the executive, mandamus would not lie. The right to retirement, the Court said, "is one dependent by statute on the judgment of the President and not on that of the courts." [8]

Two decades elapsed before the next disability retirement case appeared in court. And that case did not present the troublesome scope-of-review issue in its present form. The Secretary there had granted retirement and then revoked it. The ensuing action presented a problem of statutory construction: Was the plaintiff, as an acting assistant surgeon, a person entitled to disability retirement under the existing Act of Congress? The court held that he was not; that being so, the Secretary was legally justified in correcting his mistake.[9] Note that this was much like the holding that a Philippine scout was an enlisted man. Most lawyers would probably say that both were questions of law rather than fact.

III. THE MODERN DISABILITY RETIREMENT LITIGATION

The first straight-forward attack on an administrative ruling on military disability retirement came in 1948 in the Court of Claims case of *Lemly v. United States*.[10] Before that case is dissected, however, it should be noted that in the meantime there had accumulated a sizeable and still growing body of judge-made law in the federal courts on judicial review of administrative action. Though none of it stemmed out of military actions, it was perhaps inevitable that the principles being evolved would spill over into that field.

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[6] *See* United States v. Gay, 264 US. 353 (1924); Hoffman v. United States, 66 Ct. Cl. 452 (1928); Rudd v. United States, 71 Ct. Cl. 432 (1931); Dene v. United States, 89 Ct. Cl. 502 (1939); O'Hara v. United States, 92 Ct. Cl. 306 (1941); Hornblass v. United States, 93 Ct. Cl. 148 (1941).

[7] 263 U.S. 29 (1923).

[8] *Id.* at 38.

[9] *See* Cook v. United States, 101 Ct. Cl. 782 (1944).

[10] 109 Ct. Cl. 760, 75 F. Supp. 248 (1948).

An influential forerunner of the military retirement cases was the 1936 Supreme Court decision in *Dismuke v. United States.*[11] There the Court had faced the question whether it could review an administrative ruling that a government civilian employee was not entitled to retirement under the Civil Service Act. The Government argued that judicial review was precluded. "But," the Court said:

> in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. . . . If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, . . . or by failing to follow a procedure which satisfied elementary standard of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized . . . . But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.[12]

This opinion, as will presently appear, is the key to all the subsequent judicial review of military administrative action. It provides the framework for review. Of course, this formulation does not answer the central, difficult questions: To what extent is authority given to an administrator to decide certain questions? What is a "plain command" which gives the administrator final authority over a particular matter? When is a particular statutory benefit to be allowed only in the discretion of an administrator?

Two civil service retirement cases filed thereafter, in the early nineteen forties, in the Court of Claims served as a bridge from *Dismuke* to the later military litigation. In *Byrne v. United States*[13] and Bayly *v. United States*,[14] involving questions of the date a disability arose and the date of plaintiff's birth, the court invoked the *Dismuke* formulation. In neither case, howeveq did the court substitute ita judgment for that of the administrator. Instead it held for the government and let the administrative determination stand, using such language as: "The Civil Service Commission could reasonably have concluded . . .,"[15] and, "In the disputed facts of this case we are not able to say that the action was arbitrary or capricious. We cannot say that it is unsupported by evidence."[16] Following a pattern that has long been familiar, the

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[11] 297 U.S. 167 (1936).
[12] Id. at 172.
[13] 97 Ct. Cl. 412 (1942).
[14] 99 Ct. Cl. 598 (1943).
[15] Id. at 607.
[16] Byrne v. United Statea, 97 Ct. Cl. 412, 424 (1942).

court branded the administrative decision which it was not overturning as involving an issue of "fact," as distinguished from one of "law." The court said: "The question of whether there is a total disability in a given case is largely a question of fact. At the most it is a mixed question of law and fact. . . . The date when total disability began is a question of fact." [17] The significant point in both these cases is that the court recognized, in the context of a retirement claim where administrative decisions were directed by Congress, that there was a power of judicial review to determine arbitrariness or lack of evidential support.

Then came the *Lemly* case [18] in 1943, the beginning of the modern military disability litigation. This litigation, most of which has been in the Court of Claims. can be analyzed in terms of two distinct questions. One concerns the appropriate degree of judicial review which may properly be exercised over the military's decision by federal courts in general. This is a matter of the judiciary vis-a-vis the executive acting under delegated authority from Congress—in a sense, a separation of powers problem. The other question concerns the extent to which review may be undertaken by either the Court of Claims or a district court in light of the different jurisdictional statutes governing these two tribunals. This involves an examination of the particular forum's authority as defined by Congress. Much lack of clarity has resulted from treating these two questions as though they were the same. For the moment we are discussing the first question only and are not concerned with the peculiarities of Court of Claims or district court jurisdiction. Stated otherwise, the problem being dealt with in this section is that of locating the appropriate line between executive and judicial authority.

In *Lemly* a naval officer on inactive duty sued in the Court of Claims to recover disability retired pay, contending that he incurred a permanent disability while on active duty which was unknown to him but known to the Navy at the time of his release from active duty. Plaintiff had not been given a hearing before a retiring board. In the Court of Claims the government demurred to the petition; since the court's decision was simply a ruling on this demurrer, the decision was based on plaintiff's allegations which were assumed to be true. One ground of demurrer was that, as the opinion states it, "this court is without jurisdiction because plaintiff's eligibility for retirement pay was a matter for exclusive determination within the Navy Department involving the discretion of the Secretary and the President. . . ." [19] The government

[17] *Ibid.*
[18] 109 Ct. Cl. 760, 75 F. Supp. 248 (1948).
[19] *Id.* at 763, 75 F. Supp. at 250.

relied on *Denby v. Berry*[20] for the proposition that courts will not interfere with an exercise of the Secretary's discretion in ordering a reservist from active duty without sending him before a retiring board. But the court rejected the government's argument, saying that "when the Secretary orders a Reserve Officer from active to inactive duty who is known to be suffering a service-connected disability without ordering him before a retiring board, me think the Secretary has failed to perform a duty imposed upon him by the Act of Congress for the benefit of the Naval Reserve."[21] *Denby v. Berry* was distinguished on the ground that the plaintiff there had not appealed the Secretary's denial of a board to the President and had thus not exhausted his rights under the retirement statutes. A better distinction, but one not mentioned, might have been that in *Denby* the Court did not read the pertinent statutes as imposing a duty on the Secretary to convene a board, while the court in *Lemly* had found such a duty to be laid on the Secretary by the different statutes involved there.[22] Viewed that way the convening of a board in *Lemly* was not left to the Secretary's discretion, as in *Denby*, but was a matter commanded by law and hence judicially enforceable. In any event the Court of Claims concluded: "This case is here on demurrer, and without passing upon the merits we think the plaintiff has stated a sufficient cause of action within the jurisdiction of this court."[23]

Thus *Lemly* is an instance of the court's taking jurisdiction of a claim for physical disability retirement pay where the armed service had refused to consider the claim on its merits. Taking the facts alleged by the plaintiff to be true for this purpose, the court ruled that the Secretary could not lawfully refuse to entertain the claim.[24]

If judicial review of administrative action were confined to that kind of question it would involve relatively slight judicial supervision over the executive branch. Instinctively lawyers might say that this question is one of law, the construction of a statute and the duty it imposes on an official. Moreover, the question is procedural — whether the Secretary must hold a hearing. A decision for the plaintiff does not involve a substitution of judicial for administrative judgment on the merits of the claim, that is, whether this individual's physical condition, its origin, its nature, its severity, and so on entitle him to retirement. The decision is only that the individual is entitled to be heard by the Secretary on these matters; he is entitled to have an administrative determination

[20] 263 U.S. 29 (1923).

[21] Lemly v. United States, 109 Ct. Cl. 760, 765, 75 F. Supp. 248, 251 (1948).

[22] This distinction was made by the Court of Claims in a later case. See Hamrick v. United States, 120 Ct. Cl. 17, 24–25, 96 F. Supp. 940, 942–43 (1951).

[23] Lemly v. United States, 109 Ct. Cl. 760, 767, 75 F. Supp. 248, 252 (1948).

[24] Another case of this type appears to be Uhley v. United States, 128 Ct. Cl. 608, 121 F. Supp. 674 (1954).

on the merits of his claim. This the court can guarantee him. This type of judicial review seems sound, and indeed it is the least troublesome type.

For the next few years only cases of that sort came before the courts. One resulted in a Supreme Court decision, ***Robertson** v. Chambers*.[25] There an Army officer was discharged without disability retirement as a result of a decision by the retiring board and disability review hoard. The officer discovered that the record before the board included some medical reports from the Veterans' Administration concerning his condition. He requested a rehearing with those reports excluded from consideration. When that was refused he filed an action for mandamus. The governing statute provided that board review "shall be based upon all available service records relating to the officer . . . ." The question was whether the words "service records" included VA records. The Supreme Court held that they did and accordingly denied mandamus. Review of this issue did not call for an inquiry into the merits of the retirement question; the problem was at the procedural level: what material could the administrator lawfully consider in passing on the retirement claim?

The Court of Claims next pushed closer to the substantive heart of the retirement determination in a pair of cases in which the Secretary of the Army, after certifying plaintiffs to be entitled to disability retirement, thereafter revoked his certification.26 The issue tendered and decided was whether the Secretary could lawfully revoke such a certification once made. Here the court formulated the rule that the Secretary can revoke his retirement orders but only upon a showing of fraud, substantial new evidence, mistake of law, or mathematical miscalculation. In one case the court held for the government; in the other it held for the plaintiff. In the case decided for the plaintiff, the court viewed the Secretary as having revoked retirement "without having before him new evidence of any substantial probative value, or evidence of fraud"; accordingly, "he exceeded his authority.''[27] This type of review still falls short of a substitution of a judicial view for the administrative view on the merits of whether a man should be given disability retirement. The question is: On what grounds may the administrator lawfully revoke a retirement action once it is final?[28] The court appeared to recognize this distinction when it said: "This opinion has not discussed

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[25] 341 U.S. 37 (1951).

[26] See Spencer v. United States, 121 Ct. Cl. 558, 102 F. Yupp. 774, *cert. denied*, 344 U.S. 828 (1952); Carlin v. United States, 121 Ct. C1.643, 100 F. Supp. 451 (1951).

[27] Carlin v. United States, supra note 26, at 661, 100 F. Supp. at 454.

[28] Another case involving that question is Girault v. United States, 133 Ct. Cl. 135, 135 F. Supp. 521 (1955).

the evidence as to whether the plaintiff's disability was or was not service-connected. The statutes lodge that decision in the military establishment, and, in the circumstances here present no judicial reversal of its decision is warranted." [29]

That was in **1952,** and no court had yet undertaken to review a military administrative decision on whether a disability was service-connected or on any of the numerous other factors which the statute delegates to the Secretary for determination. But by saying that ***in the circumstances here present*** no judicial reversal of the military decision on the service-connected issue was warranted, the court seemed to imply that there ***might be*** circumstances in which a reversal would be warranted. This implication was strengthened by the broad way in which the court rejected the government's contention that the court was without jurisdiction to review a retirement decision. The government had argued unsuccessfully that the suit was "an attempt to take retirement pay proceedings out of the hands of the executive department to which it had been entrusted by Congress." [30] The court responded to these government arguments by pointing out that courts had long granted relief to parties aggrieved by action of executive or adtninistrative officers which was arbitrary or capricious. It cited two of the leading Supreme Court decisions, ***Dismuke v. United States,***[31] discussed above, and ***American School of Magnetic Healing v. McAnnulty.***[32] And from another Supreme Court opinion it quoted this passage: " '. . . there is no place in our constitutional system for the exercise **of** arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.' " [33]

The fundamental scope-of-review problem was presented at last in **1955** in ***Register v. United States,***[34] a Court of Claims suit for retired pay. Plaintiff was a naval officer whom a retiring board had found to be permanently incapacitated for active service; the board further found, however, that the disability was not an incident of service, that it preexisted entry into service. Accordingly, retirement was denied all the

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[29] **Spencer v. United States, 121 Ct. Cl. 558, 569, 102 F. Supp. 774, 777, *cert. denied,* 344 U.S. 828 (1952).**

[30] **Carlin v. United States, 121 Ct. Cl. 643, 660, 100 F. Supp. 451, 453 (1951).**

[31] **297 U.S. 167 (1936).**

[32] **187 U.S. 94 (1902).**

[33] **Carlin v. United States. 121 Ct. Cl. 643, 661, 100 F. Supp. 451. 454 (1951), quoting from Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 262 (1908).**

[34] **131 Ct. Cl. 98, 128 F. Supp. 750 (1955). There was other litigation in this period involving disability retirement, but it did not directly involve this particular scope-of-review problem. See, *e.g.,* Updike v. United States, 132 Ct. Cl. 627, 132 F. Supp. 957 (1955); Uhley v. United States, 128 Ct. Cl. 608, 121 F. Supp. 674 (1954); Prince v. United States, 127 Ct. Cl. 612, 119 F. Supp. 421 (1954); Hanes v. Pace, 203 F. 2d 225 (D.C. Cir. 1953).**

way through the administrative hierarchy of the Navy. The governing statute read:

> *When a retiring board finds* that an officer is incapacitated for active service, *and that has incapacity* is *the result of an incident of the service*, such officer shall, if said decision is approved by the President, be retired from active service with retired pay.[35]

The statute clearly placed authority in the board to find whether the incapacity was an incident of service. But to what extent was the board's decision to be conclusive and not subject to judicial review? In the language of the Administrative Procedure Act, to what extent was this "agency action by law committed to agency discretion," and thus immunized from judicial scrutiny? This problem could be approached in a variety of ways. Was the question of "incident of the service" a question of "law" or a question of "fact"? As between the courts and the military authorities, which was better equipped to decide this question? Did the question involve an enunciation of general principle, which would make an independent judicial determination appropriate, or only the application of legal standards to unique facts, in which case the matter might better be left to the administrator?

But the Court of Claims, so far as its opinion shows, pursued no such inquiries. The basic facts, in the sense of what happened and when, were undisputed. The plaintiff's condition did pre-exist his entry into service, but it was aggravated by the service. The disputed point was whether that made his incapacity "the result of an incident of the service." Without pausing to discuss the appropriate scope of judicial review the court simply proceeded to decide the matter de novo as though there had been no administrative determination. In other words, the court substituted its judgment for that of the Savy and held for the plaintiff. It treated the question as one of "law."

An evaluation of this exercise of judicial review can be sharpened by comparing with it another Court of Claims decision later the same year, *Girault v. United States*.[36] The question on which retirement depended was the same—whether plaintiff's incapacity was an incident of service. But to review the adverse administrative determination the court was drawn much more deeply into evaluating evidence. Unlike *Register*, the facts in *Girault* were disputed. The factual controversy centered on whether plaintiff had the incapacitating disease before he entered the service. If he did, he was not entitled to retirement. The court undertook a detailed revien of the evidence and of the pertinent Army regulations. The regulations established a presumption that a person entered

[35] Act of 3 Aug. 1861, ch 42, § 23, 12 Stat. 291, extended by the Savy Aviation Personnel Act of 1940, ch. 694, 54 Stat. 864. (Emphasis added.)

[36] 133 Ct. Cl 135, 135 F Pupp 521 (1955).

the service in sound condition, and they required the fact that an incapacitating disability was not an incident of service to be established beyond reasonable doubt. The court, as in *Register,* simply proceeded to decide the question itself for the plaintiff, contrary to the military finding. It did, however, invoke the arbitrariness formula which stemmed from *Dismuke* and similar nonmilitary cases, saying that the Secretary's decision "was so clearly erroneous and so obviously contrary to law, that we must hold it to have been arbitrary, in the sense that it completely disregarded the regulation of the War Department . . . and gave weight to evidence so out of proportion to its real probative value as to force us to conclude that there was not a reasonable exercise of discretion on the part of the Secretary . . . ." [37]

Analytically it is difficult to classify the questions in *Register* and *Girault* as either law or fact. But that simply points up the well-recognized inadequacy of an analytical approach to the law-fact distinction in judicial review of administrative action.[38] A distinction can be made between the cases on the ground that *Register* involved the formulation of a generally applicable principle, namely, that a pre-existing condition aggravated by service is an incident of service within the meaning of the retirement statute. *Girault,* on the other hand, involved the application of established principles to the peculiar facts of the particular case. Some jurists and commentators are prone to call the former law and the latter fact. That the court itself may have viewed it this way is indicated by its use of the arbitrariness standard in *Girault* and not in *Register.* The idea of a review for arbitrariness is usually linked to what are considered questions of fact. *Girault* was more "factual" in the sense that it required a weighing of conflicting evidence rather than simply a drawing of the ultimate inference from historical or basic facts established by the evidence. But the Court of Claims did not bother to distinguish the two cases nor to discuss any of these problems. The court appeared quite willing to review the military's decision in both settings and to substitute its opinion on the merits of the retirement claims for that of the military service.

While *Girault* indicated that the Court of Claims would go far in reviewing a military retirement decision under the guise of the arbitrariness standard, the Fourth Circuit at about the same time held a retirement decision to be completely immune from all judicial review. In *Updegraff v. Talbott,*[39] a former Army officer had been denied retire-

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[37] *Id.* at 141–42, 135 F. Supp. at 525. The court's entire discussion of this point was dictum because it held that the action was barred by the statute of limitations. *Id.* at 143–45, 135 F. Supp. at 526–27.

[38] See 4 DAVIS, ADMINISTRATIVE LAW 189–270 (1958).

[39] 221 F.2d 342 (4th Cir. 1955).

ment, after hearings before the various boards, on the ground that his incapacity was not the result of an incident of service. The officer's contention was that his records concerning disability had been illegally altered and that this resulted in his being improperly denied retirement. The Fourth Circuit affirmed the district court's dismissal of the action. On the scope-of-review question the appellate court said only that "In so far as it [the suit] seeks review of action by the Army Retiring Board or the Disability Review Board, it is asking judicial review of matters committed to agency discretion, as to which the statute precludes judicial review by providing for review by the President." [40] While this was a clear echo of the relatively early Supreme Court opinion in *Denby v. Berry*, it appeared to be at odds with *Lemly v. United States* and the emerging Court of Claims pattern. *Updegraff*, though seemingly inconsistent with *Register* and *Girault*, might possibly be reconciled with those cases on the apparent failure of the plaintiff in *Updegraff* to allege that the military authorities had acted arbitrarily. Absent a claim of administrative arbitrariness it was probably sound to say that the military action was not subject to judicial review. But the Fourth Circuit did not so limit its statement of nonreviewability.

The Court of Claims undertook to review the merits of retirement questions in several more cases without making any effort to explain why decisions on such questions were not committed finally to the military.[41] In 1957, in *Furlong v. United States*,[42] in a discussion of the statute of limitations, the court did say that "jurisdiction is conferred by Congress, not on this court, but on retiring boards and the Secretaries of the three armed services, to decide an officer's right to retirement for physical disability . . . it follows therefrom that we cannot acquire jurisdiction of such a claim uiitil after the board and the Secretary have acted, or failed or refused to act, and not then unless the board and the Secretary acted arbitrarily or capriciously or contrary to law . . . ." [43] This of course still failed to explain why the military's decisions on the merits of retirement claims were not immunized altogether from court review.

In a series of four cases in 1937 and 1958 the government pressed the point. But by this time the Court of Claims had become accustomed to deciding disability retirement questions de novo and appeared to care little about coming to grips with the fundamental question of the

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[40] *Id.* at 346.

[41] Loth v. Cnited States, 133 Ct. CI. 476, 137 F. Supp. 414 (1956); Capps v. United States, 133 Ct. CI. 811, 137 F. Supp. 721 (1956); Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957).

[42] 138 Ct. Cl. 843, 152 F. Yupp. 238 (1957).

[43] *Id.* at 845–46, 152 F. Supp. at 240.

relation of the judiciary to the military. In *Millan v. United States*[44] the court merely said that—

> it seems to be defendant's position that the Department of the Army has a sort of exclusive jurisdiction to determine eligibility for disability retirement benefits in the same manner as the Veterans' Administration has exclusive jurisdiction to determine finally all questions of law or fact concerning eligibility for benefits or payments under acts administered by the Veterans' Administration . . . .[45]
>
> The statutes covering disability retirement and disability retirement pay confer no such *exclusive jurisdiction* on the administering government agency . . . .

In the next case, *Friedman v. United States*,[46] the court probed more deeply into the point, with reference to the Board for Correction of Military Records. The Board had been established by Congress with broad power to change any military record. It is the last resort administratively in many retirement cases. In *Friedman*, the Board had refused to correct plaintiff's records to show that he was incapacitated for active service on the date of his release from active duty; thus plaintiff was unable to obtain retired pay, and he sued, claiming that the Board had acted arbitrarily. The government argued that the Court of Claims, in its prior decisions holding that it had jurisdiction in such cases, had not adequately considered the legislative history of the correction board statute. The history indicated, so the government argued, that Congress intended the Board's decision to be conclusive. In response, the court said:

> Section 207(a) provides the corrections made by the Boards shall be final and conclusive on *all officers* of *the Government* except when procured by means of fraud. Such language does not, in our opinion, render the corrections final and conclusive on courts of the United States, and the legislative history of the 1951 Act indicates (1) that Congress knew how to enact language which would have produced such finality if Congress had wished it, and (2) that Congress considered granting such finality to Correction Board action and decided to withhold such finality.[47]

The court then delved into the legislative background to substantiate this conclusion.

While the *Friedman* opinion did face up to the reviewability point as to actions of the Correction Board, the problem of reviewability of the Secretary's determinations under the disability retirement statute itself remained unexplored. And it is important to bear in mind that it is on the retirement statute that a claimant's right to retirement

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44 139 Ct. Cl. 485, 487, 153 F. Supp. 370,371 (1957).

45 38 U.S.C. § 211(a) (1964) provides that the decision of the Veterans' Administration on claims for benefits is "final and conclusive and . . . no court of the United States shall have power or jurisdiction to review any such decision." For a criticiem of this *see* F. Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of Positive Government*, 39 IND. L. J. 183 (1963).

46 141 Ct. Cl. 239, 158 F. Supp. 364 (1958).

47 *Id.* at 256, 158 F. Supp. at 375. *See* also Eicks v. United States, 145 Ct. Cl. 522, 527, 172 F. Supp. 445, 448 (1959).

ultimately rests. not on the Correction Board's action.[48] Under the statute a right to retirement arises only "Upon a determination by the secretary . . -- of the several enumerated factors. The crucial question remained: What, if anything, justifies a court's substituting its own determination for that made administratively pursuant to this congressional scheme'?

The government again argued want of jurisdiction in the next two retirement cases in the Court of Claims, but no further elucidation was forthcoming.[49] And indeed none has yet been given, though the Court of Claims now almost routinely reviews military decisions on the merits of retirement questions.

IV. THE POWER ASD THE SCOPE

Whatever deficiencies there may be in the Court of Claims' explanations, it is submitted that, putting aside the court's remedial limitations, at least two propositions which have evolved are sound. These are: (1) that the armed services secretaries' determinations of physical disability retirement questions are not conclusive; they are subject to at least some measure of judicial review; *(2)* the scope of judicial review is properly limited to determining whether the Secretary acted arbitrarily or acted contrary to regulation or statute. This is not to say that every application of these propositions has been sound. But the propositions themselves are in line with the pattern of judicial review which has built up in the federal courts in the past few decades, arid they appear to achieve a desirable accommodation between maintenance of government under law and executive leeway. Apparently the only opinion in a military disability retirement case since the Second World War out of line with these notions is *Updegraff v. Talbott,* and in this respect the case seems destined to be swept into a backwash and left behind.

Even though the statutory right to disability retirement is conditioned on an administrative deterniination, it seems appropriate that a court have power to review that determination. Such power is consistent with what can be called the presumption of reviewability of governmental action which today exists where there is no clear statutory preclusion of review. As Professor Davis has put it, ". . . in absence of legislative guidance as to reviewability, an administrative deterniination affecting legal rights is reviewable unless some special reason appears for not reviewing." [50]

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[48] For an excellent statement of this see Friedman v. United States, 159 Ct. Cl. 1, 30–32, 310 F 2d 381, 399–400 (1962).

[49] See Patterson v United States, 141 Ct. Cl. 435 (1958); Brown v. Cnited States, 143 Ct. Cl. 605 (1958).

[50] 4 DAVIS, ADMINISTRATIVE LAW 25 (1958)

Congress has not purported to shut off judicial review over retirement questions. It has not even said that the Secretary's determination is "final," a word which, even when it has been used, has been held not to foreclose review.[51] On the other hand, as for special reasons for not reviewing, there is the argument based on the peculiar nature of the niilitary establishment, a "specialized community," [52] into which the judiciary has been particularly loathe to intrude. But in passing on retirement disputes the courts are not really intruding into military operations. Typically in retirement litigation the clainiant has been discharged or released from active duty without being retired; he contends that he should be retired. Whether he prevails or whether the military prevails on that question, the nian is out of the active service. There is no judicial-executive conflict as to whether a person reniains on active duty. An adjudication will have no real impact on the operation or makeup of the arnied forces. The chief consequence of a decision for the individual will be that the government will have to pay money.[53] Thus the argunient against judicial interference in this area of large executive prerogative has little force. It seems quite insubstantial when weighed against the interest in assuring to a disabled serviceman the retirement benefits Congress has provided.

Given the power to review a military retirement decision, the standard of arbitrariness governing the scope of judicial review which has been articulated in the cases seems appropriate. As *Dismuke* and other cases make plain, official action which is arbitrary is incompatible with our notions of government under law; it is illegal.[54] It is in the application of this arbitrariness standard that the difficulties come. Moreover, a constitutional order surely presupposes that an official must act in accordance with the statute which prescribes his authority and which spells out the duty he is to perform. And, under a doctrine of recent popularity, he must abide by regulations even though he himself proniulgated them.[55] The courts properly can and do review the Secretary's actions in retirement cases to see that they square with all these notions.

As in the whole field of judicial review of administrative activity, the really bothersome and seemingly insoluble problem is whether, or in what circumstances, the court will substitute its view for that of the Secretary. As Professor Davis points out, we have to live with the fact that there are two lines of cases. One applies the arbitrariness or "rational basis"

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[51] See, *e.g.*, Heikkila v. Barber, 345 U.S. 229 (1953).

[52] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[53] See Carranay, *Disability Retirement or Separation: The Financial Aspects*, 1 JAG J. 91 (1962).

[54] See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

[55] See Meador, *Some Thoughts On Federal Courts and Army Regulations*, 11 MIL. L. REV. 187 (1961).

test, letting the administrative determination stand if the judges believe that it has a rational basis, is supported by evidence, is not arbitrary. In the other line of cases the courts ignore the administrative determination and simply decide the questions for themselves without inquiry into arbitrariness or evidentiary support. The former are often called questions of "fact," the latter "law." [56] This same phenonienon can be seen in the military retirenient cases. And yet there is a difference. In the great mass of litigation attacking administrative action the courts most often invoke the "rational basis" approach as a device for upholding the administrator. If the courts are going to substitute judgment they usually call the question one of "law" and do not talk in terms of arbitrariness or rational basis. But the Court of Claims in the military retirement cases uses both approaches to overturn administrative decisions, and substitutes its own opinion, as illustrated in the ***Register*** and *Girault* cases. Sometimes the court will invoke both in the same case. For example, it said in one case:

> If we treat the Correction Board's decision as a decision on a question of fact, the question being whether the plaintiff had or did not have multiple sclerosis in 1946, and if we treat it as a decision that he did not have the disease, there is not a scintilla of evidence to support it. If we treat it as a legal decision that, though he had the disease, he was not, under the rules, regulations and policies in effect in 1946, eligible for disability retirement, there is not a scrap of authority for such a decision.[57]

The truth is that "fact" and "law" are hopelessly enmeshed in the disability retirement problem. However, judging from the whole field of adniinistrative law we cannot expect a clean-cut consistent judicial handling of these issues. Nevertheless, clarity might be served by keeping more clearly in mind the principles involved, especially those jurisdictional and remedial matters to be discussed below.

V. THE COURT OF CLAIMS PECULIARITIES

The analysis in this article so far has dealt in general with the power and scope of judicial review over niilitary disability retirement issues without regard to the particular federal court in which that review might take place. The concern has been over delineating the appropriate line between the authority of the federal judiciary and the authority of the military acting under the retirement statutes. Once we isolate that problem and see that courts sitting under Article III of the Constitution can properly review a military decision on retirement to determine whether it complies with regulations and statutes or whether it is arbitrary,

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[56] See generally 4 DAVIS, ADMINISTRATIVE LAW 189–270 (1958).

[57] Patterson v. United States, 141 Ct. Cl. 435, 452–53 (1958). See also Grubin v. United States, 166 Ct. Cl. 272, 281, 333 F.2d 861, 865 (1964).

we can turn to the next question: To what extent, in view of the congressional allocation and limitation on jurisdiction, can such review be undertaken in the Court of Claims as compared with the federal district courts? The former is where the great bulk of the disability retirement litigation has actually occurred, and that court's peculiar remedial limitations give rise to the main problem in these cases today.

The Court of Claims and the district courts are all repositories of Article III judicial power.[58] But Congress has granted theni differing jurisdiction under its broad authority to distribute that judicial power among a variety of tribunals. The Court of Claims is more narrowly circumscribed than the district courts. Its authority, so far as pertinent here, is stated thus: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . ." [59] Only the United States can be a defendant, and the claim must rest upon statute, regulation, or the Constitution. Moreover, the only remedy which the court has authority to give is a money judgment.60

Consider then, within that jurisdictional framework, an action for disability retirement. The court has described the nature of such an action this way: "The right to retirement pay is statutory . . . . In determining whether or not the plaintiff was denied his statutory right to disability retired pay, the court is merely exercising its jurisdiction under 28 U.S.C. Section 1491, [quoted above] to render judgment upon any claim against the United States founded upon an act of Congress." [61] And further: "In disability retirement cases the claimant's cause of action rests upon the retirement legislation (now 10 U.S.C. § 1201 et seq.) which gives servicemen disabled in the course of active service the substantive right to disability retirement. . . . The Act of Congress upon which the claim is founded—in the sense of the Tucker Act [62]—is the substantive retirement statute, not the provision for boards or other methods for implementing that right." [63]

Accordingly, to present a cause of action within the Court of Claims' jurisdiction a plaintiff must assert a right to retirement under the retirement statute. His theory is necessarily that the facts of his case bring him within the provisions of that statute, so that he has a right to retirement, and that nevertheless the United States, acting through the

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[58] The Court of Claims was held to he a constitutional court in Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[59] 28 U.S.C. § 1491 (1964).

[60] United States v. Jones, 131 U.S. 1 (1889).

[61] Patterson v. United States, 141 Ct. Cl. 435, 438 (1958).

[62] This is the jurisdictional statute, 28 U.S.C. § 1491 (1964), quoted in the text at note 59 *supra.*

[63] Friedman v. United States, 159 Ct. Cl. 1, 31-32, 310 F.2d 381, 399-400 (1962).

armed Service secretary, has denied him that statutory right. Because Congress has made a secretarial determination integral to the right, the claimant's position must be that he is entitled to retirement because a *nonarbitrary* determination would bring his case within the retirement statute. By way of relief in the Court of Claims he asks for a judgment awarding him the back retired pay he contends he is due, and in the Court of Claims this is the only direct relief he can get.

The remedial limitation restricting the court to an award of a money judgment has a bearing on the scope of review in this type of case which has not been adequately appreciated by the Court of Claims itself and has been only fuzzily recognized elsewhere. The remedial restriction has been relied on by the government to support the argument that the Court of Claims lacks "jurisdiction" to "confer" a retired status on a person, that the court has no authority to hold that a person is entitled to retirement when the military has refused to recognize such entitlement. This argument, it is submitted, is partially valid, but it is too sweeping.

Consider first the situation where the individual's case is evaluated on its merits through the appropriate administrative procedures and it is determined by the Secretary for one reason or another that he is not entitled to disability retirement. The claimant then sues in the Court of Claims for retired pay. The crucial administrative determination blocking retirement may be on one or more such grounds as fitness to perform the duties of the applicant's grade or that the disability was not incurred while he was in active service or that the disability was less than 30 percent and so on through the factors listed in the statute. To have a legally cognizable action, under the esisting decisions, the plaintiff must allege and prove that in deciding any of such questions against him the military authorities were arhitrary or nere acting in violation of statute or regulation. If the plaintiff's contention prevails with the court, and the court concludes that the Secretary's determination which resulted in a denial of retirement n-as unlawful, there is only one lawful possibility left open, namely, the opposite determination. Assuming the Secretary had concluded all other issues in his favor, the only action remaining is to retire the individual. This is so because the claim has already been considered on the merits by the Secretary. He had two choices: to grant retirement or to refuse retirement. Since his refusal is, by hypothesis, held to be unlawful, his only lawful choice is the grant of retirement.

For example, suppose the Secretary ruled that plaintiff's disability was not an incident of service but that in all other respects he met the statutory requirements. If the court holds the adverse administrative determination to be arbitrary, the only possible noiiarbitrary—and hence lawful—determination that could he made would be the determination that the disability *was* an incident of service. The Secretary's ruling

on the merits of that ground having been legally nullified, the Secretary has no leeway, no choice on the same evidence but the opposite ruling.[64]

There may be other grounds, however, on which retirement could be legitimately denied but which were never reached by the Secretary. If, for example, the claimant has less than **20** years' service and less than a 30 percent disability he is not entitled to be retired. If the Secretary ruled the disability to be not an incident of service, he had no occasion to pass on the other grounds for denying retirement. Or it may be that the Secretary ruled adversely to the claimant on the degree of disability and length of service and thus had no occasion to pass on the service-incident issue. In such cases a key factor has never been determined either way by the Secretary, and it is the Secretary, not the court, who is directed by Congress to make this determination. For a court to proceed to determine initially an essential element in the statutory retirement right with no prior decision in the administrative sphere mould appear to be a judicial usurpation of executive function and to be inconsistent with the congressional scheme.

