

# MILITARY LAW

# REVIEW

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HEADQUARTERS, DEPARTMENT OF THE ARMY

SEPTEMBER 1958

## PREFACE

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## THE WARNING REQUIREMENT OF ARTICLE 31(b) : WHO MUST DO WHAT TO WHOM AND WHEN?\*

by Major Robert F. Maguire\*\*

“No person subject to this chapter [Code] may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.”<sup>1</sup>

Article 31 of the Uniform Code of Military Justice throws a triangle of protection around accused persons. Subsection (a) incorporates the privilege against compulsory self-incrimination; subsection (d) proscribes the admission in evidence of involuntary confessions and admissions. However, subsection (b) provides an entirely distinct and more sophisticated protection. Concepts of compulsion, coercion, and unlawful influence or inducement and their effect upon the will of a subject are not in point. The sole relevant question is: As a matter of *fact*, was the subject given a proper and timely warning advising him of his Article 31 rights? It is the failure to recognize this apparently obvious proposition that has caused much unnecessary confusion in this area.

The drafters of the Manual included among the instances of “coercion, unlawful influence, or unlawful inducement” in obtaining a statement that it had been obtained without the subject having been warned of his rights under Article 31(b).<sup>2</sup> This language was most inappropriate as it ignored the clearcut distinction made by Congress in Article 31(d) excluding from evidence statements obtained “in violation of this article” and those obtained “through the use of coercion, unlawful influence, or unlawful inducement.” It is readily apparent that the first of these categories must apply to statements obtained without a warning and, therefore, that the absence of a warning does not, as such, have any application to the second category. If a warning has not been given, when required,

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<sup>1</sup> Art. 31(b), UCMJ, 10 U.S.C.831(b) (Supp. IV).

<sup>2</sup> Par. 140a, MCM, 1961.

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the resulting statement is by this very fact rendered inadmissible and it becomes unnecessary to determine whether the statement was also obtained in violation of the law of confessions.

However, the failure of the Manual to make any distinction between the two categories and the manner in which it purported to merge them into the one concept of "voluntariness" led some boards of review, in the early days of the Code, to believe that the absence of a warning is merely another factor to be considered in determining whether a statement was made voluntarily under the law of confessions.<sup>3</sup> An outstanding example of the effect of this original interpretation of Article 31(b) is found in a case where the Board cited a long line of Federal decisions holding that the mere fact that a suspect has not been warned of his rights under the fifth amendment does not render a confession involuntary under the law of confessions and concluded with the following statement :

" . . . This rule does not carry over into our military system, for the Congress in its wisdom has seen fit to clothe the soldier with a greater measure of protection than is afforded the ordinary citizen."<sup>4</sup>

Finally, in *United States v. Wilson*<sup>5</sup> the Court of Military Appeals gave independent significance to Article 31(b), stating that the policy underlying the Congressional mandate is "so overwhelmingly important in the scheme of military justice as to elevate it to the level of a 'creative and indwelling principle.'" <sup>6</sup> Although the requirement of a warning was treated apart from the law of confessions, there was no express recognition of the distinction. Then in *United States v. Williams*<sup>7</sup> the Court made a firm pronouncement that Article 31(b) extends the fifth amendment far beyond the privilege against self-incrimination and that the voluntariness of the statement is immaterial for this purpose.<sup>8</sup> Subsequently, it reaffirmed this principle, stating that although the purpose of the requirement of a warning is to avoid impairment of the constitutional guarantee against compulsory self-incrimination,<sup>9</sup> the former is not

<sup>3</sup> *E.g.*, CM 353954, Franklin, 8 CMR 513 (1952); CM 368180, Sherwood, 7 CMR 311 (1953); CGCM 9773, Griffin, 5 CMR 358 (1962). *Contra*, CM 361748, Smith, 10 CMR 262 (1953), *rev'd on other grounds*, 4 USCMA 369, 15 CMR 369 (1954). We are not concerned here with the use of the term involuntariness as a short-hand expression indicating the proof which is required in order to make a statement admissible.

<sup>4</sup> CM 363954, Franklin, 8 CMR 513, 517, *pet. den.*, 2 USCMA 673, 8 CMR 178 (1952), *recon. den.*, 2 USCMA 682 (1953).

<sup>5</sup> 2 USCMA 248, 8 CMR 48 (1963).

<sup>6</sup> *Id.* at 255, 8 CMR 55.

<sup>7</sup> 2 USCMA 430, 9 CMR 60 (1953).

<sup>8</sup> *Id.* at 433, 9 CMR 63.

<sup>9</sup> *U.S. v. Gibson*, 3 USCMA 746, 752, 14 CMR 164, 170 (1954). This conclusion was based upon a study of the legislative history of the provision and, in particular, the need for some provision to defeat the coercion inherent in interrogation of a subject by his military superior.

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coextensive with the latter,<sup>10</sup> Needless to say, the boards of review have given full effect to the changed views of the Court in this area.<sup>11</sup>

As we have seen, the drafters of the Manual and, for some time, the Court of Military Appeals apparently failed to appreciate the true significance of Article 31(b). However, it must be realized that the problems posed by the statutory provision had to be decided largely without the aid of judicial precedent. The Court was entering upon virgin territory. There was no military precedent because Article of War 24, the predecessor of Article 31 of the Code, did not expressly exclude as evidence statements obtained without a warning, with the result that the principles which were developed thereunder as to the effect of a failure to warn were treated as a part of the law of confessions. They were concerned solely with "voluntariness." There was little judicial precedent available, for in only one other American jurisdiction is there an absolute requirement of a warning similiar to that found in Article 31(b) ; and, in that jurisdiction, the statute differs from the Article to such an extent as to render most of its decisions thereon of little practical use.<sup>12</sup> In this climate it was to be expected that there would be a certain amount of confusion as to the meaning and effect of the statute. However, in the opinion of this writer, the confusion is more apparent than real and results more from a failure to properly analyze the reported decisions than from faults in the language or reasoning of the judicial opinions.

Logical analysis of Article 31(b) requires recognition that it comprehends four distinct factors posing four questions ; *viz.*, Who

<sup>10</sup> *U.S. v. Ball*, 6 USCMA 100, 105, 19 CMR 226, 231 (1955). See also *U.S. v. Booker*, 4 USCMA 335, 337, 15 CMR 335, 337 (1954) for opinion that only compulsory self-incrimination is involved when Article 31(b) does not apply.

<sup>11</sup> *E.g.*, CM 390175, Hill, 21 CMR 501 (1956) (Coercion etc. expressly excluded in case involving Art. 31(b)) ; CM 365872, Howard, 13 CMR 212 (1953) (Distinction between coercion and warning emphasized) ; ACM 6868, Murray, 12 CMR 794 (1953) (Statement held not involuntary but excluded for lack of warning).

<sup>12</sup> Tex. Code Crim., Proc. Ann. Art. 727 (Vernon 1941). The Statute is set forth in part below with emphasis added to indicate the principal points which distinguish it from Article 31(b) :

"The confession shall not be used *if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer*, unless made in the voluntary statement of accused, *taken before an examining court* in accordance with law, *or be made in writing and signed by him; which written statement shall show that he has been warned* by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement may be used in evidence against him on his trial for the offense concerning which the confession is therein made; *or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt*, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

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must do what to whom when? The Article is quoted below in such manner as to indicate these four factors and the precise question posed by each.

Who must warn?	“No person subject to this [code]
When is a warning required?	may interrogate, or request any statement from,
Who must be warned?	an accused or a person suspected of an offense
What warning is required?	without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.”

In the following pages we shall consider each of these factors separately.

### I. WHO MUST WARN?

“No person subject to this [code] may interrogate . . . .”

In order to properly isolate the factor with which we are concerned under this heading we will, in each case, assume that the subject is a person who must be warned and that the problem arises with reference to an occasion on which a warning would be required. It is only in this fashion that we can screen out other factors which otherwise might well confuse the issue.

For the meaning of the phrase “person subject to the code” we need look no further than Article 2 of that statute which sets forth twelve distinct categories of such individuals. If we could stop here there would be no problems other than to determine in a given case whether the interrogator fell within one of these groupings. Obviously, a person on active duty with the armed forces or a person accompanying or serving with the armed forces within the meaning of Article 2(11) of the Code is a person subject to the Code.<sup>13</sup> It is equally obvious that members of civilian law enforcement agencies, State or Federal, or foreign, are not;<sup>14</sup> nor is a civilian employee

<sup>13</sup> See *e.g.*, ACM 6913, Matthews, 13 CMR 615 (1953), *pet. den.*, 3 USCMA 843, 14 CMR 228 (1954); ACM 6341, Biagini, 10 CMR 682 (1963). Both of these cases involved statements obtained by civilian employees on Okinawa. The boards found no duty to warn because of surrounding circumstances, but the opinions indicate an awareness of the effect of Article 2(11).

<sup>14</sup> *E.g.*, *U.S. v. Grisham*, 4 USCMA 694, 696, 16 CMR 268, 270 (1954) (French police); ACM 9035, Bishop, 16 CMR 899, 902 (1954), *pet. den. sub nom.* Koch, 5 USCMA 841, 17 CMR 381 (1954) (city police); CM 367832, Bailey, 14 CMR 254, 258 (1953) (city police); ACM 7074, Walker, 13 CMR 676 (1953), *pet. den.*, 3 USCMA 843, 14 CMR 228 (1964) (city police); ACM 7446, Thompson, 13 CMR 643 (1953) (Secret Service); CM 366023, Williams, 13 CMR 198, 200 (1953), *pet. den.*, 3 USCMA 844, 14 CMR 229 (1954) (county sheriff); ACM S-5198, Wiser, 9 CMR 748, 750 (1953) (city police).

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of the Army within the United States.<sup>15</sup> However, certain principles have developed whereby a determination that a person is or **is** not subject to the Code does not conclude the matter.

The Court of Military Appeals has indicated that, under some circumstances, a person *not subject* to the Code may be required to give a warning. In *United States v. Grisham*<sup>16</sup> it held that French authorities were not bound by Article 31(b) but was careful to point out that a contrary result would obtain if it appeared that the military investigators used the foreign authorities as their agents for the purpose of obtaining a statement from an uninformed subject.<sup>17</sup> A board of review had anticipated this result by holding that the failure to warn was fatal where the interrogator was a civilian employed for that purpose by military authorities. The board stated that when the investigator is acting as the agent of a person subject to the Code, the warning is required “as fully as though it [the statement] were obtained directly by the person subject to the Code for whom he was performing the investigation.”<sup>18</sup>

The Court has also held that a person *subject* to the Code is *not*, under all circumstances, required to give a warning to a suspect before interrogating him.<sup>19</sup> The first case raising this issue was *United States v. Creamer*<sup>20</sup> which involved a situation wherein an enlisted member of the air police was escorting an airman recently released from confinement in a civilian jail to an air base. During the automobile ride the subject volunteered the remark that he had been absent without leave since 1945. The escort asked him to repeat the date and he did so. The opinion of the court was silent as to the failure of the escort to warn the accused, despite the fact that a question had been asked and answered, and held the statement admissible as being merely an unsolicited remark made during a friendly and aimless conversation.<sup>21</sup> The Court thereby indicated its approval of the provision of the Manual that where a statement is made by the subject spontaneously “without urging, interrogation,

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<sup>15</sup> ACM s-5748, Cocuzza, 10 CMR 753, 755 (1953) (Post Laundry superintendent).

<sup>16</sup> 4 USCMA 694, 16 CMR 268 (1954).

<sup>17</sup> *Id.* at 696, 16 CMR 270.

<sup>18</sup> NCM 181, Noel, 8 CMR 572, 576 (1953). See also CM 353954, Franklin, 8 CMR 513, 517 (1962) for similar expressions of opinion. The drafters of the Manual had also realized the justice of this result. See Legal and Legislative Basis, MCM, 1951, at 217.

<sup>19</sup> The reader is reminded that circumstances relating to who must be warned or when the warning is required are not being considered at this time. We are **now** concerned solely with the status of the interrogator.

<sup>20</sup> 1 USCMA 267, 3 CMR 1 (1952).

<sup>21</sup> *Id.* at 273, 3 CMR 7. *Accord*, CM 360336, Sanchez, 8 CMR 411, 415, *pet. den.*, 3 USCMA 811, 10 CMR 159 (1953).

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or request” it may be regarded as voluntary.<sup>22</sup> However, since the record disclosed that, after the spontaneous statement had been made, a question was put to the subject at a time when he was or should have been a suspect, the *Creamer* case gave notice that the Court might require something more of an interrogator than merely being a “person subject to the code” before Article 31(b) would be applied. The next case decided by the Court indicated what that additional requirement might be. In *United States v. Welch*<sup>23</sup> a young lieutenant accused of having cheated in an examination at a service school was given inadequate advice as to his rights by the lieutenant colonel investigating the incident. The Court held that an officer conducting a “quasi-judicial” investigation must comply with Article 31(b).<sup>24</sup> Together, the foregoing two cases presented the two extremes in this area but furnished only slight clues as to where the dividing line might be found. In this state of the law, we can find but one board of review decision which ventured into the undefined middle ground. The Secretary of an Officers’ Open Mess informed a lieutenant colonel member, without first advising him of his rights, that some of the latter’s personal checks had been returned by the bank without payment and had received from the member an implied admission of guilt in the form of a promise to make immediate restitution. The board disposed of the issue of the failure to warn with a footnote stating that the admission was not made in the course of an investigation but that the Secretary was merely discharging his official duties in informing the member of the return of his checks.<sup>25</sup>

There were no further developments in this area until the advent of the case which prompted the Judge Advocates General of the Armed Forces and the General Counsel of the Treasury to recommend that Article 31 “be redrafted to make it more practical in application so that it does not impose an insuperable burden upon law enforcement agencies.”<sup>26</sup>

On 10 April 1951 a Korean civilian was shot and killed in South Korea. A military policeman who happened to be in the area on a routine patrol was informed of the shooting and went to the scene

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<sup>22</sup> Par. 140a, MCM, 1951.

<sup>23</sup> 1 USCMA 402, 3 CMR 136 (1952).

<sup>24</sup> *Id.* at 407, 3 CMR 141.

<sup>25</sup> ACM 5128, Maxwell, 7 CMR 632,645, fn. 1 (1952).

<sup>26</sup> *Annual Report of the United States Court of Military Appeals for the Period June 1, 1952, to December 31, 1953*, 19, 33. The Court recommended that no action be taken on this recommendation, p. 33. In the *Report* for the period January 1, 1955, to December 31, 1965, the recommendation was adhered to, p. 17, and the Court again recommended disapproval thereof, p. 10.

where he saw a group of American soldiers standing about a fire. Another military policeman who was present pointed two soldiers in the group out to him and told him that some Koreans had identified these two as the men who had fired the shots. He approached the group at the fire, looked at these two soldiers and without giving any warning under Article 31—not then in existence—asked who had done the shooting. The two subjects replied that they had “shot at the man.” These, then, were the facts upon which the Court of Military Appeals, incident to its mandatory review of the death sentence adjudged in the case, passed upon the admissibility of the incriminating admission of the two accused in *United States v. Wilson*.<sup>27</sup> Judge Brosman, with Chief Judge Quinn concurring, held that as the two accused were suspects and the interrogator was a person subject to the Code, there was a duty to warn them of their rights.<sup>28</sup> The status of the interrogator was ignored in reaching this holding. It was not until *after* the Court had held the statement inadmissible that, in discussing the effect of the improper use thereof at the trial, we find it stating: “Where—as here—an element of officiality attended the questioning . . . .”<sup>29</sup> Thus, it appears that the majority did not consider that the status of the interrogator required any discussion as bearing on the requirement of a warning, despite the *Creamer* and *Welch* decisions, which it did not mention. Judge Latimer filed a forceful dissent. He stated that Congress did not intend that Article 31 (b) should prohibit any and all inquiries by persons subject to the Code and indicated his belief that there are three conditions which must exist before the duty to warn arises. These are: (1) The interrogator must occupy some official position in connection with law enforcement or crime detection; (2) The inquiry must be in furtherance of some official investigation ; and (3) The facts must have developed far enough to reasonably cause the interrogator to suspect the subject. He pointed out that any other construction of the Article would seriously impair the investigation of crimes in the armed forces.<sup>30</sup> The application of the first two of these requirements to the issue now under discussion is apparent. The other will be considered subsequently as bearing on the issue of who must be warned. There would be a lapse of over a year before the Court would again speak on this problem. In the

<sup>27</sup> 2 USCMA 248, 8 CMR 48 (1953).

<sup>28</sup> *Id.* at 255, 8 CMR 56.

<sup>29</sup> *Zbid.* Despite the fact that UCMJ was not in existence at the time of the interrogation, the Court held Article 31(d) to be a rule of evidence binding on all trials subsequent to the effective date of the Code.