It may be, of course, that it is clear that the Secretary has already passed on all the requisites for retirement. If he has found in favor of the claimant on all of his determinations except those which the court holds to be arbitrary, or if the government admits the other requisites, then there is nothing further for the Secretary to do. The court's decision is in effect a decision that the plaintiff is legally entitled to retirement. **As** pointed out above, grant of retirement is then the only lawful alternative open to the Secretary.

The conclusion which emerges from this analysis is that in th latter situation the Court of Claims can properly entertain the case and give judgment for the plaintiff, whereas the court cannot do so if other statutory factors have not yet been determined administratively. It would exalt form over substance and place an unnecessary and meaningless burden on the plaintiff to require him to go elsewhere, either back to the Secretary or to another court, to establish that on which only one lawful position could be taken, all other issues on the retirement claim having already been determined in the plaintiff's favor. The Court of Claims is justified in proceeding on the assumption that that is done which legally must be done. But this reason is not present where the military has not determined the merits of all the retirement questions, as illustrated above. With a case in that posture there is no certainty that a right to retirement will be established when the remaining factors are considered. Yet in order to enter a money judgment for plaintiff, where the Secretary never reached the merits of some of the essential factors and the government

[64] For examples of this type of case see Register **v.** United States, **131** Ct. Cl. **98, 128** F. Supp. **750 (1955);** Girault v. United States, **133** Ct. Cl. **135, 135** F. Supp. **521 (1955).**

does not admit them in plaintiff's favor, that is what the court would have to do. The result is that since the Court of Claims possesses no other remedial authority, the action should be dismissed in order for the Court to avoid exceeding its proper judicial sphere of authority.

In several decisions, however, the Court of Claims has not dismissed but has proceeded to do just what is here asserted that it cannot do. One was *Lemly v. United States*, discussed earlier. In another, *Sutcr v. United States*,[65] the court said, curiously: "We have no power to remand the case, hence me must decide it." The court then proceeded to decide that plaintiff had a permanent, service-connected disability when he was released from active duty, and a judgment was entered for retired pay.

"We have no power to remand the case, hence we must decide it." This, it is respectfully submitted, is an unsound *non sequitur*. It mould have been accurate to say instead that because of the military's unlawful refusal of a hearing the plaintiff was entitled to relief in *a* court, but because "We have no power to remand the case," *it must be dismissed*. This is not to say that the plaintiff is without judicial relief or that the military action is immune from judicial scrutiny. It is only to say that because of its remedial limitation the Court of Claims cannot decide the case; it is not the appropriate forum. Moreover, this is not an assertion that the Court of Claims is wholly without authority to give a judgment for retired pay when the Secretary has denied retirement. What the Secretary has done must be analyzed carefully. Only if he has administratively determined all issues in favor of the plaintiff except those asserted by the plaintiff to be arbitrary or otherwise unlawful may the court take jurisdiction over the case.

There are sound reasons why the Court of Claims, contrary to its present practice, should confine its exercise of jurisdiction in this manner. Whether a serviceman should be retired for physical disability is a question turning on a combination of numerous variables, as reflected in the statute earlier quoted. Somebody has to decide on these officially. Congress has designated the Secretaries of the Army, Navy, and Air Force, and they in turn utilize boards and other administrative machinery, subject of course to judicial review for illegality. This arrangement makes sense. The military establishment generates and maintains records on its own personnel; it furnishes medical care, and its officials have a certain expertise in assessing the military-medical ingredients in such issues as whether an injury was service-connected or whether it disables a man for further service. From a functional standpoint, a court is not the best place for such issues to be canvassed on raw evidence, at least not initially. Yet that is what happens when the court proceeds to adjudicate the right to retirement when the Secretary has not yet

[65] 139 Ct. Cl. 466, 153 F. Supp. 367, 369 (1957), *cert. denied*, 355 U.S. 926 (1958).

passed on some of the matters which he is directed by Congress to determine. Apart from the compelling fact that Congress has said that the determinations are to be made by the Secretary and not a court, the court as a practical matter is substantially assisted in deciding retirement questions if they have been first sifted and decided administratively. Wiser and more informed adjudication is apt to result.

VI. THE DISTRICT COURTS

Cases where essential issues on the individual's right to retirement are left undecided by the admiristrator point up the significant difference between the Court of Claims and a United States District Court. The district court may give a declaratory judgment or issue an injunction. Thus, if the Secretary arbitrarily denied a hearing, the district court can render a declaratory judgment to that effect or it could order the Secretary to hold the hearing which the law requires him to hold. And if the Secretary decided less than all the requisites for retirement, the district court, if it holds certain administrative findings arbitrary, can void those findings and in effect remand the case to the Secretary for decision on the remaining points. The district court could not, however, in that circunistance adjudicate that plaintiff was entitled to retirement. The statutory scheme places that authority in the Secretary, subject to judicial review, as discussed earlier. Just as the district court may not properly make such an adjudication here so should the Court of Claims not do so. There is no absolute bar to judicial review in this type of case. The probiem is only that of the plaintiff's choosing the court with authority to give a remedy for the particular unlawful action in light of the posture of the case.

Where the military authorities do consider all questions of the claimant's right to retirement on the merits and hold against him, in an ensuing action to establish the retirement right there is no reason why the scope of review should differ according to the forum. Whether suit is brought in the Court of Claims for the retired pay or in the district court for other relief the military determination should be reviewed the same way.[66] The fact that the Court of Claims can give no direct relief except a money judgment is no reason for allowing it more freedom than a district court in substituting its judgment for that of the administrator. The Court of Claims is exercising Article III judicial power, and it should accord the same respect other Article III courts accord to the executive branch and to the congressionally delegated administrative determinations. This would be particularly so if, as contended elsewhere, because of the nature of the issues presented, coupled with the doctrine of collateral

[66] For a rare example of a retirement case brought in a district court see Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951).

estoppel, the Court of Claims' decisions should affect military status and bind the government beyond mere paynient of the judgment.[67] The complaining individual is not without relief; the district courts are open to him, in his home district, with process which can reach the Secretary from anywhere in the country;[68] moreover, he can now recover even the retired pay if his claim does not exceed $10,000.[69]

Only a handful of military disability retirement cases are reported in the federal district courts. There are at least three possible explanations. First, most servicemen denied retirement are interested as a practical matter' in the retired pay, and until very recently exclusive jurisdiction to give judgment for pay was vested in the Court of Claims. Second, the curious rule, now discarded by a 1962 statute,[70] that no federal district court outside the District of Columbia could issue mandamus probably discouraged suits. This was reinforced by *Denby v. Berry,* which carried *a* strong flavor that retirement questions would not be adjudicated at all by the federal courts. Third, there is reason to suspect that lawyers and judges have failed to appreciate the potential for district court review in these retirement cases, even with the previously existing limitations.

Any difficulty about a mandatory injunction against a federal officer has now been removed by the 1962 Act of Congress which gives all district courts authority "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The *Denby* case should be read as holding only that a court will not order the Secretary to take action in a retirement case unless the law imposes a duty on hini to act. If the Secretary can rationally decide a particular retirement question either way a court will not compel him to go one way rather than another. However. the court can compel him to consider the matter if the substantive law puts a duty on hini to consider it, and if the Secretary's determination was arbitrary, the court can compel hini to pursue the only lawful course open to him—to make the opposite determination. In short, the real problem is one of substantive law, not of remedy. The remedy of a mandatory injunction or mandamus is available to enforce whatever duty the law fixes. *Denby* is not contrary to this, as the Supreme Court seems to have implicitly recognized in *Miguel v. McCarl,* where mandamus did issue to enforce a retirement right.[71]

To sum up, the scope of judicial review in disability retirement cases should not vary between the Court of Claims and the district courts

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[67] See Meador, *Judicial Determinations of Military Status,* 72 YALE L. J. 1293, 1318 (1963).

[68] 28 U.S.C. §§ 1361, 1391(e) (1964).

[69] 28 U.S.C. § 1346(d) (1964).

[70] See 28 U.S.C. § 1361 (1964).

[71] Retirement litigation in the district courts is discussed in Meador, supra note 67, at 1319–23.

in cases which are properly within the respective courts' jurisdiction. But the ability of the two courts to cope with a denial of retirement varies; because of the Court of Claims' more limited jurisdiction it cannot properly entertain some cases which the district courts can entertain. If this is eventually recognized and if the distinction betxeen the substantive law governing retirement and the law of remedies becomes clarified, more retirement litigation may appear in the district courts. However, as long as the Court of Claims exceeds the proper scope of its authority, as it is submitted it is doing in deciding issues not first passed on administratively, there will be little incentive for litigants to resort to the district courts, other than convenience in dealing with a forum closer to home and more familiar to local counsel.

The existence of two possible forums, with differing but partially overlapping jurisdictions over retirement and other military personnel questions, seems unnecessary in our modern circumstances. Not only is there needless duplication of judicial machinery; there is also fertile ground for confusion and for strange legal doctrine to sprout, as this article attempts to show. The interests in affording servicemen a knowable and simple judicial remedy and in maintaining proper military-judicial spheres of authority are not being served as well as they could be by the present arrangements.

Perhaps it is time for Congress to take a hard look at the situation.[72] A thorough study might show that personnel litigation might best be put by statute entirely into the district courts, particularly in light of the recent statutes changing the old law on mandamus, venue, and service of process as to federal officers. These claims are rarely of very large amounts, compared to much of the Court of Claims business. That court would still be left with an abundance of substantial litigation, such as contract cases, in which it could best perform as a specialized forum for disputes with the government involving large economic interests.

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[72] The time seems opportune. The chairman of the Senate Judiciary Committee's subcommittee on Improvements in Judicial Machinery (Sen. Tydings) stated in a Senate speech on 15 October 1965 that the subcommittee **was** considering several aspects of the Court of Claims' jurisdiction. 111 CONG. **REC.** 26137–38 (daily ed. 15 Oct. 1965).

LEGAL PROBLEMS OF OCCUPIED NATIONS AFTER THE TERMINATION OF OCCUPATION*

By Lieutenant Colonel Romulus A. Picciotti **

Once an occupied nation is liberated, and its eziled government returns and restores its former laws, problems arise concerning the validity of legal rights and obligations which came into existence during a belligerent occupation. The validity of these rights and obligations is determined by the international law principle of "Postliminium." This article will study the practice of governments in applying postliminium during and after World War 11 after they had returned to power. It will also examine the juridical basis for such practice and present conclusions and recommendations.

I. THE NATURE OF POSTLIMINIUM

A. *ROMAN LAW*

The Romans were a legal people, and although the American system of municipal law is based upon the common law of England, it cannot be denied that in addition to the civil law systems of Europe and other parts of the world, much of the international law applied by the municipal courts of all nations owes its origin to Roman legal principles and doctrine.' Although Roman law considered war a legal institution, there were no precise rules for the conduct of warfare itself, since only discretion guided the combatant's treatment of the opposing forces. However, there were very precise rules concerning the effects resulting from the mode in which war was terminated.[2] In ancient times, the victors in war,

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[1] Yntema, *Roman Law* and *Its Influence on Western Civilization*, 35 CORNELL L. Q. 77, 88 (1949).

[2] 1 OPPENHEIM, INTERNATIONAL LAW 73 (8th ed. Lauterpacht 1955). War could end through negotiation of a treaty of peace, by surrender *(deditio)*, by conquest (*occupatio*), or by subjugation (*debellatio*).

including the Romans during the earlier phase of their conquest of the world, invariably killed those whom they vanquished and captured in battle. As the Roman Empire grew, however, and the Romans became more civilized and less inhumane, and in order to reduce the rigors and the senseless human slaughter of war, they enslaved those they captured in battle. In return they expected that their own Roman soldiers, should they be defeated and captured, would be spared being put to the sword by their captors.

Since the Roman citizen lost all his civil property and civil and matrimonial rights when he was captured, Roman law, in order to mitigate the calamities associated with captivity, granted to those who later returned to Roman soil the *jus postliminii* or right of postliminium. The term "postliminium" is a contraction of *post* (after), and *limen* (threshold or boundary), and literally can be translated as one who comes afterwards to the boundary.[3] Through use of legal fiction this right restored to him his former civil status, to include all of his rights and obligations, with retroactive effect to the date he was first captured. By holding that his civil rights had been merely suspended and not extinguished by his capture, the *status quo ante* capture was restored.[4]

Later, the doctrine of postliminium was extended to include not only captured persons but property which, after appropriation by an enemy and return to the realm of its former owner, regained its former status, reviving and reinvesting title and the right to possession in the former owner. By analogy, the term has found its way into modern international law and municipal law to indicate the right of the restored sovereign to re-establish the legal status of persons and property of his realm, within practical limitations, retroactively to the suspension of his sovereignty by occupation.

B. *PRESENT CONCEPT OF POSTLIMINZCM*

Postliminium is considered to be that doctrine which holds that after a belligerent occupation of territory has ended, as by defeat or expulsion of the enemy or relinquishment of the territory by voluntary departure of the occupant, and the absent sovereign returns, the territory, its inhabitants and property come under the control of the original and now restored sovereign, and the legal state of things is conceived for many purposes to have been continuously in existence. Accordingly, the doctrine of postliminium holds that mere possession in the course of war of property or territory of the enemy is insufficient to transfer title or

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[3] Ireland, *Jus Postliminii and the Coming Peace,* 18 TUL. L. REV. 584 (1944).
[4] 3 HYDE, INTERNATIONAL LAW § 922 (2d rev ed. 1945).

sovereignty as against the absent sovereign who regains possession during the belligerency and before a treaty of peace is negotiated.[5]

Using the term postliminium to define the negative fact that the legitimate absent sovereign, upon returning to his domain, is under no obligation to recognize any of the acts of a belligerent occupant during the occupation is considered by one writer to be mere "substantive dress."[6] Another noted writer,[7] in emphasizing the transitory nature of the rights of a belligerent occupant, stated that the use of the term *jus postliminii* to describe the revival of rights which had never been extinguished by a belligerent occupation, was an unfortunate occurrence (*malencontreuse*) and served merely to obscure rules which in themselves are quite simple. In the opinion of this same writer, the *jus postliminii* is superfluous and cannot have the effect of reestablishing retroactively the right of sovereignty, since that right has never been destroyed by the belligerent occupant, who merely exercises the temporary right of sovereignty during the occupation.[8]

It can accordingly be seen that cases of postliminium occur only when the rights of sovereignty have been suspended, that is, by a belligerent occupation. And, as a corollary, when sovereignty has been extinguished, as by conquest or as a result of cession by treaty of the territory, and the territory subsequently reverts to the former sovereign, the doctrine of postliminium is not considered applicable, there having been an intervening sovereignty or interregnum that not merely suspended but actually terminated the sovereignty of the original government.

The extent to which the right of postliminium will be used, *i.e.*, to invalidate with retroactive effect acts of the belligerent occupant, will depend upon the nature of the acts of the occupant, the extent to which that body of international law is recognized as applicable in the municipal law by the returning sovereign, political implications and practical considerations. The concept of belligerent occupation and the body of international law applicable to it will more clearly delineate the criteria normally considered by restored governments in their determination of the validation or invalidation of acts of the former occupant.

C. *BELLIGERENT OCCUPATION*

1. *A Phase of Warfare.*

During practically all wars fought in the past there has been occupation of belligerent territory by one or more of the belligerents. It is an aim

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[5] *Zbid.* Restoration of occupied territory or other enemy property in consequence of a treaty of peace is due to the agreement rather than to any principle described by the phrase borrowed from Roman law.

[6] HALL, INTERNATIONAL LAW 578 (8th ed. 1924).

[7] See 2 FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PGBLIC § 1710 (1921).

[8] See *ibid.*

of warfare. Even in so-called brush fire wars of today or in the remotely possible nuclear holocaust of tomorrow, one may expect that one belligerent will succeed in occupying the whole or part of the territory of his enemy.

International law recognized, until war mas renounced as a recognized means of self-help by an aggrieved state against another in the General Treaty for the Renunciation of War,[9] its inherent inability to settle peacefully international disputes because of lack of effective sanctions as possessed by municipal law in regard to intrastate disputes. However, international law, through the centuries since the time of the Romans, developed through treaties and common usage a body of rules regulating warfare.

It appears that in regard to belligerent occupation international law has progressed more than in other phases of warfare. This is due perhaps to the fact that belligerent occupation is a phase that extends usually throughout the period of hostilities, a phase where humanitarian treatment of a temporarily subjugated people may be partially or completely disregarded by the occupant under the guise of military necessity. Motivated by humanitarian principles to protect the helpless, combatant or noncombatant, from unnecessary suffering, and to facilitate the return of peace, the law of nations has developed towards an increased limitation on the occupant's rights in time of war.[10]

2. *Historical Development.*

It was not until the middle of the eighteenth century that the temporary nature of belligerent occupancy began to emerge as the guiding concept for legal rights of both the occupied and the occupant. Up to that time it **was** confused with and equated to conquest.[11] In the Roman era, complete subjugation of an enemy's country and people, referred to as *debellatio,* led to annexation of the country to the empire. Even before subjugation and annexation were complete, however, the temporary possession of territory was regarded as a conquest since it was the ultimate aim of the belligerent. **As** time went on, it appeared that belligerent occupation was not always followed by conquest, either because the occupant was ultimately driven from the territory or because annexation was not one of his objectives. However, down to the eighteenth century mere possession of territory **was** regarded as **a** conquest enabling the occupying power to deal with occupied territory as his own and to act as the legitimate ruler of the inhabitants. The occupying belligerent, even before the occupation was secure, could dispose of pri-

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[9] Pact of Paris, **27** Aug. **1928, 46** Stat. **2313** [known as the Kellog-Briand Pact].

[10] *See* Gold Looted by Germany from Rome in **1913,** Arbitral Advice **of** G. Sausser Hall, [1953] Int'l L. Rep. **441.**

[11] *See* Thirty Hogsheads of Sugar **v.** Boyle, **13** U.S. **(9** Cranch) **191, 195 (1815).**

vate and public property as he desired, and, considering himself absolute ruler, could exact oaths of allegiance and fidelity, conscript soldiers for his army, and exact other services normally due the legitimate sovereign. Moreover, he could dispose of territory, even before hostilities had ended.[12]

After the Seven Years' War, these violent practices of belligerent occupation became rarer as the writings of jurists and legal scholars began to point out the differences between the rights consequent upon occupation and those following conquest. While the continuing sovereignty of the original ruler became generally recognized for certain purposes, for other purposes the belligerent occupant was considered to be invested with a quasi-sovereignty and substituted in his place.[13] Occupancy being essentially provisional in character, it was not considered as transferring sovereignty over the territory controlled, although the *de jure* sovereign was, during the occupation, deprived of the power to exercise his sovereign rights.[14]

3. Present Concept of Belligerent Occupation.

As the nineteenth century drew to a close, the distinction between conquest and military occupation had been firmly established. Moreover, the illogical and oppressive fiction of substituted sovereignty as the basis for justification of the rights of the occupant was replaced by the broader and more natural foundation of military necessity and the duty owed by the occupant to the population.15 Simultaneously with these changing concepts, there developed a body of international law, much of it incorporated into the municipal law of many nations and almost universally recognized, delineating the scope of the rights of the occupant over the territory and limiting his freedom of action.[16]

The majority of these rules were incorporated in fourteen articles of the Hague Regulations annexed to the IVth Hague Convention of 1907.[17] The experience of World War I and especially that of World War II demonstrated the inadequacy of these regulations in many respects.

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[12] 2 OPPENHEIM, INTERNATIONAL LAW 432 (7th ed. Lauterpacht 1948). In the Northern War of 1700-1718, Denmark sold the occupied Swedish territories of Bremen and Verden to Hanover before the war was terminated.

[13] United States v. Rice, 17 U.S. (4 Wheat.) 246, 255 (1819). The Court decided that the subeequent evacuation of conquered territory by the enemy and resumption of authority by the United States could not change the character of past transactions, and that accordingly the doctrine of *jus postliminii* was inapplicable in the case.

[14] GREENSPAN, THE MODERN LAW OF LAND WARFARE 605 (1959).

[15] 2 WESTLAKE, INTERNATIONAL LAW 95–96 (2d ed. 1913).

[16] 3 HYDE, op. *cit. supra* note 4, § 688.

[17] Hague Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 Oct. 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as the Hague Regulations or the Hague Convention, as appropriate]. *See* appendix I of this article for articles 42–56 of these Regulations.

As a result, there was drafted the Geneva Civilian Convention of 1949,[18] which has been ratified and acceded to by many countries including the United States.[19] More recently the Hague Convention of 1954,[20] relating to the protection of works of art during hostilities, has appeared to further complement the others

Notwithstanding deficiencies in them, especially in regard to economic and financial matters,[21] they further delineate and limit the powers of the occupant with respect to property in occupied territory, simultaneously tipping the balance between military necessity and humanitarian treatment heavily in favor of the latter. Their application to future conflicts will see an even greater application of the concept of postliminium to unauthorized acts of the belligerent occupant as the trend to limitation of the occupant's power continues.[22]

4. *Limitations on the Occupant's* ***Power***

As soon as the invasion phase ends and his control of enemy territory is secure, belligerent occupancy begins.[23] With it the occupant acquires broad powers which international law recognizes he must have for prosecution of the war and simultaneous administration of the territory under his control Article 43 of the Hague Regulations[24] provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented the laws in force in the country.

.Accordingly, upon occupying a country, the belligerent at once is invested with absolute executive, legislative and judicial authority. In order to discharge properly his obligations he may substitute military courts for the civil courts in existence, suspend existing laws, make new laws and ensure they are obeyed. However, his power must be exercised within the limits of international law relating to belligerent occupation,[25] always having due regard to its transient character. When and if the

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[18] Geneva Convention Relative to the Protection of Civilian Pereons in Time of War, 12 Aug. 1949, [1955] 3 U.S.T. & O.I.A. 3516, T.I.A.S. *3365* [hereinafter cited as Geneva Civilian Convention of 1949]. Together with the other three Geneva Conventions for the protection of war victims, this treaty came into force for the United States on 2 February 1956.

[19] See *ibid.*

[20] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954. The United States is not a party to this Convention. For a summary of its provisions, see UNESCO Bull., No. 6, p. 120 (21 April 1954).

[21] See STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 377 (4th ed. 1958).

[22] Gold Looted by Germany from Rome in 1943, hrhitral Advice of G. Sausser Hall, [1953] Int'l L. Rep. 441.

[23] Hague Regulations, art. 42.

[24] Hague Regulations, art. 43.

[25] Codified in the Hague Regulations, arts. 42–56, and Geneva Civilian Convention of 1949, arts. 47–78.

occupation is terminated, by expulsion or departure of the occupant, and the absent sovereign returns, postliminium does not invalidate those acts of the military occupant affecting the occupied territory that he was, according to international law, competent to perform. These are legitimate acts and should be considered valid or validated by the restored sovereign. Conversely, if the occupant has performed acts during his occupation which he was not under international law competent to perform, application of postliminium invalidates those acts.[26] In the light of these two general principles the practice of restored governments, vis-a-vis validation or invalidation of acts of a belligerent occupant during and after World War II, will be considered.

II. THE COMPETING "SOVEREIGNS"

A. *MUNICIPAL EFFECTS OF ACTS OF THE BELLIGERENT OCCUPANT*

1. *The Norm for Determining the Validity of Acts of the Belligerent Occupant.*

a. The International Norm. Fifteen articles of the Hague Regulations[27] prescribe in broad terms the military authority and limitations on the power of a belligerent over the territory of a hostile state.[28] Article 43 is perhaps the most important one since it permits the occupant the greatest latitude and freedom of action and gives the legislature and courts of the restored government the greatest difficulty in interpretation and application. In the preamble to the Hague Convention, however, it was recognized that all cases could not be covered by the annexed Regulations. Accordingly, to preclude such cases being decided by the arbitrary judgment of military commanders, the Convention provided "the inhabitants and the belligerents remain under the protection and the

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[26] McNair, *Municipal Effects of Belligerent Occupation,* 57 L. Q. REV. 3, 34-36 (1941).

[27] Arts. 42-56.

[28] It is generally recognized that the law of land warfare ceases to be applicable upon cessation of hostilities, the termination of a war by agreement, normally in the form of a treaty of peace, or upon the complete subjugation of the enemy. The Allies, after World War II, considered Japan and Germany as being completely subjugated and accordingly the Hague Regulations were not considered applicable. In future conflicts, however, the Geneva Civilian Convention of 1949 will supplement the Hague Regulations. Article 6 of the Geneva Convention continues the protection of the whole convention in occupied territory for one year after cessation of hostilities and certain provisions for the duration of the occupation. For a typical case during the Allied occupation of Germany after World War II, wherein the Court considered the Hague Regulations inapplicable due to the complete subjugation of Germany, see Dalldorf v. Director of Prosecutions, Control Commission Court of Appeal, British Zone of Germany, 31 Dec. 1949, Control Commission Criminal Appeal Reports R. No. 4, p. 442, [1949] Ann. Dig. 435 (No. 159). See also U.S. DEP'T OF ARMY, FIELD MANUAL No. 27-10, THE LAW OF LAND WARFARE paras. 10, 249 (1956) [hereinafter cited as FM 27-10].

rule of the principles of the law of nations as they result from usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." [29]

While it cannot be denied that the returning sovereign has complete legislative freedom to rescind retroactively all acts of the former occupant, international law holds that the restored government should recognize the validity of and not abrogate at will the legislation and acts which the occupying power was, within the limits of his authority under international law, entitled to accomplish.[30] In effect, this statement postulates an implicit recognition of the legal aspects of such acts.

The leading writers on international law, in remarkable agreement, maintain that postliminium does not "wipe out the effects of acts done by an invader, which for one reason or another it is within his competency to do." [31] This view has been concisely stated as follows:

> The judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time, remain good. Were it otherwise, the whole social life of a community would be paralyzed by an invasion;—acts done by an invader in pursuance of his rights of administrative control and enjoyment of the resources of the state cannot be nullified in so far as they have produced their effects during his occupation.[32]

Sir Arnold McNair [33] is in agreement with this principle as are French writers extending over a period of many years. Hyde [34] feels even stronger about the duty of the restored sovereign to validate legal acts of the occupant, observing that a failure to do so on his part is a "dangerous doctrine which if consistently and broadly applied must be defiant of legal principle.'' [35] Also, Oppenheim,[36] who emphasized the factual rather than the legal relationship between the belligerent occupant and the inhabitants of occupied territory, believes that the occupant has a right,, by international law, to demand of the returning sovereign recognition of his legitimate acts of warfare.

It may appear at first blush that the views of these writers were actuated primarily by the fact that it is inexpedient and at times almost impossible to invalidate and annul changes in private relationships which have resulted from acts of the occupant. This foundation in

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[29] Hague Convention, preamble.

[30] FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION §§ 496, 498 (1942); Woolsey, *The Forced Transfer of Property in Enemy Occupied Territories,* 37 AM. J. INT'L LAW 282 (1943).

[31] HALL, *op. cit. supra,* note 6, § 163.

[32] *Ibid.*

[33] See MCNAIR, LEGAL EFFECTS OF WAR (3d ed. 1948).

[34] See 3 HYDE, *op. cit. supra* note 4, at 1885.

[95] *Ibid.*

[36] *See* 2 OPPENHEIM, *op. cit. supra* note 12, § 282.

expediency is a strong one, for were all such acts to be rescinded by a returning sovereign, no one would enter into any legal relations during an occupation and public life would be paralyzed. Moreover, since rescission measures affect the inhabitants more than the former occupant, going to extremes to annul such acts would do more harm to a sovereign's own people than to the enemy occupant.[37]

On the other hand, the argument based on expediency has not prevailed with respect to unauthorized acts of an occupant which have produced changes not easily undone but which the returning sovereign has declared null and void and ordered rescinded. This is particularly true in the validation or invalidation of sequestration measures or dealings in occupation currency.

It may be concluded, therefore, that the legitimate acts of the occupant produce legal municipal effects. Accordingly, retroactive rescission of them would be contrary to legal pririciple and not in the best interests of the inhabitants of the occupied territory and its restored government.

Whether or not the traditional law of belligerent occupation as embodied in the Hague Regulations continued to be applicable in an occupation following complete subjugation, as happened in Germany following World War II, was highly controversial.[38] However, it was universally recognized that the Regulations would be considered as guiding principles in the absence of treaty provisions to the contrary.[39]

Since parties to a treaty may agree to anything, as they may in the case of an armistice,[40] treaty provisions relating to the unlawful acts of the former occupant and providing for the restitution of property confiscated[41] or illegally requisitioned or sequestered are not really in the realm of postliminium. The treaty provisions serve merely as a recognition by parties to the treaty of the nullity in international law of

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[37] FEILCHENFELD, *op. cit. supra* note 30, §§ 497, 502.

[38] Representative theories of the application of international law to the occupation of Germany include the opinion that the law of belligerent occupation embodied in the Hague Regulations continued to be applicable (Laun, *The Legal Status of Germany,* 45 AM. J. INT'L L. 267 (1961)); that the Hague Regulations continued to limit therights of the occupant to the necessities of occupation, the occupant being a fiduciary (Rheinstein, *The Legal Status of Occupied Germany,* 47 MICH. L. REV. 23 (1948)); and that the law of belligerent occupation ceased to be applicable by reason of total subjugation and vesting of supreme authority in the occupying power (Mann, *The Present Legal Status of Germany,* 1 INT'L *a* COMP. L. Q. 314 (1947)).

[39] See Hague Convention, preamble; Geneva Civilian Convention of 1949, art. 6. In future conflicts, certain provisions of the latter convention relating to belligerent occupation would continue to be applicable after cessation of hostilities.

[40] Ruocco v. Fiore, 28 Feb. 1947, Ct. of Cassation, 70 FORO ITALIANO 1.587 (1947), [1947] Ann. Dig. 248 (note to No. 112).

[41] For a discussion of World War II peace treaty provisions widening the joint responsibilites of co-belligerents with respect to confiscatory acts committed by them, see Martin, *Private Property, Rights and Interests in the Paris Peace Treaties,* 24 BRIT. YB. INT'L L. 273 (1947).

unlawful acts of the occupant. However, this practice can be considered to be founded on the Roman concept of postliminium since it seeks an invalidation, albeit in the territory of defeated states, of all acts contrary to the law of nations perfornied in time of war by the occupant.[42] The treaties following both World Wars contained such provisions.[43]

b. The Requirement that International Law he Incorporated into Municipal Law. By what legal standards are the validity of the acts of the fornier occupant to be measured by the restored government? After both World Wars, the court's of countries that had been under the oppressive adrninistration of the German and Japanese occupation were faced with the task of determining which acts of the fornier occupant should he declared illegal without disrupting private and public relationships to any great degree. Although it was universally recognized that the Hague Regulations should be the basis of that measure, some countries, notwithstanding their being signatories of the IVth Hague Convention, had to decide if there was a requirement that' the Convention and its Regulations be expressly incorporated into their municipal law, and whether or not legislation was required with respect to the non-self-executing provisions.

Whether the Hague Regulations are binding in the niunicipal sphere will be decided by the niunicipal courts of the restored government. The majority of municipal courts, recognizing the Hague Regulations as declaratory of the rules of customary international law, have decided that these rules have been "adopted" into their municipal law. In the United States, for example, the Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .[44]

The customary law of war, even if not contained in a treaty, is equally a part of the niunicipal law of the United States, except as it may be contrary to treaty, or a controlling executive or legislative act. This principle is found in the language of the United States Supreme Court in the *Pacquete Habana:*[45]

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[42] Gold Looted by Germany from Rome in 1943, Arbitral Advice of G. Sausser Hall, [1953] Int'l L. Rep. 441.

[43] Treaty of Peace with Italy, 10 Feh. 1917, arts. 75, 78, 61 Stat. 1245, T.I.A.S. *So.* 1648; Treaty of Peace with Roumania, 10 Feb. 1917, art. 23, 61 Stat. 1757, T.I.A.S. *So.* 1649; Treaty of Peace with Bulgaria, 10 Feb. 1917, art. 22, 61 Stat. 1915, T.I.A.S. No. 1650; Treaty of Peace with Hungary, 10 Feb. 1947, art. 24, 61 Stat. 2065, T.I.A.S. *So.* 1651. For six months after the effective date of these treaties, even a hona fide purchaser for value of such illegally obtained property was not protected, being required to make restitution without rompensation therefor. The Treaty of Versailles, 28 June 1919 (arts. 297, 298), however, did not follow such property in the hands of a bona fide purchaser for value.

[44] U.S. CONST. art. VI.

[45] 175 U.S. 677, 700 (1899).

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of those, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but trustworthy evidence of what the law really is.

The High Court of Judicature in Burma,[46] in determining the validity of judgments rendered during the occupation by courts established by the enemy occupant, arrived at the sanie conclusion as did the United States Supreme Court. It stated that there was no sharp distinction between municipal and international law and held that since international law was part of the law of the land, the Hague Regulations were to be treated by the courts as incorporated into the municipal law of Burma. Other jurisdictions support the same view.[47]

Article 1 of the Convention [48] gives the impression that the annexed Regulations may not be self-executing. It does not appear that this consideration has ever deterred a court froni giving them validity and recognizing them as enforceable in the municipal sphere.