<sup>30</sup> *Id.* at 260, 8 CMR 60. The limitations suggested by Judge Latimer were incorporated by reference in the recommendation of The Judge Advocates General for an amendment of Article 31, mentioned *supra* note 26.

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interim, the boards of review were obliged to attempt to reconcile *Wilson* with the implications of *Creamer* and *Welch* as best they could. They had no difficulty in applying *Wilson* to interrogations by military police arising out of investigations by them into specific offenses and holding that a duty to warn existed.<sup>81</sup> Interestingly enough, in each case emphasis was placed upon the fact that at the time of the interrogation the policeman was acting in an official capacity. Apparently, the phrase "an element of officiality" in the majority opinion in *Wilson* had made an impression. As this element is clearly present where a commanding officer, after having heard of an illegal "slush fund" maintained by the subject, queries him about it, or when an Inspector General conducts an investigation pursuant to orders of a commanding officer, the duty to warn exists in each situation.<sup>82</sup> By the same principle, where the statement is made to one holding no official position at all with regard to the subject, as in the case of a nurse whose relations with the subject-patient are limited entirely to nursing duties, or of a fellow civilian employee not having any supervisory power over the subject, there is no duty to warn.<sup>83</sup>

However, the test of "officiality," standing alone, appears to be inconsistent with the result in the *Creamer* case. Therein, the air policeman was certainly acting in his official capacity in escorting the subject. The distinguishing factor would appear to be that in *Creamer* the interrogation was not, in the words of Judge Latimer, "in furtherance of some official investigation." The decisions of the boards of review indicate their awareness of this distinction.

An excellent illustration of this approach is found in a case wherein a commanding officer, acting as such, queried one of his officers about an apparent shortage of official funds, without warning him of his rights, and received an incriminating reply which was held admissible. The Captain had been placed in arrest of

<sup>81</sup> *E.g.*, CM 363922, Fisher, 11 CMR 325 (1953), *redd on other grounds*, 4 USCMA 152, 15 CMR 152 (1954) (Military policeman pursued and lost soldier who had fired gun; found accused in vicinity and asked him if he had fired his gun); ACM 6858, Murray, 12 CMF 794 (1953) (Gate guard ordered to inspect all cars for stolen government property; asked accused contents of burlap bag found in trunk of car); ACM S-6129, Troupe, 10 CMR 878 (1953) (Gate guard ordered to stop man suspected of radio theft; asked him who owned radio in his possession); CM 362743, Henry, 10 CMR 489 (1953), *rev'd on other grounds*, 4 USCMA 158, 15 CMR 158 (1954) (Military policeman ordered to arrest accused on suspicion of impersonating an NCO; asked him his grade).

<sup>82</sup> CM 367761, Cox, 13 CMR 414 (1953); ACM 6458, Taylor, 10 CMR 669 (1953).

<sup>83</sup> CM 360857, Smith, 10 CMR 350 (1953), *aff'd*, 5 USCMA 314, 17 CMR 314 (1954); ACM 6913, Matthews, 13 CMR 615 (1953), *pet. den.*, 3 USCMA 843, 14 CMR 228 (1954).

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quarters pending action on charges that he had written personal checks which had been returned unpaid by the bank. When notified of his arrest he was relieved of all duties, including the custodianship of an official fund. At that time the commanding officer directed him to open the safe in which the funds were kept and found an envelope containing far less money than a notation thereon indicated should have been there. The commanding officer then asked the subject, without any warning of his rights, where the balance was and the subject replied that he had spent it. The board held that the checking of the fund was performed as an official responsibility of the commanding officer, incident to the subject being relieved of his duties, and was not an investigation of any discrepancies in the fund.<sup>84</sup> Similarly, the boards have held that under the following circumstances, an interrogator, although acting in an official capacity, did not have a duty to warn since he was not conducting an investigation: His First Sergeant saw the subject, later charged with rape, in a dirty uniform and said ("You look like a tramp. Why are your clothes so dirty?") and the subject replied he had been with a girl who "wouldn't give him any," "So I took some."<sup>85</sup> The subject, later charged with making false claims, was ordered to produce a marriage certificate to support a previously filed claim for additional allowances.<sup>86</sup> In a similar case, the subject replied that he couldn't produce a marriage certificate as his marriage was illegal.<sup>87</sup>

That the boards had correctly anticipated the limitations to be placed upon Article 31(b) was established by subsequent decisions of the Court of Military Appeals. The next case presented to it involved the issue of whether an informer working under certain instructions from military investigators can question a suspect without warning him of his rights. In *United States v. Gibson*<sup>88</sup> the suspect was in confinement. The authorities contacted another prisoner, a former cell mate of the suspect, whom they had reason to believe would cooperate, and then placed the potential informer in the suspect's cell with instructions to watch him and relay to

<sup>84</sup> CM 364607, Williams, 11 CMR 521, 526 (1953), *pet. den.*, 3 USCMA 839, 13 CMR 142 (1953). A more recent decision with a similar holding is *U.S. v. Hopkins*, 7 USCMA 519, 522, 22 CMR 309, 312 (1957). But see CM 383584, McCarthy, 20 CMR 406 (1955) where an officer 4 weeks delinquent in rendering weekly reports on funds in his possession become AWOL and on his return was asked by the Finance Officer where the missing cash was. The Board held that the Finance Officer was conducting an investigation into a possible embezzlement.

<sup>85</sup> CM 366424, King, 13 CMR 261 (1953), *pet. den.*, 3 USCMA 846, 14 CMR 228 (1954).

<sup>86</sup> NCM 257, Turpin, 13 CMR 537 (1953).

<sup>87</sup> CGCM 9790, Burlarley, 10 CMR 582 (1963).

<sup>88</sup> 3 USCMA 746, 14 CMR 164 (1954).

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them any information which he might obtain concerning the suspect. However, he was not given any instructions as to the nature of the information which was desired. The informer obtained several incriminating admissions from the suspect by asking him why he had been confined. All members of the Court concurred in holding that there was no duty to warn because of the absence of any element of "officiality" in the interrogation by one prisoner of another. Chief Judge Quinn was also of the belief that Congress never intended that Article 31(b) should bind informers or undercover agents, saying:

" . . . Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation. . . . Careful consideration of the history of the requirement of warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against compulsory self-incrimination."<sup>39</sup>

This opinion was shared by Judge Brosman.<sup>40</sup> Judge Latimer would hold that even an informer has a duty to warn but only when he is acting under a "mantle of officiality."<sup>41</sup>

Next came a case involving a situation wherein a guard walking his post saw the subject, a personal friend of the guard, and some other men in a closed post exchange late at night. Shortly thereafter, the guard while still on duty found the subject in the boiler room of a nearby building and, without any preliminary warning, asked him why he had broken into the exchange. The Court did not discuss the absence of a warning other than to refer to the **Creamer** case as controlling.<sup>42</sup> The next step was a holding that Article 31(b) does not apply to an interrogation of a larceny suspect by the victim, acting in his private capacity and "not cloaked with any color of officiality."<sup>43</sup> Then, in **United States v. Dandaneau**<sup>44</sup> the Court reaffirmed its adoption of the principle that the mere existence of an official relationship between the interrogator and the subject does not render the interrogation official for purposes of Article 31(b). Therein, the accused, a marine staff sergeant, missed the movement of the ship to which he was as-

<sup>39</sup> *Id.* at 752, 14 CMR 170.

<sup>40</sup> *Id.* at 753, 14 CMR 171.

<sup>41</sup> *Id.* at 757, 763, 14 CMR 175, 181. Gibson has since been cited as holding that an undercover agent has no duty to warn. ACM 8212, Cascio, 16 CMR 799, 813 (1954). *pet. den.* 5 USCMA 847, 18 CMR 333 (1955).  
<sup>42</sup> *U.S. v. Armstrong*, 4 USCMA 248, 252, 15 CMR 248, 252 (1954).

<sup>43</sup> *U.S. v. Trojanowski*, 5 USCMA 305, 310, 17 CMR 305, 310 (1954).  
*Accord, U.S. v. Schilling*, 7 USCMA 482, 484, 22 CMR 272, 274 (1957). It is immaterial that the conversation between the victim and the accused may have been overheard by a military policeman. *U.S. v. Johnson*, 5 USCMA 795,799, 19 CMR 91, 95 (1955).

<sup>44</sup> 5 USCMA 462, 18 CMR 86 (1955).

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signed, remained absent for two weeks and then surrendered himself at a marine base. Captain *L*, the commanding officer of a squadron at the base, who had known the accused personally for about 1 year, heard of his surrender and anticipated that he would be assigned to his squadron. Subsequently, he saw the accused in his squadron office whereupon he walked over to him and talked to him about his predicament. During this conversation, the accused made several incriminating statements. About 1 hour thereafter, Captain *L* interrogated him “officially” in his office, after properly warning him of his rights for the first time. Chief Judge Quinn, with Judge Latimer concurring, held that the first conversation was on a purely personal, as opposed to official, basis and that there was no duty to warn, stating:

“...The prohibition of the Article [31] extends only to statements elicited in the course of official interrogation. . . . One may occupy a position officially superior to that of an accused, without necessarily characterizing all his actions in relation to the accused, as **official**.”<sup>45</sup>

Judge Brosman agreed that not every conversation between military personnel is “official” but would hold that the interrogator’s official position together with his knowledge of the offense having been committed by the accused created a sufficient “odor of officiality” to bring Article 31(b) into play.<sup>46</sup>

Although the Court has not expressly adopted Judge Latimer’s proposal in *Wilson* that a duty to warn does not arise unless the interrogator not only occupies an official position but also is acting in furtherance of an official investigation, an examination of the foregoing cases compels the conclusion that their test of “officiality” encompasses both of these factors.<sup>47</sup> The interrogators in both *Creamer* and *Armstrong* clearly were acting in an official capacity. Their exemption from Article 31(b) can be explained only on the basis that they were not “investigating.” Similarly, in *Dandaneau* it is difficult to comprehend how Captain *L*, knowing of the accused’s

<sup>45</sup> *Id.* at 464, 465, 18 CMR 88, 89. The majority also discussed and negated the possible existence of coercion out of the disparity in rank.

<sup>46</sup> *Id.* at 466, 18 CMR 90.

<sup>47</sup> In *U. S. v. Green*, 7 USCMA 539, 23 CMR 3 (1957), Judge Latimer, speaking for the majority, took the occasion, while stating that an admission of the accused had properly been excluded at his trial, to indicate that the ruling of the law officer was proper because of the presence of these elements of “officiality.” Judge Ferguson took issue with this *dictum* in a concurring opinion, stating:

“...I wish to disassociate myself from the proposition set forth in [the Gibson and Dandaneau cases] . . . that a prerequisite to the application of the provisions of Article 31, supra, is ‘officiality’ of investigation or of the questioner. . . . Any person subject to the Code is, in my opinion, required to fulfill the provisions of Article 31(b) before asking any questions. . . .”

*Id.* at 542, 23 CMR 6.

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offense and also believing that he would be assigned to his command, could possibly be acting in other than an official capacity when talking to him during normal duty hours in the squadron office. However, a court might find that he was not at the time investigating the offense but merely seeking information about a prospective member of his command for personal and administrative purposes.

A unique problem results from the fact that a doctor-patient relationship does not arise out of the treatment of a member of the armed forces by an armed forces doctor.<sup>48</sup> When incriminating statements made to the doctor by the patient are offered as evidence the question arises as to whether the doctor, normally a person subject to the Code, should have warned the patient in compliance with Article 31(b) before seeking any information from him. Thus far, the problem has arisen in only two types of cases; *viz.*, those involving the use of drugs and those involving neuropsychiatric evaluations.

In the narcotics cases, it has been held that where the accused is merely being treated for addiction, the doctor is not acting in any investigative capacity and has no duty to warn his patient.<sup>49</sup> But where a doctor, who had examined a suspect the previous night at the request of the military police who suspected a narcotic offense, has occasion to treat him on the following day and at that time asks him if he had been using drugs, he assumes an investigative role and must also assume its obligations.<sup>50</sup> In this area the normal tests of "officiality" and "investigation" are not overly difficult of application.

Where the incriminating statements at issue were made during the course of a psychiatric examination which was being conducted because the patient was suspected of or charged with criminal offenses, the picture becomes quite complicated. The doctor is usually aware of the nature of the alleged offense and, in many cases, his opinion is being sought as to the suspect's mental condition at the time of the offense. Under these conditions it is arguable that the examination is necessarily being made in furtherance of an official investigation. However, with but one exception, the boards of review have held that the questioning of a subject by a psychiatrist is merely a medical examination as an aid to diagnosis

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<sup>48</sup> Par. 151c(2), MCM, 1951.

<sup>49</sup> ACM 6280, Wright, 8 CMR 850,852, *pet. den. sub nom.* Schly, 3 USCMA 812, 10 CMR 159 (1953).

<sup>50</sup> CM 387109, Reed, 21 CMR 355, *pet. den.*, 21 CMR 340 (1956).

and is not an investigation for Article 31(b) purposes.<sup>51</sup> In the one case in which it was held that the doctor had a duty to warn the patient, the facts were such as to show that the former had, in fact, taken it upon himself to investigate a suspected offense. Therein, the doctor had been alerted to the fact that the subject intended to feign insanity in order to avoid further military service and his interrogation of the patient, later tried for feigning mental illness, was designed to obtain admissions to this effect.<sup>52</sup>

The Court of Military Appeals has not as yet passed upon this problem. In a case wherein it appeared that the accused had refused, on advice of counsel, to submit to a neuropsychiatric evaluation by military doctors, the several members of the Court by way of *dicta* indicated their general views.<sup>53</sup> Judge Latimer stated that whether an accused can be compelled to answer questions put to him by a psychiatrist is “veiled in uncertainty” and took note of the fact that controlling service publications indicate the desirability of his being advised of his rights prior to the examination ;<sup>54</sup> Chief Judge Quinn stated that he agreed with Judge Latimer ; and Judge Brosman added that this area is “an especially complex and difficult one.” The significance of the foregoing remarks becomes apparent when it is considered that if the subject cannot be ordered to answer the questions put to him by the doctor, it necessarily follows that he must be warned of his right to refuse to do so, provided, of course, that the other elements which bring Article 31(b) into play are present.

The writer would hazard a guess that when the Court does decide this issue it will do so by applying the same test of “official investigation” as it has in other areas.<sup>55</sup> If the doctor is examining the subject for the primary purpose of obtaining evidence (*e.g.*, a psychiatric evaluation for court-martial purposes) he is “investigating” and should be required to comply with Article 31(b). However, if the interrogation is merely incidental to the normal

<sup>51</sup> NCM 327, Chauncy, 16 CMR 395, 399 (1954); NCM 262, Barnes, 13 CMR 552, 555 (1953); CM 352627, Nichols, 6 CMR 239, 244 (1952), *pet. den.*, 1 USCMA 727.6 CMR 130 (1952).

<sup>52</sup> ACM 6746, Calandrino, 12 CMR 689 (1953).

<sup>53</sup> *U.S. v. Bunting*, 6 USCMA 170, 177, 179, 19 CMR 296, 303, 305 (1955).

<sup>54</sup> *Passim*, TM 8-240, AFM 160-42, Psychiatry in Military Law.

<sup>55</sup> The Court may well avoid a holding on this issue, if at all possible. See *U.S. v. Fleming*, 3 USCMA 461, 13 CMR 17 (1953), where the Court declined to pass upon the question of whether a judge advocate conducting a post trial interview of the accused for the purpose of obtaining background information for possible clemency must first warn the accused of his rights. The board of review had held that no warning was required but that the results of the interview were quasi-confidential and not admissible. CM 359817, 9 CMR 502 (1953).

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diagnosis and treatment of a patient and it is not then contemplated that the results thereof are to be used in connection with court-martial charges, *i.e.*, if the doctor does not have reasonable grounds to believe that his patient is a "suspect," there should be no duty to warn.

It must be noted that if an accused availed himself of his right to remain silent and refused to cooperate with the psychiatrist, the normal result would be a lack of sufficient evidence to overcome the presumption of sanity.<sup>56</sup> For this reason, in all but the rare case his counsel would certainly advise him to cooperate with the doctor.

The last area wherein the status of the interrogator bears on his duty to warn is that involving the not uncommon situation where one investigator warns the subject of his rights and thereafter a statement is made to another individual who has not personally warned the subject. In this situation the law is clear. Where the facts indicate one continuous investigation and the subject has been properly warned at some time during that investigation, that warning thereafter continues in full force and effect. Any subsequent interrogation can be made without any further warning, even though the individual to whom the statement is made was not the one who warned the subject or was not even present when the warning was given.<sup>57</sup>

If Article 31(b) were to be amended to conform to its judicial interpretation, that portion relating to who must warn might read :

"No person subject to the code who occupies an official position superior to that of an accused or suspect or who occupies an official position in connection with law enforcement, or the detection or investigation of crimes, and no person, whether or not such person is himself subject to the code, who is acting as the agent of such first mentioned person, shall, while engaged in an official investigation of an alleged or suspected offense, unless at some prior time during such investigation the accused or suspect has been otherwise properly advised and informed, interrogate . . . ."