*2. **Acts** of the Belligerent Occupant.*

The courts of restored governments, in deciding the municipal effects of acts of the niilitary occupying power, have had to determine whether or not these acts were within the occupant's conipetency under international law. In this determination, the niunicipal courts have been concerned principally with the application of articles **43,** 52 and **53** of the Hague Regulations to the legislative, judicial and administrative acts of the occupant.

a. Legislative Acts. Generally, rights acquired under legislation which the occupant could lawfully enact have been recognized to subsist after the liberation and thus to have legal effect. During the occupation of Greece, for example, Gerniaii niilitary courts were given jurisdiction over certain local criminal law offenses. Certain Greek citizens were tried by the German niilitary courts and later tried again for the same offenses by a Greek court. The Court, of Appeal of Athens [49] decided that judgments of occupation courts were by a legal fiction to be considered

[46] The King v. Maung Hmin, High Ct. of Judicature, 11 March **1946, 1946** RANGOON L. REP. **1, [1946]** Ann. Dig. **334** (No. **139).**

[47] Hongkong & Shanghai Banking Corp. v. Luis-Perez Samanilla, Inc., Ct. of First Instance, Manila, **14** Oct. **1946,** [1946] Ann. Dig. **371** (No. **157).** ***Accord,*** Austrian Treasury v. Auer, Sup. Ct., 1st Div., **1** Oct. **1947,** [1947] Ann. Dig. **276** (No. **125).**

[48] Hague Convention, art. **1.**

[49] Judgment **of 1945,** No. **645,** German Military Ct. in Greece, Ct. App., Athens, **56** THEMIS **220** (1945), [1943–1945] Ann. Dig. **433** (No. **149).**

as judgments of the land. The military courts exercised jurisdiction over the country under the power conferred by the laws of war. Therefore, the defendants could not be tried again since Greek courts regard decisions of German military courts in such cases as res judicata.

Similarly. a Greek Court of Cassation,[50] in an appeal before it, decided that a law enacted by the local government established by the military occupant was in conformity with international law and accordingly valid. In reaching its decision the court had to decide first that the act of the occupying power in establishing the *de facto* Greek government was within the authority conferred by article **43.** The court's dictum, to the effect that the local *de facto* government was a true government and hence invested with full powers elicited the following coninient:

> Nor, contrary to the dictum of the Areopagus, is such a "Government" a sovereign Government, since it does not possess *plenitudo potestatis.* It results from military occupation, and it is subject to the orders of the occupant. It cannot therefore in any way claim to exercise full legislative powers, still less full constitutional power. "Governments" set up in occupied territory have only such powers as are delegated to them by the Occupying Power from whom they derive, and whose competence is strictly delimited by international law.[51]

Although the decision is correct, the underlying reasons, as appear in the dictum, are open to question. The "puppet" nature of any government controlled by the occupying power niakes it incumbent upon a post-occupation court to scrutinize that government's enactments in the light of article **43** exactly as though they had been promulgated by the occupying authorities themselves.

b. *Judicial Acts.* Courts of the restored government have readily given legal effect to the judgments of courts established by the military occupant. They have recognized thereby the wide administrative powers of the occupant under article **43,** to include suspending local courts and replacing them with those appointed by him or with military courts. The High Court of Burma,[52] passing on the nature and effects of a court established by the occupying power, held that the Japanese City Court in Rangoon was a competent court, had jurisdiction to entertain the suit, and that its decrees were executable by the local courts after the occupation. Another court in Bur.na,[53] after the occupation, similarly recognized as valid the judgment of an occupation court established by the Japanese conimander during the occupation, by holding that the defense of former jeopardy by the accused was a good defense when brought to trial again after the occupation for the same offense.

[50] See *In re* Law 900 of 1913, **So.** 68, Ct. of Cassation, Areopagus, 55 THEMIS (Greece) 121 (1944), [1943-1945] Ann. Dig. **441 (So.** 152).

[51] [1943-1945] Ann. Dig. **442 (So.** 152) (editor's note).

[52] Abdul Aziz v. The Sooratee Bara Bazaar Co., High Ct. (App. Civil), **20** Dec. 1916, 1917 RANGOON **L.** REP. 18, [1946] Ann. Dig. 342 **(So.** 140).

[53] See The King v. Maung Hmin, High Ct. of Judicature, 11 March 1946, 1946 RANGOON L. REP. 1, [1946] Ann. Dig. 334 **(So.** 139).

After alluding to article 43 and duties of the military occupant thereunder the Court stated:

> If the enemy respects the provisions of this article, and to the best of his ability restores and maintains public order and safety in occupied territory, and does so by enforcing the ordinary laws of the occupied territory, how can it be possible for the lawful government, on reoccupation of the territory, to treat as null and void the judgments and orders of the courts which have administered that law during the absence of the lawful government? Such action would render Article 43 meaningless and purposeless, and would lead to complete chaos.

It appears that as long as the substantive laws of the occupied territory are not changed by the military occupant,[54] the judgments rendered by the procedural function of his courts in applying those laws, except in rare cases of arbitrary action, generally will be recognized by the municipal courts of the restored government,.

Similarly, courts of the restored sovereign have considered military police of the occupant, when enforcing local law and ensuring public order, as acting within the spirit of the Hague Regulations and entitled to the protection of the local laws against bribery. The Italian Court of Cassation,[55] for example, upheld the post-occupation conviction of an Italian who had attempted to bribe an occupant's military police.

c. Administrative Acts.

(1) *Title to Property.* In the application of article 53 of the Hague Regulations, although it appears that the taking only of possession of public property is authorized, courts have interpreted the article as giving the occupant the right to transfer title to a bona fide purchaser.[56] Moreover, the title acquired by such a purchaser is not divested even by the returning sovereign.[57]

An Austrian court in 1947[58] decided that the military occupant could not only seize and transfer ownership but also acquire ownership to public property. Whether the occupant actually acquires ownership

[54] Art. 43, Hague Regulations, requires the occupant to respect, "unless absolutely prevented, the laws in force in the country." Art. 64, Geneva Civilian Convention of 1949, which supplements the Hague Regulations, further restricts the authority of the occupant to repeal or suspend the penal laws of the occupied territory.

[55] See *In* re Vitucci, Ct. of Cassation, 6 Dec. 1945, 69 FORO ITALIANO 11.81 (1946), [1946] Ann. Dig. 362 (No. 151).

[56] See *In* re Lepore, Sup. Military Tribunal, 19 July 1946, 70 FORO ITALIANO 11.133 (1947), [1946] Ann. Dig. 354 (No. 146). The court held that the seizure of public property by the occupant was permitted by the Hague Regulations, which had been incorporated into municipal law by the Italian Law of War, and that accordingly the military occupant was able to transfer a good title to an inhabitant of the occupied territory.

[57] *Ibid.*

[58] Austrian Treasury v. Auer, Supreme Court, 1st Div., 1 Oct. 1917, [1947] Ann. Dig. 276 (No. 125). The court held that the Hague Conventions had been incorporated into municipal law by the Austrian Constitution.

under these circumstances is arguable since it is reasonable to conclude that any title acquired thereby can be divested by the returning sovereign. Similarly, the title of a bona fide purchaser of an article requisitioned by the occupant pursuant to article 52 was held by a Dutch court to be ininiune from attack by the original owner.[59]

(2) Sequestration Measures of the Occupanf. Although confiscation of private property is expressly condenined by the Hague Regulations,[60] there is no provision expressly forbidding or permitting the sequestration of private property. During World War II both Axis countries and .Allied nations sequestered foreign assets. The Allied countries appointed property custodians to administer eneniy assets within their borders. Alien property custodians in Germany were empowered to collect debts owed to residents of Allied nations. The Japanese included in their sequestration measures the liquidation of a number of banks in the Philippine Islands by requiring the deposit accounts of residents of Allied nations to be turned over to an eneniy property custodian bank. The German measures did not appear confiscatory for continued Allied ownership was recognized by the custodianship, whereas the nonconfiscatory nature of Japanese custodianship was not so readily apparent.

It is not to be denied that there is a close similarity between sequestration measures of an occupant and sequestration measures of Allied powers or enemy belligerents within their own domains. Although some writers have relied on the difference, *i.e.*, the territory in which the sequestration occurs, to argue that an occupant is not authorized to sequester property, there is no basic difference.[61] United States doctrine regarding the authority of an occupant to control property in occupied territory would appear to support this view.[62]

The distinction between confiscation and sequestration is an important one which the courts of restored governments had to draw as cases came before them. Once the court decided the measure was **a** sequestration, it had to determine whether or not the sequestration was according to international law and hence to be validated or invalidated. The distinction between the occupant exerting any type of control over private property of the inhabitants of the occupied territory in one case, and

[59] See Vitse v. Brasser, Dist. Ct. of hliddelburg. 18 Feb. 1948, [1948] Kederlandsche Jurisprudentie, No. 620, [1948] Ann. Dig. 601 (No. **200).** The court decided that a purchaser for value in Holland of a tractor, requisitioned by the German army in France and subsequently abandoned and received by Dutch forces as booty of war, acquired good title from the Dutch forces and was entitled to keep it as against the former owner. For the legal basis of booty of war, see Smith, Booty of *War*, 23 BRIT. **YB.** IST'L L. **227** (1946).

[60] Hague Regulations, art. 46.

[61] See Fraleigh, *The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights,* 35 CORNELL L. Q. 89, 104, 105 (1949).

[62] FM 27–10, para. 399.

exerting control, to include beneficial use of enemy private property, that is property belonging to residents of enemy countries in the other, is a basic one in distinguishing confiscation and sequestration.[63] The authority of a belligerent occupant to sequester property must be determined by reference to articles 43 and 53 of the Hague Regulations.[64] These have been used to validate sequestrations because of the obligation the occupant has to act as custodian for property whose owner is absent, and the recognized right of the belligerent in warfare to control an asset which may be used by the enemy to impede his war effort.[65]

It is to be noted that the authority of Germany and Japan to sequester private property in World War II would have been lacking had they been considered as aggressors instead of belligerents in the determination of the validity of their actions with respect to [illegible] +heywere with respect to the type of war waged by them. [illegible] ations of the validity of their acts relating to property, were [illegible] d as aggressors, appear in a draft document [66] prepared by [illegible] group of legal scholars. Under the terms of this study an aggressor would, with certain exceptions, have none of the rights which it would have were it a belligerent. Titles to property would not be affected by an aggressor's purported exercise of such rights. It is apparent, however, that restored governments' in their legislation and court decision, determined the authority of enemy occupants by rules applicable to a belligerent and that enemy occupants were authorized to exercise the same rights as allied occupants.[67]

Since sequestrations do not involve transfer of ownership, the owner is usually permitted by legislation to recover tangible property if it can be found, even from a bona fide purchaser for value. As to sequestration of intangible assets, restored governments, with some variation, generally validate sequestrations by relieving debtors from liability to their creditors by virtue of payment of the preoccupation debt to the occupant

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[63] 3 HYDE, INTERNATIONAL LAW 1728 (2d rev. ed. 1945). Hyde draws this distinction:

> The point to be noted is that a belligerent may in fact deprive an alien enemy owner of property by processes that are not essentially confiscatory, even though the taking and retention may cause him severe loss and hardship. Recourse to such non-confiscatory retentions or deprivations has marked the conduct of belligerents since the beginning of the World War in 1914. They may perhaps be appropriately referred to as *sequestrations.*]Emphasis supplied.]

[64] Fraleigh, *supra* note 61, at 104, 105; *accord,* FM 27-10, para. 399.

[65] For reasons justifying appointing of alien property custodians by the United States for enemy assets in the United States and their sequestration, see DAPC Annual Report, 11 March 1942, to 30 June 1913, p. 13. Compare with reasons in Haw Pia v. China Banking Corp., 80 Phil. Rep. 604 [1948], discussed in 23 PHIL. L. J. 575 (1948).

[66] See Harvard Research in International Law, *Draft Convention on Rights and Duties of States in Case of Aggression,* 33 AM. J. INT'L L. SUPP. 827 (1939).

[67] Hagad, *Effect of Payment of Pre-War Debts to the Liquidator Bank of Taiwan,* 22 PHIL. L. J. 159 (1947); Hyde, *Concerning the Haw Pia Case,* 24 PHIL. L. J. 141 (1949).

through the latter's sequestration. Validation has been accomplished by means of legislation [68] and municipal court decisions.[69] As a result of this validation, the creditors, legal owners of the debt, are left with a general claim against the former occupant's government and a claim against any general fund that may be established for this purpose by his own government from sequestrations of enemy property and reparations from peace treaty arrangements.

(3) *Occupation* Currency *Transactions.* Under his trusteeship obligations of article 43,[70] the occupying power has the implied authority to maintain the local currency in circulation,[71] to regulate the quantity of it [72] and to replace the local currency with his own. In addition, he may issue special occupation currency for the use of his own forces if necessary.[73]

During the course of hostilities depreciation of the local currency inevitably occurs. Whether the depreciation is attributable to illegal acts of the occupant, the restored government faces the task of determining what action, if any, should be taken with respect to occupation currency transactions, principally the discharge of preoccupation obligations during the occupation with depreciated currency. The government may declare invalid all such transactions if the occupant intentionally debased the currency through acts violative of international law, but as a practical matter such an order could never be implemented. By judicial decree or legislation the restored governments have taken action to validate or partially invalidate these payments of preoccupation indebtedness with occupation currency. In the Philippines, for example, the courts have held that payments in depreciated occupation currency were effective at face value for this purpose, whether the payments were made to creditors in occupied territory [74] or to Japanese custodians acting for creditors

[68] Act No. 36, The Japanese Currency (Evaluation) Act, 1947 § 4 (Burma); see Law of 17 Sept. 1914, art. 33, [1944] Staatsblad No. E 100 (Neth.), validating sequestration of intangible assets and thereby exempting debtor from further payment, except where debtor could have refused payment; Law of 7 March 1949, Debtor and Creditor (Occupation Period) Ordinance, Colony of Singapore Gov't Gazette, Supp. No. 17, 11 March 1949 (Sing. & Malaya); Law of 7 March 1949, Debtor and Creditor (Occupation Period) Ordinance, Hong Kong Gov't Gazette, Supp. No. 1, 18 June 1918, reported in Fraleigh, *The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights*, 35 CORNELL L. Q. 89, 100-102, 108 (1919).

[69] See Haw Pia v. China Banking Corp., 80 Phil. Rep. 601 (1948); Hodges v. Maria Gay, 87 Phil. Rep. 401 (1950).

[70] Hague Regulations.

[71] FM 27-10, para. 430.

[72] Fraleigh, *supra* note 61, at 112, 113.

[73] FM 27-10, para. 430.

[74] *See* Ruperto-Obando v. Fidelity & Surety Trust Co. of Phil. Islands, No. L-2490, Ct. of First Instance, Manila, 26 Sept. 1950, extracted in Arnego, INT'L L. REV. (PUBLIC) 288 (1962). The court validated a discharge in 1914 of a mortgage indebtedness contracted before the Japanese occupation while basing its decision on Haw Pi3 v. China Banking Corp., 80 Phil. Rep. 601 (1948).

residing in Allied territory.[75] In Burma,[76] validation at face value was accomplished through legislation. In Hong Kong,[77] Singapore and Malaya,[78] the legislation partially validated and partially revalued payments in occupation currency. Netherlands legislation in Indonesia,[79] for example, validated payments in varying percentages from 100 percent in 1943 to 3 percent in July 1945.

Although restored governments normally have validated or partially validated commercial transactions in occupied currency, they have enacted legislation invalidating currency transfers where special situations justified such action.[80]

(4) *Utilization of Local Police.* Where the occupant has required services of the inhabitants, Dutch courts, upon liberation, have been particularly harsh on individuals, notably policemen. These inhabitants were required to assist the occupant in maintaining law and order pursuant to the Hague Regulations [81] in operations not against their own country (hence not violative of international law). Yet they were under a legal obligation, imposed by their own government-in-exile, to remain faithful to their sovereign by abstaining from carrying into execution, except in case of force majeure, orders of the enemy which prima facie were intended to serve the latter's interests exclusively.82 Some writers, in accord with the Dutch view [83] of the intent of the Hague Regulations, view belligerent occupation as having no legal character and hence to be regarded merely as an exercise of force imposing no duty upon the inhabitants to even refrain from jeopardizing the safety of the occupant.[84]

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[75] Haw Pia v. China Banking Corp., *supra* note 74.

[76] See Act No. 36, The Japanese Currency (Evaluation) Act, 1917, § 4 (Burma).

[77] *See* Law of 7 March 1919, Debtor and Creditor (Occupation Period) Ordinance, Hong Kong Gov't Gazette, Supp. No. 1, 18 June 1918.

[78] *See* Law of 7 March 1949, Debtor and Creditor (Occupation Period) Ordinance, Colony of Singapore Gov't Gazette, Supp. No. 17, 11 March 1949 (Sing. & Malaya).

[79] Law of 3 May 1947, art. 52 [1947] Staatsblad von Nederlandsch-Indie No. 70 (Indonesia), reported in Fraleigh, *supra* note 61, at 112.

[80] See, for example, Hilado v. de la Costa, 83 Phil. Rep. 471 (1949), upholding constitutionality of Philippine law nullifying unpaid obligations of banks to depositors arising from deposits of occupation currency.

[81] Arts. 43, 52.

[82] *In re* Van Huis, Special Crim. Ct., The Hague, 15 Nov. 1946, [1946] Na-oorlogse Rechtspraak (Neth.), 2d yr., No. 605, [1946] Ann. Dig. 350 (No. 143). The court held that the Hague Regulations were intended to curtail the enemy's power in occupied territory and not to define hi rights against the population; accordingly, his legislative measures did not, in general, create legal obligations for the inhabitants.

[83] See *ibid.*

[84] See Baxter, *The Duly* of *Obedience to the Belligerent Occupant,* 27 BRIT. YB. INT'L L. 243 (1950); VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 45-48 (1957). Although the Geneva Civilian Convention of 1949 is silent on the duties owed to the occupant by the inhabitants, FM 27-10, para. 432, is clear in the statement of these limited duties.

The particularly vulnerable lot of police officials during and after any occupation generated a commentary [85] in 1958 by the International Committee of the Ked Cross on article 54 of the Geneva Civilian Convention of 1949 and a draft "Declaration" [86] The latter proposes to delineate the police officer's duties to the enemy occupant and relieve him of duties arid obligations that would subject him to later censure by his own sovereign.

B. *MEASURES TAKEN BY THE DEPOSED SOVEREIGN-IN-EXILE*

At the termination of the occupation by Axis forces in World War II, the restored governments faced the burdensome task of determining which of the occupant's acts should be validated and which invalidated. Although municipal law ultimately would make this determination, all of the restored governments used international law as the basis by which to measure the validity of the occupant's enactments.[87] Many governments, even before invasion of their domains, foresaw the problems incident upon belligerent occupation and enacted preventive legislation to limit confiscation of public and private property by the invader and to give notice of the manrer in which the *jus postliminii* would be applied. In 1040, Denmark. Norway, Belgium, France aiid the Netherlands,[88] for example. passed legislatioil forbidding domestic business organizations from disposing assets abroad in case of enemy occupation The United States, on 3 January 1943, in a policy statement issued a warning [89] to all concerned, and in particular to persons of neutral countries, against acts of dispossession and confiscation committed in territories under enemy occupation This warning was to be incorporated in peace treaties with the defeated states after the war.

During a belligerent occupancy the occupant may, if he determines it necessary to accomplish his principal aims of the protection of his forces and the discharge of his trusteeship obligations, suspend any or all existing

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[85] 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IS TIME OF WAR (Pictet ed. 1958). See appendix II of this article for art. 51 and the commentary.

[86] *Id.* at 2, 3.

[87] Even courts of countries not signatories to the IVth Hague Convention of 1907 incorporated its provisions in their decisions. See, for example, V v. O, *So.* 163, Ct. of First Instance, Corfu. 1947, 58 THEMIS (Greece) 424 (1947), [1947] Ann. Dig. 2G4 (No. 121).

[88] This legislation, even though enacted by the then Setherlands government in exile, was effective, ut least in the United States. to bar confiscation of these assets by German representatives. See Amstelbank N.V. v. Guaranty Trust Co. of New York, 177 Misc. 548, 31 N.Y.S. 2d 194 (Sup. Ct. 1941).

[89] See 15 DEP'T STATE BULL. 21 (1943).

laws in the occupied territory.[90] It follows then that he may forbid the government of the occupied territory from carrying on its usual functions for the occupaiit "must regard the exercise by the hostile government of legislative or judicial functions . . . as in defiance of his authority, except in so far as it is undertaken with his sanction or cooperation." [91]

Many governments, however, upoii occupation of their territory, have fled the invader. While carrying on the struggle against the enemy occupant, they have continued to legislate for their subjects, regardless of whether they lived in occupied or unoccupied territory. Upon liberation these restored governments have determined, through judicial decisions of their courts, that they retain the capacity to legislate for their subjects in occupied territory.

On an appeal, for example, by a Sorwegian from a conviction of treason during the German occupation, the Norwegian Supreme Court [92] in August 19-15 affirmed. It decided that the sovereign-in-exile could issue the decree increasing the penalty for treason, which decree was valid for the territory under enemy occupation, even though its provisions could be implemented in Norway only after the end of the occupation. The rationale of the decision was that sovereignty in Norway was not legally changed by the German provisional occupatioii; that Sorwegians continued to owe allegiance to their own country; and that no rule of international law prevented the lawful Norwegian authorities from issuing criminal legislative measures which were binding upon Sorwegian citizens from the date of their promulgation.

Belgian courts,[93] which have supported a harsh postliminy attitude after both World Wars, and understandably so in view of long enemy occupations, have held that legislative decrees of their government-in-exile became effective in occupied territory once the required publicity had taken place. A Greek court [94] held in the same manner, adding that the laws promulgated by the Greek government-in-exile applied to occupied territory as of the date of their publication in the Official

[90] L v. N, No. 21, Ct. of App., Thrace, 1947, 58 THEMIS (Greece) 210 (1947), [1947] Ann. Dig. 242 (*So.* 110). The court held that if suspension or repeal of local penal laws is necessary, such action may be taken by the occupant, presumably under the authority of art. 43, Hague Regulations. *Cf.* Geneva Civilian Convention of 1919, art. 64.

[91] 3 HYDE, *op. cit. supra* note 63, at 1883.

[92] Public Prosecutor v. Reider Haaland, Sup. Ct. (App. Div.), 9 Aug. 1945, [1945] Norsk Retstidende 13 (Nor.), [1943–1945] Ann. Dig. 444 (*So.* 154). This was the leading precedent for similar cases derided since the German surrender.

[93] In *re* Hoogeveen, Ct. of Cassation, 6 Sov. 1944, [1945] Pasicrisie Belge 1.23, [1943–1945] Ann. Dig. 432 (No. 148). Regular publication of a Decree-Law in the Moniteur Belge in London. provisional seat of the Belgian Government, together with lapse of a prescribed period of time, constituted the due publicity required to make the law binding throughout all of Belgium.

[94] *In re* X.Y., No. 54, Council of State, 1945, 56 THEMIS (Greece) 138 (1945), [1943–1945] Ann. Dig. 431 (No. 147).

Gazette at Athens. An Italian court[95] in 19-16 came to the same conclusion in regard to the validity in German-occupied Italy of acts of the absent Italian government. It tempered the harshness of this doctrine, however, by adding that reasons of political expediency might induce the legislature to renounce the unlimited application of that principle whenever the retroactive application of it in individual cases might have inequitable results. It may he concluded, therefore, that whether or not legislative enactments of the government-in-exile became effective and applied to its subjects in occupied territory were determined by municipal law and public policy. The legality, according to international law, of contrary laws of the occupant received little consideration by the courts.

A special situation exists as to the validity of legislation of the absent sovereign in occupied territory following an armistice, in contradistinction to a true belligerent occupation before cessation of hostilities. The former was the type of occupation by allied forces existing in Italy following the armistice between Italy and the Allies. After the armistice, the Italian Government passed legislation affecting the daily lives of Italians in occupied as well as unoccupied Italy, and the Allied Military Government implemented the majority of them in occupied territory. At the trial by an Allied military court of a number of Italians for the massacre in 1945 of 54 of their compatriots confined in the Schio jail near Vicenza, Italy, the men were sentenced to death. The court declined to apply provisions of recent Italian legislation eliminating the death penalty. Upon review the Chief of Allied Military Government decided that the occupants were not bound in every case to apply the laws passed by the Italian government. He affirmed the conviction but commuted the sentence, in effect giving validity in this case to the new law of the absent sovereign.[96] The decision will strengthen British and United States doctrine, which requires the occupant, within the limits of his military aims, to give the widest possible effect in occupied territory to the legislation of the absent sovereign.[97] It is consistent with article 43, which may not expressly but impliedly require it.

111. JUDICIAL REVIEW OF ACTS OF THE BELLIGEREKT OCCUPAST

A. *STATUS OF BELLIGERENT OCCUPANCY—LEGAL OR FACTUAL*

The view of the legal nature of belligerent occupation held by a municipal court in declaring certain acts of the belligerent to be prohibited by

[95] Ferrovie dello Stato v. S.A.G.A., Ct. of First Instance, Venice, 21 June 1946, [1946] Giurisprudenza Italiana **1.2,** [1946] Ann. Dig. **357** *(So.* **147**).

[96] For an illuminating disrussion of the case see Stein, *Application of the Laws of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre,* 46 *MICH. L.* REV. 341 (1948).

[97] *Id.* at 370.

the Hague Regulations mill determine the legal effect of these unlawful acts and the harshness of the postliminy doctrine applied by the courts. When the occupation has been regarded merely as a factual exercise of power with the Hague Regulations restricting the abuse of force by the occupant,[98] whatever validity these acts may have is tested by their effectiveness and not by their compliance with any rules. Accordingly, the restored government may rescind even acts of the occupant which were not violative of international law since they possessed no legal character. On the other hand if the belligerent occupation is regarded as a legal regime, notwithstanding its temporary nature, and hence governed by international law, the legal effect of the occupant's acts are tested against the Hague Regulations, and if determined to be beyond the competence of the occupant, are declared null and void. Regardless of the view entertained by the court, the effect of unlawful acts, if merely declaring them a nullity, mill not restore the *status quo ante* occupation. It mill give rise to a claim for reparations [99] in favor of the aggrieved state, a claim that can be satisfied by provisions of a treaty of peace or voluntary submission of both sides to an international arbitral commission.

The courts of most countries, which have been occupied at one time or another by a belligerent, have recognized the *de facto* status of governments established by military occupants. They have also recognized that the laws enacted by them, if within the purview of international law, have the character of true laws during the occupation and hence should be obeyed by the inhabitants. There have been, however, a number of decisions holding to the contrary. In a landmark case following World War I, the Court of Appeal of Liege, Belgium,[100] held that the Hague Regulations gave no legislative power to the occupant but merely restricted the abuse of force by him. To the same effect was the decision by a criminal court in Crete [101] in 1915. It held that all legislative acts of the occupant were to be presumed invalid until Greek courts had taken

[98] Mathot v. Longue, Ct. App., Liege, 19 Feb. 1921, [1921] Belgique Judicaire, col. 438, [1919–1922] Ann. Dig. 463 (No. 329).

[99] Hague Convention, art. 3.

[100] Mathot v. Longue, Ct. App., Liege, 19 Feb. 1921, [1921] Belgique Judicaire, col. 438, [1919–1922] Ann. Dig. 463 (So. 329). This case marked the reversal of current decisions adhered to by the court in regard to a German ordinance of 8 August 1918 and followed the reasoning used by the Court of Cassation, in an earlier decision, that the Hague Convention of 1907 did not imply that the occupant had any power over law, even within the limits fixed by article 43, Hague Regulations.

[101] *In* re G., No. 107, Crim. Ct., Heraklion (Crete), 1945, 56 THEMIS (Greece) 63 (1945), [1943–1945] Ann. Dig. 437 (No. 151). The occupant's acts were viewed as products of de facto courts having no juridical force at the end of the occupation and to be regarded as laws of a foreign country of which Greek courts need not have knowledge. The editor (Ann. Dig.) noted that this judgment was open to question and in conflict with previous decisions of Greek courts expressly recognizing the de facto status of governments established during the occupation and the laws enacted by them as having the character of true laws of the state.

affirmative action to validate them and that only those legislative measures of the occupant enacted in the true interest of Greece would be ratified. This decision appears to overlook many of the legal justifications contained in the Hague Regulations for other legitimate acts of the occupant which are not for the sole benefit of the occupied territory but for the benefit of the belligerent, such as the right to collect taxes, pay for the occupation, and requisition for the needs of his army. An Italian court [102] was less harsh, when, by a reverse twist to the Greek ratiouale. it held that legislation enacted in the sole interest of the occupant ceases to he operative as from the liberation of the territory

B. *REVIEW OF ACTS OF THE OCCUPANT BY COURTS DURING OCCUPATION*

1. *Limitations Imposed on Courts' Invalidating Powers.*

After territory has been secured by a belligerent and occupation can be considered effected,[103] it is normal for the occupaiit to permit local courts to continue to function in order *to* assist him in administering the territory. The attitude of the local courts of occupied territory to word the acts of the occupant which are contrary to international law, even though the courts' decrees are unenforceable, serves the purposes of putting the occupying power on iiotice of the illegal act. Thus, the occupant is exposed to world opinion, and the more salutary effect of guiding the inhabitants in their day to day affairs which may come under scrutiny after the occupation.

The general principle or test by which municipal courts judge the acts of the occupant is simply stated: Those acts of the occupant which he was competent to perform according to international law will be recognized by a restored government. Those acts which the occupant was not competent to perform under international law are illegal and to be declared null and void.

The second part of this principle—that acts beyond the occupant's competence are in effect ultra vires and hence a nullity—has practical limitations. First, article 43 is phrased in such general terms that municipal courts have been reluctant to declare illegal those acts which prima facie were intended to discharge the occupant's obligations of restoring and ensuring public order and safety as required by article 43. Municipal courts, therefore. recognizing the wide discretionary powers possessed by an administrator. have considered themselves under obligation to recognize, escept in cases of patent abuse of this discretion, the legality of the occupant's acts. A second limitation is the *fait-accompli* nature of the practical effects of the occupant's acts. Recognition of

[102] Anastasio v. Ministero dell' Industria e di Commercio, Council of State, 22 Jan. 1946, 69 FORO ITALIANO III.75 (1946), [1946] Ann. Dig. **359** (No. 150).

[103] Hague Regulations, art. 42.

their legality arid their validation constitute an easier path for the court, than nonrecognition of legality and subsequent invalidation. Some things done cannot be easily undone. The courts may quite readily grant relief, after the occupation, from criminal sanctions imposed by the occupant, but dispensing justice where conflicting claims to tangible and intangible property have been generated by enactments and acts of the occupant is a much more difficult problem. Upon liberation of territory individual court decision, special legislation of the restored government and of third states, and peace treaty provisions are procedures available for a practical solution to the problem.

Although municipal courts look to international law for general principles by which to test the legality of the acts of a belligerent or friendly[104] occupant, it is municipal law which determines the consequences of those acts. In the review of unlawful acts by municipal courts, it must be remembered that in addition to sanctions these courts possess much greater freedom of expression after the termination of the occupation, be it friendly or belligerent.

2. *Decisions of Municipal Courts During Occupation.*

Although there are notable exceptions, generally the municipal courts of occupied countries have reviewed the judicial and legislative acts of the occupant from the point of view of their conformity with international law. The Greek Court of Cassation,[105] in 1944 during the German occupation, reviewed an appeal by a Greek national who had been convicted by a German military tribunal of a minor rationing offense and sentenced to total confiscation of his property. It held that the judgment of the tribunal was illegal and had to be treated as null and void by the Greek court. In its opinion the court emphasized that according to accepted rules of international law, which had been incorporated expressly into Greek law, the sovereignty of the state continued in existence even after occupation by the enemy and that the occupant would be going beyond what was permitted by article 13 of the Hague Regulations if he established tribunals other than those permitted by these Regulations. The court did not hold the German tribunal illegal but attacked the sentence of complete confiscation as a punishment prohibited by the Constitution and laws of Greece.

A Norwegian court,[106] in **1943,** in an expropriation proceeding based on the validity of a Decree-Law which an interested litigant was influential

[104] Ruocco **v.** Fiore, Ct. of Cassation, 28 Feb. 1917, 70 FORO ITALIANO 1.587 (1947), [1947] Ann. Dig. 218 (note to No. 112). After termination of Allied occupation of Italy, this court interpreted international law to include not only the Hague Regulations but also the Armistice Agreement of 3 Sept. 1943.

[105] *In re* S., So. 255, Ct. of Cassation, Areopagus, 1914, 56 THEMIS (Greece) 143 (1945), [1943–1945] Ann. Dig. 436 (No. 150).

[106] Overland's Case, Dist. of Aker, Nor., 25 Aug. 1913, [1943–1945] Ann. Dig. 416 (No. 156).

in having the German-controlled Norwegian authorities enact in its favor, dismissed the action. It held that allodial laws of Norway could not be set aside by a military occupant to achieve a purpose outside the scope of the Hague Regulations. The court interpreted article **43** as implying an explicit distinction between regulations issued by the occupant and ordinary constitutional legislation. It indicated that "unless absolutely prevented," [107] not only must there be compelling reasons to set aside a lam but that the occupant is not permitted to set aside a law if the desired result can be achieved by other means.[108] The rationale of the latter statement is self-evident when one considers the far reaching consequences of having the occupant change any law having such general application merely to achieve a limited effect.

Evidently municipal courts have the power to pass on the acts of an occupant during an armistice. A German Reichsgericht,[109] in 1921, after hostilities but during the armistice occupation by Allied countries, held that legislation by the occupant, the United States, forbidding the purchase of materiel from the German military forces, did not fall within the purview of article **43** if it was intended to affect contracts validly concluded under private law. Accordingly, the legislation could have no effect on the relations of private persons. The court felt that the legislation should have been limited to protecting interests of the United States and should not have interfered with the relations of private law.

It is interesting to note that these court decisions were based upon the German theory of an armistice occupation, which supported their view that the occupation of the Rhineland by virtue of the Armistice Agreement of 11 November 1918 was not a belligerent occupation in the sense of the Hague Regulations. The British and United States view is that both the occupation ***flagrante bello*** and the armistice occupation are variations of a belligerent occupation and that accordingly the Hague Regulations applied to both except as the latter were modified by the armistice agreement.[110] The Germans, however, viewed belligerent

[107] Hague Regulations, art. **43.**

[108] *See* Overland's Case, Dist. of Aker, Nor., **25** Aug. **1943** [1943–1945] Ann. Dig. **446, 447 (No. 156).** The question of whether courts in an enemy-occupied country can pass on validity of legislative enactments of the occupant **was** the subject of correspondence between the Norwegian Supreme Court and the German Reichskommissar during the first year of occupation and led to the resignation of the Court, which held the question had to be answered in the affirmative. Later, the same Court, now "packed" with German-influenced judges, answered the question in the negative. The District Court in the instant rase, aware of the later decision **of** the Supreme Court, determined by **a** majority vote that the Supreme Court's derision had been given with reservation as to "decrees beyond one's power" and accordingly it was not at variance with its own decision dismissing the expropriation proceeding (Summary of editor's note.)

[109] Armistice Agreement (Coblenz) Case, Reichsgericht in Civil Matters, [1921] **102** Entscheidungen des Reichsgerichts in Zivilsachen 106 (Germ.), [1919–1922] Ann. Dig. **440 (No. 305).**

[110] Compare the apparently similar view in Ruocco **v.** Fiore, Ct. of Cassation, **28** Feb. **1947, 70** FORO ITALIANO I.587, [1947] Ann. Dig. **248** (note to No. **112).**

occupation as a legal and not factual power, wherein the occupant exercised all rights of the deposed sovereign as granted him under international law, but that an armistice occupation was *sui generis*, a non-genuine armistice to which provisions of the Hague Regulations did not apply. Consequently, the sovereign retained the legitimate authority in occupied territory, including the legitimate power, unless the armistice agreement provided otherwise.[111]

The municipal courts of some states have been reluctant, and in some cases have refused, to review during the occupation the enactments of the occupying power. A French court of first instance,[112] in May 1941, in declining to review the legality of racial legislation enacted by the German authorities confiscating bank accounts of Jewish depositors, decided that "the decrees of the occupying authorities bind all within the occupied territories." [113] Later in the occupation, in 1944, a French tribunal [114] alluded to occupation as not being tantamount to annexation and alluded to its own competence to determine the legality of measures taken by local authorities for the maintenance of public order and local needs. Nevertheless, it restricted its competence to those cases not involving the interpretation of acts of an international nature and those not touching upon the rights of the occupying power. The decisions of French courts must be viewed in the light of their apparently laissez-faire, and perhaps even collaborative, nature.

The Dutch courts, also, during World War II consistently refused to review the legality of legislative enactments of the occupant. The Supreme Court of Holland,[115] in a case that set the pattern for all other Dutch courts during the occupation, decided that municipal courts did not have the authority. In the case, the court was required to pass on its own competence to test the legality of German legislative acts since on appeal from a conviction by lower courts established by the occupant, the appellant challenged the judgments on the ground they were imposed by courts established in violation of the Hague Regulations. The Supreme Court washed its hands of the affair and dismissed the appeal. It adopted the view that ordinances of the Reichskommissar were to be considered as Acts of the Dutch legislature, which Netherlands courts were not allowed

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111 For a thorough discussion of the Anglo-American and German doctrine and practice during an armistice, see Stein, *supra* note 96.

112 *In* re C, Tribunal Civil de la Seine, [1941] Dalloz Jurisprudence 267 (Fr.), [1919–1942] Ann. Dig. 283 (No. 157) (Supp. vol.); *accord, In re* Heriot, Conseil d' Etat., 22 Nov. 1944, [1945] Revue de Droit, Public 494 (Fr.), [1919–1942] Ann. Dig. 228, 293 (note to No. 161) (Supp. vol.).

113 *In re C, supra* note 112, at 284.

114 *In re* Le Coq, Conseil d'Etat, 7 Jan. 1944, Gazette du Palais (Fr.), 11 Feb 1944, p. 63, [1943–1945] Ann. Dig. 452 (No. 161).

115 *In* re Jurisdiction of the Dutch Supreme Court for Economic Matters, Sup. Ct., 12 Jan. 1942, [1942] Nederlandsche Jurisprudentie & Weekblad, No 271, [1919–1942] Ann. Dig. 288 (No. 161) (Supp. vol.).

to test for intrinsic value nor for legality in respect to a treaty such as the Hague Regulations. In addition, the court held that neither the history nor the wording of article 43 was intended to confer on municipal courts the jurisdiction to judge measures of the occupying power in the light of the requirement that the occupying power was bound to respect the legislation in force in the country unless absolutely prevented. The first reason appears untenable, even adopting the legal concept of belligerent occupation. It is almost universally recognized that an occupant does not exercise sovereignty over occupied territory, and accordingly, his ordinances cannot have the same stature and legal force as constitutional legislation. The court's interpretation of article 43 was in keeping with its melange of pro-German composition, pro-German attitude and fear. The circumstances under which the decision was rendered and the widespread indignation aroused by it[116] tend to support the generally accepted view that municipal courts, during an occupation, have the power and are under an obligation to test the occupant's legislative enactments in the light of international law.

C. *REVIEW OF ACTS OF THE OCCCPANT BY COURTS AFTER OCCUPATION*

1. *Interpretation* by *Courts* of *the Legal Effect* of *Invalidating Legislation.* Immediately before countries in Western Europe were liberated during World War 11, their governments-in-esile, to prevent legal chaos and to facilitate the return to normalcy, without being completely familiar with the ordinances and other measures enacted by the occupant, issued decrees laying down provisional rules with respect to the validity of these occupation measures.[117] To the municipal courts would fall the burden of interpretation and application of the legislation. Sot infrequently

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[116] *Id.* at 291. The decision in this case and other related reasons prompted the Setherlands Government, upon its restoration after the occupation, to suspend all members of the Supreme Court from duties for an extended period and deprived the court of its customary power of policing unworthy elements of the judiciary.

[117] The Dutch Decree on Occupation Measures, dated 17 Sept. 1944 (Official Journal, **So.** E93), is a typical example of such legislation:

> In that decree they attempted, without knowing the contents of numerous measures and regulations which were not published in the German Verordnungsblatt, to lay down provisional rules relating to these ordinances. German ordinances were divided into four groups, namely:
>
> A. Those which must be held never to have had any validity. These included the anti-Jewish ordinances.
>
> B. Those which became inoperative as from the liberation.
>
> C. Those which, for purely practical reasons, were temporarily maintained in force.
>
> D. All others, i.e. a small number published in the German Verordnungsblatt and the majority of those not published in it. The operation of these was provisionally suspended pending a final decision. Legal difficulties arose, particularly with ordinances on List B., for wording of the decree seemed to imply that they were valid during the ocrupation. [1947] Ann. Dig. 250 (***So.*** 114) (editor's note).

courts, seemingly applying legislation in different manners, arrived at diverse results in order to give effect to the spirit of the law and the intent of the legislature.

In a case, for example, where the trustees of funds of a pro-German labor organization sought to recover arrears in membership dues which members, on grounds of principle, had refused to pay, a Dutch court [118] held that the dues were not recoverable. It reasoned that, even though the German ordinance had been declared by the Netherlands legislature to have been provisionally in force after the liberation, this did not necessarily mean that it should be given retroactive validity. In a similar case, the Supreme Court of Holland [119] decided differently, holding that the German ordinances on List B and List C [120] "were to be treated as though they had been in force during the occupation irrespective of whether this had really been the case." The implication was that these ordinances had been given a provisional validity that could be retroactively destroyed by the courts.

That these courts did not hesitate to declare this retroactive invalidity where the loyalty of Dutch citizens was in doubt during the occupation, is brought out forcefully in their decisions relating to the acts of Dutch policemen. After liberation of Holland, in their trial for having carried out oppressive measures of the German occupant, Dutch policemen contended that the German ordinances which they had so effectively enforced, had been declared by the Decree-Law to be inoperative from the liberation and accordingly by implication they were valid during the occupation. The courts rejected this defense and, in effect, affirmed their convictions.[121] They held that while the legislature had intended to dispel any possible doubt of the legal nullity of ordinances on List A from the moment of their enactment, it had intended that those on List B [122] "would have no further, even factual, operation after the liberation

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[118] B.B. en A. The Hague v. Vonck, Cantonal Ct. (Groningen), 13 Feb. 1947, [1948] Nederlandsche Jurisprudentie, No. 76, [1947] Ann. Dig. 250 (No. 114).

[119] Kloet v. Klok, Sup. Ct., 18 April 1947, [1947] Nederlandsche Jurisprudentie, No. 380, [1947] Ann. Dig. 252 (note to No. 114).

[120] See decree cited *supra* note 117.

[121] See *In re* Van Huis, Special Crim. Ct., The Hague, 15 Nov. 1946, [1946] Na-oorlogse Rechtspraak, 2d yr., No. 605, (Neth.), [1946] Ann. Dig. 350 (No. 143); *In re* Policeman Balster, Special Ct. of Cassation, 20 Jan. 1947, [1947] Nederlandsche Jurisprudentie, No. 47, [1947] Ann. Dig. 225 (No. 115); *In re* Van Kempen, Special Ct. of Cassation, 12 March 1947, [1947] Na-oorlogse Rechtspraak, 3d yr., No. 832, (Neth.), [1947] Ann. Dig. 259 (No. 117); *In re* Policeman Vollema, Special Ct. of Cassation, 20 Jan. 1947, [1947] Kederlandsche Jurisprudentie, No. 48, [1947] Ann. Dig. 258 (No. 116).

[122] See decree cited *supra* note 117.

of national territory, leaving to the courts the task of assessing their legality in the light of international law." [123]

2. *Invalidation* by *Municipal Courts.*

Municipal courts, applying the Hague Regulations very strictly and narrowly, have invalidated acts which the occupant was not forced by military necessity to execute for the preservation of his forces and maintenance of public order. Courts have declared a nullity ordinances of the occupant suspending the property alienation laws of the occupied country; [124] acts replacing local appellate tribunals with their own; [125] requisitions [126] which were not made "for the needs of the army of occupation" [127] or were not of "such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country," [128] except under *force majeure;* acts intending to annex occupied territory; [129] and judgments of occupation courts imposing criminal penalties for political offenses based upon acts tending to aid the enemy and directed against the safety of the occupant.[130] A Norwegian court,[131] in dictum, stated that a Norwegian decree would as a rule be binding on a Norwegian national even if at variance with a patently lawful act of the occupant and international law, thereby emphasizing the primary role of municipal law in the determination of the validity of acts of a belligerent occupant.

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[123] *In* re Policeman Balster, Special Ct. of Cassation, 20 Jan. 1917, [1947] Nederlandsche Jurisprudentie, No. 47, [1947] Ann. Dig. 255 (No. 115); *cf.* Co Kim Cham v. Valdez, 75 Phil. Rep. 113 (1945), wherein the court held that Gen. MacArthur's Proclamation of 23 Oct. 1914, notwithstanding its tenor, did not invalidate proceedings of the occupant's courts which were not of a political character.

[124] V v. O, No. 163, Ct. of First Instance, Corfu, 1947, 58 THEMIS (Greece) 424 (1947), [1947] Ann. Dig. 264 (No. 121). The court, though Greece was not signatory of the IVth Hague Convention of 1907, applied the Hague Regulations annexed to the Convention.

[125] *In* re Condarelli, Ct. of Cassation, 5 July 1952, [1953] Revista di Diritto Internazionale 451 (Italy), [1952] Int'l L. Rep. 609 (No. 133).

[126] Weber v. Credito Italiano, Ct. of First Instance, Florence, 30 July 1915, 69 FORO ITALIANO 1.639 (1946), [1946] Ann. Dig. 381 (No. 163). Lucchesi v. Malfatto, Ct. of First Instance, Florence, 10 Dec. 1945, 69 FORO ITALIANO 1.985 (1946), [1946] Ann. Dig. 382 (note to No. 163). Delville v. Servais, Ct. of Appeal, Liege, 19 Oct. 1945, [1945] Pasicrisie Belge 11.43, [1943-1945] Ann. Dig. 448 (No. 157).

[127] Hague Regulations, art. 52.

[128] *In* re Contractor Knols, Special Ct. of Cassation, 2 Dec. 1916, [1947] Na-oorlogse Rechtspraak, 3d yr., No. 725, (Neth.), [1946] Ann. Dig. 351 (No. 144).

[129] See Bindels v. Administration des Finances, Ct. of Cassation, 16 June 1947, [1947] Pasicrisie Belge 1.268, [1947] Ann. Dig. 45 (So. 17). A Belgian, accused of treasonable acts during the German administration, contended German annexation of Belgium had made him a German citizen. The court differentiated between annexation and belligerent occupation, held the German decree annexing Belgium a nullity and affirmed the conviction.

[130] People of the Philippines v. Benedicto Jose, 75 Phil. Rep. 612 (1915).

[131] Public Prosecutor v. Lian, Sup. Ct., 14 Nov. 1945, [1945] Norsk Retstidende 232 (Nor.), [1943-1945] Ann. Dig. 445 (No. 155).

In an unusual case illustrating the effect of an armistice agreement upon acts of the former occupant, the Italian Court of Cassation,[132] in effect overruled the decision in a similar case of a lower court [133] which had held valid a contract concluded in violation of an occupation ordinance of the Allied forces notwithstanding a proclamation of the Italian government on 31 December 1945 validating the ordinance. The Court of Cassation decided that the ordinance was valid despite the fact it violated article 43 of the Hague Regulations. The court's decision turned on provisions of the Arniistice Agreement between Italy and the Allied governments, the entire agreement having been incorporated into Italian law by the Italian legislative decree of 20 July 1944.

IV. EXTRATERRITORIAL EFFECT OF ACTS OF THE BELLIGERENT OCCUPANT

A. *MUNICIPAL LAW OF THE THIRD STATE*

As the municipal law of the restored government determined the validity of the occupant's acts, so similarly it is the municipal law of the third state that determines the extraterritorial effect of a belligerent occupant's acts within that third state. In the former case, international law has been incorporated into the municipal law, and generally the courts have tested the validity of the occupant's acts in the light of that international law as embodied in the Hague Regulations.

Before the courts of third states, however, whenever the question has been whether or not to give effect to the acts of a belligerent occupant, although the courts have arrived generally at the correct result, the rationale of their decisions denying effectiveness has varied and appears to have been other than the one actually used by the court.

In two similar cases, for example, the Supreme Court of New York [134] declined to give effect to a German decree placing Dutch companies under German administration, thereby denying to the newly appointed administrator the firms' assets situated in the United States. The court based its decision on the lack of recognition by the United States of the German control of the Netherlands, and that consequently the decree of the unrecognized occupying force could not have the force and effect of the mandates of a lawful sovereign. There was an implication in its

[132] Ruocco v. Fiore, Ct. of Caseation, 28 Feb. 1917, 70 FORO ITALIANO I.587 (1947), [1947] Ann. Dig. 248 (note to No. 112).

[133] Vallicelli v. Bordese, Ct. of First Instance, Turin, 22 Jan. 1947, 70 FORO ITALIANO 1.522 (1947), [1947] Ann. Dig. 216 (No. 112).

[134] Amstelbank, N.V. v. Guaranty Trust Co. of New York, 177 Misc. 548, 31 N.Y.S. 2d 194 (Sup. Ct. 1941); Koninklijke Lederfabriek "Oisterwijk," N.V. v. Chase National Bank of City of New York, 177 Misc. 186, 30 N.Y.S. 2d 518 (Sup. Ct. 1941), *aff'd*, 263 App. Div. 815 (mem.), *motion for leave to appeal denied*, 263 App. Div. 857 (1942).

decision that similar confiscatory legislation by the *de jure* Setherlands government would have been given effect.[135]

The court might better have given as its reasons the illegality of the German decree in the light of international law and the lack of extra-territorial validity of the acts of an occupant. Moreover, since an expropriating decree norinally is limited to the territory where enacted, the court could have arrived at the same result even if the decree had been enacted by the legitimate Setherlands government.

B. *OBSTACLES TO EXTRATERRITORIAL RECOGNITION*

In considering the extraterritorial effectiveness of acts of a belligerent occupant, municipal court's of third states may refuse to recognize them on a nuiiiber of grounds. The occupant's enactments may be in violation of articles **42–56** to the Hague Regulations and accordingly ultra vires the occupant's authority over the occupied state. Or, if not violative of these articles, they may be denied validity because all acts of a niilitary occupant, may be considered as strictly territorial in character and accordingly have no effect beyond the limits of the country occupied.[136] This territorial liiiiitation is more easily found if one looks upon belligerent occupation as a factual rather than legal relationship [137] between the occupant arid the inhabitants, entitling its decrees to no recognition or effect by third states.[138] Moreover, since a third state may refuse to give effect to the constitutional laws of a sovereign for the reason that the public laws of one state n-ill not be enforced in another state unless the municipal law of the latter or a treaty so provides,[139] a fortiori it may refuse to give effect to acts of an occupant who enjoys no more than *de facto* recognition of a transitory nature.

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[135] See Bercholz v. Guaranty Trust Co. of Sew York, 79 Misc. 778 (Sup. Ct. 1943), wherein the court gave effert to a preoccupation law of the French government restricting alienation of securities owned by a French national and deposited in the United States.

[136] McNair, *Municipal Effects* of *Belligerent Occupation,* 57 L. Q. REV. 33 (1941).

[137] 2 OPPENHEIM, INTERNATIONAL LAW § **2d2** (7th ed. Lauterpacht 1948).

[138] FEILCHENFELD, THE INTERNATIONAL ECONOMIC **Law** OF BELLIGERENT OCCUPATION 142 (1942). *Cf.* ***in re*** G, ***So.*** 107, Crim. Ct. of Heraklion (Crete), 1945, 56 THEMIS (Greece) 63 (1945), [1943–1945] Ann. Dig. 437 (No. 151), wherein the court of a restored government, with less justification than a third state, decided that the acts of the former occupant had no juridical force and were to be regarded as laws of a foreign country of which Greek courts need not have any knowledge.

[139] Firma Wichert v. Wichert, Federal Tribunal, 28 Oct. 1948, 74 Entscheidungen des Schweizerischen Bundesgerichtes 11.2 (1948) (Swit.), [1948] Ann. Dig. ***23 (So.*** 11); *accord,* German Assets in Switzerland, I.G. Farben Case, Dist. Ct. of Zurich, 29 Aug. 1929, [1949] Schweizerische Juristen-Zeitung 342 (Swit.), [1949] Ann. Dig. 54 ***(So.*** 31). In the latter rase, the court denied effect in Switzerland of Allied espropriation of enemy assets on the ground that confiscatory legislation was contrary to Swiss law and could have no extraterritorial effect.

Due to these obstacles in the forums of third states, decisions giving effect to such enactments are rare, even though courts have stated in dicta,[140] with reservation apparently, that the lawful acts of a belligerent occupant could be given some operation and effect. These dicta indicate that the minimum requirements for extraterritorial validity are the nonpenal nature of the act in the international sense, its nonpolitical character and its sole objective being the interest of the welfare of the inhabitants.[141] When one adds to these obstacles the validity which the court of a third state will give to the legislation of the absent sovereign intended to nullify acts of the enemy occupying power, [142] and the recognized provisional nature of belligerent occupation, the probability of even lawful acts of a belligerent occupant being given extraterritorial effect except by an allied power, would appear very remote. The absent sovereign, therefore, has little cause to be concerned that a third state will give extraterritorial effect to any acts of a belligerent occupant, be these acts violative or in conformity with international law.

V. *CONCLUSIONS AND RECOMMENDATIONS*

By analogy from the Roman law restoring the legal status of person and property, considered temporarily suspended during captivity or absence from the realm, to that obtaining before captivity, the term postliminium has come to mean in international law and municipal law the right of a restored sovereign to nullify acts of a belligerent occupant with retroactive effect to the suspension of his sovereignty by belligerent occupation.

Those acts of the occupant which will be annulled by application of the jus *postliminii* are those considered to be beyond the authority of a belligerent occupant in the light of international law. The Hague Regulations of 1907, defining the authority of the occupying power over the territory of the hostile state, have been the embodiment of this international law during the two great wars. Whether the occupant's authority is considered legal or merely factual is important since those restored governments that regard it as factual are inclined to administer a harsher postliminium doctrine. However, belligerent occupancy is regarded by the majority of states as a legal regime whose *raison d'etre*

[140] Anglo-Czechoslovak & Prague Creditbank v. Janssen, Sup. Ct. of Victoria, 23 Aug. 1943, 1943 Austl. L. Rep. 427, [1943–1945] Ann. Dig. 43 (No. 11); Aboitiz v. Price, 99 F. Supp. 602, 612 (D. Utah 1951).

[141] Aboitiz v. Price, supra note 140, at 612.

[142] See State of the Netherlands v. Federal Bank of New York, 201 F.2d 455 (2d Cir. 1953), giving judgment for plaintiff on the basis of Anderson v. N. V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E. 2d 502 (1952), which gave effect to an expropriating decree of the Netherlands government-in-exile, and reversing judgment below, 99 F. Supp. 655 (S.D.N.Y. 1951). The district court position was that the decree of an absent sovereign, even a friendly one, is a nullity with respect to property in occupied territory.

is twofold—the preservation of the forces of the occupying power and the administration of the occupied territory. Because of its transitory nature, the belligerent occupant has been vested with very restricted authority over occupied territory, as articles 42 to 56 of Hague Regulations indicate. Since the restored government is expected to invalidate acts of the occupant which he was not competent to do under international law so does international law expect him to validate those acts of the occupant which he was according to same standard competent to perform.

The invalidation of illegal acts is a process beginning with occupation itself and even earlier with preventive legislation of the sovereign. Later, the sovereign-in-exile may enact legislation, and the courts of occupied territory, if not replaced by the occupying power, may hand down judgments purporting to annul illegal acts of the occupant. Upon liberation of the territory, through legislation on a broad scale and through the municipal courts on a more restricted basis, the restored government may annul illegal acts and validate legal acts of the former occupant in the light of international law to the extent that this law has been incorporated into or has been adopted by the municipal law. The extent to which retroactive annulment is ordered will depend not only on the illegality of the occupant's act but also on whether or not as a practical matter the *status quo ante* occupation can be restored. Notwithstanding these obstacles, the majority of restored governments have applied the Hague Regulations very narrowly and strictly on the assumption that the regulations were intended to limit the occupying power's authority.

The extraterritorial effect of acts of the occupant has been insignificant. The transitory nature of belligerent occupancy, the refusal of third states to enforce the public laws of another sovereign state, and opposition by enactments of the government-in-exile have rendered it very improbable that courts of a third state will give any effect to enactments of a belligerent occupant.

In a future war or armed conflict, with the greater recognition of human rights and alleviation of human suffering, the occupant's authority over the occupied state will be even more limited and more clearly circumscribed. Section III, Occupied Territories, of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War,[143] and consisting of articles 47 through 78, is for the most part the result of the lawless occupation practices of the Axis powers during World War 11. These 32 articles are an attempt to supplement and make more precise the inadequate provisions of the Hague Regulations of 1907,[144] which still remain as the international legal framework defining the occupant's authority. Moreover, notwithstanding the classification

[143] Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949 [1955] 3 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365.

[144] 2 OPPENHEIM, *op. cit. supra* note 137, §§ 172a, 172b.

of a belligerent occupant as an aggressor, his acts as an occupant should still be judged by the restored government in the light of international law, since a harsher postliminy doctrine would hinder rather than promote a return to normalcy.

Since the occupant is in the position of an administrator and must regulate all phases of public life in the occupied territory, more precise regulations should be established by international law to govern his currency manipulations. Otherwise, unrestrained, such manipulations will lead, as they have in the past, to economic chaos in the occupied territory and a prolonged period of post-occupation economic privation. In addition, to prevent unjust enrichment and ensure compliance with the Hague Regulations and the Geneva Convention of 1949, international law should find a logical basis to justify the attachment of assets confiscated from occupied territory and deposited in third states.[145]

Notwithstanding its inability to attain its ultimate objective of the peaceful settlement of international disputes, international law can continue to make great strides, even if only in an evolutionary manner, toward the mitigation of the horrors of war and the lessening of its harmful effects.

[145] For a discussion of the legal basis of the agreement entered into by the governments of Switzerland, France, the United States and the United Kingdom permitting attachment of German assets in Switzerland, see McNair, *Legal Effects of War* 402 (3d ed. 1948).

APPENDIX I

Extracts from Hague Regulations Annexed to Hague Convention So. IV Respecting the Lams and Customs of War on Land.

Section 111. Military Authority Over the Territory of the Hostile State.

Article 42

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible public order and safety, while respecting unless absolutely prevented, the laws in force in the country.

Article 44.

A belligerent is forbidden to force the inhabitants of occupied territory to furnish information about the army of the other belligerent, or about its means of defence.

Article 45.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to hostile Power.

Article 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Article 47

Pillage is fornially forbidden.

Article 48.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the sanie extent as the legitimate Government mas so bound.

Article 49.

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Article 50.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Article 51.

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-Chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

Article 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given aiid the payment of the amount due shall be made as soon as possible.

Article 53

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Article 55.

The occupying State shall be regarded only as adniinistrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied county. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Article 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction, or wilful damage to, institutions of this character, historic nionuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

APPENDIX II

LABOR OF PUBLIC OFFICIALS UNDER THE 1949 GENEVA CIVILIAN CONVENTION

Article 54.—JUDGES AND PUBLIC OFFICIALS

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

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Following is the coninientary on Article 54 prepared by the International Committee of the Red Cross:

The reference to Article 51 relates not only to the list of different types of work, but also to the conditions and safeguards contained in that Article, in particular the prohibition on the use of conipulsion to make protected persons take part in military operations. That is particularly important in the case of police officers, who cannot under any circumstances be required to participate in measures aimed at opposing legitimate belligerent acts, whether conimitted by armed forces hostile to the Occupying Power, by corps of volunteers or by organized resistance movements. On the other hand it would certainly appear that the Occupying Power is entitled to require the local police to take part in tracing and punishing hostile acts committed under circumstances other than those laid down in Article 4 of the Third Geneva Convention. Such acts may in fact be regarded as offences under coninion law, whatever ideas may have inspired their authors, and the occupation authorities, being responsible for maintaining law and order, are within their rights in claiming the cooperation of the police.

Since the application of the Convention to police officials is a particularly delicate matter, international laws or regulations will probably be issued to define in greater detail the professional duty of such persons in wartime. It is essential that they should be able to carry out their duties with complete loyalty without having to fear the consequences, should the terms of the Convention be liable to be interpreted later in a nianner prejudicial to them.

To this end the International Independent Friendship Federation of High Police Officers has prepared a draft "Declaration applying to Police Officers the Geneva Convention of August 12th, 1949, concerning the protection of civilians in wartime."

The Declaration reads as follows:

Point 1: In pursuance of art. 70, para 1, of the abovementioned Convention Police officers shall not incur any administrative or judicial penalties at the instance of the Occupying Power by reasons of the execution. prior to the occupation, or during a temporary interruption thereof, of orders of the government of the country, whether such penalty is imposed by legislative, administrative, or judicial methods, arid in so far as their acts have not been contrary to the Human Rights as defined by the Universal Declaration.

Point 2: In pursuance of art. 27 of the abovenientioned Convention Police officers shall not be required by the Occupying Power to carry out any orders contrary to their constant duty to respect Human Rights as defined in the Universal Declaration of 10 December 1948. They niay not be required to search for or question, arrest, hold in custody, or transport, any persons subjected to these measures on the grounds of race, religion, or political convictions unless the said persons express their beliefs by acts of violence not permitted under the laws of war.

Point 3: In pursuance of art. 51 of the abovementioned Convention the Police may not be required to assist in the execution of orders designed to employ the population for military purposes, or for the promotion of military operations. The Police niay only be required to maintain law and order for the protection of the rights of the civilian population as defined by laws and customs of war.

Point 4: In pursuance of art. **54, 65,** and **67** of the abovementioned Convention, Police officers discharged from their duties by the Occupying Power shall not be liable to any conipulsory service and shall enjoy the benefits and security bestowed upon them by regulations applicable to them. These regulations niay not be altered by the Occupying Power.

During or after the occupation, Police officers may in no case be subjected to penalty or conipulsion by reason of the execution by them of an order of any authority which could in good faith be regarded as competent, especially if the execution of this order was a normal part of their duty. [4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IS TIME OF WAR (Pictet ed. 1958). The Declaration is included as note 1 on pages 307–308.]

COURTS-MARTIAL APPEALS IN AUSTRALIA*

By K. E. Enderby **

The author discusses the decisions of the Courts-Martial Appeal Tribunal and their effect upon the administration of military justice in Australia; the limitations upon the authority of the Tribunal; and the questions it may have to resolve when it considers the "general article."

I. SOME BACKGROUND MATERIAL

In **1955** the Coninionwealth Government passed the Courts-Martial Appeals Act **1955** setting up in Australia a Tribunal to be known as the Courts-Martial Appeal Tribunal. This gave the ultimate review of courts-martial (save that of "pardon") to civilian lawyers? whereas previously it had been exercised by the Service concerned itself. The principles to be applied in determining appeals were set out in the Act [1] and are similar to those set out in the Criminal Appeal Act **1912** (N.S. W.).[2]

Since the creation of the Tribunal, the position of courts-martial in Australia has changed and the Tribunal's decisions are imposing on courts-martial the standards of justice required by a court of criminal appeal in a proper criminal trial. The Australian Act was part of a world-wide series of reforms. The United States had created its Court of Military Appeals and Uniform Code of Military Justice in **1950.** Canada introduced reforms and created an Appeal Tribunal in **1950.** That Tribunal

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[1] Courts-Martial Appeals Act **1955, $23, 1955** Austl. Commonwealth Acts **367, 375.** References to "regulation" are to regulations made under the Act.

[2] ***See*** Courts-Martial Appeals Act, **§ 6, 1955** Austl. Commonwealth Act **367.**

is now a Court. The United Kingdom followed suit in 1951, and Sew Zealand in 1953. In England the problem of justice in the Armed Forces had been considered by the Darling Committee in 1919, an inter-departniental committee in 1925, the Oliver C'oniiiiittee in 1938, the Lewis Committee in 1948 and the Pilcher Coniniittee in 1950, all of whom made reconiniendations and published detailed reports.

When the western world began to maintain large numbers of young ex-civilians in the services for long periods, the distinction between the hit-or-miss procedures in courts-martial and the procedure in an ordinary criminal trial became so marked that reform was inevitable, arid the imposition over the military system of a civilian appellate tribunal is only one of niany reforms that have been inade and have yet to be made in military law. In Sew Zealand, Canada and the United Kingdom the appellate body is a court of judges drawn froiii the respective superior courts of those countries. In the United Kingdom the judges are members of the Court of Criminal Appeal. In Australia the Tribunal is not a court and its nienibers are selected when needed from a panel of eminent lawyers.[3] To date, the Tribunal has heard ten appeals. Compared with the large nuniber of appeals heard elsewhere,[4] this number is small indeed; however, already the influence of the Tribunal on the justice being administered in Army, Savy and Air Force courts-martial is very noticeable.

To understand fully the effect of the Tribunal decisions it is necessary to glance at how niilitary law operated at the court-martial level in Australia before 1935. The illustrations that follow are typical of the problems that can arise. S o attempt is made to evaluate the procedures in the large and increasing number of cases which are tried summarily by commanding officers and from whose decision there is no appeal to the Tribunal. The only protections in these cases are the Service procedures of confirniation, review and coiisideratiori of the accused's petition by superior officers and, perhaps, ultimately by the Judge Advocate General. The generalisations refer to Army and R.A.A.F. procedures. The R.A.N. procedures are often different.

courts-martial are an anomaly from a judicial point of view. They developed under "leveller" influences in tl.e Cromwellian army. They consist, usually, of five officers, one of whom acts as President. There is also a judge advocate and a prosecuting officer and the accused may be represented by a friend or qualified counsel of his own choice. The procedure followed is contained in the respective Manuals of Military

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3 See Courts-Martial Appeals Act § 8, 1955 Austl. Commonwealth Acts **367, 370.**

4 **By** 1962 the United States Court of Military Appeals had considered some 15,000 petitions, the United Kingdom Courts-Martial Appeal Court **305** applications for leave to appeal, Canada 63 and New Zealand 9. Some of these figures, being based on judgments given, may not be accurate.