<sup>61</sup> ACM 6858, Murray, 12 CMR i94 (1953).

<sup>56</sup> TM 8-240, *supra* note 54, indicates that cooperation of the subject is all but indispensable to a psychiatric evaluation.

<sup>57</sup> *E.g.*, *U.S. v. Smith*, 4 USCMA 369, 376, 15 CMR 369, 375 (1954) (change in interrogators); ACM 8900, Radford, 17 CMR 595, 601 (1954) (interrogation by different persons over several days); ACM 7446, Thompson, 13 CMR 648, 654 (1953) (additional interrogator); ACM 5570, Lindner, 7 CMR 560, 668 (1952), *pet den.*, 2 USCMA 687, 7 CMR 84 (1953) (change in Interrogators); ACM 5579, Martell, 6 CMR 807,809 (1952) (change in interrogators).

## II. WHO MUST BE WARNED?

“No person . . . may interrogate . . . *an accused or a person suspected of an offense . . .*”

The meaning of the term “accused” is apparent and needs no discussion. The factors involved in the determination of when a person is deemed to be a suspect within the meaning of Article 31(b) are quite simple. Briefly stated, it appears that whether a person is a suspect is solely a question of fact which with one exception, the discussion of which will be deferred for the moment, presents no legal problems. Presented below are some of the more common factual situations which have been considered in this area.

The following circumstances have been held sufficient to make an individual a “suspect” :

A military policeman in pursuit of some soldiers who had been firing weapons in a Korean town lost contact with them and then found the subject nearby holding a carbine which had been fired recently;<sup>58</sup> A military policeman investigating a fatal shooting shortly after it occurred was informed by another military policeman that some civilians had told him that the subjects were the guilty ones;<sup>59</sup> Investigators found the subject’s billfold on the scene of an arson;<sup>60</sup> An air policeman on duty at the base entrance was instructed to inspect outgoing cars for stolen government property and found a burlap bag containing meat in the trunk of the subject’s car;<sup>61</sup> An air policeman on duty at the base entrance was informed that a radio was missing from the building where the subject had been working and instructed to detain him and thereafter the subject appeared carrying a bag containing two radios;<sup>62</sup> An investigation was being conducted into certain offenses allegedly committed by X, including one charge of having escaped from confinement with the assistance of the subject;<sup>63</sup> A company commander was informed by a soldier from whom a watch had been stolen that the subject was wearing a similar one;<sup>64</sup> After an unlawful entry had been committed by filing through a brass lock, brass filings were found on the subject’s peacoat;<sup>65</sup> A company commander found items similar to those reported stolen in the subject’s locker;<sup>66</sup> A company commander was informed that the subject was maintaining an unauthorized fund;<sup>67</sup> A finance officer knew that the subject recently returned to duty after being absent without leave, had been four weeks

58 CM 363922, Fisher, 11 CMR 325 (1953), *rev’d on other grounds*, 4 USCMA 152, 15 CMR 152 (1954).

59 U.S. v. Wilson, 2 USCMA 248, 8 CMR 48 (1953).

60 ACM 9785, Holmes, 18 CMR 801 (1955), *rev’d on other grounds*, 6 USCMA 151, 19 CMR 277 (1955).

61 ACM 6858, Murraray, 12 CMR 794 (1953).

62 ACM S-6129, Troupe, 10 CMR 878 (1953).

63 NCM 90, Walls, 3 CMR 402 (1952).

64 CM 390175, Hill, 21 CMR 501 (1956).

65 CGCM 9795, Karl, 11 CMR 654 (1953).

66 CM 365619, Dickerson, 12 CMR 512 (1953).

67 CM 367761, Cox, 13 CMR 414 (1953).

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behind in his weekly reports as to cash on hand prior to the absence; <sup>68</sup> A military policeman knew that the subject had been recently disciplined and was therefore unlikely to have a pass.<sup>69</sup>

The following circumstances have been held insufficient to cause a subject to become a "suspect":

An air policeman on duty at the base entrance examined the subject's pass, later found to be false, incident to a routine check of personnel leaving the base; <sup>70</sup> The subject's first sergeant saw him in a soiled uniform the day following a rape; <sup>71</sup> The subject's commanding officer found an apparent discrepancy in a fund of which the subject was custodian, incident to the subject being relieved of responsibility for the fund; <sup>72</sup> The subject contacted his commanding officer by telephone late at night and asked permission to come to his home and talk to him about an important matter; <sup>73</sup> The subject's commanding officer received a letter from the alleged wife of the subject complaining that she was not receiving adequate support.<sup>74</sup>

In all of the foregoing cases the inquiry by the board was into the question of whether, based upon facts known to the interrogator, the individual being interrogated was a suspect. In many of them, there were strong indications that there were in existence other circumstances known to the military authorities but not to the interrogator which clearly made the subject a person suspected of an offense. It would appear, therefore, that the boards of review have adopted the third of the requirements for the operation of Article 31(b) laid down by Judge Latimer in his dissenting opinion in *Wilson*; *i.e.*, that the facts must have developed far enough to reasonably cause the interrogator to suspect the individual. The logical extension of this rule is that if the interrogator does not, at the time of the interrogation, have reasonable grounds to believe that the subject is a suspect, it is immaterial that he is, in fact, suspected by other military authorities or even has been formally accused of an offense. To hold otherwise would be to charge every interrogator with knowledge of all information concerning the subject known, at least officially, by any and all military authorities. In this connection, the Court of Military Appeals has

<sup>68</sup> CM 383584, McCarthy, 20 CMR 406 (1955).

<sup>69</sup> *U.S. v. Nowling*, 9 USCMA 100, 25 CMR 362 (1958).

<sup>70</sup> ACM S-8174, Meyers, 15 CMR 745 (1954).

<sup>71</sup> CM 366424, King, 13 CMR 261 (1953), *pet. den.*, 3 USCMA 346, 14 CMR 228 (1954).

<sup>72</sup> CM 364607, Williams, 11 CMR 521, *pet. den.*, 3 USCMA 839, 13 CMR 142 (1953).

<sup>73</sup> CM 364606, Simpson, 12 CMR 255 (1953), *pet. den.*, 3 USCMA 840, 14 CMR 228 (1954).

<sup>74</sup> ACM 10756, Smith, 20 CMR 632, *pet. den.*, 6 USCMA 83.5, 20 CMR 398 (1955).

held that the official knowledge of a military superior is not, *per se*, to be imputed to a subordinate for this purpose.<sup>75</sup>

The mere fact that an individual is not a "suspect" at the outset of an interrogation does not conclude the matter. There is no doubt that the duty to warn can arise thereafter as a result of information supplied by the subject which should reasonably cause the interrogator to suspect him of having committed an offense. However, the Court of Military Appeals has held that this duty does not arise as soon as the subject makes an incriminating remark. In *United States v. Hopkins*<sup>76</sup> a routine monthly audit of a fund of which the accused was custodian was being conducted by Lieutenant *B*. When Lieutenant *B*, while counting the assets of the fund, asked the accused where the balance was, the accused said that he had something to tell him. Lieutenant *B* replied, "What's that?", whereupon the accused confessed to having taken the money. The Court pointed out that there was no doubt that the execution of a routine audit of a fund need not be prefaced by a warning to the custodian, that only a "very suspicious person" would have suspected the accused when he made his first remark, and that Lieutenant *B*'s reply was entirely compatible with the expectation of receiving an innocent explanation of the shortage. The Court closed with the following statement :

" . . . While it is argued that the Lieutenant was required to interrupt the accused, before his tale was completed, we cannot agree. The accused's explanation included both exculpatory and inculpatory statements' and we cannot demand a degree of perception such that the listener must assess the nature of the statement before its completion." 77

There is one situation wherein it has been held by the Court of Military Appeals that the status of the subject, as such, places him without the protection of Article 31(b). A board of review had held that a statement was inadmissible by virtue of Article 31 when made by the subject as a witness before a court-martial without having been, at that time, informed of his rights under the Article.<sup>78</sup> The Judge Advocate General of the Army forwarded the case to the Court by certified questions requesting a further ruling on this issue

<sup>75</sup> *U.S. v. Dickenson*, 6 USCMA 438, 20 CMR 154 (1955). In CM 377832, Batchelor, 19 CMR 452 (1955) the contention was made that the investigators in Japan should be charged with knowledge of information possessed by investigators in the United States which would make the accused a suspect. The board avoided deciding the issue by assuming the validity of the contention *ad arguendo*. The decision was affirmed by the Court without discussion of the above point. 7 USCMA 354, 22 CMR 144 (1956).

<sup>76</sup> 7 USCMA 519, 22 CMR 309 (1957).

<sup>77</sup> *Id.* at 522, 22 CMR 312.

<sup>78</sup> CM 365872, Howard, 13 CMR 212 (1953).

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and the decision of the board was reversed by the Court.<sup>79</sup> The Court held that Article 31(b) has no application at courts-martial and stated that if witnesses, including an accused taking the stand as a witness, are given the additional protection of Article 31(b) over and beyond the constitutional protection against compulsory self-incrimination as set forth in Article 31(a) "absurdities present themselves."<sup>80</sup> An example of such an absurdity, the Court pointed out, would be the imposition upon the attorney conducting the examination of a witness of the burden of first advising him of his right to remain silent.

On the basis of the foregoing discussion we can now answer the question, "Who must be warned?" The answer, again with reference to the language of the Article itself, follows :

"No person. . . may interrogate . . . a person, other than a witness before a court-martial, reasonably believed by him to be accused or suspected of an offense.. .,"

### III. WHEN MUST THE WARNING BE GIVEN?

"No person. . . may *interrogate, or request any statement from* [a suspect] . . . *without first* informing him . . ."

Thus far, we have discussed the factors involved in determining both the individuals to whom the statutory prohibition of Article 31(b) is addressed and those in whose favor it exists. We now **pass** on to determine exactly when, or on what occasions, this duty of an interrogator to warn a suspect must be discharged.

Before we enter upon the troublesome area encompassed by the terms "interrogation" and "request for statement" it would be well to discuss briefly the significance and effect of the phrase "without first informing him." Read literally, the phrase might seem to imply that a warning must be given prior to each and every occasion on which a suspect is interrogated. The Court of Military Appeals has not had the need to rule on this point. However, the boards of review have uniformly held that the only requirement is that the subject be warned at the outset of the particular investigation and have rejected the contention that an interruption of the interrogation requires that the warning be repeated when it is renewed.<sup>81</sup> It will

<sup>79</sup> *U.S. v. Howard*, 5 USCMA 186, 17 CMR 186 (1954).

<sup>80</sup> *Id.* at 190, 17 CMR 190. Par. 150b, MCM, 1951, provides that "the court should advise an apparently uninformed witness of his right to decline to make any answer which might tend to incriminate him." The Court held that this provision is not mandatory. 5 USCMA 194, 17 CMR 194.

<sup>81</sup> *E.g.* ACM 8900, Radford, 17 CMR 595 (1954); CM 365691, Smith, 12 CMR 519 (1953), *pet. den.*, 3 USCMA 841, 14 CMR 228 (1954); ACM 6788, Ragsdale, 11 CMR 730, *pet. den.*, 3 USCMA 831, 12 CMR 204 (1953); ACM 6252, Otero, 8 CMR 795 (1953); CGCMS 19351, Damaske, 4 CMR 466 (1952).

be recalled that a comparable result is reached with regard to the situation wherein there is a change in interrogators during an investigation.

The determination as to when an investigator is interrogating, or requesting a statement from, a suspect would not appear to be particularly difficult. It would seemingly be necessary, in any given case, only to decide whether the interrogator was seeking a statement, or its equivalent. Nevertheless, the first impression received from an examination of the reported cases dealing with this problem is one of complete confusion. However, upon closer inspection much of this confusion disappears. In retrospect it can be seen that the cases divide themselves into two categories; *viz.*, those wherein an investigator seeks affirmative information from the words or actions of the subject and those wherein the investigator merely seeks physical evidence which speaks for itself.<sup>82</sup>

Under the first of these categories the issue is entirely one of fact. The underlying principle is simple. If the suspect is being asked to furnish information to the investigator, either by his conduct or by conduct together with words, he is being interrogated. This problem normally arises in connection with a search by investigators for the fruits or tools of the crime or other physical evidence.

If the alleged interrogation amounts to no more than a request for the suspect's consent to the search there is no attempt to secure information and, hence, no duty to warn.<sup>83</sup> Conversely, if the subject is asked to produce the fruits of the crime<sup>84</sup> or the weapon used therein,<sup>85</sup> the investigator is seeking information both as to the location of the items and the suspect's guilty knowledge thereof. Similarly, asking the subject to identify items which have evidentiary value is a request for information. Thus, the Court of Military Appeals has held that it is an interrogation within the meaning of

<sup>82</sup> We are not concerned here with the situation wherein the investigator summons the suspect, informs him of his rights, and then remains silent in obvious expectation of some reply. This is, of course, an implicit request for a statement. See CGCMS 20052, Doyle, 17 CMR 542 (1954), *pet. den.*, 5 USCMA 847.18 CMR 333 (1955).

<sup>83</sup> ACM 11793, Dutcher, 21 CMR 747, *aff'd*, 7 USCMA 439, 22 CMR 229 (1956). See also U.S. v. *Wilcher*, 4 USCMA 215, 15 CMR 215 (1954) and U.S. v. *Florence*, 1 USCMA 620, 5 CMR 48 (1952), affirming admissibility without mention of any duty to warn.

<sup>84</sup> U.S. v. *Josey*, 3 USCMA 767, 14 CMR 185 (1954) (stolen money); CM 376162, Reid, 18 CMR 341 (1954) (stolen gun); ACM 7393, Figueroa, 14 CMR 804, *pet. den.*, 4 USCMA 727, 15 CMR 431 (1964) (stolen property).

<sup>85</sup> ACM 9381, McKay, 18 CMR 629 (1954), *pet. den.*, 5 USCMA 853, 18 CMR 333 (1955) (murder weapon); CM 361215, Thomas, 10 CMR 299 (1953) (murder weapon).

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the Article to request a suspect to identify his clothing or his locker where such identification has evidentiary significance; *i.e.*, it furnishes information.<sup>86</sup> It is immaterial, for this purpose, that the information requested may otherwise have been readily available to the interrogator.<sup>87</sup>

An excellent illustration of the close analysis required to determine whether a certain act performed by a suspect includes within it any admissions is found in *United States v. Nowling*.<sup>88</sup> Therein an air policeman on town patrol who, by his own admission, "strongly suspected" that the accused did not have a proper pass, confronted the accused and asked to see "his pass." The accused produced a pass bearing the name of another airman. The Court held that the law officer erred in admitting the pass into evidence over a defense objection at the accused's trial for wrongfully possessing an unauthorized pass with intent to deceive. The holding was based upon the failure of the air policeman to warn the accused of his rights under Article 31. It is clear that the act of the accused in producing the pass in response to the demand for "his pass" constituted both an admission of conscious possession thereof and also a representation that it was his pass, the latter representation being clearly relevant to the issue of his intent to deceive. The pass would not be admissible at the trial, under ordinary rules of relevancy, unless it could be somehow connected up with the accused. Under the facts of this case, such connecting up would be impossible without showing the manner in which the air policeman obtained the pass. Therefore, the pass was inadmissible, not because it was a "statement" obtained in violation of Article 31, but because the exclusion of the evidence of the accused's actions made it impossible to establish its relevancy. Although the Court did not expressly adopt the above reasoning, that this was the underlying rationale of the reversal is plainly indicated by its discussion of the principles involved in admissions by conduct which closed with the following statement: "We conclude, therefore, that the

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<sup>86</sup> *U.S. v. Bennett*, 7 USCMA 97, 21 CMR 223 (1956) (suspect identified his locker); *U.S. v. Holmes*, 6 USCMA 151, 19 CMR 277 (1955) (suspect identified clothes worn by him on prior night); *U.S. v. Taylor*, 5 USCMA 178, 17 CMR 178 (1954) (suspect identified clothing). Accord, ACM 10439, Smidutz, 19 CMR 888 (1955) (identified locker); CGCM 9795, Karl, 11 CMR 654, *pet. den.*, 3 USCMA 829 (1953) (identified clothing). *But see U.S. v. Vigneault*, 3 USCMA 247, 12 CMR 3 (1953) where asking the suspect to write his name—not for purposes of obtaining a handwriting specimen—on a jacket identified as his, was held not to be an interrogation. The Court treated the signing merely as a method of "tagging" the garment which could have been done by anyone.

<sup>87</sup> In *Bennett*, suspect's locker was plainly marked with his name. The same factors were present in Smidutz and Karl.