Law and Air Force Law for the Army and Air Force, and in the B.H. 11 in the Savy. These are the "bibles" of military and naval lawyers. The relevant Australian statutes are the Defence Act 1903–1956 (Cth), the Air Force Act 1923–1956 (Cth) and the Naval Defence Act 1910–1952 (Cth). Regulations made thereunder also apply. Laws, statute and otherwise, of the United Kingdom are often made applicable by these statutes to the Australian servicenian.[5] This has the result that repealed English laws are often applied to Australian servicemen but iiot applied to English servicenien on service in Australia. In the Manuals there are statements of the law to be applied but no authority is given and there is uncertainty whether they are the law or merely expressions of some unknown author's opinion on the law. Both the substantive and adjective laws are peculiar to the Service in which the accused serves. There is no uniforni code for the three Services. Some Service offences are common to the ordinary criminal law to which a serviceman is also subject. In a court-martial, a plea of autrefois acquit or autrefois convict in an ordinary criminal court will be a defence, but an acquittal or conviction by a court-martial niay not be pleaded as a defence in an ordinary criminal court.[6] Theoretically then, a serviceman can be tried twice for the same offence although visiting forces servicemen under visiting forces legislation can only be tried once, and if a serviceman successfully appeals against a court-martial conviction he cannot be tried again by any other court.' The revelance of a nonconipliance with the Judges' Rules, if it arose in a court-martial, is still uncertain. In an increasing number of matters, hustralian law and particularly Australian criminal law, is nioving away from English law,[8] yet, there seems little doubt, for example, that when an Australian serviceman is charged with an offence under "the general [devil's] article," *i.e.*, conduct to the prejudice of good order and "military" discipline, he mill be judged by English and not by Australian law. Many of these uncertain aspects of Australian military law will only be conipletely remedied by the enactment of a uniform code of military law. In the meantime the Tribunal deals with the problems that arise before it but is unable to introduce any major reforms. It does its best to determine the applicable law and insists that the minimum standards at courts-martial be no lower than those which courts of criminal appeal demand in trials at Quarter Sessions.

It is here that the judge advocate's position has been spotlighted. Historically, his was a strange role. As his title suggests, he was not

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5 See Defense Act 1903–1956, § 88, 2 Austl. Commonwealth Acts 1901–1950, at 1560, 1593 (1953), as amended, 1956 Austl. Commonwealth Acts 619.

6 R. v. Aughet, 13 Cr. App. R. 101 (1918); Army Act, 44 & 45 Vict., c. 58, § 162 (1881) (amended).

7 Courts-Martial Appeals Act 1955, § 41, 1955 Austl. Commonwealth Acts 367, 381.

8 *Cf.* Parker v. The Queen, 37 Austl. L.J.R. 3 (1963).

a judge and for many years he was more advocate than judge. He merely advised the court on questions of law and his functions always included duties to assist the court, the prosecution and the accused. He is not in charge of the court as is a nonmilitary judge. The President (usually his senior officer) controls the court and is also a member of the jury. Some of the judge advocate's difficulties result from the service view that courts-martial are not so much courts of law but courts of honour and true descendants of the old court of chivalry. The nienibers are officers trained in Service traditions of discipline and efficiency, and there is nothing strange to them when one of their number, charged with an offence against those Service traditions, comes before them to be tried. It is not surprising when justice miscarries through an excess of zeal on the part of a judge advocate who forgets the impartial nature of his position and thinks of himself as a superior officer representing the Service against which some offence has been committed.[9] There are many professional disciplinary tribunals where similar problenis exist and there are only rare suggestions of an infringement of the basic rules of natural justice. In those cases there is less of the zeal that one finds at courts-martial and the accused person has voluntarily entered the profession and subjected himself to its rules. Again. in such situations the parties involved are more likely to be equals in power and status. In the armed services where the young civilian serviceman is often a conscript. the argument that he takes the Service rules for better or for worse seems a little thin.

The court-martial is a jury, but a jury with a difference: it is judge of fact and of law, arid it also decides on sentence. It can disregard the judge advocate's advice to it on the law it should apply. Strange situations can arise on interlocutory matters. **A** submission of no case to ansner at the close of the prosecution case is not made to the judge advocate in the absence of the court—it is made to the court who are the jury, and they can disregard the judge advocate's advice. The judge advocate's advice on the law may he faultless—it may be that there was no case to ansner and yet the court-jury may hold that there was, and convict. Suppose, again, evidence of a confession is tendered against the accused. He challenges its admission because it was not made voluntarily. In the Army and the R.A.A.F.the examination on the *coir dire* takes place in the presence of the court. If he is asked by the prosecuting officer "Alright, but is the confession true?" and he answers "Yes"[10] it is extremely unlikely that the court will be inclined to acquit even if it excludes the confession as not being voluntary. In the ordinary criminal trial such evidence would never get to the jury.

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[9] See examples of cross-examination by the judge advocate in the appeal of ***Schneider, infra,*** II.A., and the appeal of *Feiss, infra,* II.B.

[10] See R. **v.** Hammond, 28 Cr. App. R. 84 (1941).

As the Tribunal's judgments expose the uncertainties and anomalies we can expect legislation to introduce reform. Service life is changing and old concepts which seemed basic are also changing. It is in keeping with these changes that the Tribunal should "civilianize" the procedures at courts-martial. It must not be forgotten that the **1955** Act did not itself change any Service law. It merely engrafted the system of appeals to the Tribunal on to the existing Service system of confirmation, review and petition. The presentation of an unsuccessful petition was made a prerequisite to an application for leave to appeal."

Since 1955, there have been ten appeals and the judgments are not to be found in any series of reports, One can read in the judgments the determination of the Tribunal to play an educative as well as an appellate role. Of the ten, the appeal of *Marwood* failed for a technicality and of the other nine, six succeeded. In *Marwood's* case, it became apparent on the application for leave to appeal that the petition to Air Board had not been properly endorsed as required by regulation 6. The defect was considered fatal, and, as it was held that there was no power to extend time for the presentation of another petition, the appeal went no further. It was argued that time did not run until the conviction had been promulgated and that promulgation had been defective, but the Deputy President's view was that "promulgation" meant "notifying the accused of the confirmation of finding and sentence.'' It was not a ruling and the point is still open. The *Marwood* failure was unfortunate because the appeal would have raised the important question of whether a serviceman could be convicted of an offence alleged to have been committed before he became a serviceman.

The appeals to date that have proceeded to judgment are those of *Schneider* (F.A.A.F.), *Feiss* (R.A.A.F.), *Cox* (Army), *Goodwin* (R.A.A.F.), *Johnston* (R.A.A.F.), *McCann* (Army), *Manion* (Navy), *Adams* (R.A.A.F.) and *Muncey* (Army). The judgments have resulted in a new emphasis at courts-martial on the necessity for a fair trial. Certainly, the judgments have been noted with concern by the legal branches of the Services.[12] This writer has no knowledge of the percentage of convictions at courts-martial which are quashed cr varied on review or by petition in the particular Service and which never get to the Tribunal, but suspects it is considerable. The Judges Advocate General are civilian lawyers, and well aware of the attitude of the Tribunal to inadequate standards at the hearing. The standards can be expected to improve still further.

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[11] See Courts-Martial Appeals Act, § 20(2), 1955 Austl. Commonwealth Acts **367, 373.**

[12] See the agenda for the 1963 Australian Army Legal Corps Conference in Canberra.

II. THE APPEALS TO DATE

A. *THE SCHNEIDER APPEAL*

The first appeal to come before the Tribunal was the appeal of *Schneider* and it failed. Schneider n-as charged with refusing to obey an order, using threatening language, escaping from arrest and conduct to the prejudice of good order and Air Force discipline.

When his appeal came on for hearing he had served his sentence and been discharged. This was the first point argued, the Tribunal deciding that notwithstanding his discharge, he still answered the description in section 20 of the Act of a person who had been convicted by a court-martial. The Tribunal has poner under section 60 of the Act and regulation 11(3) to grant legal aid. Regulation 11(3) requires the Tribunal to be satisfied that the appellant has insufficient means to enable him to prosecute his appeal before it can grant legal aid. Schneider applied for legal aid and relied on a statutory declaration stating simply that he had insufficient funds for the reason that he had been imprisoned for five months without pay and that any money he had in reserve had been used up in commitments arising from this imprisonment. This was held to be not sufficient evidence, and he was permitted to supplement his statement by oral evidence on oath. The Tribunal granted legal aid, but declared that an appellant had no right to supplement his statutory declaration by oral evidence.

An application was made to call fresh evidence pursuant to the provisions of section 31 of the Act. In a nonmilitary court, such applications are usually made in support of an application for a new trial, but the Tribunal has no poner to order a new trial. It can only allow or dismiss the appeal and, in certain cases, substitute findings and sentences.[13] Section 31 gives poner to receive evidence at the appeal hut gives no indication of how the new evidence is to be considered.

Counsel for the appellant informed the Tribunal that the proposed new evidence was no different in substance from the evidence which had been given at the court-martial and no written statements of the proposed new evidence were put before the Tribunal. This no doubt explained the failure of the application. The Tribunal, however, indicated its views on its duty to receive new evidence, but reserved the right to refuse to be bound by these views should exceptional cases occur in the future. It quoted with approval the statement dealing with the functions of the Courts-Martial Appeal Court in England by Lord Goddard C.J.:

> We cannot try anybody; we do not try anybody. We sit merely as a court of appeal, and as a court of appeal our duties are these. First of all, we have to see that the finding is one that is possible in law. Then we have to see that

[13] Courts-Martial Appeals Act, §§ **24–28, 1955** Austl. Commonwealth Acts *367,* **375–77.**

there was evidence before the court-martial which supported their finding. Then, if any question of law arose, we have to see whether or not the law has been correctly laid down by the judge-advocate, who nowadays is a qualified lawyer in every case before a general court-martial, I think, and in most cases before a district court-martial.[13A] R e have to see that the summing up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the facts for the prosecution and states fairly the nature and evidence of the defence. It is not necessary to go into every point the defence has raised. It is not necessary to go into the evidence of every witness. The court has to be reminded of the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. It is not our function to re-try the case because we do not see the witnesses, and no court of appeal does re-try the case in the sense of substituting themselves either for a jury in a civil case or for a court-martial in the case of one of the services.[14]

The Tribunal's view was that new evidence should only be taken in an exceptional case and the Tribunal would have to be satisfied on three points: (1) that the evidence that the proposed witness ran give is apparently credible (the witness should make a statutory declaration setting out the evidence he can give—a statement from the Bar table is not sufficient); *(2)* that the evidence, if believed, must be such that it would he likely to affect the finding of the court-martial; and **(3)** a satisfactory explanation must be offered for the failure to call the evidence at the trial. These three points are the same as are required to satisfy a civilian court. It appears that, if these requirements are satisfied, the Tribunal will uphold the appeal without finding that it accepts the truth of the new evidence itself. The Rules of Procedure dealing with courts-martial were considered and declared to impose a particular burden upon commanding officers to ensure that all ranks who have duties in connection with the preparation of a trial by courts-martial should observe both in the letter and the spirit the provisions of the Rules of Procedure.

Schneider's counsel had submitted that the words used and alleged to constitute a command were no more than a suggestion or a piece of advice, and that to constitute a command the words used must be such as go beyond advice or suggestion. The argument failed as it later did in the *Manion* appeal,[15] it being held that although the most satisfactory course for a superior officer who intends to give a command is to use the language of direct command, it was impossible to say that all words which are capable of another interpretation could not also be the subject of a command. On the charge of resisting an escort whose duty it was to have him in charge, the defence at the trial had been that the escort had used unnecessary force in effecting the arrest, and that the accused in resisting this excessive force was merely defending himself. The judge

[13A] Not so in Australia.
[14] R. v. Linzee [1956] **3 All** E.R. 980, 981–82 (Ct.-M.App.Ct.).
[15] *Infra,* II.G.

advocate's summing up was critically examined. Although the Tribunal found that the Court might have been more clearly and distinctly told that if the arresting escort used more than necessary force and the resistance of the accused was directed to defending himself only against the use of that unnecessary force and not against his continuing arrest, he nould be entitled to an acquittal, and also that the accused nould be entitled to an acquittal if the Court were left in doubt whether more than necessary force was used in effecting the arrest and that the accused resisted only to the extent of defending himself against such unnecessary force and was not simply resisting his escort; yet, as a whole, the summing up of the judge advocate was sufficient. A point argued as a matter of "principle" was that at the trial a single charge sheet had included charges relating to the different offences alleged to have been committed by the accused at different times and on different days. S o objection had been taken to the procedure at the trial and no application had been made by the accused for a separate trial in respect of the different offences. There was no suggestion of prejudice. The Tribunal's view was that it was preferable for an accused to be arraigned on different charge sheets in respect of different groups of charges. Before dismissing the appeal, the Tribunal adopted its educative role and commented on the duties of the judge advocate at the trial and on the importance of his not descending into the arena and assuming the mantle of a prosecuting officer.[16] One witness for the defence had been recalled merely for the purpose of being cross-examined by the judge advocate. The tone and language of the questions were such that had they been used by a nonmilitary judge there is little doubt a nen trial would have been ordered. There is no mention in the judgment of this aspect having been argued by the accused's counsel and it appears as an independent matter that troubled the Tribunal. Five years later this appeal might well have been upheld. A warning was given that cross-examination was not the function of the judge advocate. The judge advocate could ask questions particularly to assist the accused, but his paramount duty was to maintain an impartial position.

B. *THE FEISS* ***APPEAL***

Feiss was charged with neglect to the prejudice of good order and Air Force discipline in that he hail received a certain hand package from the safe hand officer. aiid failed to ensure the safe custody of the package. **An** application was made under section 18(2) of the Act for an order that in the interests of the defence of the Commonn-ealth all members of the public be escluded during the hearing. This was refused, but an order was made that no report of the contents of a document tendered in

[16] *Cf.* Jones **v.** Sational Coal Bd. [1957] 2 Q.B. 55 (C.A).

evidence be published. The Tribunal refused to embark on any exhaustive comment on the scope of section 18(2) with the remark that such a statutory discretion was best left unfettered. An order mas made under section 21(1)(b) of the Act extending the time for making the application for leave to appeal to enable the accused to include certain additional grounds of appeal. Inadequate grounds had been filed before the accused was represented. No principles were declared as to how this discretion was to be exercised in the future but literality can be assumed. Further affidavit evidence mas admitted and the deponents cross-examined. Evidence of a handwriting expert was excluded because it would have been available at the time of the trial.[17] The Tribunal took as its guide on the proviso to section 23, the words of Fullagar J. in *Mraz v. The Queen* (No. 1):

> It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the a p pellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to law. It is for the Crown to make clear that there is no real possibility that justice has miscarried. . . .[18]

The following grounds of appeal were then considered: **(1)** the bias or the appearance of bias on the part of the President of the Court-Martial; **(2)** a wrongful rejection of evidence; **(3)** unreasonable and improper interference by the Judge Advocate; **(4)** wrongful recall of a prosecution witness after the closure of the defence case; ***(5)*** misdirection by the Judge Advocate.

As to (1), Feiss tendered evidence of an opening address by the President of the Court-Nartial which by order, had not been recorded. Its terms were to the effect that the loss or disclosure of classified information was very seriously viewed and if evidence of such information was to be given, the Court might be closed; any evidence heard was not to be repeated outside the Court,; divulging classified information was very serious and he had been instructed by higher authority to take every precaution regarding breaches of security during the trial; higher authority took a particularly serious view of this kind of offence and persons divulging what was said at the Court-Martial might well find themselves in a similar position to that of the accused. The appellant's submission

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[17] See Nash v. Rochford Rural Dist. Council [1917] 1 K.B. 384, **393** **(C.A.** 1916) (Scrutton, L.J.) and the appeal of *Schneider, supra,* II.A.

[18] Mraz. v. The Queen, 93 Commw. L.R. 493, 514 (Austi. 1955).

was that the President's opening address left him and all others present with the strong feeling that the President had been briefed by someone in higher authority. This was the "Court of Honour" approach. The Tribunal was informed by counsel for respondent that the President had, on the day before the Court-Martial, attended a conference at Headquarters Home Command, and that he was there given a "brief" which disclosed that the contents of the safehand package contained confidential material. The purpose of the "brief" was to prevent improper disclosure of information at the Court-Martial and contained certain recommendations as to what action should be taken at the trial in certain eventualities. He was to safeguard Commonwealth security and not restrict the Court in its administration of justice. The well known principles expounded in *R. v. Sussex Justices ex parte McCarthy*,[19] *R. v. Essex Justices ex parte Perliins*[20] and *R. v. Bodmin Justices ex parte McEwen*[21] were relied on by the appellant who claimed that the President's remarks were such as to create a strong impression in the minds of reasonable persons that the Court-Martial had a bias against him: "bias" meaning "a real likelihood of an operative prejudice whether conscious or unconscious." The Tribunal referred to *Rex (De T'esci) v. Justices of Queens County*[22] and *Reg. v. Nailsworth Licensing Justices ex parte Bird* where Lord Goddard C.J. said, ". . . the mere fact that a justice may be thought to have formed some opinion beforehand is not in my opinion enough to upset the decision . . . ,"[23] and *Reg. v. Australian Stevedoring Industry Board ex parte Melbourne Stevedoring Company Pty. Ltd.*, where the High Court had said:

> But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should he strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be "real." The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that "preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded. . . ."[24]

Although the quoted principles were from judgments in cases of an entirely different kind and the *Feiss* case illustrates the difficulties to be found in imposing civil standards on military situations, the Tribunal

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[19] [1924] 1 K.B. *256*, 259 (1923).
[20] [1927] *2* K.B. 475, 488-89.
[21] [1947] K.B. 321 (1946).
[22] [1908] *2* Ir. R. 285, 291 (K.B. 1907).
[23] [1953] 1 Weekly L.R. 1046, 1048 (Q.B.).
[24] The Queen v. Australian Stevedoring Indus. Bd., 88 Commw. L.R. 100, 116 (Austl. 1953).

came to the view that justice, being required to be not only done but manifestly seen to be done, had in fact, not manifestly been seen to be done. There was no justification for the President's opening address in the Act or the Rules of Procedure. Indeed, they provided that courts-martial were to be conducted in a manner befitting a court of justice and in accordance with the rules of evidence applied in courts exercising criminal jurisdiction in England. Such cases in the future should be met by giving full instructions to the prosecutor who would then be in a position to make such applications and submissions to the court-martial as occasion required. It was of great importance that members of a court-martial have their minds free of any knowledge concerning the charge other than what the law permits.

The Tribunal then considered the wrongful refusal by the judge advocate to allow certain questions in cross-examination of a prosecution witness and stated that if material and relevant evidence was rejected it necessarily followed that a miscarriage of justice had occurred. Dixon C.J. in *Balenzuela v. De Gail* had said:

> The basal fact is that material evidence was erroneously excluded from the consideration of the jury, evidence that touched the question upon which the case turned. It was something the party was entitled to lay before the jury for its consideration. It lies outside the province of the court to inquire into the effect which the evidence if admitted would produce upon the Court if the Court were the tribunal of fact, and it lies outside the province of the Court to speculate on the effect which it would have produced on the jury. It is enough that evidence definitely material to the determination of the case was excluded .... That leaves the unsuccessful plaintiff entitled to a new trial.[25]

Menzies J. said:

> ...the party aggrieved is prima facie entitled to a new trial but a new trial will not be ordered if the evidence rejected could have had no effect with the jury:. ..[26]

The Rules of Procedure 94, 95(B) and 103 (c), (d) and (f) detailing the powers and duties of the judge advocate and, in particular, his obligation to record the transactions before the Court and record any objections concerning evidence and his advice to the Court on them and the facts that in this case counsel for the accused had not made any such objection or request for the matter to be recorded, and that as a result the Court-Martial had no written record before it of the complete proceedings when it deliberated in closed court on its findings, were considered as possibly restricting the extent of the dicta in *Balenzuela's* case,[27] but they did not overcome the real error which was that defending counsel had been prevented from following a line of enquiry which was plainly relevant.

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[25] Balenzuela v. DeGail, **101** Commw. L.R. **226, 236–37, 32** Austl. L.J.R. **356, 360 (1959).**

[26] **Id.** at **239,** Austl. L.J.R. at **361.**

[27] *Supra* note **25** and accompanying text.

As to (3), it was clear from a perusal of the proceedings that the judge advocate had in fact closely questioned one of the nitnesses for the prosecution and later the appellant liiniself. Under Rule of Procedure 103(q) he was entitled anti indeed bound to question witnesses "on any matters which appear to he necessary or desirable for the purpose of eliciting the truth." But in this case his questioning of the appellant did partake of the character of cross-examination arid did result in his deserting the entirely impartial position which is required of a judge advocate. The Tribunal repeated its remarks in the appeal of *Schneider*.[28] As though to emphasise its chosen educative role it excused the judge advocate because he would not have had an opportunity of reading the judgment in *Schneider's* case which had been handed down only tn-o days before the trial. The inference was clear that the Tribunal's judgments were to be read as guides for the future conduct of courts-martial. To their reference in *Schneider's* case to *Jones v. National Coal Board* [29] they added *R. v. Delaney* [30] arid also *Yuill v. Yuill*.[31] It was as though they were declaring the principles on which they nould act and where the authorities could be found.

As to (4), that a witness for the prosecution had been recalled to give further evidence after the case for the defence had closed, it was clear that there was conflict between the common law reluctance to allow prosecution witnesses to be recalled [32] and Rule of Procedure 86(D) which provided: "A Court may call or recall any witness at any time before the finding if they consider it necessary in the interests of justice." Which principle should prevail? The view that the Kulc of Procedure was intended to coiifer greater powers on courts-martial than they would have had at common law was rejected. The power to recall prosecution witnesses was only to he exercised in the most exceptional circumstances, notwithstanding Rule of Procedure 86(D).

As *to* (5), the judge advocate had told the Court that it must either accept or reject the evidence of one of the witnesses. S o reference had been made to the possibility that the witness was honest but mistaken in his recollection or that he had honestly but mistakenly reconstructed the events. Again, where there was a direct conflict of evidence the Court had been told that it could not believe both the witness and the accused. There was nu direction on the law to be applied should they fail to make up their minds as to n-ho they should believe or if they were unable to determine whether either was a reliable witness. The direction as to the disputed evidence of handwriting was inadequate and misleading.

[28] *Supra*, II.A.
[29] [1957] 2 Q.B. *55* (C.A.).
[30] [1955] Vict. L.R. **47** (1954).
[31] [1945] P. 15 (C.A. 1944).
[32] See It. v. Harris [1927] 2 K.B. 587, 594 (C.C.A.); Shaw v. The Queen, 85 Commw. L.R. **365** (Austl. 1952).

There had been considerable conflict whether certain signatures were those of the accused, yet the judge advocate did not make this point clear and suggested wrongly that there was direct evidence of the accused's signature. This was misdirection of the facts, and although the dictum of Cussen J. in *Holford v. The Melbourne Tramway and Omnibus Co., Ltd.*, "It is assumed in most cases that the jury, who have or ought to have heard the evidence, will probably correct any mistake of mere fact" [33] was noted, the Tribunal thought that. in this case, the misdirection was dangerous indeed. The trial had been marked by a number of grave departures from what was required in a criminal trial and there had been a substantial miscarriage of justice. Unfortunately, the Tribunal gave no assistance as to which of the grounds alone or together would have amounted to the required miscarriage of justice sufficient to quash the convictions. This was the first appeal in which the respondent was ordered to pay an agreed sum of costs to compensate the appellant for expenses incurred in the prosecution of the appeal.[34]

C. THE COX APPEAL

This was an appeal against a conviction for behaving in a scandalous manner unbecoming the character of an officer and gentleman. The judge advocate's summing up was the basis of the appeal. The prosecution had relied heavily at the trial on the evidence of certain stains on bed sheets to establish that, in the circumstances, sodomy had taken place. There had been no evidence that the stains were seminal in character, and the prosecuting officer had stated at the close of his case that the Court could not be satisfied of this. However, the Tribunal held that the accused was entitled to a direction from the judge advocate that the stains should have been disregarded. Further, he had dealt incorrectly with the onus of proof, as his language could have suggested that the Court had to be satisfied beyond reasonable doubt of the explanation given by the accused. It was also a common ground that the accused had consumed a large amount of alcohol, and an important defence submission had been that he had no knowledge of any scandalous act and that he had been at all relevant times either drunk or asleep. This was a denial of *mens rea*, and he was entitled to have the judge advocate explain to the Court the effect of drunkenness on *mens rea* and that *mens rea* was essential and had to be proved beyond reasonable doubt. There was no direct evidence of any act of indecency and as the evidence was equally consistent with a number of inferences, some of which were innocent, they should all have been placed before the Court by the judge advocate. The appellant had raised his uncontested good

33 [1909] Vict. L.R. 497, 527 (1907).
34 See Courts-Martial Appeals Act, § 37, 1955 Austl. Commonwealth Acts 367, 380.

character at the trial and the judge advocate had failed to direct the Court on its relevance. These omissions together amounted to a substantial miscarriage of justice but, as in the appeal of *Feiss,* the Tribunal gave no indication of the relative importance it attached to each omission. "Justice" meant "justice according to law," aiid there was no such justice if matters proper to be coiisidered by the Court-Martial were not fully explained by the judge advocate. The conviction was quashed.

D. *THE GOODWIN APPEAL*

Goodwin had been convicted of four charges alleging that, being concerned in the care of public property, he had fraudulently misapplied the same. The facts alleged were that he was an accountant officer arid had cashed his own cheques from R.A.A.F. moneys knowing that his bank account had insufficient funds to honour the cheques. The principal defences were that he believed that it was permissible for him to cash the cheques in the way he did because a written R.A.A.F. instruction suggested he had this right, that he had no intent to defraud, aiid that he had reason to believe that his cheques would be met on presentation because he had promises of financial assistance from another airman serving with him. The main grounds of the appeal were that these defences had not been properly explained by the judge advocate. Xnother submission was that the temporary deprivation of the Commonwealth of its moneys was not a sufficient detriment because the moneys were not interest hearing, but this was rejected.

Again it was held there were serious omissions in the summing up. The Court should have been told that the necessary intent had to be established at the time each cheque was cashed, and that the prosecution had to satisfy the Court that the accused's conduct was designed to induce the Commonwealth to a course of conduct involving some detriment or risk. The onus was on the prosecution to establish the accused's state of mind. and the accused carried no onus of proving that he had an expectation that the cheques would be met on presentation. It was to be expected that he would seek to adduce evidence of this, but it must not be assumed that he carried any burden of proving such an expectation. The summing up had been misleading and defective. It was as though the test was whether the accused had reasonably held his beliefs. It was true that if a prosecution could establish that an accused's belief that his cheques would be met on presentation had no reasonable foundation, it would go a long way to showing that he had no belief at all, but the absence of reasonable grounds for belief was iiot conclusive against the existence of that belief. It was merely evidence from which it would be open to the Court to infer that the belief did iiot exist and the finding on that point would only he a finding as to the ultimate issue, which in

this case was whether the accused had misapplied public money with intent to defraud. The distinction had not been explained on either of the two occasions when the judge advocate addressed the Court. On the proviso in section **23** *(2)* of the Act, the Tribunal rould not say that, had the Court been properly directed it must have, nevertheless, convicted on each count. Questions of fraud are usually questions of considerable difficulty and it was essential to have complete and accurate directions on the law.

This tendency to express views not strictly relevant to the issues being argued before it is a feature of all the Tribunal's judgments. In this regard it differs greatly from the judgments now being given by the Courts-Martial Appeal Court in England, which are shorter and relevant only to the issues before it. As the standard at courts-martial improves, the Australian judgments should follow more closely the form of the English ones.

E. *THE JOHNSTON APPEAL*

There were two convictions: (1) with obtaining money by false pretences contrary to section 32(1) of the Larceny Act, 1916 (U.K.), and **(2)** in a document signed by him knowingly making a false statement. The facts alleged were that Johnston had made certain statements that he was maintaining his wife and home in order to obtain moneys and an allowance from the Air Force. The conviction on the first charge had not been confirmed and the appeal was in respect of the second conviction. The accused had previously appeared before a Court-Martial for similar offences, but, following an objection by his counsel, that trial had been adjourned without prejudice to further proceedings if the convening authority so decided, and he had been released from arrest. Later the convening authority had dissolved the first court and convened the second court.

At the second trial "a plea to the general jurisdiction" of the Court under Rule of Procedure **34** was entered. The submission was that the dissolution order was invalid and that the first court was still in existence and seized with the duty of trying the accused. He was in peril in two places. The subniission was that section *53* of the Air Force Act (U.K.), which applied, was exhaustive of the circumstances in which a court-martial could be dissolved, and that none of the circumstances set out had, in fact, occurred. The judge advocate had advised the second Court that it had jurisdiction to proceed. At the appeal the Tribunal considered this submission and cited *R. v. Durkin*,[35] where the English Courts-Martial Appeal Court had held that there was "a common law of the Army" power to dissolve a court-martial if the convening authority

[35] [1953] **2** All E.R. 685 (Ct.-M.App.Ct.).

considered that the proceedings were in some may irregular, or that matters had ariseii which were prejudicial to the accused. The position was analogous to that prevailing in civilian courts where the court always had a pon-er to discharge a jury arid begin the case over again if the interests of justice so required. Section 3 of the Air Force hct 1923–1956 (Cth) was held to adopt not only the provisions of the United Kingdom Air Force Act, but also the common law applicable to members of the R.A.F. in England, and if the provisions under section 53 of the United Kingdom Act as to courts-martial were not exhaustive of the power to dissolve an R.A.F. court-martial they should not be so construed here. The same implied power to dissolve a court whenever the interests of justice so required existed also in the R.A.A.F. In any event, the settled rule of English criminal law was that "the only pleas known to the law founded upon a fornier trial are pleas of autrefois convict or autrefois acquit for the same offence." [36] If a foriiier trial had been abortive with no verdict, there was neither a conviction nor an acquittal; [37] nor was a directioii of a Judge who discharged a jury on a former trial examinable.[38] Some interest was expressed in section 95 of the Air Force Act, 1955 (U.K.),[39] which now confers on a convening authority an express power to dissolve a court-martial where it appears to be necessary or expedient to the administration of justice, but it was held that section 95 was not legislative recognition that *Durkin's* [40] case was bad law.

The accused had also entered a plea in bar, and the judgment contains a lengthy and scholarly analysis of this peculiarly Service defence of condonation. The submission was that the dissolution of the first Court could only be justified legally under section 53 arid if there was no such legal justification it had to he assumed that the dissolutioii had some other proper purpose and this could only be an intention to condone the offences. As the Tribunal had ruled otherwise on the effect of section 33, the subniission failed, but condonation as a defence was fully considered. As a defence to criminal offences it was peculiar to the military code. Distinctions were dran n between pardon, condonation and *nolle prosequi*, and a reference in Clode's *The Administration of Justice under Military and Martial Law* [41] to *nolle prosequi* was criticised as showing misunderstanding.[42] Two aspects of condonation were left open in the lengthy

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[36] See a discussion of these pleas in ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES §§ 422, 435–36, 450 (35th ed. 1962).

[37] Winsor v. The Queen. L.R. 1 Q.B. 390, 395 (1866).

[38] R. v. Lewis, 2 Cr. App. R. 180 (1909); The Queen v. Charlesworth, 1 B. & S. 460, 121 Eng. Rep. 786 (K.B. 1861).

[39] Not applicable in Australia.

[40] R. v. Durkin [1953] 2 All E.R. 685 (Ct.-M.App.Ct.).

[41] 124 (1872).

[42] On the effect of *nolle prosequi*, see Commonwealth Life Assur. Soc'y v. Smith, 59 Comma. L.R. 527, 534 (Austl. 1938).

obiter dicta in a manner that suggested the Tribunal will consider itself bound by its own decisions. The first was whether restoration to duty was essential, and the second, whether it was necessary to communicate the condonation to the accused. P'inal answers were not given. but it was thought to be essential that in some manner or other the offender should have been restored to the status which he had occupied prior to being charged with the offence alleged to have been condoned, aiid that although an express communication of the condoning intent to the accused was riot necessary, it was essential for some overt act to have come to his knowledge from which the condoning intent could be reasonably inferred. In any event, no inference to condone could be drawn in this case, because only a few days later a second court had been convened to try the offender again in respect of the same offence.

The Tribunal then considered certain grounds of appeal based on a refusal by the second court-niartial to grant an adjournment sought by the defence. The adjournment had been sought in order to procure the attendance of a certain witness to give evidence on the condonation issue, and to allow the defence tiine to prepare its case in relation to certain additional evidence. The Tribunal thought that the prosecution had acted quite wrongly in failing to take steps to procure the attendance of the witness. A court should entertain applications for adjournment in a liberal manner, and it was unfortunate that the prosecuting officer had stated that he opposed the adjournment as a matter of principle, and that he should have given the Court so little guidance as to the principles which should guide the exercise of their discretion. Adjournments almost always involved the defence no less than the prosecution in delay and additional costs. Spurious applications were less common than often thought and where an adjournment was sought for the purpose of calling a material witness or to enable the defence to prepare its case, one would norinally expect that a court would grant the application.[43] The judge advocate appeared to have proceeded on the view that an application for an adjournment had always to be supported by sworn evidence aiid that a statement from the Bar table was not sufficient. This was plainly contrary to the provisions of Rule of Procedure 39A, which permitted the Court to act on any statement or evidence. The Tribunal was by no means satisfied that, had a proper direction been given on the application, the adjournment would have been refused. The subinission that the witness to be called was the President at the previous court-martial and that it would have been a breach of his oath had he been permitted to give evidence in the second court-martial was considered [44]

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[43] *Cf.* McManamy v. Fleming [1889], Vict. L.R. **337;** McKeering v. McIlroy [1915] Queensl. St. 85.

[44] See R. OF PROC. *26.*

but rejected, because it did not appear that the evidence proposed to be given would necessarily involve a breach of that oath. The proper time for determining whether any breach of the oath would be involved was when the evidence was actually sought to be elicited and not before. Refusals to grant adjournnients aniount to a iiiiscarriage of justice within the meaning of section 23(1)(b) of the Act,[45] but in this case, the evidence of the witness would not have materially altered the defence of condonation already raised, and it followed that no substantial miscarriage of justice had occurred.