<sup>88</sup> 9 USCMA 100, 25 CMR 362 (1958).

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accused's conduct in producing the pass at the request of the air policeman was the equivalent of language which had relevance to the accused's guilt because of its content." <sup>89</sup>

It must be noted that unless the identification or action which is sought does have some evidentiary value or significance, the accused's response to the request could not be a "statement." However, the need to warn must be tested by the circumstances existing at the time of the interrogation and not by the subject's response thereto. The failure of the subject to give the requested information may make it unnecessary to invoke the exclusionary sanction of Article 31(d) but it cannot have retroactive effect so as to legitimate the failure to warn.

The second category of cases concerned with the problem of what is an "interrogation" involves the situation wherein the subject is requested to provide the investigator with a physical item of potential evidence but where the conduct of the subject in complying with the request does not itself have any evidentiary value. In other words, the investigator is not seeking either information or incriminating admissions, by word or deed, but is interested solely in procuring the physical item. For this reason there would appear to be no interrogation within the meaning of Article 31(b) and no need that the subject be warned of his rights. However, the validity of this apparently logical conclusion has been rendered doubtful by a recent decision of the Court of Military Appeals which has far-reaching implications. A brief exposition of the development of the case law in this area is necessary to provide a proper frame of reference for its import.

In 1963 the Court held that Article 31(a) prohibits an individual being required to furnish investigators with handwriting exemplars <sup>90</sup> or to utter words for purposes of voice identification. <sup>91</sup> Although the Court reached these results entirely on the basis of Article 31(a) and, indeed, made no mention of any necessity for a warning in this area, the boards of review equated "compulsory production" to "interrogation" and concluded that a warning was required. Thus, we find a board holding handwriting exemplars inadmissible, not because they were obtained by compulsion, but because they "were taken from him without adequate warning of

<sup>89</sup> *Id.* at 102, 26 CMR 364. The Court expressly recognized the validity of routine checks, without warning, of the passes or identification cards in cases where a pass violation is not suspected.

<sup>90</sup> *U.S. v. Rosato*, 3 USCMA 143, 11 CMR 143 (1963).

<sup>91</sup> *U.S. v. Greer*, 3 USCMA 576, 579, 13 CMR 132,136 (1963).

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his rights under Article 31.”<sup>92</sup> Similarly, in cases involving voice tests we find the boards acting on the assumption that a warning is required therein.<sup>93</sup>

Finally, in *United States v. Ball*,<sup>94</sup> the Court passed upon this problem. The majority of the Court held that a handwriting specimen is rendered inadmissible only if obtained by compulsion and that there is no requirement that the suspect be first warned of his rights. Judge Brosman, with Judge Latimer concurring, pointed out that the necessity for a warning is not coextensive with the right against compulsory self-incrimination and that the terms “interrogate” and “statement” in Article 31(b) are directed solely to testimonial utterances, which he would define as “language, or its equivalent, which has relevance to one’s guilt or innocence because of its content—truth or falsity—and not because of its manner of utterance or the like.”<sup>95</sup> By this test, neither a handwriting exemplar or a voice specimen constitutes a statement. Chief Judge Quinn, although concurring in the result in the case, would hold that asking the suspect for the exemplar is an “interrogation” and that the responsive conduct of the suspect is a “statement,” thus necessitating that a preliminary warning be given to him.<sup>96</sup> Shortly thereafter, in another case, Judge Quinn, speaking for a unanimous court, disposed of a contention that an exemplar was inadmissible because obtained without a warning having been given with the statement “. . . the *Ball* case is the law.”<sup>97</sup>

A similar result ~~was~~ reached with respect to the application of Article 31(b) to the taking of urine specimens in narcotics cases. It is in this area that we find the one reported board of review decision which specifically recognized, prior to any pronouncement by the Court of Military Appeals, that the handwriting and voice specimen cases did not involve Article 31(b). In *Milton*<sup>98</sup> the board held that a urine specimen was not rendered inadmissible because obtained without a prior warning. The board pointed out that since the probative value of the chemical tests performed upon the specimen is derived from the physical object and not from any communi-

<sup>92</sup> CM 362352, Williams, 13 CMR 158, 160 (1953). *Accord*, CM 365303, Wetzell, 12 CMR 269 (1953), pet. *den.*, 4 USCMA 842, 14 CMR 225 (1954).

<sup>93</sup> ACM 8318, Rivard, 16 CMR 615 (1954); CM 365107, Thomas, 12 CMR 385, pet. *den.*, 3 USCMA 837, 13 CMR 142 (1953).

<sup>94</sup> 6 USCMA 100, 19 CMR 226 (1955).

<sup>95</sup> *Id.* at 104, 19 CMR 230.

<sup>96</sup> *Id.* at 106, 19 CMR 232.

<sup>97</sup> *U.S. v. McGriff*, 6 USCMA 143, 146, 19 CMR 269, 272 (1955). However, Judge Quinn did indicate his continued disagreement with the rule of the *Ball* case.

<sup>98</sup> ACM S-7345, 13 CMR 747 (1953).

cation from the suspect, the furnishing of the specimen is **not** a statement.

The first case decided by the Court of Military Appeals with regard to the compulsory production of urine specimens involved the catheterization of an unconscious suspect. Judges Brosman and Latimer joined to uphold this action, in separate opinions, while Chief Judge Quinn dissented. Judge Brosman's opinion was the only one which mentioned the Article 31(b) problem and he disposed of it by citing the *Milton* case to the effect that voiding urine is not making a statement.<sup>99</sup> In *United States v. Booker*<sup>100</sup> the members of the court agreed, separately, that no warning is required prior to requesting a suspect to furnish a urine sample. Judge Latimer would limit Article 31(b) to the obtaining of testimonial utterances and also would hold it inapplicable where reasonable compulsion may be employed to obtain compliance with the request; Judge Brosman finds "testimonial utterance" to be the sole test; and Chief Judge Quinn, in dissent on another point, would hold that a request for a specimen is not an interrogation.<sup>101</sup> Finally, in *United States v. Barnaby*<sup>102</sup> Judges Latimer and Brosman concurred in holding that Article 31(b) does not apply to demands for specimens of body fluids. Chief Judge Quinn, dissenting on another issue, was silent in this regard.<sup>103</sup> The *Jordan* case,<sup>104</sup> in which Judge Ferguson joined with Chief Judge Quinn to hold an order to furnish a urine specimen illegal, did not mention the requirement of a warning. The recent *Musguire* case holding illegal an order to submit to a blood alcohol test also failed to mention Article 31(b).<sup>105</sup>

At this stage of the development of the law it clearly would have been correct to say that the rule of the *Ball* case, in the words of Chief Judge Quinn, "is the law" and that an inquiry is not an in-

<sup>99</sup> *U.S. v. Williamson*, 4 USCMA 320, 330, 15 CMR 320, 330 (1954). *But see U.S. v. Jones*, 5 USCMA 537, 18 CMR 161 (1955) holding inadmissible in evidence the results of a specimen obtained over the subject's objections.

<sup>100</sup> 4 USCMA 335, 15 CMR 335 (1954).

<sup>101</sup> *Id.* at 337, 338, 15 CMR 337, 338. The boards of review have since applied *Booker* to render admissible specimens obtained without a warning. *ACM 8806*, *Dillon*, 16 CMR 835, *pet. den.*, 5 USCMA 835, 16 CMR 292; *ACM 8695*, *Yates*, 16 CMR 629, *pet. den.*, 4 USCMA 743, 16 CMR 292 (1954).

<sup>102</sup> 5 USCMA 63, 17 CMR 63 (1964).

<sup>103</sup> *Id.* at 64, 17 CMR 64. *Accord, U. S. v. Andrews*, 5 USCMA 66, 17 CMR 66 (1954).

<sup>104</sup> 7 USCMA 452, 22 CMR 242 (1957).

<sup>105</sup> *U.S. v. Musguire*, 9 USCMA 67, 25 CMR 329 (1968). However, Chief Judge Quinn's majority opinion contains some general language which seems to equate the obtaining of a blood sample with the obtaining of a "statement." Query whether this signifies a departure from Judge Quinn's prior admission that *U.S. v. Ball* is "the law."

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terrogation within the meaning of Article 31(b) unless it amounts to a request for a testimonial utterance, as that phrase has been used by the Court in this area. However, there then appeared on the scene the case of *United States v. Minnifield*<sup>106</sup> which with its implications appears to constitute a complete reversal of prior law in this area. Therein, the issue presented to the Court was whether the law officer had erred in not advising the court-martial that it should disregard certain handwriting exemplars of the accused if the members found them to have been obtained through the use of an improper promise of leniency. It was undisputed that the accused had been fully warned of his rights and advised specifically that he was not required to furnish handwriting exemplars as requested, so whether such a request need be prefaced by an Article 31(b) warning was not directly at issue. However, in order to hold, as the Court did, that an issue of involuntariness was raised as to the specimens, it was necessary for it first to overcome the obstacle raised by existing decisions, based upon a comparison of the wording of Article 31(a) and Article 31(d), holding that improper inducements will render inadmissible only *statements* and cannot affect the admissibility of physical evidence.<sup>107</sup> It accomplished this result by holding that handwriting specimens are deemed to be "statements" within the meaning of Article 31(d). If they are statements for this purpose, it necessarily follows that they are also statements within the meaning of Article 31(b) and thereby protected by the warning requirement. Because of the far-reaching implications of this opinion, close study of the following extract is desirable with special attention being given to the emphasized portions :

"While we appreciate the fact that the issue of voluntariness does not touch upon the trustworthiness of the exemplars, we believe this presents the question in too narrow a fashion. The real issue is simply whether or not a court-martial should be permitted to consider a handwriting specimen which it determines was involuntarily obtained. *It seems to us that to say a handwriting specimen does not constitute a "statement" within the meaning of Article 31 is to give that Article the most restricted interpretation possible.* As any lawyer who has ever practiced criminal law well knows, a specimen of an accused's handwriting is often as incriminating and damning as the most completely documented confession. In prosecuting numerous offenses such as forgery, larceny by check, embezzlement, false pretenses, false official statements, and fraudulent claims—just to mention a few—a specimen of an accused's handwriting often spells the difference between conviction and acquittal. To say that before a confession, which generally bears an accused's signature, can be admitted in evidence, it **must**

<sup>106</sup> 9 USCMA 373, 26 CMR 163 (1958).

<sup>107</sup> Article 31(a) forbids only "compulsion." Article 31(d), the only provision of the Article mentioning "inducement," is, by its terms, applicable only to "statements." *U.S. v. Ball*, 6 USCMA 100, 19 CMR 226 (1955).

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be shown that Article 31 has been complied with and that no unlawful inducements were made, whereas such prerequisites may be dispensed with when exemplars are involved, completely ignores the practicalities of the situation. *If the purpose of an Article 31 warning is to avoid impairment of the Constitutional guarantee against compulsory self-incrimination, then there can exist little difference between condemning one's self by mouth and condemning one's self by hand.* This is especially so when it is remembered that Article 31 'is wider in scope than the Fifth Amendment., United States v. Musguire, 9 USCMA 67, 26 CMR 329. To exclude exemplars from the thrust of Article 31 because they do not literally constitute 'statements' represents a **flimsy** and artificial technicality which isolates a single word from an entire concept.

If this Court is to succeed in preserving the Uniform Code of Military Justice as a truly living document, it cannot permit a gradual whittling away of an accused's most important safeguard until nothing is left of it but a heap of bare bones. In times of stress, as well as in times of calm, *it is a liberal and enlightened, rather than a narrow and grudging application of Article 31 that is best calculated to insure to the military the preservation of our traditional concepts of justice and fair play. We would imagine that but slight inconvenience would be occasioned by requiring military law enforcement officers, before enlisting an accused's aid in obtaining incriminating samples of his handwriting, to warn him of his rights* and at the same time refrain from tempting him with improper inducements in order to obtain such evidence. Judging by the large number of cases which reach this Court in which confessions are found which have been properly obtained, we suspect that the work of such law enforcement officers has not been effectively hindered or curtailed by the presence of Article 31.

So that there will be no misunderstanding as to the position this Court now takes, *we specifically hold that an accused's handwriting exemplar is equated to a 'statement' as that term is found in Article 31.* It follows, therefore, that in order to be admissible it must be shown that the provisions of Article 31 have been fully satisfied. When an issue of voluntariness is raised, as it was in the case at bar, it must be submitted under proper instructions to the court-martial for its consideration. Here the law officer erred in not submitting that issue to the court. Anything contained in the case of United States v Ball, supra, United States v Morris, supra, or United States v McGriff, supra, which is contrary to our holding, is hereby expressly overruled." (emphasis added)

It is arguable that the foregoing opinion should be limited in its application to cases involving handwriting specimens as being *sui generis*. This limitation could be supported by the recurring references therein to the highly incriminating material of handwriting. Further support could be found in the theory, not mentioned by the Court, that when an individual, in response to a request to create a sample of *his handwriting*, does so his act of compliance includes a representation that he had not attempted to alter or otherwise disguise the normal characteristics of his handwriting and, therefore, that his act constitutes to at least this limited extent a "testimonial utterance." If so limited, the decision in *Minnifield* would

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not extend to such matters as the production of urine specimens upon request and would be consistent with the separate opinion of Chief Judge Quinn in *United States v. Booker*<sup>108</sup> wherein he stated that the request for a urine specimen is not an interrogation so as to require a preliminary warning. However, in *Minnifield* the Chief Judge concurred in the opinion of Judge Ferguson and not merely in the result of the case. With the emphasis placed in the opinion upon the belief of the majority that Article 31 be given a "liberal and enlightened, rather than a narrow and grudging application" together with the conclusion that Article 31(b) exists to protect "the Constitutional guarantee against compulsory self-incrimination," it would seem that the military services would be well-advised, in the absence of contrary indications from the Court, to operate on the basis that Article 31(b) is coterminous with Article 31(a). Under this construction, it would be necessary that a suspect be warned whenever the investigation proposes to request him to perform an act which he cannot be compelled to do under Article 31(a). As to acts which can be compelled, there would be no duty to warn as it would be meaningless to advise a man that, for example, he could refuse to give his fingerprints and then, upon such refusal, to take them legally by reasonable force.

As a matter of policy, the writer would recommend extending the *Minnifield* decision to its utmost. It is difficult to see how criminal investigations would be impeded by a wholehearted compliance with the spirit of Article 31 and requiring that criminal investigators before having any face-to-face dealings whatsoever with a *suspect* first warn him of his rights under Article 31. It is doubtful that such a policy would result in less evidence being obtained and it is *certain* that all evidence thus obtained would be beyond attack on Article 31(b) grounds.

Based upon the foregoing discussion, the answer to the question "When must the warning be given?" is, with continued reference to the language of the Article, set forth below :

"No person . . . may ask questions designed to elicit information, or request any statement or the performance of an act which is protected by Article 31(a), from [a suspect] . . . unless at some time prior to such asking or request and, during the same investigation the subject has been informed . . . .

### IV. WHAT WARNING IS REQUIRED?

"No person . . . may interrogate [a suspect] . . . without first *informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or*

<sup>108</sup> 4 USCMA 335, 338, 15 CMR 335, 338 (1954).

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*suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."*

It will be seen that the pertinent portion of Article 31(b) set forth above establishes three distinct elements of the requisite warning; *viz.*, the nature of the offense, the right to remain silent, and the availability of statements as evidence. We shall consider each of these elements in turn, but before doing so we shall first set forth certain principles which are applicable to the warning as a whole.

The warning must be given in such a manner that the suspect is informed and advised substantially as required by the statute. It matters not that he may, in fact, be fully aware of his rights; therefore, the duty to warn cannot be discharged by merely asking him if he is aware of his rights and receiving an affirmative reply.<sup>109</sup> A verbatim reading of Article 31 to the suspect, although desirable, is not mandatory.<sup>110</sup> However, a verbatim reading does not necessarily show that an adequate warning has been given. A suspect has not been properly advised unless he comprehends his rights, and if the record shows the lack of such comprehension there has been no warning. Thus, where the record disclosed that the suspect had, at best, extremely slight understanding of the English language and that this shortcoming was known to the interrogator, the Court of Military Appeals held that :

**" . . . [A] ritualistic reading of the Article in English to an accused who has no knowledge or understanding of that language does not constitute compliance with the Article."**<sup>111</sup>

However, in the absence of evidence of lack of comprehension it is not necessary that the record show affirmatively that the subject did understand his rights.<sup>112</sup>

The interrogator may give the requisite warning with the utmost clarity and completeness and yet if his conduct thereafter is such as to effectively negate that warning any subsequent interrogation will be deemed violative of Article 31. An illustration of this principle is found in a case wherein the evidence showed that immedi-

<sup>109</sup> *E.g.*, CM 381376, *Jericho*, 19 CMR 419 (1955); ACM 9381, *McKay*, 18 CMR 629 (1954), *pet. den.*, 5 USCMA 853, 18 CMR 333 (1966); ACM 7072, *Hawk*, 12 CMR 741 (1953); CM 364267, *Orange*, 11 CMR 411 (1953).

<sup>110</sup> *U.S. v. Higgins*, 6 USCMA 308, 20 CMR 24 (1955); *U.S. v. O'Brien*, 3 USCMA 325, 12 CMR 81 (1953).

<sup>111</sup> *U.S. v. Hernandez*, 4 USCMA 465, 468, 16 CMR 39, 42 (1954). *But see* CM 362367, *Caraballo-Zayas*, 10 CMR 470, *pet. den.*, 3 USCMA 823, 11 CMR 248 (1953) where the Board of Review, with one member dissenting, upheld the validity of a warning under similar circumstances.

<sup>112</sup> *U.S. v. Molette*, 3 USCMA 674, 14 CMR 92 (1964).

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ately after the suspect was asked if he understood his rights, the interrogator reminded him of them in the following language :

“You are not required to make a statement. Anything you do say will be held against you, blah, blah, blah and so and so.”<sup>113</sup>

This factor will be considered below in more detail with reference to the various elements of the warning.

### A. *The Nature of the Offense*

“ . . . without first informing him of *the nature of the accusation*. . . .”

As might be anticipated, the problem posed in this area is whether the suspect must be informed of the *specific* offense of which he is suspected and of all offenses with which he is ultimately charged. In the present state of the law a definitive answer to this question cannot be given. This impasse results from the combined effect of two decisions of the Court of Military Appeals, both entitled *United States v. O'Brien*. In *O'Brien #1*<sup>114</sup> the contention was made that the failure to apprise the accused of the charge against him, the premeditated murder of his wife, violated Article 31(b). The Court conceded that there was a probable violation but held any error to be nonprejudicial. It then pointed out that the accused was fully aware that he was suspected of killing his wife.<sup>115</sup> In *O'Brien #2*<sup>116</sup> the accused had been informed correctly that he was suspected of attempted rape. Subsequently, as a result of admissions made by him, he was charged in addition with the misappropriation of a vehicle. The Court held that the interrogator was not bound to anticipate that the accused would admit to offenses other than that suspected. If it had stopped at that point, there would be no inconsistency with *O'Brien # 1*. However, it proceeded to add :

“ . . . It is not always possible to know of all the offenses which might be involved from a given state of facts, but it is necessary that one suspected of a crime know generally the subject of the inquiry. This puts him on notice of the purpose of the questioning, and thereafter, at least, anything not entirely foreign to the subject under discussion is volunteered at the accused's peril.”<sup>117</sup>

The last sentence of the quoted passage would seem to adopt the rule that Article 31 is satisfied so long as the suspect is put on notice of the general purpose of the investigation and, to that extent, conflicts with the prior holding of the Court that it is error, albeit

<sup>113</sup> ACM 9381, McKay, 18 CMR 629, 648 (1954). Needless to say, the law officer held the resulting confession inadmissible.

<sup>114</sup> 3 USCMA 105, 11 CMR 105 (1953).

<sup>115</sup> *Id.* at 109, 11 CMR 109.

<sup>116</sup> 3 USCMA 325, 12 CMR 81 (1953).

<sup>117</sup> *Id.* at 328, 12 CMR 84.

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nonprejudicial, not to inform him of the exact nature of the charge. The two cases might, nevertheless, be distinguishable on their respective facts were it not for a subsequent pronouncement of the Court, under facts similar to *O'Brien # 1*, that the failure to specify the offense charged is "immaterial."<sup>118</sup>

The net result is that we find the boards of review going both ways. Some hold that there is a violation of the Article but that it is not prejudicial.<sup>119</sup> Others, the majority, hold that there is no error; that it is sufficient if the accused is informed of the general nature of the offense under investigation, as then known to the interrogator.<sup>120</sup> The end result, in either case, being that the receipt in evidence of the statements is not fatal to the findings. It will be noted that this is the first occasion on which the writer has made mention of the prejudicial effect of Article 31 violations and this occurred only because it was unavoidable. It is highly desirable to divorce this issue completely from the question of whether or not a violation of the Article did take place. From this viewpoint, the ruling and language in *O'Brien #2* would appear to state the law more correctly than its older brother. This conclusion is buttressed by a recent case wherein the Court, without citing any prior authority, held that there was sufficient evidence of compliance with Article 31(b) where the accused, who had mailed a letter to the authorities accusing a named officer of gross immorality and was eventually tried for criminal libel, was told by his interrogator that the letter and the truth of its contents was under investigation. The Court said that this warning sufficed to inform the accused that his interrogation would extend to "all subject matter" embraced by the letter.<sup>121</sup>

This interpretation appears consistent with the language of the Article which speaks of "*nature* of the accusation" and does not, by

<sup>118</sup> *U.S. v. Johnson*, 5 USCMA 795, 803, 19 CMR 91, 99 (1955). But see *U.S. v. Dickenson*, 6 USCMA 438, 20 CMR 154 (1955) where the Court, during an *ad arguendo* discussion, indicated that it favored *O'Brien* No. 1.

<sup>119</sup> *E.g.*, CM 363654, Long, 12 CMR 420 (1953) (accused not told he was suspect by inspector general); ACM 6950, Cady, 11 CMR 791 (1953) (accused informed of one theft, although charged with two).

<sup>120</sup> *E.g.*, ACM 11075, Cline, 20 CMR 785, *pet. den.*, 6 USCMA 836, 20 CMR 398 (1955) (accused informed that assault being investigated; later charged as accessory after the fact); ACM 10667, Macias, 19 CMR 924, *pet. den.*, 6 USCMA 827, 20 CMR 398 (1955) (accused informed of larceny; housebreaking charge added thereafter); CM 367552, Barker, 13 CMR 472 (1953) (no warning as to offense but questions indicated sodomy being investigated); ACM 6499, Danilson, 11 CMR 692, *pet. den.*, 3 USCMA 834, 12 CMR 204 (1953) (suspect told investigation was into his misconduct; charged with desertion); CM 356445, Wilson, 6 CMR 276 (1952) (suspect told investigation was into death of named person; charged with murder).

<sup>121</sup> *U.S. v. Grosso*, 7 USCMA 566, 23 CMR 30 (1957).

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its terms, require that the specific offense be named with full technical completeness and accuracy. It is also consonant with the obvious purpose of the provision to alert the accused to the subject matter of the investigation and his alleged connection therewith.

### B. *The Right to Remain Silent*

“ . . . and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected . . . .”

It is readily apparent that a complete failure to include this element in a warning is a violation of the Article.<sup>122</sup> Likewise, if the warning as given is so worded as to cause the suspect to believe that he has any obligation whatsoever to answer his interrogator's questions, it falls short of advising him of his statutory right to remain completely silent, and is defective. For example, a suspect has not been warned properly if he is informed only that he need not make a *written* statement, thereby implying that he cannot refuse to make an oral one.<sup>123</sup> Similarly, it is a violation of the Article to advise a suspect that he can remain silent if the answers to the questions would tend to incriminate or degrade him, “but all other questions which would aid the solution of the crime and clarify the investigation he was obligated, as a member of the military service, to give testimony. . . .”<sup>124</sup> A warning which is limited to advising the suspect that he need not say anything incriminating is likewise defective.<sup>125</sup> However, if the suspect has properly been advised that he may remain silent and say nothing whatsoever, such advice is not nullified by the inclusion in the warning of a remark that “he did not have to make a statement that would jeopardize his position,”<sup>126</sup> or that he does not have to say anything to incriminate himself.<sup>127</sup>

An adequate warning of the right to remain silent can be nullified by subsequent misadvice to the extent that the accused will be deemed not to have been properly warned at all. Thus, where the suspect was completely advised at the outset of an interrogation but thereafter was told by various interrogators that he could remain silent only if he were guilty and not if his answers would be incriminating only to others, Article 31 (b) had been violated.<sup>128</sup> The same result obtains where, after a proper warning had been given by one

<sup>122</sup> *E.g.*, ACM 6745, Calandrino, 12 CMR 689 (1953) (suspect advised only that statement could be used against him).

<sup>123</sup> CM 365058, Murray, 11 CMR 495 (1953).

<sup>124</sup> *U.S.v. Williams*, 2 USCMA 430, 432, 9 CMR 60, 62 (1953).

<sup>126</sup> CGCMS 20052, Doyle, 17 CMR 542 (1954), *pet. den.*, 5 USCMA 847, 18 CMR 333 (1955).

<sup>126</sup> CM 349015, Davis, 14 CMR 238, 240 (1953), *pet. den.*, 4 USCMA 719, 15 CMR 431 (1954).

<sup>127</sup> CM 366399, Edwards, 13 CMR 322, 332 (1953), *pet. den.*, 4 USCMA 719, 15 CMR 431 (1954).

<sup>128</sup> CM 391020, Dicarrio, 17 Aug 1956.

interrogator, another one told the suspect that he must either admit or deny **guilt**,<sup>129</sup> and where the interrogator, after properly warning the suspect, told him that if he remained silent he would be compelled to talk by another investigator.<sup>130</sup>

The writer has been unable to **find** any reported case wherein it has been claimed that the phrase "regarding the offense of which he is accused or suspected" so qualifies the suspect's right not to make a statement **as** to give him less than a right to maintain absolute silence. It is arguable that Article 31(b) does not purport to give him the right to refuse to answer questions not pertaining to the offense under investigation. However, such an argument fails to give proper recognition to the absolute prohibition in Article 31(a) against compelling any person "to answer *any question* the answer to which may tend to incriminate **him**." Article 31(b) was designed to expand, not to diminish, the constitutional privilege **as** set forth in Article 31(a); the two provisions must be read together for this purpose. It appears clear that the subject cannot be compelled to make any statement which is, in fact, incriminating, even though it may have no apparent bearing on the offense under investigation. Whether or not he can be compelled to answer a question not pertaining to the investigation which will not elicit an incriminating reply is another question. It would appear that this issue would arise only in a case wherein he was tried for disobeying an order to answer a completely innocuous question to which any reply would have been equally innocuous. An example of such a question would be asking a subject his name in a situation wherein his identity was in no wise at issue. This results from the fact that unless the subject's reply was somehow incriminating it would not otherwise be relevant at any subsequent trial. It is believed that in such a case the failure to obey the order theoretically would be punishable. However, as a practical matter investigators would be ill advised to attempt to compel the subject to answer any questions whatsoever. Once any compulsion has been brought to bear upon the subject during the investigation, it is extremely likely that the reviewing authorities would find that it tainted the interrogation from that point onward. A *caveat*, laid down by the Court of Military Appeals in dealing with another Article 31 problem, has equal application to this situation.

" . . . [W]e are quite without disposition to encourage experimentation on the part of military law enforcement personnel with the limits of Article 31."<sup>131</sup>

129 ACM S-8792, Spurl, 15 CMR 759 (1954).

130 CM 392545, Jones, 22 CMR 494 (1956).

131 *U.S. v. Taylor*, 5 U S C M A 178,182,17 CMR 178,182 (1954).

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### *C. The Availability of Statements as Evidence*

“ . . . and that any statement made by him may be used as evidence against him in a trial by court-martial.”

The complete omission of this third and final element of the Article 31(b) warning will, as in the case of each of the other two elements, constitute a violation of the Article.<sup>132</sup> However, the warning need not be given in the precise terms of the Article and it is sufficient if the suspect is informed, in substance, on this matter. Thus, it is enough that he is told that his statement may be used against him and the failure to add the phrase “in a court-martial” is immaterial.<sup>133</sup>

An inaccurate warning which misleads the suspect in this regard, as, for example, advising him that an unsworn statement cannot be used against him,<sup>134</sup> is defective. However, a mistaken belief by the suspect in this regard, not generated by the interrogator, will not render a proper warning nugatory. Thus, the validity of a prior warning is not effected by a self-created erroneous belief by the subject that an oral statement,<sup>135</sup> a statement made before a board of inquiry,<sup>136</sup> or an oral statement made to the interrogator in the absence of other witnesses,<sup>137</sup> cannot be used against him.

However, if an interrogator, after informing the suspect that any statement may be used against him, makes an express or implied promise that the statement will not be so used, the prior warning is nullified and any resulting statement has been obtained in violation of Article 31. For example, where an interrogator, not satisfied with the few admissions which he had elicited from the suspect after properly warning him, told him that anything else he said would be confidential and “kept just between them,” Judge Latimer would hold that, although the promise of secrecy was not compulsive, it effectively destroyed the prior warning given to the suspect.<sup>138</sup>

## V. EFFECT OF FAILURE TO PROPERLY WARN

Art. 31(d) “No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful

<sup>132</sup> *U.S. v. Pedersen*, 2 USCMA 263, 8 CMR 63 (1953); CGCMS 19431, Wyant, 4 CMR 480 (1952).

<sup>133</sup> *U.S. v. O'Brien*, 3 USCMA 325,328, 12 CMR 81, 84 (1953).

<sup>134</sup> ACM 7874, Mauldin, 13 CMR 942 (1953).

<sup>135</sup> ACM 8768, Doyle, 17 CMR 615, 628, *pet. den. sub nom. Gaskey*, 5 USCMA 840, 17 CMR 381 (1954).

<sup>136</sup> ACM 5615, Sippel, 8 CMR 698, 737 (1953), *aff'd*, 4 USCMA 50, 15 CMR 50 (1954).

<sup>137</sup> *U.S. v. Payne*, 6 USCMA 225, 228, 19 CMR 351, 354 (1956).

<sup>138</sup> *U.S. v. Cudd*, 6 USCMA 630, 634, 20 CMR 346, 350 (1956). Accord, CMR 389181, Sinisi, 3 Aug 1956; CM 393214, Beirne, 21 Dec 1956.

inducement may be received in evidence against him in a trial by court-martial.”

Where a statement is alleged to be inadmissible in evidence because of unlawful coercion, influence or inducement, the question is whether or not the statement was “obtained . . . through” use of the improper pressure. In other words, did the improper activities of the investigators *cause* the accused to make his incriminatory statement?<sup>139</sup> However, where a failure to properly warn is alleged, the only issue is whether or not the statement sought to be introduced in evidence was “obtained . . . in violation of this article.” It is immaterial whether or not the failure to warn was the cause of the accused’s statement. The sole test is whether the statement was made *during* an interrogation in which a warning, although required, had not been given.

The troublesome problem in this area is the effect upon the admissibility of a second statement, otherwise obtained in full compliance with law, of a prior one obtained without the requisite preliminary warning. The problem can best be set out by an examination of the case law on the subject. In the first board of review case involving these factors there was present the additional circumstance that, although the second interrogation was conducted by a different individual, the suspect was specifically informed by him that he was fully aware of the prior confession. The board avoided the issue with which we are now concerned by holding that under the circumstances there was coercion which carried forward to taint the second **statement**.<sup>140</sup> The second case involved a situation wherein the second interrogator specifically informed the suspect that all prior statements made by him could not be used against him. The board did not make any mention of any possible taint upon the subsequent statements.<sup>141</sup> In the next case, the board indicated that since the absence of a warning does not affect voluntariness it could not taint a second statement. However, it also avoided deciding the issue by basing its holding upon the improper use at the trial of the **first statement**.<sup>142</sup>

The first recognition of this problem by the Court of Military Appeals is found in a separate opinion by Judge Latimer wherein **he** indicates his belief that an admission obtained without **a** proper warning will taint a later confession on the theory that the Gov-

<sup>139</sup> *U.S. v. Spero*, 8 USCMA 110, 23 CMR 334 (1957); *U.S. v. Monge*, 1 USCMA 95.100, 2 CMR 1, 6 (1952).

<sup>140</sup> CM 358180, Sherwood, 7 CMR 311.313 (1953).

<sup>141</sup> ACM 6788, Ragsdale, 11 CMR 730, *pet. den.*, 3 USCMA 831, 12 CMR 204 (1953).

<sup>142</sup> ACM 7072, Hawk, 12 CMR 741 (1953).

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ernment should not profit by its own wrongdoing.<sup>143</sup> Shortly thereafter, in a case which was disposed of as posing a problem of continuing inducement under the law of confessions, there appears in the opinion of the Court some rather inconclusive dicta to the effect that if there has been a failure to warn the suspect prior to his making an earlier admission, such a failure is immaterial since the earlier statement was not put in evidence.<sup>144</sup> No mention was made of any possible effect of the failure to warn upon the final confession. Finally, in *United States v. Bennett*<sup>145</sup> the Court was faced with a situation wherein the suspect had identified his belongings upon the request of an interrogator who had not warned him of his rights. Subsequently, after proper warning, the suspect made a full confession. The first "statement" was not put in evidence by the prosecution. The Court, in an unanimous opinion, held that there was sufficient evidence to support the ruling at the trial that the confession was not induced by the unlawfully obtained statement. It then indicated its opinion that if the prior statement had been more damaging than it was, its presumed effect upon the subsequent statement would be greater and the mere fact that the suspect was thereafter given a proper warning would not insulate the resulting confession from the effect of the earlier violation of Article 31(b) unless the suspect had meanwhile been informed or otherwise knew that the first statement was inadmissible against him.<sup>146</sup> However, in *United States v. Spero*,<sup>147</sup> the Court explained that it did not intend in *Bennett* to create a rule of law requiring in every case that the accused be advised that his prior statements could not be used against him. Rather, the Court only intended to reiterate the requirement that the Government clearly prove that the subsequent statement was not the result of the improper conduct which induced the first statement.