Other grounds of appeal were that no new suiiiiiiary of evidence was taken for the second trial and a notice of intention to call fresh evidence had been served late. These failed, because no application for an adjournment had been iiiade. There could be occasions when it would be proper to take a fresh summary of evidence rather than serve a notice of intention to call additioiial evidence. but the taking of a new sumniary of evidence was not a condition precedent to the jurisdiction of the second court. The prosecution could serve a notice of an intention to call fresh evidence. aiid if this was served late an accused would be entitled to an adjournnient or to have his cross-examination of the witnesses deferred. A prosecutor in a second trial is not bound to rest on the same evidence as was offered at the first trial.

The Tribunal thought that in his final summing up the judge advocate should have told the members of the Court that, notwithstanding that they had ruled that there was a case to ansner, and that the accused had neither given nor adduced evidence, they were still entitled to acquit him.[46] There were other oniissions. For example, if there was a possibility that words had been used with a special meaning then the Court should be told to consider whether they were used with their ordinary or their special meaning. Again, the judge advocate had neither stated nor properly summarised the evidence in respect of the charges, but to this the Tribunal said that it was not always necessary to state or summarise evidence to the Court; after all, they are presumed to have heard it.[47] It was also essential in cases like this with a strong colour of fraud that the judge advocate should direct the Court to consider the evidence in relation to each of the charges separately. It was essential in considering the second charge, for example, to disregard such of the evidence as related solely to the first charge. The summing up was defective and had resulted in "a miscarriage of justice'' within the

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[45] *Cf.* Stirland v. Director of Pub. Proserntions [1944] A.C. 315, 321 (Viscount Simon L.C.): R. v. Cohen, 2 Cr. App. R. 187 (1909); R. v. Haddy [1944] K.B. 442 (C.C.A.).

[46] *Cf.* May v. O'Sullivan, '32 Commw. L.R. 654, 658 (Austl. 1955).

[47] Holford v. The Melbourne Tramway and Omnibus Co. [1909] Vict. L.R. 497, 527 (1907).

meaning of section 23(1)(b). However, the proviso in section 23(2) applied and the appeal was dismissed.

F. *THE McCANN APPEAL*

McCann was charged with being drunk and with using insubordinate language to his superior officer. The trial was one involving disputed questions of fact, it being alleged that there was personal animosity between the principal witness for the prosecution and the accused. The main basis of the defence was that this prosecution witness was not truthful and reliable. At the trial, a report by this witness, the accused's superior officer, setting out his version of the occurrence, had been tendered in evidence and the defence had made much of the discrepancies between the facts in the report and the evidence given.

The Tribunal held that the judge advocate had failed to advise the Court fully and fairly as to these discrepancies, and the complete addresses of both prosecutor and defence on this point did not excuse the inadequacies. One particular passage of the summing up was strongly criticised: "After giving the matter very careful consideration I have come to the conclusion, I have a choice of two alternatives, either to review the whole of the evidence on this issue or to review none of it. You will be pleased I have chosen the latter." The accused had not had a trial according to law, and there had been a miscarriage of justice within the meaning of the Act. This can be compared to *R. v. Tillman,*[48] where the judge's words to the jury: "I do not think that I can help you much, you heard the evidence. It is for you to decide," were the reason the conviction was reluctantly quashed by the Court of Criminal Appeal.

Opinions were expressed on two other matters. At the trial, the defence had applied unsuccessfully under Rule of Procedure 75 to have a witness called for cross-examination. The rule was considered to be only a restatement of the traditional practice followed in Australia and England on the calling of witnesses for purposes of cross-examination.[49] If a prosecutor did not intend to examine a witness he should, unless there are exceptional reasons to the contrary, nevertheless place him in the witness box so that the defendant may have an opportunity of cross-examining him. It was undesirable for a prosecutor to join in a battle of tactics with counsel for the defence in respect of these matters, and the judge advocate should never have said "This is essentially a matter of tactics. It is a considered manoeuvre by the defence . . . ." The other point was that the judge advocate had marked certain passages of the evidence given before the Court and had referred the Court in his

[48] U.K. Ct. Crim. App., 5 Feb. 1962, reported in 1962 CRIM. L. REV. 261.

[49] See Ziems v. Prothonotary of the Supreme Ct. of New So. Wales, 97 Commw. L.R. 279 (Austl. 1957).

summing up to the passages which he had marked. This was done without the consent of and without revealing the content of such passages to the accused. It was a most undesirable practice.

G. *THE MANION APPEAL*

This was the first appeal from a Naval court-martial. Manion was charged with wilfully disobeying a lawful conimand by a superior officer, and behaving with contempt to a superior officer. Many defences had been raised to the charges, the principal ones being that the words used did not constitute an order; the accused did not believe they were an order; if they were an order, it was to do something in the future, and that when the time arrived the accused was under close arrest and unable to coniply with the order and had coniplied with the order. There were other submissions based on his uncontested good character. The main grounds of appeal concerned the failure of the judge advocate to explain these defences to the Court.

The first subniission that no comniand had been properly given was rejected and the Tribunal repeated what it had said in the earlier appeal of *Schneider.*[50] On the submission that on a coniinand to do something in the future, the offence could not be committed until that time in the future had arisen, and that in such circumstances an accused person may be guilty of contempt, but not wilful disobedience until the time came for the conimand to be obeyed, the Tribunal considered certain passages to this effect in the Savy B.R. 11 and the Manual of Military Law, and questioned whether they were binding or siniply advisory. The judge advocate had accepted the passages as law and, without deciding the point, the Tribunal adopted this view. If it be assumed that to obey the order required the accused to give further orders himself, there were three possibilities: (a) the orders had to be given immediately, in which case the offence was immediately committed or (b) the orders had to be given at a certain later time or (c) they had to be given before the later time. In either (b) or (c) it was open to the Court to find that the accused could not conimit the offence because he was then under close arrest. Which of the possibilities was to be accepted was a matter to be determined by the Court and it should have been given proper directions by the judge advocate. There had been no reference in the summing up to the other interpretations of the words used which were open to the Court, and although it could not be said that it was not open to the Court to hold that the order required instant conipliance, still the judge advocate should have left the question to be decided by the Court. He had given the Court no guidance on these niatters where it was entitled to guidance. He had given no directions as to whether the legal submissions of counsel

[50] *Supra,* II.A.

for the defence were correct or not, and the result was that there had been a miscarriage of justice.

With regard to the accused's good character which had been raised and confirmed by independent evidence, the Tribunal referred to ***Attwood v. The Queen***[51] and *R. v. Aberg*,[52] and expressed its view that, although good character was a matter which the defence was entitled to have brought to the attention of the Court, to be weighed by them in coming to their decision, this particular failure did not amount to a substantial miscarriage of justice.

The direction on the burden of proof had been only casually criticised by the appellant but the Tribunal considered the judge advocate's direction on the no case submission that: "You have to be satisfied that a prima facie case has been made out, that means that you have to be satisfied that the prosecutor's evidence which you have heard would lead to a conviction if uncontradicted or unexplained by the accused" went perilously close to suggesting that the onus of proof shifted to the defence. At the close of a case for the prosecution, the question to be decided on a "no case" submission was not whether on the evidence as it stands the defendant ought to be convicted but whether on the evidence as it stands he can lawfully be convicted. This is a question of law and unless there is some special statutory provision on the matter, a ruling that there is a case to answer has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. Whether or not the accused calls evidence, the court must be satisfied beyond reasonable doubt that he is guilty.[53] This was a Naval court-martial and the Queen's Regulations and Admiralty Instructions 2126(8) provided "the Court shall be guided by the advice of the judge advocate on all points of law." The judge advocate treated the matter as one of fact, not law, and had suggested that a case to answer indicated a probability of guilt. There had been no direction on the difference between the Court's function at the close of the prosecution case on a "no case" submission and its function at the end of the trial. These were all serious misdirections and the accused had not had a trial according to law. Although it was possible that a court properly directed would have brought in a verdict of guilty, it could not be said that it must undoubtedly have done so, and consequently section 23(2) did not apply. In considering whether a conviction of contempt should be substituted under section **25** of the Act, the Tribunal considered what had happened at the trial, namely, that after convicting Manion of the offence of wilful disobedience, the Court had

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[51] **102** Commw. **L.R.353, 359** (Austl. **1960).**

[52] **[1948] 2** K.B. **173** (C.C.A.).

[53] Woolmington v. Director of Pub. Prosecutions **[1935]** A.C. **462;** Thomas v. The Queen, **102** Commw. L.R. **584** (Austl. **1960);** May v. O'Sullivan, **92** Commw. L.R. **654, 658** (Austl. **1955).**

adopted the advice of the judge advocate and not proceeded further with the second charge. There had been no acquittal or finding of any sort. This was pursuant to Queen's Regulations and Admiralty Instructions Article 2184(2). The Tribunal's view was that, although there was much to be said in favour of the view that the proper verdict would have been to substitute a conviction on the charge of contempt, section *25* of the Act only empowered it to substitute a conviction on the second charge if it appeared that the Court must have been satisfied of facts which proved the appellant guilty of that other offence. It could not be said that the Court must have been so satisfied.

The Tribunal emphasised its educative role by commenting on a direction of the judge advocate that the law presumes that every sane person intends the probable consequence of his acts. This referred to the defence that there was lack of intent. The Tribunal stated that the law did not provide such a presumption. The responsibility of deciding whether an inference of intention should be drawn lay upon the Court and no presumption of law existed to relieve the Court of that responsibility.[54]

H. *THE* ***ADAMS*** *APPEAL*

This appeal was against two convictions of fraudulently misapplying property. The judgment is the shortest delivered by the Tribunal to date, and this is the only appeal in which the summing up by the judge advocate has not been questioned. The submissions were that the evidence did not support the convictions, and that it was a requirement of fraudulent misapplication that the property be initially in the possession of the offender. Both submissions failed. On the question whether the defendant had had possession of the property, the Tribunal held that, if not in his possession, it certainly was in his custody or control, and this was sufficient.

I. THE MUNCEY APPEAL

This appeal is the last to be heard, judgment being delivered on **31** January 1964. It was an appeal against an Army conviction for stealing public property.

Matters considered but on which the Tribunal gave no decision were the questions of fresh evidence and the use of a view. The first ground upon which the appeal seems to have succeeded was the inadequacy in the judge advocate's direction on inconsistencies in the evidence of two prosecution witnesses. The Tribunal's view was that where a prosecution case turned so much on the evidence of one or two witnesses as it did here and in the appeal of *McCann,* and there were inconsistencies the

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[54] Thomas v. The Queen, **102** Commw. L.R. 584 (Austl. **1960).**

judge advocate should evaluate the evidence for the assistance of the Court. The second successful ground of appeal concerned the prosecutor's handling of the case. One prosecution witness had made earlier statements in conflict with the evidence he gave. The prosecutor led this from the witness in chief in such a way as to put him forward as a witness of truth and, the defence having elected not to cross-examine, the Tribunal seemed to feel that this confirmed the prejudice the defence had suffered. The prosecutor had deprived the defence of an opportunity to show the witness to be unreliable.

The prosecutor's cross-examination of the accused was also criticised. In the Tribunal's opinion, it was wrong to put to a witness in cross-examination what others had said on a subject and then ask the witness whether he contradicts them or whether he says they are lying.

The Tribunal's final observation probably gives the underlying reason for the success of the appeal. "Having regard to the way in which the trial was conducted by the prosecutor and the defence, the position of the Judge Advocate was plainly a difficult one."

III. *SOME CONCLUSIONS AND PROBLEMS*

The annual courts-martial rate in Australia is approximately Army 200, Air Force 25, and Navy 12. These figures emphasise the importance of the Tribunal's judgments in the administration of military justice, yet the judgments are not reported in any series of law reports. Some Service lawyers probably get copies sent to them, but the difficulty in finding military case law quickly is a serious handicap to any advocate who is about to advise on or argue an appeal.

The principal lesson taught by the judgments is that the Tribunal expects a judge advocate to sum up at least as competently as a Quarter Sessions judge but the problem is that civil judges have many years of experience at the Bar to draw on, whereas judges advocate usually have little or none. Judges and barristers have continuity of work and judges advocate do not. Again, judges advocate do not control a court as a civilian judge does. They are often junior in rank to the President and sometimes to the prosecutor. With the exception of the appeal of *Adams* the judge advocate's summing up has always been attacked, with differing degrees of success, and this can be expected to continue. It would seem to be possible to so conduct a defence that the judge advocate will almost certainly fall into error in his directions and a conviction will be quashed on appeal.

An English case, ***Reg.** v. **Renn**,*[55] illustrates the difference between the status and power of a judge in a civil trial and that of a judge advocate at a court-martial. A young serviceman on duty in Germany had been

[55] U.K. Ct.-M.App.Ct., 19 Nov. 1956, reported in 1957 CRIM. L. REV. 47.

convicted of murder by a court-martial there despite overwhelming evidence of provocation. On appeal, Goddard L.J. expressed the view that had the trial been before a civil jury it would almost certainly have returned a verdict of nianslaughter and not murder for the reasons that a judge would have summed up in such a way to show that he would have liked a verdict of manslaughter to have been returned and the jury would have mitigated the rigours of the common law. As there was no misdirection and there was some evidence to support the conviction of murder, the Appeal Court could not interfere, but the observations were forwarded to the appropriate authority and the Army Council reduced the sentence to two years imprisonment.

In England judges advocate were civilianised in 1955. They are now civilian barristers appointed by the Lord Chancellor. Their status is roughly equivalent to that of judges and they form no part of the Arnied Services. In the United States, "law officers" (judges advocate) are members of the large and very experienced Judge Advocate *Corps* and work with a Uniform Code. For these reasons their standard of direction and summing up is higher than ours.[a]

One suggestion for cheaply overcoming the difficulties resulting from a shortage of competent judges advocate in Australia is to form a combined Judge Advocate Service common to the three Services. The combined service would have obvious advantages but there would be difficulties arising out of the differences between the codes of the three Services. The *Manion* appeal may have had a different result if counsel had been aware that the Navy rule on alternative charges was different from the Army and Air Force rule. The latter rule requires an acquittal on the alternative if there is a conviction of the original charge. Navy law does not require a finding on the alternative charge. The big differences exist between the Army and R.A.A.F. on the one hand and the Navy on the other. Perhaps as an intermediate step an interchange of Army and Air Force judges advocate could take place.

A developnient which it is felt will occur is the adoption of the 1955 British reform giving the judge advocate power to hear evidence and rule on interlocutory questions in the absence of the court. This will equate him more with a civil judge who deals with such questions in the absence of the jury. In the **R.A.S.** this is already done. Another need is the admissibility of statutory declarations and secondary evidence of bankers'

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[a] Editor—The law officer, however, is not required to summarize or marshal the evidence, but if he does decide to do so, his "summary must be fair and adequate . . . ." On the other hand, in his charge to court-martial members, the law officer must instruct on the elements of the offense charged, the burden of proof, and affirmative defenses raised by the evidence, and these instructions must be tailored to the facts presented. See United States v. Sickoson, 15 U.S.C.M.A. 340, 35 C.M.R. 312 (1965); UNIFORM CODE OF MILITARY JUSTICE art. 51; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 73.

books provided the accused does not require the attendance of the deponents for cross-examination. But these are piecemeal reforms which would make the practice of military law even more difficult for part-time advocates.

One of the most important problems in the hearing of the appeals is that of time. In Australia, an average of six months occurs after trial, before the decision on the appeal is given. The reasons are often given later. This means that if the accused has been imprisoned, his imprisonment will have to exceed six months, otherwise he will complete his punishment before knowing whether or not his appeal is successful.[56] The hearing of appeals could be hastened by abolishing the review processes within the Services, *viz* confirmation and consideration of the petition. Their purpose is no doubt to give an opportunity to the Services to put their house in order before the appeal is heard, but whether this purpose is achieved or not, they do cause delay which could make the appeal academic. The Tribunal's judgments are as capable of putting Service houses in order as is the system of confirmation and petition.

The procedure for granting legal aid and the willingness of the Tribunal to grant costs against the respondent Air Board, Army Board or Naval Board, is a feature of appeals before the Tribunal. It sets courts-martial appeals apart from ordinary criminal appeals where costs are almost never given, and the legal aid is less liberal.

The Tribunal cannot order a new trial, even though Australian appeal courts generally have power to order a new trial. The Canadian and New Zealand Courts-Martial Appeal Courts have such a power. It is only in England, whence came our model, that new trials cannot be ordered.

There have been suggestions that the Tribunal be changed from an *ad hoc* body to a court and be a regular part of the judicial system of the Commonwealth rather than an exercise of the defence power. Yet, full-time professional judges have weaknesses of a different kind from the weaknesses of part-time members of an *ad hoc* Tribunal. As at present constituted, it brings fresh civilian minds to bear on military problems, minds that are not fully conditioned by years of experience on the Bench or in the Services, and this is an advantage. Although it has been suggested that their status might indicate that they would be loath to challenge some established military procedure, their judgments do not bear this out and they have been most outspoken in their criticism of what sometimes happens at courts-martial.[57]

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[56] See the appeal of R. v. Cory, U.K. Ct.-M.App.Ct., 10 April 1963, reported in **1963** CRIM. L. REV. **517.** The appellant served his full term of imprisonment before succeeding in the English Courts-Martial Appeals Court.

[57] See the appeal of ***Feiss, supra,*** II.B.

One outstanding problem that remains for the Tribunal to consider is the "general article," *i.e.*, conduct to the prejudice of good order and military or Air Force discipline. For centuries this offence has been a basic weapon in punishing conduct contrary to the prevailing Service ethic. It serves discipline well. It may be incompatible with the existence of the Tribunal that it should thus continue. The coninients of Lord Reid in *Shaw v. D.P.P.*, an appeal against a conviction for the common law misdenieanour of conspiring to corrupt public niorals, an equally general offence, suggest the problem:

> . . . I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that . . you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally the meaning of words is a question of law for the court For example, it is not left to a jury to determine the meaning of negligence . . I know that in obscene libel the jury has great latitude but I think that it is an understatement to say that this has not been found wholly satisfactory. . . . If a jury is entitled to water dou n the strong words "deprave," "corrupt" or "debauch" so as merely to mean lead astray morally, then it seems to me that the court has transferred to the jury the whole of its functions as censor morum [and] the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.[58]

The general article is, of course, a statutory and not a common law offence, and in limiting or widening its scope one question will be whether it is a question of law or fact. Has the judge advocate to direct the court whether or not the conduct is capable of being contrary to good order and military discipline, and how far can the court call on its own Service knowledge of what is by custoni conduct to the prejudice of good order and military discipline? If it cannot, and evidence is required, then is the court to be expected to disregard its Service knowledge that the offence falls traditionally within the section and to treat it as a question of fact requiring evidence? In some Services the members of the court are entitled to have regard to their own Service knowledge, In America, the Court of Military Appeals in *United States v. Kirksey* [59] was faced with the problem of deciding whether discreditably failing to pay debts and maintain sufficient funds in a banking account through simple negligence fell within the general article. The Court stated:

> . . we cannot hold—in the absence of clear code authorization or long established rustom — that a ***negligent*** omission in this respect rises to the type of *dishonorable* conduct which is the gravamen of the offense in question .[60]

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[58] [1962] A.C. 220, 281–82 (1961).
[59] 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955)
[60] *Id.* at 561, 20 C.M.R. at 277.

In *United States v. Hooper*,[61] the Court had to decide whether the public association with known sexual deviates fell within the general article. In deciding that it did, the Court relied on the fact that public association with notorious prostitutes had traditionally come within the article.[b] But in *Reg. v. Owen*,[62] the Canadian Board had said

> ...the judicial notice of general service knowledge introduced a highly speculative element because of inadequate and meagre prosecution evidence; [but] in the present case there is clearly established a set of facts to which the general military knowledge of the Court can be applied without introducing an element of difficult speculation, for the appellant.

In *Reg. v. Jarman*[63] the English court allowed the use of general Service knowledge in circumstances consistent with the Canadian test. An English opinion can be found in the remarks of Lord Tucker in *Shaw v. Director of Public Prosecutions*,[64] where his Lordship thought in such cases the jury must remain the final arbiters since they alone could adequately reflect the changing public opinion. In *United States v. Lefort* the United States Board of Review stated:

> The coverage of the "general article" is, of course, not limited to those offenses heretofore recognized in reported cases. The law is not static. New and different conduct may become established as triable under [the general article] , . . .[65]

Another problem is whether *mens rea* is required in the general article. In *Reg. v. Howe*[66] a majority of the Canadian Courts-Martial Appeal Board read *mens rea* in for the reason given that if Parliament had intended to exclude *mens rea* it would have said so. It is clear that the Tribunal will be faced with similar problems in the future. The distaste associate with the devil's article is that it covers a wide range of behaviour. The questions will be whether the court, *i.e.*, the jury, is to be the *censor morum*, or whether it is to be the judge advocate and the Tribunal. What rules can safely be distilled and applied is uncertain. In *Reg. v Phillips*,[67] the English Courts-Martial Appeal Court held that indecent behaviour by one soldier with another was conduct prejudicial to the good order and discipline notwithstanding that there was no evidence that anyone had observed the conduct, but in America the rule is that

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[61] 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

[b] *Editor.*—Tradition is not the sole test. Rather, the test is whether the alleged act is "palpably and directly prejudicial to good order and discipline." *See* United States v. Ssdinsky, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

[62] No. 18, 1961 (unreported).

[63] No. 21, 1953 (unreported).

[64] [1962] A.C. 220, 289 (1961).

[65] CGCM 9813, Lefort, 15 C.M.R. 596, 597 (1954).

[66] No. 4, 1957 (unreported).

[67] No. 20, 1961 (unreported).

conduct to the prejudice must be direct and not remote conduct.[68, c] Also, the United States Court of Military Appeals has opined that it is wrong to allow the Services power to eliminate (by lack of use) vital eiements from specific crimes and offences and to permit the remaining elements to be punished as offences under the general rule.[69] Put another way, this is a finding that when the legislature enacts specific crimes it intends to cover the whole field. This rule has not been followed in England,[70] but it may influence the Australian Tribunal if it seeks to limit the general article.

So far, the Tribunal seems to have preferred High Court decisions to English decisions to guide it, but the English law of evidence applies at courts-martial, so it is reasonable to assume that English authorities on evidence must be applied Offences against the general article are subject to English law and English decisions again would seem to be applicable. In *Manion's* case it followed the High Court in *Thomas v. The Quetn*[71] rather than the English decisions on intent. Decisions like *Parker v. The Queen*[72] emphasise the problems that will arise. In New South Wales, if an accused calls no evidence he still has no right to have the last address to the jury. In England, he has this right. What will be the attitude of the Tribunal if this question arises'?

Military law is a strange thing, it flourishes and is recorded in times of national or international crisis. In prolonged periods of peace it appears to die down and disappear. The work of the Tribunal appears to be of lasting value at the moment. Its tasks and problems are illustrated by the Saval general article which it has yet to consider, *viz* "scandalous conduct of God's Honour and corruption of good manners." Lawyers may not know n-hat it means but the Savy has no doubt.

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[68] WINTHROP, MILITARY LAW AND PRECEDENTS 723 (2d ed. reprint 1920).

[c] Editor.--While the conduct must be directly prejudicial and done in the presence of a third person. at least if the act is done in a private place, the conduct need not, *in fact*, bring discredit upon the armed forces. The conduct is service-discrediting if the act **is** of such a nature that it could bring discredit upon the armed services. See Cnited States v. Hooper, 9 U.S.C.M **A. 637,** 26 C.M.R. **417** (1958); United States **v.** Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).

[69] See United States v. Norris, 2 U.S.C.M.A. **236,** 8 **C** M.R. **36** (1953).

[70] See Reg. v. Phillips, ***So.* 20,** 1961 (unreported).

[71] 102 Commw. L.R. 584 (Austl. 1960).

7237 Austl. L.J.R. **3,** 11–12 (1963).

COMMENTS

THE PROTECTION OF CIVILIANS FROM BOMBARDMENT BY AIRCRAFT: THE INEFFECTIVENESS OF THE INTERNATIONAL LAW OF WAR.*

Silent leges inter arma. Cicero, *Pro Milone*, IV, 10.

[E]xpediency goes with security, while justice and honor cannot be followed without danger. Thucydides, *The Peloponnesian War*, V, 17.

King Henry—God bless him—will have to say for reasons of state, that he never meant this to happen; and there is going to be an awful row. T. S. Eliot, *Murder in the Cathedral.*

I. INTRODUCTION

There is no doubt that international law is still suffering from the vagaries of weakness and the lack of an authoritative source. Such immaturity signifies a situation where the jurisprudential question of the sources of law is much more alive than in settled systems of national law. The present world order is caught in the matrix of evolution. Nowhere is the confusion of the matrix more apparent than in the laws of warfare. The demands of morality, meta-legal processes, prophecy, terror, jurisprudential theories swirl about in a maelstrom which is both a diagnosis and a prognosis of the world in which we live.

The problem of the international law of war, especially as restricted to the bombardment of civilian populations and cities, is not subject to positive law in the ordinary sense because the minimums of authority and consent for such a law do not exist. Severtheless, it is assumed that there is a recognition of at least the need for such a law. To assume otherwise is to leave thought in chaos. It is also assumed that disobedience to the international law which we do have has nothing to do with the need for specification and implementation.

There is another broader assumption, that the limitation of warfare must be based as much on the recognition of the need for rational policy as upon the existence of international law, strictly so-called. The individual nations which have the capacity to subject other peoples to attack by weapons of mass destruction must also realize that they have a responsibility for other peoples as well.

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

The determination of war policy cannot be made during the heat of war. The man on horseback then has fully the advantage of action over thought. During World War II, the Lord Bishop of Chichester complained of British bombing policy:

> I have recalled the joint declaration and theee pronouncements because it is so easy in the process of a long and exhausting war to forget that they were once held without question to imply, and because it is a common experience in the history of warfare that nut only war but actions taken in war as military necessities are often supported at the time by a class of arguments which, after the war is over, people find are arguments to which they never should have listened.'

Viscount Trenchard, in saying that Chichester's sincerity was not enough, appealed to the sincerity of those who were getting killed in carrying out the policy:

> Think of the feeling of the young men who go out on theee great bombing battles day after day and night after night.?

Behind this exchange in the House of Lords lay years of policy struggle arid an indistinct body of international law. That struggle and that law will be explored in this article.

II. THE DEVELOPMEST OF RULES

During the era of limited warfare, limited at least to the less sophisticated minds of a more civilized century, attempts were made to restrict warfare. Some of the rules arid principles then laid down have been used by analogy to apply to later weapons.

In 1868 the Declaration of St. Petersburg stated "That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy." [3]

In 1899, when balloons were still ineffective, the Contracting Powers at the first Hague Conference agreed to prohibit for five years the launching of projectiles and explosives from balloons or by other methods of a similar nature. A renewal of the prohibition was agreed to in 1907, again for a limited time, but without the former unanimity.[4]

The Annex to the Hague Convention on Land Warfare of 1899 did state in Article 25:

> The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited.

1130 H.L. DEB. (5th ser.) 739 (1944).

[2] *Id.* at *832.*

[3] See INT'L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION UF THE DANGERS INCURRED BY THE CIVILIAN POPULATION *IS* TIME OF WAR 144–45 (1956) [hereafter cited as DRAFT RULES].

[4] Lin, *Aeronautical Law in the Time* of War, 3 J. AIR L. & COM. 79, 82–83 (1932).

Unfortunately, the restriction on bombardment of undefended towns meant that the regulations was tied in with the rationale of siege bombardment because it has always been unlawful to attack a town which is open to occupation anyway. The rule is reminiscent of later rules forbidding terror bombing.

In 1907, Article 22 of the Regulations Respecting the Laws and Customs of War on Land was adopted. It gave one general applicable principle:

> The right of belligerents to adopt means of injuring the enemy is not unlimited.[5]

Because of the failure to develop air rules in 1907, the Russians proposed an amendment to Article 25 of the Laws and Customs of Land Warfare. Italy also offered an amendment. As a result, the following was adopted:

> The attack or bombardment, by *whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited.[6]

The 1907 rules on bombardment by naval forces were similar. Article 1 stated that "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden." However, Article 2 gives an exception:

> Military works, military or naval establishments, depots of arms or war *materiel*, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. . . .
>
> [The commander] incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.[7]

Article 27 of the 1907 Regulations, devoted to sieges and bombardments, only demanded that the attacker take

> . . . all necessary steps . . . to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, *historic monuments*, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.[8]

It should be noted that this rule does not protect noncombatants because of the needs of the attacking force in the zone of combat.

At the Madrid Session of the Institute of International Law, held in 1911, M. Fauchille presented some articles on air warfare:

> Art. 6. The bombardment by aircraft of towns, villages, habitations or buildings which are not defended is forbidden.
>
> The rules established by the Hague Conventions of 18th October, 1907, relative to Sieges and Bombardments by Land or Saval Forces, are applicable to aerial war.

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[5] Printed in 2 SCOTT, THE HAGUE PEACE CONFERENCE OF 1899 AND 1907, at 387 (1909).
[6] Printed in 2 *id.* at 652.
[7] Printed in 2 *id.* at 439.
[8] Printed in 2 *id.* at 389.

These suggestions were rejected because of the complaint that they were out of proportion to existing capacities for navigation. So the Conference adopted this rule:

> Aerial war is permitted, but only on the condition that it does not present for the persons or property of the peaceable population greater dangers than land or sea warfare.[9]

World War I practices were limited in scope and did not see the fuli development of the scope of air warfare because fortunately the war ended before bombardment squadrons were developed in large numbers.[10] More important for future practice was the development of the theory of the Independent Air Force. An Italian, General Douhet, devoted his life successfully to the gospel of strategic bombing. He is worth quoting *in extenso:*

> The prevailing forms of sccial organization have given war a character of national totality — that is, the entire population and all the resources of a nation are sucked into the maw of war. And, since society is now definitely evolving along this line, it is within the power of human foresight to see now that future wars will be total in character and scope. . . .
>
> . . . .
>
> It is useless to delude ourselves. All the restrictions, all the international agreements made during peacetime are fated to be swept away like dried leaves on the winds of war. A man who is fighting a life-and-death fight—3s all wars are nowadays—has the right to use any means to keep his life. War means cannot be classified as human and inhuman. War will always be inhuman . . . . The purpose of war is to harm the enemy as much as possible; and all means which contribute to this end will be employed, no matter what they are. . . .
>
> . . We dare not wait for the enemv to begin using the so-called inhuman weapons banned by treaties before we feel justified in doing the same. . . Owing to extreme necessity, a11 contenders must use all means without hesitation, whether or not *they* arc forbidden by treaties. which after all are nothing hut scraps of paper compared to the tragedy which would follow.[11]

It was in this atmosphere after a great, war in which aerial theory had not been put into practice that a Commission of ,Jurists developed Rules of Warfare for Aircraft at the Hague, rules which were never ratified. The Commission was set up after the Washington Conference of **1922.** It was composed of representatives from the United States, the British Empire, France, Japan, Italy and Holland. The rules they adopted for bombardment filled in the lacunae of the Hague Peace Conference rules stringently:

Article **22**

> Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring noncombatants is prohibited.

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[9] Printed in Lin, *supra* note **4,** at 81.

[10] SPAIGHT, AIR POWER AND WAR RIGHTS 6–7 (3d ed. 1947).

[11] DOUHET, THE COMMAND OF THE AIR 5–6. 181, 189 (Ferrari transl. 1912).

Article 24

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.[12]

The proposals of the United States Secretary of War prior to the meeting of the coniinission of Jurists had been iiiuch more specific but nevertheless both he and the Secretary of the Navy approved these provisions. The Secretary of the Navy went further in saying that the draft would have a value for guidance whether it becanie a treaty or not.[13] Although it was reported that the rules were to be submitted to the Senate, the draft was quietly shelved.[14]

The Disariiianient Conference of 1932 tried to deal with the problem again. The Benes Resolution of July 1932 agreed on a prohibition against air attack on civilian populations. British proposals in 1933 floundered when Britain sought to eliminate the bomber and aerial bonibardnient "save for police purposes in certain outlying regions." [15]

During the debate over the bombing of Gernika, Mr. Eden, the Secretary of State for Foreign Affairs, stated in the House of Commons that there was only one rule of international law regarding the bombing of civilians, "that direct, deliberate and intentional bombing of noncombatants, as such, is illegal." [16] However, on 21 June 1938, the Prinie Minister, Mr. Chamberlain, expanded this test:

> I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law.

[12] [1923] 1 FOREIGN REL. U.S. 77 (1938). Section 5 is omitted.

[13] Letter from the Secretary of the Navy to the Secretary of State, 19 May 1923, in *id.* at 87–89.

[14] N.Y. Times, 23 June 1923, p. 1, col. 6.

[15] SPAIGHT, *op. cit. supra* note 10, at 247.

[16] 331 H.C. DEB. (5th ser.) 339 (1938).