In the opinion of this writer, since the warning requirement of Article 31(b) is not dependent upon principles of causation, a proper warning should in most cases cure the effect of any prior failure to advise the subject of his right to remain silent. However, if the evidence indicates that the interrogator, or group of interrogators,

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<sup>143</sup> *U.S. v. Taylor*, 5 USCMA 178, 185, 17 CMR 178, 186 (1954). The majority found it unnecessary to pass upon the admissibility of the second statement.

<sup>144</sup> *U.S. v. Johnson*, 5 USCMA 796, 802, 19 CMR 91, 98 (1966). The Court held that the inducement of a promise of immunity had been dissipated prior to the first confession.

<sup>145</sup> 7 USCMA 97, 21 CMR 223 (1966).

<sup>146</sup> *Id.* at 101, 21 CMR 227.

<sup>147</sup> 8 USCMA 110, 113, 23 CMR 334, 337 (1957).

## ARTICLE 31(b)

deliberately failed to warn the subject until some admissions were obtained to use as psychological leverage against him, the belated warning does not cure the illegality of the procedure.<sup>148</sup> In effect, when this sort of interrogation is considered as a whole, it may be said that an *effective* advice was never really given.

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<sup>148</sup> CM 390175, Hill, 21 CMR 501 (1966).



## TRIAL OF CIVILIAN PERSONNEL BY FOREIGN COURTS

by Lt Colonel E. G. Schuck\*

The decision of the United States Supreme Court following the rehearing of the cases of *Reid v. Covert* and *Krueger v. Kinsella*,<sup>1</sup> both involving the question of jurisdiction of courts-martial over dependents "accompanying" the armed forces overseas in peacetime, may eventually result in the loss of all court-martial jurisdiction over all civilians "serving with, employed by or accompanying" the armed forces in time of peace. Although four justices clearly denied court-martial jurisdiction over any civilian for any offense in time of peace, two concurring justices limited their opinions to the narrow issue presented by the cases under consideration, *i.e.*, jurisdiction over *dependents* for *capital crimes*. Accordingly, it is not clear that a majority of the Supreme Court would hold that a court-martial has no jurisdiction over civilian employees, or over dependents for noncapital crimes. These doubts will probably be resolved shortly; it is inconceivable that several civilian ex-employees now confined by reason of court-martial sentences for capital and non-capital crimes will not bring actions for release, based upon the cases mentioned above.<sup>2</sup> Similarly, one of the dependents recently tried in Europe for noncapital crimes will probably bring habeas corpus, thus requiring judicial resolution of the other outstanding issue.<sup>3</sup> Pending judicial clarification of the questions which the Court has not answered, *it is assumed in this memorandum, in order to present the problem in its broadest terms, that the denial of court-martial jurisdiction over civilian dependents in capital cases will eventually extend to employees as well as to dependents, and in all cases.*

In the absence of jurisdiction over such persons in any other United States court, it appears, as a matter of law, that criminal jurisdiction will be exercised over dependents and civilian employees

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1 354 U.S. 1 (1957).

2 *E.g.*, *U.S. ex rel. Guagliardo v. McElroy*, 158 F. Supp. 171 (D.C. 1958) (Holtzoff, J) and *U.S. v. Wilson*, 9 USCMA 60, 25 CMR 322 (1958), upholding military jurisdiction over civilian employees accompanying the armed forces.

3 See CM 396739, Tyler, 11 Oct 1957, 58 Chron Ltr 1/19, in which a board of review denied the military jurisdiction to try a civilian dependent overseas in a case initiated as a capital case but tried as a noncapital case.

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by the courts of the countries in which such personnel are stationed unless, under applicable international agreements, they enjoy diplomatic immunity (the comments which follow have no application to MAAG, or Mission civilian personnel who may have diplomatic immunity in varying degree).

The ultimate denial of court-martial jurisdiction over all civilians in time of peace has been considered in the light of the various international agreements which define the legal status of civilian employees and dependents overseas. Analysis reveals that the agreements all fall into either of two classes :

a. *Agreements under which the receiving State will exercise jurisdiction over such United States civilians by operation of the treaty language (e.g., the NATO Status of Forces Agreement <sup>4</sup>).*

b. *Agreements under which the receiving State will exercise jurisdiction over such United States civilians by operation of customary international law (e.g., the agreement in effect in Korea <sup>5</sup>).*

With respect to the type of agreement referred to in paragraph a, above, it should be noted that all cases involving offenses committed by members of the civilian component and dependents may be entertained by local courts immediately upon loss of court-martial jurisdiction over those persons, and without action of any kind on the part of the United States, with the following exceptions:

a. In the Federal Republic of Germany, under the Bonn Conventions,<sup>6</sup> offenses under German law committed by dependents or civilian employees against other than German interests may be transferred to the German courts with the consent of the German authorities.

b. In the Philippines, offenses committed on military bases by dependents or civilian employees will be subject to Philippine jurisdiction upon mere notification to the Philippine prosecutor of the intention of the United States not to prosecute.<sup>7</sup>

c. In the leased Territories (Antigua, Bahamas, Bermuda, British Guiana, Jamaica, Saint Lucia, Trinidad, and the **Turks** and Caicos Islands), the United States enjoys concurrent jurisdiction only with

<sup>4</sup> 4 U.S. Treaties & Other Int'l Agreements 1792, T.I.A.S. No. 2846.

<sup>5</sup> Agreement With the Republic of Korea Concerning Jurisdiction Over Offenses by United States Forces in Korea, July 12, 1950, 5 U.S. Treaties & Other Int'l Agreements 1408, T.I.A.S. No. 3012.

<sup>6</sup> Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, May 26, 1952, 6 U.S. Treaties & Other Int'l Agreements 4278, T.I.A.S. No. 3425.

<sup>7</sup> Art. XIII, Agreement With the Republic of the Philippines Concerning Military Bases, March 14, 1947, 61 Stat. 4025, T.I.A.S. No. 1775.

respect to offenses committed within United States military sites.<sup>8</sup> The agreements provide that in the event the United States decides not to prosecute a given case, the local courts may do so, provided both governments agree that the offender should be tried.

The advisability of enactment of federal legislation extending United States District Court jurisdiction to offenses committed overseas, suggested by implication in the Court's opinion, is presumably under consideration at appropriate levels of government. No reference to that subject will be made here, except to note that even should domestic legislation thus enlarge the jurisdiction of United States courts, and establish a substantive criminal code, violations of which overseas would be cognizable by such courts, a new agreement would have to be negotiated with each of the countries with which we now have agreements defining the legal status of United States personnel, in order to permit release of jurisdiction to the United States District Courts. The possibility of obtaining such agreements is believed to be negligible.

As indicated, in the absence of legislation and of international agreements of the kind referred to above, the courts of the receiving States would have the exclusive right to exercise criminal jurisdiction, in all cases cognizable under local law, over all civilian personnel (civilian employees and dependents) to whom court-martial jurisdiction does not extend.

The Judge Advocate General of the Army, taking the position that the opinions in the *Krueger* and *Covert* cases must be limited to a view upon which a majority of the court agreed, *i.e.*, that courts-martial have no jurisdiction to try dependents for capital crimes in time of peace, has instructed oversea commanders to the effect that court-martial policy remains unchanged, with the single exception that no dependent will be tried for a capital offense (clearly, should such a case now arise, the receiving State, under the rationale developed above, would have the right to try the offender in its own courts, unless this possibility can be avoided in a proper case by court-martial trial on lesser charges alleging a noncapital offense). In all other cases, court-martial jurisdiction will be exercised as heretofore, and the procedures under which waivers of receiving State jurisdiction are requested will be continued.

It is anticipated that a number of the problems regarding the extent of court-martial jurisdiction over civilians which the decision of the Supreme Court created will be resolved in the near

<sup>8</sup> Art. IV, Agreement With the United Kingdom Regarding Leased Naval and Air Bases, March 27, 1941, 56 Stat. 1562, E.A.S. No. 235.

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future. It is desired to point out, however, that should judicial determination of these questions result in complete loss of such jurisdiction, as assumed for the purposes of this memorandum, certain policy matters might appropriately be considered. Major overseas commanders would have to be advised at that time of the changed legal status of civilian employees and dependents, *i.e.*, of their subjection to the exclusive receiving State criminal jurisdiction; the attention of such commanders would have to be invited to the other matters discussed above. Arrangements might appropriately be made to permit, or even require, civilian employees or dependents (or both categories) stationed in certain countries to return to the United States, in view of their changed status. Alternatively, if they are to be allowed to remain in such countries, their written acknowledgement of understanding their subjection to local criminal jurisdiction might be desired. Consideration might also appropriately be given to a policy precluding the introduction of civilian employees or dependents into designated countries. Any policies finally determined with respect to the foregoing matters would necessarily require three-service coordination.

The situation engendered in Okinawa by the Supreme Court's opinion is unique. Executive Order 10713, effective 5 June 1957, provides for the administration of justice in the Ryukyu Islands by three court systems: The courts of the Government of the Ryukyu Islands (local courts), the courts of the United States Civil Administration for the Ryukyus, and courts-martial. The Executive Order denies the GRI courts jurisdiction over any United States nationals (except tourists). Persons subject to military law may be tried by court-martial, or by the USCAR courts, at the discretion of the military commander. The USCAR courts exercise jurisdiction over United States nationals employed by the United States who are not subject to the Uniform Code of Military Justice, as well as over their dependents.

In the event that court-martial jurisdiction over civilians should be eventually denied, under the mentioned provisions of the Executive Order, USCAR courts would then exercise jurisdiction over all civilian employees and their dependents, since such employees would no longer be subject to the Uniform Code of Military Justice. No court in the Ryukyus, however, under the provisions of the Executive Order, could exercise jurisdiction over the dependents of military personnel.

The Executive Order could, of course, be amended to extend the jurisdiction of the USCAR courts or of the GRI courts to cover *all* United States civilian personnel. This might well prove to be a

futile measure, however, in the light of the reasoning of the Supreme Court opinions here under consideration, for the USCAR and GRI courts may be considered to be courts established by the United States and the Supreme Court's opinions may be based upon the proposition that no American civilian may be tried by any court established by the United States unless that court affords him certain rights guaranteed by the Constitution, *e.g.*, indictment and trial by jury. The USCAR and GRI courts suffer from the same shortcomings in this respect as does the court-martial, and they would, therefore, appear equally to lie under the Supreme Court's denial of jurisdiction over civilians.

Taken in its broadest aspect, the Supreme Court's opinion may eventually lead to the undesirable result that no court could exercise jurisdiction over a civilian employee or dependent who commits a crime in the Ryukyus. In its narrowest terms, the opinion means that no dependent may now be tried by any court for a capital offense committed in the Ryukyus.

A solution to this latter problem may lie in the enactment of legislation extending United States District Court jurisdiction to offenses committed in the Ryukyus, or even by judicial recognition of the inclusion of the Ryukyus within the maritime jurisdiction of the United States. As an interim measure, and unless the Supreme Court's opinion is further extended, any civilian who commits a non-capital offense in the Ryukyus could be tried by court-martial or by the USCAR courts. Similarly, and still under the narrow construction referred to above, a civilian employee alleged to have committed a capital offense may be tried by court-martial (or USCAR court), and a dependent accused of a capital crime could be tried by court-martial (or USCAR court) for an offense not capital, *e.g.*, a dependent alleged to have committed premeditated murder, a capital crime, could be tried by court-martial for unpremeditated murder, a noncapital crime.



## COMPLAINTS OF WRONG UNDER ARTICLE 138\*

by Captain Abraham Nemrow \* \*

In May 1955, paragraph 25b of new Army Regulations 624-200 was promulgated which provided that personnel reduced for inefficiency would be advised in writing of their right to submit within ten days following the date of reduction a complaint under Article 138, Uniform Code of Military Justice.<sup>1</sup> Prior to the appearance of the new regulations, Article 138 was known to exist, and, legally at any rate,<sup>2</sup> it was presumed that all enlisted personnel understood its provisions. In fact, it was rarely utilized and little understood. Army commanders, their staffs, and legal advisers had for many years accepted the attitude that the articles relating to complaints were antiquated and of slight significance.<sup>3</sup> For example, in testimony before the House Subcommittee on Military Affairs relative to Article of War 121,<sup>4</sup> the forerunner of current Article 138, Brigadier General Enoch H. Crowder, then The Judge Advocate General of the Army, said:

“This is an unused Article, and I presume a strong argument could be made that it had been repealed by nonuse. There is I think no demand for it in the service, and I can recall but one trial under this article, or, rather but one investigation under it in my 39 years of service. The inspectors visit the posts and they hear the soldiers’ complaints. Then the soldiers can make their complaints to the commanding officers and investigations and trials result. Substantial justice is done, and this article is of no use in the service, I do not care whether it is retained, further than it encumbers the code because the service has outlived it. I do not know why

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\* This article was adapted from a thesis presented to The Judge Advocate General’s School, U. S. Army, Charlottesville, Va., while the author was a member of the Fifth Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the Judge Advocate General’s School or any other governmental agency.

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1 10 U.S.C. 938 (Supp. IV). The Uniform Code of Military Justice (Act of 5 May 1950, 50 U.S.C. 551-736 (1952)) was codified by the Act of 10 Aug 1956, 70A Stat. 1. 50 U.S.C. 734 (Art. 138, UCMJ) was re-enacted as 10 U.S.C. 938. As section 938 contains a parenthetical reference to Article 138 and as the codifiers had no intent to change the substantive provisions of the enactment, any future citation of this law will appear as Article 138.

2 Art. 137, UCMJ, requires that certain articles of the Code, including 138, shall be carefully explained to every enlisted person at the time of his entrance on active duty in any of the armed forces of the United States, or within 6 days thereafter; again after he has completed 6 months of active duty; and again at the time he reenlists.

3 Winthrop, Military Law and Precedents 600 (2d ed. 1920 reprint).

4 Act of 4 Jun 1920. 41 Stat. 811.

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this article is reinstated, unless somebody thinks it is good preachment to have on the statute books." 5

There was considerable confusion as to the procedures to be used in processing the Article 138 complaints engendered by the reduction regulations as there had never existed any implementing regulations for this statutory provision, whereas there had been in effect in the Army for many years standing procedures for the receipt and processing of complaints through inspector general channels. Shortly after the dissemination of the reduction regulation, inspectors general were precluded from taking action in connection with complaints of wrongs or appeals made pursuant to Article 138.<sup>6</sup> It was then anticipated, and experience has proven it a valid prediction, that staff judge advocates would be responsible for processing and transmitting complaints filed under AR 624-200 and Article 138.

Shortly after the effective date of the regulations with respect to reductions, it became apparent that complaints' would be commonplace. As the regulations authorized commanders to reduce enlisted personnel more than one pay grade for inefficiency,<sup>8</sup> it was well known that this procedure was being utilized frequently; and that the individuals so reduced would as a matter of course appeal such reduction on the theory that they had nothing to lose. Staff judge advocates were, therefore, immediately confronted with various problems concerning the processing and transmitting of Article 138 complaints. Resort to the various manuals for courts-martial,

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<sup>5</sup> *Hearings Before a Subcommittee of the Committee on Military Affairs of the House*, 64th Cong., 1st Sess. (1916), as cited in JAGA 1955/2382, 21 Mar 1955.

<sup>6</sup> Par. 21, AR 20-50, 26 Aug 1955.

<sup>7</sup> In most instances, they were designated and known as appeals, and the proceedings had thereon were usually considered the hearing of an appeal rather than proceedings against an alleged wrongdoer to determine whether the complainant had in fact been wronged by the commander who effected the reduction.

<sup>8</sup> Under the provisions of Article 15, UCMJ, a commander may, for misconduct, impose only a one grade reduction. In the case of noncommissioned officers, and specialists above the fourth enlisted pay grade, a summary court-martial may not adjudge reduction except to the next inferior pay grade. The opinion has been expressed that "some types of 'misconduct' may also indicate inefficiency. Thus, when it appears that a reduction is not intended as punishment, but rather is due to a determination by the reducing authority that the soldier concerned lacks the qualities required of a noncommissioned officer, the prior imposition of nonjudicial punishment under Article 16, UCMJ, is not a bar to an administrative reduction to further the efficiency of the command, even though, in effecting the reduction, the reducing authority has taken into consideration the misconduct which prompted the imposition of nonjudicial punishment." JAGA 1956/5785, 6 Aug 1956. It will be readily seen that in all instances where he may properly do so, a commander desiring to reduce a soldier of his command would be more likely to resort to the administrative procedure rather than to nonjudicial punishment or to processing court-martial charges.