> In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed.[17]

Broad as Mr. Chamberlain's rules are, they bear the sanie phraseology as the resolution and recommendation of the report of the Third Committee of the League of Nations of **30** September **1938:**

> (1) The international (sic) bombing of civilian populations is illegal;
> **(2)** Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> **(3)** Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighborhood are not bombed through negligence.[18]

111. THE DEVELOPMENT OF PRE-WORLD WAR II POLICY

The burden of the development of bombardment policy after World War I lay with Great Britain. She developed a separate air arni and a separate Bomber Command within that arm. Psychologically, Britain wanted to eliminate as a possibility the terrible losses of land warfare that decimated her arniies in World War I. This was to be a return to the tradition of reliance on a special arm similar to the old combination of the Royal Savy, a small professional army and the land forces of the allies.[19]

In **1923** at a conference held by the Chief of the Air Staff, it was said:

> The question had been asked at Camberley "Why is it that your policy of attack from the air is so different from the policy of the Army, whose policy it is to attack the enemy's army, while yours is to attack the civil population." The answer was that we were able to do this while the Army were not, and so go straight to the source of supply and stop it. Instead of attacking a machine with 10 bombs we would go straight to the source of supply of the bombs and demolish it, and the same with the source of production of the machine. . . . [T]he Army policy was to defeat the enemy Army—ours to defeat the enemy nation. The Army only defeated the enemy Army because they could not get at the enemy nation.[20]

The attitude of Douhet was deep in those who headed the British air arm. But there was a difficulty in convincing others. The problem of aerial bombardment was extensively discussed in 1928. Trenchard, the Chief of Air Staff, drew up a memo in which he said:

> **As** regards the question of legality, no authority would contend that it is unlawful to bomb military objectives, wherever situated. There is no written

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[17] **337** *id.* **at 937.**

[18] DRAFT RULES **149.**

[19] See Cate, *Plans, Policies, and Organization,* in 1 THE ARMY AIR FORCES IN WORLD WAR II **557, 592** (Craven & Cate eds. 1948).

[20] 4 WEBSTER & FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY **62** (1961).

international law as yet upon this subject, but the legality of such operations was admitted by the Commission of Jurists who drew up a draft code of rules for air warfare at The Hague in 1922–23. Although the code then drawn up has not been officially adopted it is likely to represent the practice which will be regarded as lawful in any future war. Among military objectives must be included the factories in which war material (including aircraft) is made, the depots in which it is stored, the railway termini and the docks at which it is loaded or troops entrain or embark, and in general the means of communication and transportation of military *personnel* and *material*. Such objectives may be situated in centers of population in which their destruction from the air will result in casualties also to the reighboring civilian population, in the same way as the long-range bombardment of a defended coastal town by a naval force results also in the incidental destruction of civilian life and property. The fact that air attack may have that result is no reason for regarding the bombing as illegitimate provided that all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city. . . . What is illegitimate, as being rontrary to the dictates of humanity, is the indiscriminate bombing of a city for the sole purpose of terrorising the civilian population.[21]

Milne, the Chief of the Imperial General Staff blasted Trenchard's arguments as leading to an advocacy of indiscriminate bombing of undefended towns and of their unarmed inhabitants. He drew attention to another section of the Hague rules:

I feel compelled to draw attention to the fact that, in quoting the opinion of the Commission of Jurists on this subject, the Chief of the Air Staff seems to have overlooked an important qualification which was entered by this Body when defining the legality of air operations against factories situated away from the fighting areas. Their report states in Article 24, paragraph (3), that, where such objectives cannot be bombarded without the indiscriminate bombardment of the civilian population, aircraft must abstain from bombardment.22

Milne based his main arguments on expedience:

Whatever views may be held as to the ethical or moral rights of the case, the point of real importance to this Empire, and about which there should be no doubt, is the practical aspect; in effect is such a policy expedient?[23]

The catalyst of expediency led to a confusion of desirable and ethical military ends. The Western Air Plans of 1937 were drawn up for various eventualities. W.A. 5 was the direct offensive on German industry in the Ruhr.[24] Although attacks on such industry mould be legitimate:

There was another reason for which it was doubtful whether such a plan as W.A. 5 could be put into operation. In view of the British air inferiority it is not surprising to find that the possibility of restricting bombing to purely military objectives now received fresh and sympathetic consideration. Such restriction

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[21] *Id.* at 73.
[22] *Id.* at 78.
[23] *Id.* at 79.
[24] 1 *id.* at 94–95, 97.

had indeed always been part of official policy if the means could be found to make it effective. On 21st June 1938 the Prime Minister announced in the House of Commons that Britain would only bomb purely military objectives and even so would take due care to avoid civilian casualties. . . . Both the Air Officer Commanding-in-Chief, Bomber Command, and the Air Ministry were of opinion that restrictions on bombing would be an advantage and official riders were sent to the former to confine his attacks to the . . . plans which were obviously aimed at military objectives.[25]

It appears that the British felt that there were some sanctions in international law but wanted these sanctions to be more than strictly kept in order to protect themselves. This is what led to the confusion of thought which is well projected in the British history:

Part of the argument centered upon the difference between "military" and "civilian" targets and developed somewhat along the lines of the conventions which had been attached to military and naval warfare. There was a school of thought which demanded that bombing should be restricted to "niilitary targets" which could be destroyed without undue risk to "civilian" life or property. . . .

Obviously a strict interpretation of these obscure questions meant the absolute prohibition of all strategic bombing and the confinement of all operations to the actual area of . . . fighting. It meant, indeed, the kind of restriction which was, in fact, applied to Bomber Command at the outset of the Second World War. On the other hand, once it had been agreed that this restriction was too narrow—once it had been decided to extend the definition of "military targets"—then the limit was very difficult to see. In modern war between major powers there is, after all, practically nothing worth attacking which does not have some bearing upon the national war effort. Even the national churches pray for national victory. . . .

Thus, the moral argument about strategic bombing, once that kind of warfare had been accepted at all, tended to degenerate into the drawing of distinctions between necessary and unnecessary destruction. But at this point it merged with and became indistinguishable from the strategic argument, for clearly it was against every strategic precept to waste bombs, bombers and bomb crews. . . .[26]

It should be pointed out that although the United States advocated a policy of bombardment of selected key spots in enemy industry (at least in Europe), the Army Air Forces did not reject the concept of bombing of enemy cities as such:

Only when the industrial fabric of Germany began to crack should the AAF turn to area bombing of cities for morale purposes.[27]

This quote is taken from Air War Plans Division 1 of 11 September 1941, a portion of a Joint Board Estimate of United States Over-All Production

[25] *Id.* at 99.
[26] *Id.* at 11–15.
[27] Cate, *supra* note 19, at 599.

Requirements. Policy makers in the United States had failed to integrate what international law there was into policy, just as the British had.[28]

IV. THE DEVELOPMENT OF POLICY DURING AND AFTER WORLD WAR II

The ingredients of international law and national policy were put into the crucible of war from 1939 to 1945 and were found wanting in the protection of civilians from bombardment. Moreover, bombardment was found wanting as an efficient weapon for achieving the ends of war, in the way it was used.

The Germans used their air force at the beginning of the war mainly for land battles, in connection with what was essentially siege bombardment.[29] Hitler's Directives for the Conduct of the War attempted to protect civilian populations in Belgium, Holland and Luxembourg and the attack on Britain was to be aimed at Britain's economy.[30] Directive No. 13stated that the attack on England "is to be opened with a devastating attack in reprisal for the English attacks against the Ruhr area" but in accord with the principles of Directive No. 9 which limited the attacks to the war economy. Directive No. 17 of 1 August 1940 stated that Hitler reserved for himself "the decision on terror attacks as a means of reprisal."[31]

At any rate, the development of unliniited warfare arid bombardment from the air was the policy of the victorious powers, not of Germany, whatever Germany was responsible for in Poland or at Rotterdam and Coventry.[32]

In line with the early policy of expediency in order to protect Britain froni bombing, the British refrained froni attacks on German war industry. On 1 September 1939, President Roosevelt had asked that civilian populations of unfortified cities be spared. The English and French replied that they would bomb only military objectives in the narrowest sense and Hitler did the same. But on 10 May 1940, the British announced through the Foreign Office that the right was reserved to take any action appropriate in the event of the bombing of civilian populations.33

[28] The author apologizes for not considering World War II development of policy by the United States. Lack of time prevented consideration of primary sources. Apparent lack of open discussion by Air Force officials prevents consideration of the secondary sources.

[29] See LIDDELL HART, DEFENSE OF THE WEST 318 (1950); *cf.* SPETZLER, LUFTXRIEG UND MENSCHLICHKEIT 247 (1956).

[30] See 8 DEP'T STATE, DOCUMENTS ON GERMAN FOREIGN POLICY, 1918–1945, at 316, 430, 463 (1954).

[31] See *id.* at 463; 9 *id.* at 427; 10 *id.* at 390.

[32] See SPAIGHT, *op. cit. supra* note 10, at 39; LIDDELL HART, *op. cit. supra* note 29, at 316–17.

[33] SPAIGHT, *op. cit. supra* note 10, at 265.

The British historians have stated:

> This policy of restricted bomhing was, however, a matter of expedience as much as of morality, for the perforniance of the *Luftwaffe* in Poland, where bombing was often indiscriminate, was soon taken by some highly placed officers to free Britain from the moral obligation assumed by the acceptance of the Roosevelt appeal. . . . Though as Air Commodore Slessor said, "Indiscriminate attack on civilian populations as such will never form part of our policy," he felt that it would be legitimate to attack the Ruhr power stations and oil plants.[34]

But the British had to change their policy:

> The conditions of limited warfare were, however, sufficiently violent to reveal one fundamental operational fact. This was that Bomber Command could not carry out a strategic offensive in daylight. Between September **1939** and the launching of the offensive in May, **1940**, the force, therefore, turned to night action. . . . By Sovember **1942,** however, the process was almost complete and bombing policy had progressed through a series of less and less precise aims to that of general area attack on whole towns.
> . . . the change in bombing policy was not due solely to the recognition of operational facts, though these alone did make it inevitable. It was also due to a positive eagerness, shared by prominent members of the War Cabinet, that the Germans should get as good as they were giving.[35]

The British did at times return with their bombs early in the war because they could not find their targets. The practice changed after the indiscriminate attack on London on 7 September 1940, although the British claimed that military targets were still aimed at.[36]

On **24** August, London central had been attacked for the first time. On the first night after this attack, Bomber Command attacked Berlin but not against the policy of precision bombing.[37] Paradoxically, it is possible that the German shift of attack from the sector stations *to* London in September as reprisal for the "reprisal" raid of *23* .August was a factor which saved the United Kingdom. As a matter of fact, the first raid on London was an accident.[38]

The problem of who started what in bombing civilians is necessarily unclear since the Germans had the same operational difficulties as the British. Certainly! even the reprisals were not really reprisals. At least both sides claimed that their "reprisals" were really aimed at military targets.

As early as September 1940, Bomber Command under Sir Charles Portal believed that the by-product of hitting civilians should become an end-product. The Vice-Chief of Air Staff, Sir Richard Peirse, "believed that what was inevitable was also desirable only in so far

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[34] 1 WEBSTER & FRANKLAND, **op.** *cit.* **supra** note **20,** at **135,** quoting Plans Memo of **7** Sept **1936.**

[35] *Id.* at **130.**

[36] SPAIGHT, **Op.** *cit. supra* note 10, at 268-69.

[37] *Id.* at **53–54;** 1 WEBSTER & FRANKLAND, **op.** *cit.* **supra** note 20, at 152.

[39] COLLIER, THE DEFENCE OF THE UNITED KINGDOM **233–34 (1957).**

as it remained a by-product of the primary intention to hit a military target in the sense of a power station . . . ."[39]

The search for policy now became highly complex, without any real guidelines other than those of maximum destruction while looking for something better. It was pointed out by the Minister for Air, Sir Archibald Sinclair, on 16 June 1941, that the program for obliteration bombing was too heavy for industry to bear, intimating a desire to try day bombing again.[40] Sir John Dill, Chief of the Imperial General Staff, made the same remark on 2 June 1941, stating that the attack on morale took large forces so that transport should be the primary target with morale as primary when bomber forces were large enough.[41]

What ensued was that communications and morale became twin target systems and the Director of Bombing Operations had already placed them together on 13 May 1941, because communications targets were adjacent to workers' dwellings and congested areas of industry.[42] Lord Trenchard's argument on 19 May 1941 was this:

> . . . if you are bombing a target at sea, then 99 per cent of your bombs are wasted, but not only 99 per cent of your bombs are wasted but pilots (etc.). So, too, if the bombs are dropped in Norway, Holland, Belgium or France, 99 per cent. do Gerinany no harm, but do kill our old allies, or damage their property or frighten them or dislocate their lives. . . . If, however, our bombs are dropped in Germany, then 99 per cent. which miss the military target all help to kill, damage, frighten or interfere with Germans in Germany and the whole 100 per cent. of the bomber organization is doing useful work, and not merely 1 per cent. of it.[43]

Morale was defined only at the end of 1941 because of United States insistence and criticism. The attack on morale included

> "the disruption of transportation, living and industrial facilities of the German population rather than the more restricted meaning." This definition implied that the attack was directed not so much to destroying the German worker's will to work as to deprive him of the means of working effectively. This distinction became more apparent in later stages of area bombing. It is obviously different [it is indeed not] from that put forward by Lord Trenchard and others who had supported the attack on morale earlier in 1941.[44]

On 14 February 1942, Air Vice-Marshal Bottomley wrote to the Acting Chief of the Bomber Command:

> In accordance with these principles and conditions, a review has been made of the directions given to you in Air Ministry letter dated 9.7.41, and it has been decided that the primary objective of your operations should now be focussed on the morale of the enemy civil population and in particular, of the industrial workers.[45]

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39 1 WEBSTER & FRANKLAND, *op. cit. supra* note 20, at 154.
40 See *id.* at 177.
41 See 4 *id.* at 198–99.
42 See 1 *id.* at 297; 4 *id.* at 136.
43 4 *id.* at 195.
44 1 *id.* at 298. The bracketed comment is mine.
45 4 *id.* at 144.

Portal in a minute to Bottomley specifically said:

> I suppose it is clear that the aiming points are to be the built-up areas, *not*, for instance, the dockyards or aircraft factories. . . .[46]

To keep its place in the war, the strategic air offensive had to show results. This led to the 1,000 bomber raid on Cologne of **30** May **1942,** the first of the great raids.[47]

It had been claimed, even during the mar, that the attack on morale, even as the broader definition would have it, was a waste. The broader definition solved United States criticism by including legitimate targets within its ambiguous words.

More practical uses for bombers were suggested until such time as operational difficulties were solved. There was a fight to have aircraft transferred to Coastal Command[48] which was stoutly resisted by Air Marshal Harris who said it took some *7,000* hours of flying to destroy one submarine at sea while this was enough to destroy one-third of Cologne in one night.[49] Blackett put the emphasis positively, away from mere destruction, saying each bomber could save at least six merchant ships in **30** sorties while in bombing Berlin it could drop less than 100 tons of bombs and kill riot more than a couple of dozen enemy men, women, and children and destroy a number of houses.[50]

The bombing of French targets in **1942** led to much criticism because of the damage done to French civilians. The resulting directive of **29** October **1942** showed that operational considerations did not have to be the paramount considerations in bombardment:

> It was in an effort to bring up to date a code of rules for operations in this delicate but unavoidable situation that the Air Ministry, to whom the responsibility for such political matters was customarily left, issued the directive of October **29.** Bombardment was to be confined to military objectives. The intentional bombardment of civilian populations, as such, was forbidden. It must be possible to identify the objective. The attack must be made with reasonable care to avoid undue loss of civilian life in the vicinity of the target, and if any doubt existed as to the possibility of accurate bombing or if a large error would involve the risk of serious damage to a populated area no attack was to be made. The provisions of Red Cross conventions were, of course, to be observed. Military objectives were defined broadly to include any sort of industrial, power, or transportation facility essential to military activity. . . . In conclusion, the directive stressed that none of the foregoing rules should apply in the conduct of air warfare against German, Italian, or Japanese territory, except that the provisions of Red Cross conventions were still to be observed, for consequent upon the enemy's adoption of a campaign of unrestricted warfare,

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[46] 1 *id.* at 322–24.

[47] *Id.* at **339, 342.**

[48] Blackett, *Operational Research,* in [1953] BRASSEY'S ANNUAL **88,** 103–04 (Thursfield ed.).

[49] 1 WEBSTER & FRANKLAND, *op. cit. supra* note **20,** at **342.**

[50] Blackett, *supra* note **48,** at 104.

> the Cabinet have authorized a bombing policy which includes the attack on enemy morale.[51]

Further problems arose to plague the independent air force concept. Air Marshal Harris had depended primarily on destruction of everything to carry out Bomber Command's mission. In Coventry, 100 out of 1,922 acres had been destroyed. But in Hamburg, 6,200 out of 8,382 acres were destroyed; in Essen 1,030 out of 2,630.52 Yet the German Air Force was not dead by the end of 1913, and the approach of Overlord made it imperative that the Allies gain air superiority. And even the American Eighth Air Force policy of precision bombing was failing because of a lack of air support while the British casualties on night raids were also mounting.[53]

The British historians have commented on the dilemma:

> It might appear, and it has often been suggested, that a great moral issue was involved in this situation, but the moral issue was not really an operative factor. The choice between precision and area bombing was not conditioned by abstract theories of right and wrong, nor by interpretations of international law. It was ruled by operational possibilities and strategic intentions.[54]

Reduced to plain English, this means that policy was being made up on a day-to-day basis, ignoring any moral factor and failing to establish sound military policy besides. The authors go on to draw a distinction without a difference:

> The issue did not concern simply the operational distinction between day precision and night area bombing, though that was to some extent involved. It arose from the strategic difference between selective and general attack. Selective bombing was based upon the principle that "it is better to came a high degree of destruction in a few really essential industries than to cause a small degree of destruction in many industries." It could be pursued by precision bombing, which would strike at individual factories and plants in the particular key industries which had been selected, and by area bombing, which would strike at particular towns associated with those industries. The principle of general attack . . . postulated the theory that the only effective attack as that which, by cumulative results, produced such a general degree of devastation in all the major towns that organized industrial activity would cease owing to a combination of material and moral effects.[55]

At any rate, the British started to get qualms about night area attacks and in the beginning of 1944 had to shift over to at least selective attack.[56] It was admitted:

> This emphasis upon the value of selective attack corresponded more closely to the aim which had inspired the efforts of the Eighth Air Force than to the

[51] A. Ferguson, *Oriyins of the Combined Bomber Offensive,* in **2 THE ARMY AIR FORCES IN WORLD WAR II 209, 240 (1949).**

[52] **2 WEBSTER & FRANKLAND,** ***op. cit. supra*** note **20,** at **48.**

[53] *Id.* at **37–39.**

[54] *Id.* at **22.**

[55] *Id.* at **5.**

[56] *Id.* at 4–6.

policy which had generally and primarily governed the conduct of Bomber Command since the summer of **1941.** Yet it was undoubtedly the apparent failure of the Eighth Air Force, culminating in the Schweinfurt disaster of October **1943,** which had produced this shift. The continuing growth of the German fighter force and the evident failure of the Eighth Air Force to check it coupled with the approach of ***Overlord*** and the overwhelming need for air superiority, had virtually forced the Air Staff into what amounted to a policy of desperation. . . . The general area assault . . . appeared to be not only extravagant but also irrelevant.[57]

The Casablanca directive which had been sent to Sir Arthur Harris on 4 February 19-13 was ambiguous in its policy. Harris changed some words and introduced the new version as a direct quote in order to make morale the supreme objective of the Combined Bomber Offensive.[58] This duplicity in the making of policy was matched on the public level:

The conduct of the strategic air offensive had long been regarded with suspicion by sections of public opinion in Britain. It was generally regarded as morally legitimate to bomb strategic objectives such as factories, oil plants . . . even if this did incidentally cause severe destruction of residential areas and of civilian life and limb. On the other hand, the view that it was morally legitimate to bomb residential areas, even if the object was to reduce military or industrial activity, was frequently challenged, and the more apparent it became that in the majority of the major area attacks, Bomber Command was, in fact, aiming at the centres of the residential areas, the more pronounced the protests became.

Severtheless, the view that the Air Staff . . . were ultimately responsible for the decision to carry out . . . "terror bombing" had grown **up** with . . . the bombing offensive. This was undoubtedly at least partly attributable to the nature of the frequent public and in some cases private pronouncements which Sir Archibald Sinclair found it his duty to make. In these he did not concede that one of the objects of area bombing was the reduction of civilian and especially industrial morale by the bombing of housing and public utilities and so, of course, of the populations themselves. He usually, and, on public occasions, invariably, suggested that Bomber Command was aiming at military or industrial installations as, of course, it sometimes was.[59]

For example, the Secretary of State for Air said at various times:

The objects of our bombing offensive in Germany are to destroy the capacity of Germany to make war and to relieve the pressure of the German Air Force and Armies on our Russian allies. No instruction has been given to destroy dwelling houses rather than assault factories, but it is impossible to distinguish in night bombing between the factories and dwellings which surround them.[60]

On **3** November 1943, the question was put to him:

In view of the fact that our bombing is discriminatory and that we seek only industrial targets, whereas the German bombers over this country go for civilian targets in a large percentage of cases, do not these figures afford further proof

[57] *Id.* at **71.**
[58] *Id.* at **14.**
[59] **3** *id.* at **114.**
[60] 379 H.C. DEB. (5th ser.) **1364 (1943);** *cf.* **388** H.C. DEB. (5th ser.) **155 (1943); 395** H.C. DEB. (5th ser.) **337–38** (1943).

> of the desirability of concentrating our heavy bombers and those of the United States here on destroying the war production of the enemy? [61]

Sinclair replied ambiguously that "certainly all our bombing attacks are directed to the destruction and dislocation of the German war machine."

Amazingly, after the conquest of the German Air Force which had been necessary for D-Day, the renewal of the Battle of Berlin was projected in July of 1944 not as against industry but as against morale. There was one suggestion to obliterate towns of 20,000 population but this was said to effect too small a portion of Germany. The policy did lead to the attack on Dresden in February 1945, the climax of the night area offensive.[62] After the attack, the public outcry was so great that on 28 March 1945, the Prime Minister addressed a minute to General Ismay and the Chief of the Air Staff:

> The destruction of Dresden remains a serious query against the conduct of Allied bombing. I am of the opinion that military objectives must henceforward be more strictly studied in our own interests than that of the enemy.
>
> The Foreign Secretary has spoken to me on this subject, and I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction, however impressive.[63]

Due to pressure from the Air Staff, Churchill withdrew the minute and reissued it on 1 April 1945, specifying only that methods be "reviewed from the point of view of our own interests." [64]

On the other side of the world, the experts were slow to authorize area techniques in Japan. But the temptation was too great. Where 15 leading RAF area targets in Germany had contained only about 12.3 percent of greater Germany's total labor force, 14 leading Japanese urban areas contained 42.5 percent. Industry was more centralized as well, *i.e.*, 40 percent of aircraft engine production was located in one city.[65]

On 9–10 March 1945, 16 square miles of Tokyo were set ablaze with 78,000 Japanese killed. As one author phrased it:

> With such obliteration of cities as accepted mode of warfare on both sides, it was difficult for most military chieftains to believe that a new weapon of destruction presented ethical questions not found in TNT and the fire bomb.[66]

The ground had been well prepared for the use of the atomic bomb. There was a consistent recognition of some standard to be followed in

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[61] 393 *id.* at 641.
[62] See 3 WEBSTER & FRANKLAND, *op. cit. supra* note 20, at 52-55, 108–09.
[63] *Id.* at 112.
[64] *Id.* at 117.
[65] HAUGHLAND, THE AAF AGAINST JAPAN 451 (1948).
[66] KNEBEL & BAILEY, NO HIGH GROUND 98-99 (1960).

bombardment of cities, sametimes recognized as quite stringent. Nevertheless, the appeal to the undoubted crimes of the enemy led to so-called reprisals by Great Britain and the United States and then to an area bombing policy which was a real concession to the attitude that the end justifies the means.

Unfortunately, the means were ill-adapted to the avowed pragmatic purpose. The United States Strategic Bombing Survey concluded that area bombing was ineffective to achieve its ends.[67] More amazingly, the British Bombing Survey Unit agreed, although the British had expended one-half their effort in area bombing,

> On the evidence, they concluded that "area bomhing against German cities could not have been responsible for moie than a very small part of the fall which actually had occurred in German production by the spring of **1945**, and . . . in terms of bombing effort, they were also a very costly way of achieving the results which they did achieve."[68]

Reich Minister Speer on 1 December 1944 said:

> You must realize that those people of the enemy who work out the plans for the economic bombing attacks know German industry very well and that there is here a clever and far-reaching planning in contrast to our earlier raids on England. We have been lucky in that the enemy did not make niethodical use of this detailed planning unti! the last half or three-quarters of this year and that before that he gave us enough time.[69]

Speer confirmed these observations in interrogations after the War. To him, the night attacks against city centers were "incomprehensible" because the effects on industry were slight. Even when attacks were directed on industrial areas, and damaged to plants more widespread, the damage was not enough for destruction. The effect of raids like Cologne and Hamburg was primarily in their shock effect. But even Hamburg recovered speedily.[70]

In an interrogation on 18 July 1945, Speer went on to say:

> In spite of all this, however. the Allied air attacks remained without decisive success until early **1944.** This failure, which is reflected in the armaments output figures of **1943** and **1944,** is to be attributed principally to the tenacious efforts of the German workers and factory managers and also to the haphazard and too scattered form of attack of the enemy *who until the attacks on the synthetic oil plants based his raids on no clearly recognisable economic planning.*
>
> . . . .
>
> The American attacks, which followed a definite system of assault on industrial targets, *were by jar the most dangerous. It was in fact these attacks which caused the breakdown oj the German armaments industry.* The night attacks did not succeed in breaking the will to work of the civilian population."

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[67] Quoted in 4 WEBSTER & FRANKLAND, *op. cit. supra* note **20,** at **48.**
[68] *Id.* at **49.**
[69] *Id.* at **358.**
[70] *Id.* at **375.**
[71] *Id.* at **380, 383.**

V. THE DEVELOPMENTS OF RULES AFTER WORLD WAR II

After World War 11, there has been little official development in the law regarding bombardment of civilians. But there has been a strange verification. At Nuremberg, it was stated by Sir David Maxwell-Fyfe:

> These last documents seem to raise quite clearly the issues of *tu quoque:* If the Reich committed breaches of the laws and usages of war, other people did the same thing. The submission of the Prosecution is that that is entirely irrelevant. The standard is laid down by the conventions and it is no answer, even if it were true that someone else had committed breaches. . . .[72]

And Mr. Justice Jackson said somewhat the same:

> If Your Honor please, I believe it is a well-established principle of international law that a violation on one side does not excuse or warrant violations on the other side. There is, of course, a doctrine of reprisal, but it is clearly not applicable here, on any basis that has been shown.[73]

In the *Hostages Trial,* the Tribunal concluded that the "rules of international law must be followed even if it results in the loss of a battle or even a war." [74]

Despite all the inhibitions on air warfare pointed out above and despite the resounding principles of the Nuremberg trials, air warfare had been used by the victorious Allies to an almost unlimited extent. Schwarzenberger has pointed out:

> It is significant that, in the British directive [of 29 October 19421, the bombing policy adopted is not justified on the ground of reprisals, but based merely on a *tu quoque* argument. It is even more relevant that neither the Indictment leading to the trials of the German major war criminals before the International Military Tribunal at Nuremberg nor the Judgment itself deals expressly with the question of the legality of German air warfare or the most indiscriminate of all known forms of warfare, that is to say, the German V-weapons. . . .[75]

Whatever rules had exercised an inhibiting effect on the policy makers were highly confused to have allowed the situation to come to this pass. Atomic weaponry has made specification of inhibiting factories even more difficult. Army Field Manual 27-10 of July 1956 has already laid down the applicable lack of law:

> The use of explosive "atomic weapons" whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.
>
> . . . .
>
> There is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate objectives.[76]

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[72] 8 INT'L MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS 178–79 (1947).
[73] 9 *id.* at 188.
[74] Quoted in SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 212 (1959).
[75] SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS 20–21 (1958).
[76] U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, THE LAW OF LAND WARFARE 18, 20 (1956).

Interestingly enough, Article *25* of the Hague Rules for Land Warfare is specified in the Army Field Manual by an explanation relating to the naval rules:

> Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.
>
> . . . .
>
> Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property must not be out of proportion to the military advantage to be gained."

The United States Air Force apparently has published nothing on the subject of the legal protection of civilians from bombardment. Rather, the mission of strategic operations was broadly defined.[78]

The International Committee of the Red Cross drew up draft rules which were submitted to the nations for consideration.[79] Six out of 10 proposals to amend Article 14 relating to blind weapons were to prohibit such weapons entirely. Even so, General Gruenther, representative of the United States for the American Red Cross said that Articles **8,** 9, 10 and 14 taken together "can be considered as virtually prohibiting the use of atomic weapons in war." [80] Mr. Siordet, Vice President of the International Committee of the Red Cross set the tone when he said:

> The ICRC knows that in a conflict the preservation of a country's safety may face it with harsh necessities. . . On the other hand, its mission . . . is to proclaim and ceaselessly reaffirm the fact that humanity also has its necessities.[81]

The rules were constructed on the idea that the Hague Rules, although not completely modernized, expressed principles "which, in the absence of any more suitable code of rules, *are and remain valid at all times.*"[82]

Finally, to bring one development down to 1963, the policy of counterforce is being enunciated in today's war councils. This policy is not law but it is based on a fundamental need for rationalization in conflict. Dr. Alain Enthoven, Assistant Secretary of Defense, has said:

> In the nuclear age, military force will be too dangerous to use if our objectives are not carefully chosen and limited at each step of a conflict, and if the force cannot be used in a controlled and deliberate way to achieve precisely the objectives being sought. To fight for unlimited objectives, or to fight in an uncontrolled way would almost surely bring on almost unlimited destruction.

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77 *Id.* at 19.

78 U.S. DEP'T OF AIR FORCE, MANUAL 1–8, STRATEGIC AIR OPERATIONS **2** (1954).

79 See INT'L COMM. OF THE RED CROSS, FINAL RECORD COSCERNING THE DRAFT RULES FOR THE LIMITATIOS OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 141 (1958).

80 *Id.* at **37.**

81 *Id.* at 9.

82 DRAFT RULES 53–54.

> Moreover, when force is being applied, the military action must not be allowed to control events and compel the President's decisions; rather, it should be the other way around. . . .
>
> This belief may be contrasted to the view that "peace is peace and war is war," and in war military necessity is the only valid criterion for decision. . . . The President must be free to weigh the requirements of the military commander against other requirements. . . .
>
> . . . .
>
> Doubtless questions will arise in your minds as to whether nuclear war can and should be limited and controlled. First can it? The answer depends on our will to make it so.[83]

VI. THE THEORIES

Men such as Liddell Hart and Walter Lippman have pointed out that the modern democracies seem to be going the way of the Greeks. The democratic system brakes preparations for war but once passions are aroused, then no control exists. So it was that the theory of the Independent Air Force won out over the idea of precision bombing in World War II.[84]

One of the better authors on this subject has given almost a totally pragmatic cast to his approach to the problem of the protection of civilians:

> The elements which form the basis of warfare rules fall into two main categories: a dominating group of military interests and a minor group growing out of "social sanction." This dominating group of military interests is bound up with state security and is motivated solely by utility. Its one standard is effectiveness. Checks on this effectiveness never come from within the group. The few restraints in force come from without from the common culture of the time expressed as a social sanction.[85]

Although the prediction was made before World War II that one of the main agencies of war would be poison gas,[86] the social sanction, or the fear of reprisal, stopped the use of gas. There is a ferment today, even apart from the Ban the Bombers, which may lead to the avoidance of planned use of nuclear bombs on cities—the needs for tactical weapons against armies,[87] the realization that exaggerated nationalism feeds the immoral use of technology,[88] the prophetic voices of religious leaders.[89]

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[83] Address by Asst. Sec. of Defense Alain C. Enthoven, before the Loyola University Forum for National Affairs, Los Angeles, Calif., 10 Feb. 1963.

[84] See LIPPMAN, ESSAYS IN THE PUBLIC PHILOSOPHY 23–24 (1955); LIDDELL HART, *op. cit. supra* note 29, at 319–20; A. ARMSTRONG, UNCONDITIONAL SURRENDER 163–64 (1961).

[85] ROYSE, AERIAL BOMBARDMENT 1 (1928).

[86] See Quindry, *Aerial Bombardment of Civilian and Military Objectives,* 2 J. AIR L. & COM. 474 (1931).

[87] See Moriarity, *Technology, Strategy and National Military Policy,* in MORALITY AND MODERN WARFARE 34, 53–51 (Nagle ed. 1960).

[88] See T. Murray, *Morality and Security: The Forgotten Equation,* in *id.* at 58, 59; Mumford, *The Morals of Extermination,* in BREAKTHROUGH TO PEACE 17–18 (New Directions paperback 1962).

[89] Merton, *Peace: A Religious Responsibility,* in BREAKTHROUGH TO PEACE 103 (New Directions paperback 1962).

The basic problem for international lam has been well posed by Walter Stein:

> In the normal run of the world, force is a right and necessary condition of order and humane existence. We cannot imagine a world that could not, man being what he is, require a measure of physical power, to restrain abuses of physical power. . . . Yet it is precisely at this moment of extreme need for physical protection that effective physical force seems to elude us, beyond its ultimate tolerable limits.[90]

In this context, the fight for international law takes substance. Granted that the Hague Rules protecting undefended cities except for military objectives have an old-fashioned cast, the rules did point the way to certain solutions by way of certain principles. Even the **1923** Draft Rules were too tightly drawn but they did give adequate guidelines which would have been better operational policy than that actually followed in World War II. Royse with all the cynicism of his utilitarianism gives a more practical guide as to what must be done. The policy makers for the military must set up the military posture in a fashion which is directed against the military force of the enemy.