## ARTICLE 138 COMPLAINTS

to Army regulations or to military publications failed to shed light on many questions. The following are examples of some of the many problems that were raised: To what extent and in what manner should the officer exercising court-martial jurisdiction over the officer against whom the complaint was made investigate the complaint; what measures of redress could be taken, especially in those cases where it was found that the reduction was not supported by sufficient evidence of inefficiency; what type of proceedings were required by the Article; what action could be taken on such proceedings by superior commanders? A lack of uniformity in the processing of complaints as to inefficiency reductions was soon apparent. As a result of inquiries made by various staff judge advocates, much valuable guidance was furnished by the Office of The Judge Advocate General, and it appeared that within a reasonable time the procedures would become standardized.

However, on 8 June 1956, Army regulations concerning promotions and reductions were again revised, and significantly the reference to Article 138 was omitted.<sup>9</sup> Of course, the right of the individual so reduced to appeal or complain to higher authority still exists. This was clearly recognized when the revision of the Army regulations in question was under consideration in the Department of the Army.

It was noted :

“The intent of the proposed change is to permit an informal method of complaint in addition to the right of complaint under Article 138. Prior to promulgation of AR 624-200, the majority of complaints were handled under the informal procedure, either orally or by correspondence. Representatives of The Inspector General and The Adjutant General indicated that the proposed changes would re-establish the informal procedure used in handling complaints of this type. If, however, a complaint was submitted *specifically under Article 138* the provisions thereof would be followed, but if complaint was not made specifically thereunder the proposed informal method would be used, which would eliminate many complaints without merit, together with the necessity of the administrative requirements of Article 138.”<sup>10</sup>

It is reasonable to assume that formal complaints under the provisions of Article 138 with respect to inefficiency reductions will still be submitted frequently. The procedure under Article 138 having been spotlighted, it is not likely to fade entirely into obscurity. The noncommissioned officer or specialist who feels himself aggrieved by the reduction will no doubt explore every avenue of redress known to him. He will probably seek that method of appeal which assures him the best impartial review. The proceedings under

<sup>9</sup> Par. 24b, AR 624-200, 8 Jun 1956, as changed.

<sup>10</sup> Memorandum retained in OTJAG concerning opinion JAGA 1955/7908, 20 Oct 1965, emphasis added.

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Article 138, being formal proceedings somewhat like a board of inquiry, accomplish this objective more than any other complaint procedure.

Although reductions for inefficiency were the reason for the recent attention to the complaint procedure guaranteed by Article 138, this procedure has a functional purpose in other fields wherein the military person feels himself aggrieved. The use of Article 138, although historically infrequent in practice, nevertheless has a definite place in the administration of personnel matters. Therefore, it is incumbent upon all individuals in the military service who may be involved with a complaint made pursuant to Article 138 to have a thorough understanding of the provisions thereof, including their basic aim, their scope and limitations, and the procedures to be followed.

The substance of Article 138 is not of recent origin. The provisions of the Article may be traced to the military code promulgated in 1688 by the English King, James II.<sup>11</sup> In general, the James code and subsequent British<sup>12</sup> and early American<sup>13</sup> articles of war were in two parts: The first offered a method of relief to an "officer" who thought "himself wronged by his Colonel, or the commanding officer of the regiment"<sup>14</sup> while the latter provided a grievance procedure for the "inferior officer or soldier" wronged by his superior.<sup>15</sup> Though the article concerning complaints of officers was once considered in some quarters a device for the "settlement of professional disputes,"<sup>16</sup> it came to be recognized that the true purpose of both articles was the protection of subordinates from the abuses of misguided superior authority.<sup>17</sup>

Article 121<sup>18</sup> of the 1920 Articles of War was the direct precursor of the current redress procedure. It afforded but one remedy to both officer and enlisted man and substituted an examination into the complaint by the commanding general for the former more formal hearing by a "regimental court-martial"<sup>19</sup> with a right of appeal to

<sup>11</sup> Articles of War of James II, Arts. L, LI and LVII (1688), Winthrop, *op. cit. supra* note 3, at 927.

<sup>12</sup> *E.g.*, Articles of War of 1765, § XII, Arts. I, II, Winthrop, *op. cit. supra*, at 937, 938.

<sup>13</sup> *E.g.*, Articles of War of 1806, Arts. 34, 35, Winthrop, *op. cit. supra*, at 979.

<sup>14</sup> *Id.* Art. 34.

<sup>15</sup> *Id.* Art. 35.

<sup>16</sup> Clode, *Administration of Justice Under Military or Martial Law* 79.

<sup>17</sup> DeHart, *Military Law* 252 (1862).

<sup>18</sup> Act of 4 Jun 1920, 41 Stat. 811.

<sup>19</sup> In fact, the "regimental court-martial" was nothing more than an investigative board of officers similar to that which would be convened by a commander charged with examining a complaint.

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a general court.<sup>20</sup> In spite of vigorous efforts to expunge these provisions from the law,<sup>21</sup> the present Article 138 is a virtual reenactment<sup>22</sup> of former 121—and now reads :

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

“These provisions have been consistently interpreted as providing a procedure through which soldiers and officers may be protected from individual arbitrary, unfair or unjust actions of a commander.”= Congress clearly intends to perpetuate a formal grievance procedure for the protection of subordinates from the infrequent, but possible, abuses of military commands ;and the reduction for inefficiency situation illustrates how popular Article 138 procedure may become. A procedure which has clung so tenaciously to military law must be understood by military administrators.

### I. SCOPE OF THE ARTICLE

Clearly, the first step in a detailed analysis of Article 138 is a consideration of the type of wrongs which may be the subject of complaints under its provisions. Does it encompass all conceivable wrongs committed against military personnel by superior commanders? Speaking of Article 35 of the 1806 Code, Captain DeHart expressed the opinion that it “ought to be well understood in order that the subject matter of complaint be properly limited, [that] . . . [u]nless the species of wrong be clearly defined, it would be in the power of any dissatisfied soldier to harass his officer with baseless or malicious allegations, and the service with troublesome and expensive investigations . . . .”<sup>24</sup> In view of the general nonuse of the procedure authorized by Article 138, perhaps it has been improperly limited.

The key phrase in the Article—“who believes himself wronged by his commanding officer”—is not defined either by the Article itself or by any implementing publications or directives. Colonel Win-

<sup>20</sup> The former right of appeal was a dubious one since a “vexatious and groundless” appeal was punishable by the general court.

<sup>21</sup> See note 5, *supra*; Winthrop, *op. cit. supra* note 3, at 600.

<sup>22</sup> See Sen. Rep. No. 486, 81st Cong., 1st Sess. 33 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 36 (1949).

<sup>23</sup> JAGJ 1953/1012, 29 Jan 1953.

<sup>24</sup> DeHart, Military Law 257 (1862).

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throp had this to say about the term “wronged” appearing in Article 29 of the Articles of War of 1874:<sup>25</sup> “This undefined but general term is interpreted as including any and all injuries or grievances that may be done or caused by a superior to an inferior officer in his military capacity or relation, and that are, at the same time, properly *susceptible of being remedied without a resort to a trial by court-martial.*”<sup>26</sup> He was also of the opinion that a more specific construction would be that “the wrongs contemplated are mainly denials of rights or just privileges, or other arbitrary proceedings in contravention of military **usage.**”<sup>27</sup>

With respect to a soldier “who thinks himself wronged” Colonel Winthrop expressed the following: “In the absence of any definition of this term in the Article, the authorities have construed it as referring mainly to such wrongs as result from mistake of fact, **mis**-apprehension of law, or want of judgement on the part of the officer in regard to some matter connected with the ‘internal economy’, . . . of the **command.**”<sup>28</sup> The phrase “internal economy” found support in the views of other military writers.<sup>29</sup>

Some of the specific types of complaints considered by the early military commentators to be cognizable under the laws enacted for the redressing of wrongs were errors in the accounts of the soldier, as in denying to him a right to pay or to a pecuniary or **in** kind allowance to which he was entitled, or in entering stoppages against him to which he should not have been subjected; grievances as **to** the imposition of unreasonable arrest, the assigning of improper duties, the enjoining of excessive work or service, the withholding of customary privileges. With respect to these types of grievances, Colonel Winthrop took a rather narrow view. He expressed the opinion that they could be remedied by such proceedings only where the fault of the officer consisted of a misapprehension of facts or lack of discretion rather than in an intention to injure or **oppress.**<sup>30</sup> This view is understandable, however, as it was accepted doctrine that where the act of the officer, as complained of, amounted clearly to a specific military offense, it could not properly become the basis of a complaint.<sup>31</sup> Thus, formal grievance procedure would not be available to investigate deliberate oppression or ill treatment or the striking of a subordinate.<sup>32</sup>

<sup>25</sup> Article 29 pertained only to complaints of officers.

<sup>26</sup> Winthrop, *op. cit. supra* note 3, at 600.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at 602. Here he was referring to Article 30 of the Articles of War of 1874. This article pertained only to complaints of soldiers.

<sup>29</sup> *E.g.*, DeHart, *Military Law* 258 (1862).

<sup>30</sup> Winthrop, *op. cit. supra* note 3, at 602.

<sup>31</sup> *Id.* fn. 82.

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

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The then general view, followed by the military authorities<sup>33</sup> and the military writers of the day,<sup>34</sup> was that only such matters could be investigated as were susceptible of redress by doing justice to the complainant; that is, when in some way he could be set right by putting a stop to the wrongful condition which the officer had caused to exist. Thus, a wrong consisting of the denial of a substantial right which may be restored as such, or a wrong involving the imposition of a liability which may specifically be done away with, would be within the purview of the redress procedure; to the contrary where it consists of an injury which is not practicable to undo and for which no satisfaction can be afforded other than the moral satisfaction experienced from the infliction of punishment upon the offender.

Prior to the enactment of the 1920 Articles of War, the War Department had indicated that the redress procedure was generally limited to the following: disputes involving accountability for public property; the right to pay, or to an allowance, or relief from a stoppage; a question of irregular detail, excessive work or duty, and the like.<sup>35</sup> Thus it was held that when, in the course of his duty, a regimental commander reports facts in an officer's efficiency report, the officer is not wronged in the sense of the 29th Article of War<sup>36</sup> unless it is clearly shown that the report by the regimental commander was malicious and was not dictated by a true sense of duty.<sup>37</sup>

In a case involving the imposition of arrest, The Judge Advocate General of the Army, after referring to the procedure authorized by Article of War **121**, expressed the opinion that a complaint against close arrest and request for an extension of its limits for the purpose of needed physical exercise should be forwarded by the local commanding officer to higher military authority for consideration and appropriate action.<sup>38</sup>

In another case, the facts were in part as follows: An officer charged with an offense, conviction of which then involved mandatory dismissal, was placed in arrest, and, while awaiting trial, was restricted to his quarters, the officers' mess hall, and within a radius of one-quarter of a mile of his quarters. Subsequently, the limits of arrest were enlarged and he was authorized to attend divine services and consult with the post chaplains. The officer filed a complaint, under Article of War 121, alleging that the restraint im-

<sup>33</sup> Dig Op JAG 1912, fn 1, p 126.

<sup>34</sup> Winthrop, op. cit. *supra* note 3, at 602.

<sup>35</sup> Dig Op JAG 1912 (Article of War XXX, § A), p 125.

<sup>36</sup> Articles of War of 1874.

<sup>37</sup> Dig Op JAG 1912 (Article of War XXIX, § B), p 125.

<sup>38</sup> CM 199315 (1932), Dig Op JAG 1912-40, p 400.

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posed on him exceeded the "minimum necessary under the circumstances" as provided in paragraph 19, Manual for Courts-Martial, U. S. Army, 1928, in that it denied him social intercourse with brother officers. Although relief was not granted, the wrong complained of was considered cognizable under Article of War 121.<sup>39</sup>

Since the enactment of Article 138 of the Uniform Code of Military Justice, the most common type of wrong for which redress was sought *via* the statutory complaint procedure involved reductions of enlisted persons for inefficiency. Army regulations<sup>40</sup> expressly authorized the utilization of this procedure in order to obtain a review of the reduction action.

The Judge Advocate General of the Army suggested prompt investigation of reduction complaints.<sup>41</sup> In cases, however, involving reductions for misconduct,<sup>42</sup> Article 138 is not considered an avenue of appeal from a reduction in grade pursuant to the imposition of nonjudicial punishment.<sup>43</sup>

A recent opinion of The Judge Advocate General of the Army<sup>44</sup> indicates that today Article 138 covers many more types of wrong than its predecessors did. It was there stated that Article 138 does not cover the redress of wrongs which the complaining member has suffered as a result of the imposition of nonjudicial punishment or conviction by court-martial, but rather is directed to allegations that the member's commanding officer has deprived him of some *property right*, abused his *command discretion*, or *otherwise dealt with him unjustly in a field other than discipline*.

In cases involving courts-martial, the view has been expressed that Article 138 does not provide military personnel convicted by court-martial with an additional means of appeal.<sup>45</sup> In one case, The Inspector General of the Army decided that a court-martial conviction which came to his attention was incorrect in that no offense had been proven and that the commander concerned should be directed to vacate the findings of guilty. The Judge Advocate General of the Army concluded that The Inspector General had no such authority.

<sup>39</sup> JAG 250.451, 28 Sep 1928, Dig Op JAG 1912-40, p 289.

<sup>40</sup> Par. 25b, AR 624-200, 31 May 1955, wherein it was provided that personnel reduced for inefficiency would be advised in writing of their rights under the 138th Article to submit a complaint.

<sup>41</sup> JAGA 1956/2592, 9 Mar 1956.

<sup>42</sup> Par. 24a, AR 624-200, 8 Jun 1956, provides that Art. 15, UCMJ, and chapter XXVI, MCM, 1951, will govern the reduction of enlisted personnel for misconduct.

<sup>43</sup> JAGJ 1957/2711, 20 Mar 1957.

<sup>44</sup> JAGA 1955/8275, 20 Oct 1955.

<sup>45</sup> JAGJ 1954/9907, 3 Jan 1955; JAGJ 1954/9542, 7 Dec 1954.

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"The mere fact that the **complaint** was purportedly made in conformity with the provisions of Article 138, UCMJ, does not authorize a re-examination of the merits of the case by either The Judge Advocate General or The Inspector General. The Uniform Code of Military Justice expressly provides an appellate procedure to be followed in the review of trials by court-martial. When this review has been accomplished, the sentence is final and conclusive. . . . [The provisions of Article 138] were not intended to provide a device for the review of punitive measures imposed pursuant to statute. . . ." <sup>46</sup>

This was in accord with a previous ruling<sup>47</sup> as to a complaint made under Article 121 wherein it was held that the findings and sentence having been approved and ordered executed, there is no authority in law for its subsequent vacation or modification.

Would Article 138, however, apply to wrongs which are allegedly committed by a commander in connection with processing of court-martial charges? For example, suppose a company commander prefers formal charges against a member of his command without any preliminary inquiry into the allegations and without personal knowledge of the **accusations**<sup>48</sup> and it turns out the accused is in fact innocent. Or suppose a company commander, after making an inquiry, prefers formal charges, notifies the accused thereof, but delays unreasonably the disposition of the **charges**.<sup>49</sup> Such improper action on the part of a commander would probably not be cognizable under the redress procedure. Wrongs constituting violations of Article 98 of the Uniform Code of Military Justice<sup>50</sup> are, of course, specific military offenses and presumably not remediable by Article 138 procedures. But suppose such violations also affect some property right of the accused. Suppose in the case of delayed disposition of charges the accused is a sergeant, eligible in all respects for promotion and in fact under consideration for promotion to the next higher grade by the regimental commander. Army **regulations**<sup>51</sup> provide that an individual may not be appointed to a higher grade when he is under court-martial charges until such charges have been dis-

<sup>46</sup> JAGJ 1953/1012, 29 Jan 1953.

<sup>47</sup> SPJGJ 1945/7617, 28 Jul 1945.

<sup>48</sup> Art. 30, UCMJ, requires the signer of charges to have personal knowledge of or to have investigated the matters set forth therein.

<sup>49</sup> Par. 30*h*, MCM, 1951, provides in part that "upon the receipt of charges or of information as to a suspected offense, the proper authority—ordinarily the immediate commanding officer of the accused—shall take prompt action to determine what disposition should be made thereof in the interests of justice and discipline."

<sup>50</sup> Art. 98, UCMJ, provides that "any person subject to this chapter who—(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused: shall be punished as a court-martial may direct."

<sup>51</sup> Par. 6c, AR 624-200, 8 Jun 1956.