With competing world systems, morality cannot be written into law because the structure cannot bear the strain. The principle of the inviolability of noncombatants is still a principle but not one that underlies the law of war. As one author has put it, the conceptual basis for a law of nuclear war must be that of legitimate military necessity.[91] It would seem, however, that legitimate military necessity could well be immoral unless reference is made to something outside of the structure of international military law. Legitimate military necessity would seem to take its reference from within the military system. Legitimate military necessity has been defined as:

> All measures immediately indispensable and proportionate to a legitimate military end, not prohibited by the laws of war or by the natural law, taken on the decision of a responsible commander subject to judicial review.[92]

This seems to be a circular definition because to appeal to the natural law is to go back to the "humanitarianism" originally rejected by the author.

During World War 11, area bombing could well have been subject to the laws of proportioiiality **up** to a point, since it could have been conceivably argued that there was no other way to attack German industry. The argument would not have been valid because before D-Day direct attacks were made on civilians and after D-Day, the area bombing

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[90] Stein, *The Defense of the West*, in BREAKTHROUGH TO PEACE **158** (New Directions paperback **1962).**

[91] W. O'Brien, *Legztimale Military Necessity in Nuclear War*, **2 WORLD POLITY 40–41 (1960).**

[92] W. O'Brien, *The Meaning of Military Necessity in International Law*, **1 WORLD POLITY 174–75 (1957).**

policy was continued although it was no longer needed to protect operational safety. The Germans stated that the heavy raids were most dangerous because of their shock value when there was a sudden step-up in activity. This was possibly the greatest effect of the atomic bonibs; they did help avert bloody land battles which would have killed many niore Japanese, let alone Americans, and would have left a path of hate across Japan.[93] Should both sides have the atomic bomb, the argument of proportionality diminishes because there is a vast possibility that the use of such weapons will have no rational connection with the end of a war, only with the beginning.

Schwarzenberger has rejected the notion that there are any law-creating processes, relevant legal principles or relevant individual rules to control the use of atomic weapons, let alone ordinary bombs.[94] He conies to the conclusion that the protection of the enemy civilian population is limited to those who are not connected with the war effort, and are remote from target areas.[95] It is likely that his conclusion is influenced by a presupposition:

> [T]he first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanised barbarism.
>
> . . . He must be willing to consider without fear or favour any changes in the structure of existing world society, however radical, which may be required to break the vicious circle of our system of world power politics in disguise.[96]

It is submitted that a limited international law is today without power to control war by laws of war, as is indicated by aerial bombing of civilian populations. Schwarzenberger's conclusion can only lead to the attempt to make it policy that there must be a world government with a legal monopoly of force. Long range and idealistic as such an attempt is, there is no other substitute but cold war.

PAUL J. GODA*

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93 *Cf.* U.S. STRATEGIC BOMBING SURVEY, JAPAN'S STRUGGLE TO END THE WAR 8, 12 (1946); *cf.* the revelations of Lt. Col. Masataka Iwata, *Japan War Revelation,* San Jose Mercury, 14 Aug. 1965, p. 8, on the continuation of war if the atom bomb had not been dropped.

94 See SCHWARZENBERGER, *op. cit. supra* note 75, at 7-11.

95 See *id.* at 22.

96 *Id.* at 58.

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SELECTIVE SERVICE IN 1965*

More than at any other time since 1951, the year 1965 has been one of intense and varied activity within the Selective Service System. There have been increased calls for men tripling and even quadrupling prior calls. Physicians, dentists and veterinarians have been reached in increasing numbers. Married men have ceased to be deferred, and students no longer comprise a relatively favored group free from military service. Considerable litigation has also occurred during the year.

The purpose of this study is to seek to bring up to date several prior articles in this publication by this writer discussing Selective Service through 1964.[1] We shall consider legislative and other changes, vital litigation, the calls for registrants in the healing arts, students, the Reserves, and certain emergency changes which might arise in the near future.

I. INCREASED CALLS FOR MEN

The following Classification Picture shows the total number of registrants in each Selective Service classification on a nation-wide basis and discloses the various manpower classifications within the Selective Service System as of 1 July 1965:[2]

Classification Picture, 1 July 1965

Class		Number
Total		30,462,513
I-A	and I-A-O	
	Examined and qualified	164,294
	Not examined	355,784
	Not available for induction or examination	350,801
	Induction or examination postponed	5,142
	Married, 19 to 26 years of age	554,884
	26 years and older with liability extended	69,138
	Under 19 years of age	465,355
I-Y	Qualified only in an emergency	1,928,023
I-C		
	Inducted	239,720
	Enlisted or Commissioned	1,609,528

*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] See *Selective Service: A Source of Military Manpower*, 13 MIL. L. REV. 35 (1961); *Selective Service Litigation Since 1960*, 23 MIL. L. REV. 101 (1964); *Selective Service Ramifications in 1964*, 29 MIL. L. REV. 123 (1965).

[2] Selective Service, vol. 15, No. 9, September 1965, p. 2.

	Class	Number
I-O		
	Examined and qualified	2,566
	Not examined	5,873
	Married, 19 to 26 years of age	3,053
I-W		
	At work	2,448
	Released	5,721
I-D	Members of reserve component	1,020,149
I-S	Statutory deferment	
	College	2,321
	High School	550,288
II-A	Occupational deferment (except agricultural)	176,205
II-A	Apprentice	17,507
II-C	Agricultural deferment	19,046
II-S	Occupational deferment (student)	1,655,713
III-A	Dependency deferment	3,084,697
IV-A	Completed service: Sole surviving son	2,333,528
IV-B	Officials	52
IV-C	Aliens	9,932
IV-D	Ministers, divinity students	86,363
IV-F	Not qualified	2,424,945
V-A	Over age liability	13,320,437

On 28 July 1965, President Lyndon B. Johnson announced at a press conference considering the subject of Vietnam that Department of Defense requisitions upon the Selective Service System would be doubled to 35,000 beginning with September 1965.[3] As an indication of the effect of this decision, the following table is included. The table shows the total number of registrants delivered to the Department of Defense during the calendar year 1965.

January	5,400
February	3,000
March	3,900
April	13,700
May	15,100
June	17,000
July	17,100
August	16,500
September	27,400
October	33,600
November	38,350
December	48,224 [4]

The majority of the inductees went to the Army. However, the Navy asked for 4,600 inductees in October 1965 and 4,000 in November.[5] These were the first men sought by the Navy through Selective Service

[3] See 1965 DIR. OF SEL. SERV. ANN. REP 1 [hereafter cited as 1965 REPORT].

[4] Data extracted from vol. 15 of Selective Service for each month, and the 1965 REPORT 2.

[5] 1965 REPORT 1.

since 1956. The Marine Corps requested 4,050 inductees for November and 5,024 for December.[6]

By way of comparison, the following data indicate total Selective Service deliveries of men, calls and inductions for the last 17 fiscal years:

Fiscal Year	*Calls*	*Deliveries*	*Inductions*
Total	3,093,943	3,625,145	3,230,234
1949	35,000	31,800	30,129
1950 (just before Korea)	0	0	0
1951	550,397	602,246	587,444
1952	367,288	408,781	381,006
1953	523,000	589,308	560,798
1954	251,000	289,096	268,018
1955	211,000	232,407	213,716
1956	136,000	149,474	136,580
1957	175,000	196,875	179,321
1958	124,958	144,026	126,369
1959	109,000	137,745	111,889
1960	89,500	130,119	90,549
1961	58,000	85,274	61,070
1962	147,500	194,937	157,465
1963	70,000	98,971	71,744
1964	145,000	190,496	150,808
1965	101,300	137,590	103,328 [7]

II. SELECTIVE SERVICE BOARDS

What is the instrumentality by which Selective Service obtains men in response to Department of Defense requisitions? The local board is the basic contact with the registrant. At the local board level, a man subject to the operation of the Universal Military Training and Service Act [8] is registered, ordered to physical examination, classified, and, if otherwise qualified, ordered to report for induction at an Armed Forces Induction Station. The following show the local boards' activity through June 1965:

Local Boards	4,061	in the United States
Local Board Members	16,372	uncompensated
Advisers to Registrants	8,447	uncompensated
Medical Advisers to L.B.s	7,549	
Medical Advisers to State Directors	428	
Living Registrants, all ages	30,676,300	
Average per Local Board	7,554	
Registrants Classified, all ages	30,462,513	
Registrants Inducted Since 1948	3,230,234	
Average Inductions per L.B	795 [9]	

[6] 1965 REPORT 2. The Navy and the Marine Corps are prone to cancel or reduce a request through Selective Service dependent upon the success of recruitment in the previous month.

[7] 1965 REPORT 26.

[8] See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 (1964) [hereafter cited as the Act].

[9] 1965 REPORT 48–50.

An extraordinary feature in Selective Service is the great disparity of uncompensated personnel working for the System contrasted with compensated personnel. There was a total of 40,709 uncoinpensated workers. The total compensated employees were 3,746 full tinie and 1,841 part time employees.[10]

Perhaps the most distinctive feature of Selective Service is the participation of a relatively large number of uncompensated skilled personnel. This is not a recent development but has been a feature since the 1940 statute.[11]

III. LEGISLATIVE CHANGE

The present Act [12] was extended by Congress from 1 July 1963 for four years ending 1 July 1967.[13]

Amendment of the Act has been relatively infrequent. Public Law 89–152, approved 30 August 1963,[14] amended section 12(b)(3) [15] of the Act to penalize any person who *knowingly destroys* or *knowingly mutilates* any certificate, *i.e.*, of registration or nonresidence, "or any other certificate." The adoption of this amendment closely followed in time the publicity aroused by instances of alleged burning of draft cards (registration certificates) by registrants. Before the amendinent, section 12(b)(3) applied only to any one who forges, alters, or in any manner changes a certificate.

The question has arisen as to the possible effect of Public Law 89–332, approved 8 Sovember 1965,[16] which provides for the right of persons to be represented by counsel or others in matters before federal agencies. The effect, of the statute is to broaden the appearances of counsel whose names do not regularly appear upon the lists of agency practitioners. Section 1624.1(b) [17] of the Selective Service Regulations provides:

> No person other than a registrant shall have the right to appear in person before the local board, but the local hoard may, in its discretion, permit any person to appear before it with or on behalf of a registrant:. . . . [N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel.

Although litigation niay prove necessary to settle the issue with finality, it would seem that Public Law 89–332, above, was not intended to apply in the instance of a Selective Service registrant. The local board is composed of citizens of his county of residence, and, presumably,

[10] 1965 REPORT 48–49.
[11] See Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.
[12] See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 451 (1964).
[13] See 77 Stat. 4 (1963), 50 U.S.C. App. § 467(c) (1964).
[14] See 79 Stat. 586 (1965), 50 U.S.C. App. § 462(b)(3) (1965 U.S. CODE CONG. & AD. SEWS 3192).
[15] Act of 24 June 1918, ch. 625, § 12(b)(3), 62 Stat. 622.
[16] See 79 Stat. 1281 (1965 U.S. CODE CONG. & AD. SEWS 5859).
[17] See 32 C.F.R. § 1624.1(b) (1962).

his "neighbors" can best consider his personal status as a result of an informal meeting with the registrant in person.

IV. SPECIAL CALLS FOR PROFESSIONAL MEDICAL PERSONNEL

Registrants in the healing arts specialties are called under the general authority in the present law, section 4(a) and (i).[18] The provision permitting special calls of medical, dental, and allied specialists has been held constitutional.[19]

There has been marked activity in the impact of Selective Service upon physicians, dentists and veterinarians. In early 1965, there was a special call through the System for 1,085 physicians to enter active duty in July 1965. Five hundred ninety-five were allotted to the Army, 320 to the Navy, and 170 to the Air Force.[20]

At the end of June 1965, there were 158,518 professional registrants.[21] The breakdown by profession is as follows:

Physicians	107,707
Dentists	41,620
Veterinarians	9,19122

On 21 September 1965, the Department of Defense placed a special call for 1,529 physicians, 350 dentists and 100 veterinarians. The selectees were to enter active duty in January 1966.[23] In order to meet 1965 needs, 2,500 physicians were ordered to induction. This induced 900 physicians to enter Reserve Components after receiving their orders for induction.[24]

The local boards have been ordered to examine physically all physicians other than interns unless they have in fact been examined since 1 April 1965. Thus, an estimated 12,000 physicians will be examined. Likewise, the boards are considering the status of dentists and veterinarians born in 1937 or thereafter, and physical examinations are being given.[25]

A new factor of significance is that local boards are examining the status of *optometrists* of whom there is a serious shortage in the Army and Air Force.[26]

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[18] 64 Stat. 826 (1950), as amended, 50 U.S.C. App. § 454(a), (i) (1964).
[19] Bertelsen v. Cooney, 213 F.2d 275, (5th Cir.), *cert. denied*, 348 U.S. 856 (1954).
[20] 1965 REPORT 27. In 1964, 1,175 physicians were inducted: 650, Army; 325, Navy; and 200, Air Force. See Selective Service, vol. 14, No. 4, April 1964, p. 4. In 1963, Department of Defense requested 1,250 physicians for the Armed Forces. See 1963 DIR. OF SEL. SERV. ANN. REP. 22.
[21] 1965 REPORT 27.
[22] 1965 REPORT 76–77.
[23] Records of Selective Service System, Washington, D.C.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*

A foreseeable event in the near future is a special call directed to registrants who are licensed as registered nurses. The Department of Defense has disclosed that there is a shortage of nurses in the Armed Forces. Each State Director of Selective Service was requested to report to National Selective Service Headquarters by 1 February 1966 the number of registered male nurses by each classification and by year of birth in each classification. State Boards of Registration for nurses are to be asked for full information in order to identify male nurses.[27]

V. LITIGATION IN 1965

Extensive litigation has resulted during the calendar year and mainly concerned with conscientious objectors or ministerial status.

In United States *v. Capson*,[28] it mas held that there was no direct judicial review of a local board's classification for Selective Service purposes. Questions of classification could be raised by habeas corpus proceedings or as a defense to a prosecution for failure to submit to induction. The court further found there was no right to the assistance of counsel in the administrative appeal from a classification. Courts were not to sit as "super-draft boards substituting their judgment on the evidence." In the ultimate court proceeding, the board's classification may be overturned only if it had no basis in fact. Here, the registrant had been plainly and fully advised as to his right to appeal his classification and was informed of the availability of an appeal agent.

An appeal from a conviction for failure to submit to induction was before the Seventh Circuit in United States *v. Stolberg*,[29] and the judgment was reversed. The court held that a registrant who was opposed to combat or the killing of human beings was entitled to a conscientious objector classification (I–O) although he was uncertain whether or not he believed there was a Supreme Being or an after-life.

Stolberg, decided in June 1965, seems to give effect to the Supreme Court decision in United States *v. Seeger*,[30] resolved in March 1965, and affirmingthat any belief although slight in a Supreme Being was sufficient to satisfy the requirements of section 6(j)[31] of the Act which refers to "an individual's belief in a relation to a Supreme Being."

In Fleming *v.* Cnited *States*,[32] decided in April 1965, the Tenth Circuit reversed a conviction for willful refusal to submit to induction. Although the registrant, claiming to be a conscientious objector, may have been influenced more by sociological and philosophical views than by religious

[27] Sel. Serv. System, National Hqs., State Director Advice No. 741, 30 Dec. 1965, issued to all state directors.

[28] 347 F.2d 959 (10th Cir. 1965).

[29] 346 F.2d 363 (7th Cir. 1965).

[30] 380 U.S. 163 (1965).

[31] See 62 Stat. 609 (1948), as amended, 50 U.S.C. App. § 456(j) (1964)

[32] 344 F.2d 912 (10th Cir. 1965).

beliefs, he was entitled to exemption as he had some belief in a Supreme Being. However, the burden at trial is on the registrant seeking exemption which is a matter of legislative grace. Judicial inquiry is limited to determining whether there is any factual basis for the classification granted. Here, there was some evidence from the registrant who made out a prima facie case. The court, however, seems to have disregarded that when the registrant registered in **1957,** he did not claim to be a conscientious objector. He first advanced this contention *after* he was classified **I–A** in 1960.

The Third Circuit, in *United States v. Sturgis,*[33] affirmed a conviction for willfully failing to report for assignment to perform civilian work in lieu of induction. The court saw a substantial basis in fact and in the record for the local board's refusal to give a member of ,Jehovah Witnesses a ministerial exemption (IV–D) or to allow a conscientious objector exemption (I–O). The court noted that Congress did not extend to the administrative action of a local board, the customary extent of judicial review which prevails under other statutes. The courts are not to weigh the evidence. A decision by a local board is final if there is some basis in fact to substantiate the classification allowed. Here, a failure by the board to post the names of advisers conspicuously, standing alone, and despite an Executive Order, would not justify setting aside a conviction for failure to report for civilian work in a state hospital. The burden was upon the registrant to show actual prejudice as a result of the failure to post. Further, the denial of counsel at a hearing before the board is not a conflict with due process.

A conviction for failure to report for civilian work in lieu of induction was affirmed in *United States v. Norris.*[34] The defendant, a Jehovah's Witness, worked 40 hours weekly in secular employment as a shipping clerk earning **$72.14** net. Out of **93** members in the congregation, it was claimed that **8** were ministers, or a ratio of one minister for every 11 members. The court concluded that the ministerial exemption is a narrow one, not available to all members of the Jehovah's Witnesses solely by reason of their membership and despite their religious belief that each member is a minister. It was for the Appeal Board to decide whether the defendant sustained the burden that his removal would leave the "flock without a shepherd," and that ministerial work was his vocation and not his avocation. The record before the Appeal Board had some basis in fact for the denial of exemption and the record was not one of mere suspicion and speculation. The evidence established that the defendant knew of the order to report and that he deliberately failed to obey. It is not an issue for a jury, but rather for the court, whether a denial by the board of ministerial exemption was improper. **Any**

[33] 342 F.2d 328 (3d Cir.), cert. *denied,* 382 U.S. 879 (1965).
[34] 341 F.2d 527 (7th Cir.), cert. *denied,* 382 U.S. 850 (1965).

questions as to the legality of the work order for civilian employment in lieu of induction, are for the court and iiot for a jury.

In *DeRemer v. United States*,[35] the Eighth Circuit affirmed a conviction for refusing to submit to induction. The defendant. claiming to be a conscientious objector, was employed in a factory entirely engaged in defense work for the Savy. The defendant claimed that he was not furnished with a facsimile copy of the Justice Hearing Officer's Report. He did receive a resume of the adverse evidence against him.[36] The court held that he was not entitled to a verbatim copy. Further, the Appeal Board could consider that the defendant willingly engaged in defense work as this was a factor bearing upon exemption from combatant service. Any possible prejudice against a registrant before a local board is cured by a fair consideration of his claim at the .Appeal Board level.

The Ninth Circuit affirmed a conviction for failure to submit to induction.[37] The defendant first claimed to be a coiiscientious objector, and, after being classed I–A, asserted that lie was a .Jehovah Witness minister. He did not appeal from the local board to the hppeal Board. The court deterniined that he was not entitled to a judicial review of the local board action in the absence of an administrative appeal.[38] In a request by the defendant to the local board to reopen his case and reclassify him, the board could consider that the registrant had not appealed from the local board classification.

Feldman v. Local Board No. 22[39] was an action to ***enjoin*** the local board and the New York City Director of Selective Service from ordering the induction of the plaintiff-registrant. The plaintiff had been an active reservist whose perforinance of duty with his Army Reserve unit was unsatisfactory and who n-as receiving accelerated inductioii by his board into the Arniy under the provisions of section 1631.8(a) of the Selective Service Regulations.[40] The court dismissed the proceeding for lack of jurisdiction in the absence of any enabling statute. It found no jurisdictional basis to act under the Declaratory Judgments

35340 F.2d 712 (8th Cir. 1965).

36 In Simmons v. Cnited States, 348 U.S. 397 (1955), it was held that the omission of the Justice Department to furnish to a registrant a fair resume of all adverse information in the FBI report was reversible error.

37 Woo **v.** United States, 350 F.2d 992 (9th Cir. 1965).

38 In the fiscal year 1965, there were 9,741 appeals to the Appeal Boards contrasting with 9,371 appeals in fiscal 1964. Within the Selective Service System. there are 95 Appeal Boards plus 23 additional Appeal Board Panels. In 1965, there were 1,963 appeals to the President. 1965 REPORT 21, 66.

The presidential appeal is not a matter of right in the registrant, but can be taken only when one or more of the members of the Appeal Board have dissented from the classification action in his instance. In other words, there must have been a divided vote in the Appeal Board. See 32 C.F.K. § 1627.3 (Supp. 1965).

39 239 F. Supp. 102 (S.D.N.Y.1964).

40 See Exec. Order No 11188, 29 Fed. Reg. 15563 (1964).

Act. Nor was there jurisdiction to act under the Administrative Procedure Act,[41] since that Act expressly does not apply to decisions made pursuant to the Universal Military Training and Service Act.[42]

In *United States v. Garth*,[43] the defendant had been indicted for offenses under the Act. He moved to dismiss on the ground that his Selective Service classification was unreasonable under the facts and he was discriminated against as a Negro. The court held that the defendant could not challenge his classification as he had failed to appeal administratively from the local board. The court noted that the defendant had been delinquent for 4 years before the time that he registered belatedly. There was no discrimination by the grand jury against him as a Negro since four Negroes sat on the grand jury and six Negroes had been summoned to the same panel. The method followed by the jury commissioner was fair and there was no exclusion of any race.

In *United States v. Prue*,[44] the defendant, convicted for failure to report for induction, had failed to appear on the date specified on the induction order. He testified that he intended to report on some other future date. The court held that when the defendant failed to report on the due date, he was under a continuing duty to report from day to day thereafter which he did not do. "[H]e has no right to decide for himself the time and place that he will enter the Service." [45] A motion for a new trial was denied despite a showing that when the defendant eventually did report and was physically examined, he was rejected by the Armed Services.

Dyer v. Halston Mfg. Co.[46] was a proceeding for declaration of relief for reemployment rights under the Act. The district court received evidence and determined that on the date that the plaintiff, a string knitter, entered military service, she did not have with her employer a position to which she could return after the termination of military service. She was laid off prior to entering the service, and the craft of string knitting was eliminated at the employer's plant between the time of entry upon military service and the date of return. There was some evidence that the plaintiff's work did not measure up to company standards. The court held that section 9 [47] of the Act only required the eniployer to restore the employee to the position she had when she entered the armed forces, and the Act does not create re-employment rights in an employee which are superior to the rights of other employees.

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[41] See 5 U.S.C. § 1009.
[42] See 62 Stat. 623 (1948), as amended, 50 U.S.C.App. § 463(a) (1964).
[43] 239 F. Supp. 164 (M.D. Ala. 1964).
[44] 240 F. Supp. 390 (D Neb. 1965).
[45] *Id.* at 391.
[46] 237 F. Supp. 287 (D. Tenn. 1964).
[47] See 62 Stat. 614 (1948), as amended, 50 U.S.C. App. § 459 (1964).

The conclusions which may be drawn from the extensive litigation in 1965 are: (1) There is no right to counsel before the local board of the Appeal Board. *(2)* In the absence of an appeal to the Appeal Board, the registrant subsequently cannot challenge his classification in any court proceedings. (3) A board classification will be overturned only where it has no basis in fact within the record. **(4)**Even a slight belief in a Supreme Being is sufficient to support a conscientious objection claini, taken together with other required elements of proof. (5) The ministerial exemption (IV-D) is strictly construed against the claimant.

VI. THE RESERVES

A. *STANDBY RESERT'ES*

The Director of Selective Service has the sole responsibility for determining the availability of members of the Standby Reserve for recall to active duty in time of war or national eniergency. This group is coniposed of unorganized reserve personnel and is subject to no legal limitation as to size. There is no provision for pay, allowances or promotion for reservists in this category. In brief, it is coniposed (1) of reservists who have conipleted their Ready Reserve obligations and did not request retention, and 12) of registrants screened out of the Ready Reserve by way of transfer to the Standby Reserve.[48] Part 1690 of the Selective Service Regulations[49] contains the applicable provisions concerning the Standby Reserve.

A separate system of classification is prescribed for standby reservists in sections 1690.12-.14a[50] of the Selective Service Regulations. The categories are:

I-R: Reservist available for order to active duty.
II-R: Sot available for recall because of civilian occupation.
III-R: Sot available because of extreme hardship to dependents.
IV-R: Sot available.

The Armed Forces notify Selective Service of each reservist released or assigned to the Standby Reserve. The local board then classifies the registrant. His availability status is reported to his service branch, and his status is reviewed annually.

Selective Service has records on ***3.3*** million reservists who have at some time been standby reservists, and the current reservists in this category total 316,612 on 30 June 1965.[51] A continuing audit is made of the records of all enlisted standby reservists to the end that a reservist may be removed by the local board at the expiration of his reserve obligation.[52]

[48] 1964 DIR. OF SEL. SERV. ANN. REP. **23**
[49] See 32 C.F.H. § 1690 (1962).
[50] See 32 C.F.R. §§ 1690.12-.14a (1962).
[51] 1965 REPORT 29.
[52] Sel. Serv. System, Operations Bulletin So. 273 (27 May 1965).

The efficacy of the Standby Reserve System is that the Armed Services utilize the accurate information received from the local boards in planning their readiness programs. Reservists pronounced available do not require rescreening in the event of an emergency. Literally, thousands of missing reservists have been located by Selective Service and the Services have been informed of their availability status.[53]

The numerical strength of the Standby Reserve is as follows:

	Total	I-R	II-R	III-R	IV-R	Not Determined
	516,612	192,624	70,814	172,327	47,122	33,725
Commissioned	162,787	52,092	35,206	57,559	12,815	5,115
Enlisted	353,825	140,532	35,608	114,768	34,307	28,610 [54]

3,464 women appear in the total 516,612, although they are not registrants.

B. *READY RESERVISTS*

As of 1 July 1965, there were 1,020,149 ready reservists in Class I–D, as shown by the Classification Picture, above. A factor in inducing satisfactory performance of duty by ready reservists is the effect of section 1631.8[55] of the Selective Service Regulations.

Section 1631.8 provides for the "priority induction" of any registrant who is a member of the Ready Reserve and who fails to serve satisfactorily with his unit or section. Such a reservist is reported to his local board which accelerates his early induction into the Arniy. Only 290 reservists were reported as unsatisfactory in their units in fiscal 1965.56 From 1957–1965, inclusive, there was a total of 7,647 accelerated inductions.[57] Obviously, the effect of section 1631.8 is a great incentive to satisfactory performance within a registrant's ready reserve unit and is a boon to **a** unit commander.

VII. STUDENTS

On 29 July 1965, Lieutenant General Lewis B. Hershey, Director of Selective Service, discussed Class II-S relating to students. The Director set forth:

1. The declining average age of involuntary induction during recent months has focused increased attention upon the classification of college students. When a local board questions a student's progress . . . the local board should request the registrant to supply a transcript of his credits , . . . With the information

[53] Today, 1 July 1965, pp. 6–7 (monogram of Sel. Serv. System).
[54] 1965 REPORT 30.
[55] See Exec. Order No. 11188, 29 Fed. Reg. 15563 (1964). See also note 40 supra and accompanying text.
[56] 1965 REPORT 28.
[57] *Ibid.*

contained in this document, the local board will be better equipped to make a judgment . . . as to whether the student should or should not be deferred.

2. Although the number of credit hours a student is currently enrolled in is helpful evidence, it alone usually is not adequate basis for either deferment or denial of a deferment.[58]

The reference by the Director to the "declining average age" of registrants is borne out by the age levels of inductees. During June 1964, the average age of an inductee was 21.8 years. at the end of June 1965, the average age was 21.2 years.[59] The large calls expected in 1966 will reduce the average age even further.

On 3 January 1966, the Director stated that if students are to be inducted, the "draft would first aim for those in the lower quarter of their class." In this regard, the Director would prefer to have the colleges inform the local boards of the "least promising students" rather than to have Selective Service conduct examinations.[60]

On 23 December 1965, General Hershey informed the Selective Service System that the Secretary of Defense had approved a change resulting in reduced mental standards for certain high school graduates who receive a score of 16 through 30 on the Armed Forces Qualification Test.[61]

A controversy has arisen over the alleged reclassification of students who have demonstrated against the draft. The following is from a letter by the Director, 15 December 1965, to the Chairman of the House Judiciary Committee:

> Any Selective Service registrant is deemed to be available for military service until his eligibility for deferment or exemption is clearly established to the satisfaction of the local board. The local board will receive and classify all information pertinent to the classification of a registrant, which is presented to it . . . .
>
> However, any deliberate, illegal obstruction of the administration of the law by a registrant cannot be tolerated.
>
> We must always distinguish between young men who engage in a legal demonstration of political views, and those who express those views by willfully violating the Selective Service law . . . .
>
> . . . [W]henever possible, a young man who violates the Selective Service law should be given an opportunity to enter the armed forces . . . . [N]o board shall be required to defer a student solely on the basis of test or class standing.[62]

On 11 January 1966, an official of the Department of Justice warned that the draft laws cannot be used to silence any "constitutionally protected" expression of views—such as student protests against national involvement in Vietnam.[63]

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[58] Sel. Serv. System, Operations Bulletin No. 275 (29 July 1965).

[59] 1965 REPORT 26.

[60] Washington Post, 4 Jan. 1966, p. A-7.

[61] Sel. Serv. System, Operations Bulletin No. 283, as amended (23 Dec. 1965).

[62] Letter to Representative E. Celler, 15 Dec. 1965, set forth in U.S. Sews & World Report, 10 Jan, 1966, p. 39.

[63] Washington Evening Star, 11 Jan. 1966, p. B-10.

Final determination would seem to rest with the local board which is the judgebn an individual basis whether a registrant should be deferred as a student.

VIII. MISCELLANEOUS

Executive Order No. 11241, effective 26 August 1965,[64] in effect, removed the deferment of married men without children. By that order, President Johnson amended the Selective Service Regulations to provide that registrants in Class I–A who *married after 26 August* would not be in a delayed sequence of induction. In other words, those who married after 26 August 1965 would be placed in the same category subject to an induction call with those who are single and between 19 and 26 years old. Those married on or before 26 August may be called only after the induction call category mentioned above is exhausted. On 10 September 1963, President John F. Kennedy had deferred married registrants who maintained a bona fide marriage relationship.[65] Fathers had been placed in a deferred category on 14 March 1963.[66] The removal of the married men's deferment will enlarge the pool of I–A men immediately available for induction to meet increasing draft calls.

The physical examination of 18-year-olds continued throughout 1965 in response to President Johnson's request expressed on 5 January 1964.[67] During the fiscal year 1965,348,372 youths were examined. Of this number, about two-fifths did not meet the physical, mental or moral standards required for induction, and these registrants were counseled and directed to any appropriate forms of rehabilitation.[68]

The status of Class I–Y registrants is being reviewed by the local boards. Class I–Y is comparatively new as it was created on 5 January 1962.[69] The class includes men now deferred on medical, mental or moral grounds, but who would be acceptable in the event of war or other emergency when acceptance standards are lowered. In a sense, Class I–Y is a reserve for a future Class I–A, and the I–Y men have been identified and indexed in advance of an emergency. On 1 July 1965, as shown by the Classification Picture, above, there were 1,928,023 registrants in Class I–Y. Formerly, these men would have been lumped into Class IV–F which includes rejected registrants.

On 28 December 1965, the Director ordered a redetermination of the acceptability of those I–Y registrants who were not otherwise I–A solely for failing to score 80 in the examination area of the Armed Forces

[64] See 30 Fed. Reg. 11129 (1965).
[65] *See* Exec. Order No. 11119, 28 Fed. Reg. 9865 (1963), as amended.
[66] See Exec. Order No. 11098, 28 Fed. Reg. 2615 (1963), as amended.
[67] Selective Service, vol. 14, No. 2, Feb. 1964, pp. 34.
[68] 1965 REPORT 4.
[69] See Exec. Order No. 10984, 27 Fed. Reg. 193 (1962), as amended.

Qualification Test. Such men will be promptly sent to the Armed Forces Examining Stations.[70]

In August 1964, the United States Ambassador to Vietnam in behalf of that government asked personnel of the Department of State to arrange for a specialist in Selective Service to study and make recommendations as to Vietnam's complex military manpower procurement operation. A specialist was provided and an extensive investigation was conducted. An analytical report on the situation in South Vietnam was prepared and suggestions made for objective improvement. The Premier of Vietnam through the Ambassador accepted the suggestions which were put into effect in 1965.[71]

IX. CONCLUSION

The year 1965 has shown a rapid response by Selective Service to the increasing demands being made upon the System by the Department of Defense. The healing arts specialists are being furnished in increasing numbers. Male registered nurses may soon be called. The removal of the deferment of married men has been a realistic adjustment to the need for an enlarged pool of I–A registrants. The Standby Reserve has been systematically classified and is now a reliable complement to the Armed Services Ready Reserve components. It is foreseeable that the local boards will closely scan student deferments and registrants with low academic grades should expect to be reclassified. There is an element of uncertainty in the status of student reclassification as the disgruntled student may cry discrimination.

Increasing litigation is inevitable as effecting conscientious objectors arid claimants for ministerial exemption.

Selective Service would seem to continue to justify the confidence of the American electorate as the System adjusts promptly to the demands upon it. The maintenance of Selective Service since 1948 is proving a most provident investment by the nation.

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[70] Sel. Serv. System, Operations Bulletin No. 286 (28 Dec. 1965).

[71] 1965 REPORT 5.

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