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missed, withdrawn, or the individual has been tried and acquitted. In such instances, the unreasonable delay in the preference of the charges has also affected the property rights of the member, that is, his possible entitlement to a higher grade, additional pay and allowances. Therefore, a complaint against his company commander alleging the failure to make appropriate disposition of the charges would be cognizable under Article 138.

In a case decided prior to the enactment of Article 98 of the Uniform Code of Military Justice, a State court did indicate that the preferring and the prosecution of unfounded court-martial charges would be a type of wrong which should be redressed by a proceeding under the complaint article. This case<sup>52</sup> involved a civil suit for malicious prosecution. The plaintiff, a warrant officer in the National Guard of Oregon, alleged that the defendant had signed a court-martial charge sheet accusing him without proper basis of making false reports as to the number of men in the band; and that the Adjutant General of the State of Oregon improperly had referred the charges to trial by general court-martial. After the prosecution presented its case, a motion for verdict of acquittal was granted. The court, in dismissing the civil suit, stated that :

“ . . . Article 121 of the Articles of War of the Army of the United States, which are the governing laws for the National Guard of this State, . . . is similar in language and identical in substance with the section of the Articles of War of the British Army which the court held in *Dawkins v. Paulet* should be taken as prescribing the measure and mode of redress to which an officer was entitled for wrong done him by his commanding officer, and we think, so far as the present question is concerned, that no different effect should be given the provision by this court.”<sup>53</sup>

An indication of the scope of the statutory redress procedure is the recent case of Private Wiley.<sup>54</sup> This soldier requested an investigation under the provisions of Article 138 of the procedures employed by his superiors in reaching the decision to eliminate him from the service under the provisions of AR 615-368.<sup>55</sup> His allegation was that there had been a violation of the provision of the regulation which provided that “care will be exercised in assuring that any intervening officer who has direct knowledge of the case is not a member of the board.”<sup>56</sup> Complainant contended that one of the members, a lieutenant colonel, had direct knowledge of the case,

<sup>52</sup> *Wright v. White*, 166 Ore. 136, 110 P.2d 948 (1941).

<sup>53</sup> *Id.* at 148-149, 110 P.2d 953.

<sup>54</sup> JAGA 1956/1452, 17 Feb 1956.

<sup>55</sup> AR 615-368, 27 Oct 1948, as amended, has been superseded by AR 635-208, 21 May 1956. These regulations provide procedure and guidance in the elimination from the service of enlisted personnel having undesirable habits and traits of character.

<sup>56</sup> Par. 1b(3), AR 615-368, 27 Oct 1948.

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as complainant had served for him as a clerk for several weeks and had been interviewed by him concerning an alleged wrong bearing directly on the case. The Judge Advocate General of the Army expressed the following opinion: "Although this office appears never to have considered a case in which the elimination of an enlisted man was the subject of a complaint pursuant to Article 138, the general principle that an *abuse of command discretion for which no other corrective or appellate procedure is provided* is a proper subject of such a complaint can be gleaned from the cited cases."<sup>57</sup>

Would the following, then, be a proper subject: Suppose defense counsel in a general court-martial case requests prior to trial that trial counsel subpoena Miss X to be a defense witness. Trial counsel refuses on the ground that her testimony is admissible by deposition. Proper application is made to the convening authority, but he denies the request although defense counsel clearly establishes that the witness's testimony is essential to the defense and cannot be adequately presented by deposition. Complaint pursuant to Article 138 is thereupon made to the next superior commander. The refusal of the convening authority, if shown to be an abuse of discretion, is a type of wrong which should be subject to redress. It may be argued, however, that the complainant has not been wronged as a corrective procedure exists, that is, at the trial he could resubmit his request for the subpoena of the witness to the court-martial whose action would be subject to further review by the usual appellate procedure.<sup>58</sup> The possibility of such corrective action is too remote and ineffectual. The defense is entitled to know prior to trial whether or not the requested witness will be present as he must decide on a proper course of action prior to trial—whether to utilize a deposition, attempt to bring in the witness at accused's own expense, or to do without her.

In what other fields is the redress procedure properly operative? A recent Federal court decision has indicated that an erroneous determination of absence without leave would be a proper subject.<sup>59</sup> This case involved a habeas corpus proceeding wherein the relator contended that he was being held illegally in service beyond the term of his enlistment to make up "time lost."<sup>60</sup> The court held that

<sup>57</sup> JAGA 1956/1452, 17 Feb 1956 (emphasis added).

<sup>58</sup> See *U.S. v. Harvey*, 8 USCMA 538, 25 CMR 42 (1957) and *U.S. v. Thornton*, 8 USCMA 446, 24 CMR 256 (1957).

<sup>59</sup> *U.S. ex rel. Parsley v. Moses*, 138 F. Supp. 799 (N.J. 1956).

<sup>60</sup> The current act (24 Jul 1956, § 1, 70 Stat. 631) provides in part that an enlisted member who deserts or is absent from his organization, station, or duty for more than 1 day without proper authority is liable, after his return to full duty, to serve a period which, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted. See also par. 12a, AR 635-200, 6 Dec 1955.

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if he felt the computation was erroneous or that the absence was in fact not an unauthorized one, the proper mechanism for him to use to secure a recomputation by proper authority of the time he must make up was Article 138. This case indicates a possible adequate remedy for military personnel who wish to contest any administrative determination of absence without leave or desertion. Suppose, for example, a soldier contends that he was unable to return from an authorized absence due to circumstances beyond his control, but his commanding officer determines that the overleave period was without proper authority. If he believes himself wronged by such determination, that wrong would be a proper subject for a proceeding pursuant to Article 138.

A paucity of cases and precedents makes it difficult to describe other specific types of wrongs covered by Article 138, but the following may be considered as examples of wrong in addition to those already mentioned which probably could be redressed by the procedure under discussion: improper deprivation of pass or leave privileges; denying, without sufficient cause, a married enlisted member of the command privilege of living off the post and drawing separate rations; denying a noncommissioned officer, without sufficient cause, the privilege of occupying an available private squad room, or utilizing a separate noncommissioned officers' mess; imposing duties upon a noncommissioned officer which tend to degrade the rank; utilizing a noncommissioned officer for menial tasks, which could be performed by available subordinates; utilization, without proper authority, of subordinates on personal matters, such as cook, chauffeur, valet, gardener, and the like; requiring subordinates to purchase from personal funds articles of clothing, uniform, or equipment which are authorized but not required by regulations or custom; requiring subordinates to obtain permission to purchase or own motor vehicle; failure to adhere to known command policies with respect to pretrial or post trial confinement; failure to consider, without justification, a subordinate for promotion although he is eligible and vacancy exists; improper efficiency ratings; imposition of punishment in guise of additional training.

The recitation of other examples would serve no useful purpose. The general categories, previously mentioned, are sufficiently indicative of the type of wrongs which are likely to arise under Article 138.

### 11. JURISDICTIONAL PROBLEMS

In addition to the requirement that the complaint should involve a particular type of wrong, there are other factors which must be

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considered before a determination can be made whether the formal complaint procedure has been properly invoked. These factors are jurisdictional in nature and may either invalidate the proceedings entirely or require that they be considered under some provision of law or regulation other than Article 138.

First, the complainant must be in the military service.<sup>61</sup> Separation of the complainant from the service after he has filed his complaint will not, however, invalidate the proceedings. In the previously mentioned case of Private Wiley, involving the soldier who was discharged pursuant to an approved recommendation of a board of officers convened pursuant to Army regulations, the opinion was expressed that "logically Article 138 should apply to a complaint made by a former member which was made prior to separation and which protested the member's pending separation."<sup>62</sup>

A recent case involved a reserve officer, not on active duty, who complained against the commanding officer of his reserve unit, alleging that he had been wrongfully transferred from the reserve unit because of absenteeism. Complainant contended that he had been excused from the drills, and that racial discrimination by his commanding officer was the true cause of his involuntary transfer. The view was expressed that:

"The Articles from which Article 138, UCMJ, was derived do not appear to have been framed in contemplation of complaints by reservists not on active duty nor subject to court-martial jurisdiction. This conclusion is supported by the fact that the articles relating to complaints have undergone relatively slight and infrequent changes since 1775 while an entire concept of reserve service has developed. Introduction of concept of amenability to court-martial jurisdiction in Article 138, UCMJ, indicates more clearly than previously that complaints such as in the instant case may not be processed under this Article."<sup>63</sup>

Reference was previously made to a civil suit involving a warrant officer occupying National Guard status wherein it was indicated that his proper remedy was a proceeding under the article for redressing wrongs.<sup>64</sup> He was not on active duty when the alleged wrong was committed. However, the proceeding which the court mentioned actually involved a procedure authorized by state law—that is, the particular state had adopted as part of its military law the provisions of Article of War 121. A proceeding of concern to the U. S. Army was not contemplated. Hence, it may be said that the Federal enactment, Article 138, is not applicable to complaints

<sup>61</sup> Winthrop, *op. cit. supra* note 3, at 603.

<sup>62</sup> JAGA 1956/1452, 17 Feb 1956.

<sup>63</sup> JAGA 1955/2382, 21 Mar 1955.

<sup>64</sup> *Wright v. White*, 166 Ore. 136, 110 P.2d 948 (1941).

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by reserve or National Guard personnel regarding wrongs allegedly committed against them by commanders of their units when neither of the persons involved is on active duty nor subject to Army court-martial jurisdiction.

The amenability to court-martial jurisdiction concept is not, however, the decisive criterion. There are many classes of persons who are subject to military law and court-martial jurisdiction<sup>65</sup> but are not within the provisions of Article 138. This Article uses the phrase "any member of the armed forces" rather than the broad phrase "any person subject to this code" which appears in many of the other Articles of the Uniform Code of Military Justice.<sup>66</sup> It was clearly intended that the formal redress procedure would be available only to those individuals who may be considered members of the armed forces. This term is generally limited to those individuals who are on active duty with an armed force of the United States. They must at least occupy this status at the time the complaint is made. More often than not, a separation from the military service will render the proceeding moot

A second basic requirement is that the grievance for which redress is sought must be *personal* to the complainant. Only direct sufferers may complain. Colonel Winthrop's view, speaking of the 1874 enactment,<sup>67</sup> was that it did not include such acts as merely affect discipline in general. That particular Article contained the phrase "for the doing of justice to the complainant," and the military writers consistently interpreted this to mean a personal wrong of such a nature as was capable of redress.<sup>68</sup> Thus, Article 138 procedure may not be used to inform upon a commander for misdeeds in general or to others.<sup>69</sup>

It is also well settled that a combination or the joining of complaints together so as to present a formidable front will not be permitted. Colonel Winthrop made the observation that "it is the sentiment of the authorities that where several soldiers have the same grievance, they should not be permitted to combine in a joint complaint, since to allow this would be to encourage a mutinous or insubordinate feeling, but that separate and individual complaints only should be entertained."<sup>70</sup> This historical precedent would not,

<sup>65</sup> Art. 2, UCMJ, defines the persons who are subject to the Uniform Code of Military Justice.

<sup>66</sup> Thus, Art. 17(a), UCMJ, provides that each Armed Force shall have court-martial jurisdiction over all persons subject to the Code.

<sup>67</sup> Art. 30, Articles of War of 1874.

<sup>68</sup> Winthrop, *op. cit. supra* note 3, fn. 84, at 602.

<sup>69</sup> DeHart, *Military Law* 267 (1862).

<sup>70</sup> Winthrop, *op. cit. supra*, at 605; *id.* fn. 94, indicating that a round robin, or any other paper, stating a general complaint should not be entertained.

it is believed, preclude the presentation and consideration at one and the same time of separate complaints of more than one individual alleging the same wrong against the same commander.

“[B]y *his commanding officer*.” In a recent opinion,” The Judge Advocate General of the Army expressed the view that this language indicates that Congress intended, through the medium of this Article, to provide a remedy against the wrongful acts of a commander only. In that case, the complainant sought a reexamination of the merits of a conviction by court-martial; and there can be no argument with the conclusion that “there is no indication of an intent to provide for an additional review of trials by courts-martial — that an error found in the conduct of a trial is the act of the members of the court-martial and not the commanding officer.”<sup>72</sup>

In a case involving the 121st Article of War, colored officers on board a British transport made complaint to the commanding general of the United States troops on board the vessel, by way of letter of appeal, charging that they were mistreated and discriminated against solely on account of color. The conditions complained of were brought about by British authorities. It was held that the Article contemplates such wrongs as may emanate from the commanding officer of the complainant, not a state of affairs brought about by foreign authorities.<sup>73</sup>

It is interesting to note that the 35th Article of War<sup>74</sup> of the Code of 1806 contained the phrase “shall think himself wronged by *his Captain or other officer*” (emphasis supplied). Article 30 of the 1874 Articles of War, however, was expressed in broader language, utilizing the words “who thinks himself wronged by *any officer*” (emphasis supplied). Colonel Winthrop was, nevertheless, of the opinion that the soldier was limited to cases arising in the regiment. Referring to the phrase “by any officer,” he stated in his learned treatise “while this general term may be held to include officers of whatever rank, and whether or not of the same company or regiment as the complainant, it is to be gathered from the history and text of the Article that it was therein contemplated that it would be mainly the acts of company officers and especially’ company commanders for which redress would be sought.”<sup>75</sup>

However, there were differences of opinion as to the Article concerning complaints of officers. Article 34 of the 1806 Code used

<sup>71</sup> JAGJ 1953/1012, 29 Jan 1953.

<sup>72</sup> *Ibid.*

<sup>73</sup> JAG 250.451, 6 Mar 1919, Dig Op JAG 1912-40, § 479.

<sup>74</sup> This article pertained only to complaints of soldiers.

<sup>75</sup> Winthrop, *op. cit. supra* note 3, at 602.

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the phrase “wronged by his Colonel, or the commanding officer of the regiment”; and Article 29 of the 1874 Code provided relief to an officer “wronged by the commanding officer of the regiment.” DeHart<sup>76</sup> was of the opinion that the 34th Article should be held to apply to cases of wrongs inflicted by any superior officer. It was his theory that it was a remedial statute and might properly be thus freely construed. Colonel Winthrop, however, maintained the contrary—insisting upon the rejection of a complaint against a post commander not also a regimental commander.<sup>77</sup>

Suppose, however, that this regiment was assigned or attached to the post, thereby making the post commander the immediate superior of the regimental commander. Surely in that situation a wrong committed by the post commander would be cognizable under the current Article, as the more comprehensive term “by his commanding officer” has been used. The military authorities of his day, however, followed Colonel Winthrop’s view and held in several cases that the 29th Article of War was expressly limited in its terms to wrongs alleged to have been committed by commanders, and did not apply to other than commanding officers.<sup>78</sup>

However, several recent opinions have clearly indicated that the phrase “by his commanding officer” is not limited to the *immediate* commanding officer but includes a commander higher in the chain of command. Thus it was held<sup>79</sup> “that with respect to complaints of discharges issued pursuant to AR 615–368 the general court-martial authority who convenes the board and orders the members discharged, rather than any subordinate [who initiates, recommends or approves elimination] must be regarded the officer against whom complaint is made.” In another opinion,<sup>80</sup> it was held that “where the general court-martial authority is the officer being complained of, Article 138 requires that the complaint be forwarded to the next higher general court-martial authority for action.” Certainly, the latter opinion was not intended to apply only in those few instances when the general court-martial authority was also the immediate commanding officer of the complainant. That view would be too restrictive as it is common knowledge that grounds for complaints very often are caused not only by the immediate commander but by superior commanders. A command relationship between the aggrieved and the alleged wrongdoer would appear sufficient. Hence, a wrong committed by an officer subordinate to the immediate com-

<sup>76</sup> DeHart, *Military Law* 78,263 (1862).

<sup>77</sup> Winthrop, *op. cit. supra*, at 600, 601.

<sup>78</sup> See **Dig Op JAG** 1912 (Article of War **XXIX**, § **A**), p 125.

<sup>79</sup> **JAGA** 1956/1452, 17 Feb 1956.

<sup>80</sup> **JAGA** 1956/6505, 12 Sep 1956.

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mander should also be cognizable; for example, a wrong committed by a unit staff officer, platoon leader, or officer in charge of a section. With respect to the last two individuals, it should not matter whether the aggrieved person is a member of their unit or a member of another platoon or section. There is sufficient historical basis for this holding. The early articles contained the phrase "by his captain or other officer" and this was generally construed as meaning other officers of the company or at least of the **regiment**.<sup>81</sup> The current Article should receive an equally broad interpretation. However, complaints against a unit staff officer, platoon leader or the like will be rare. An alleged wrong on the part of such officers is usually called to the attention of the immediate commander. **If** the latter fails to rectify the alleged wrong, then the complaint should be alleged against him since wrongs on the part of a commander may be passive as well as active.

Conceivably then, there may be complaints of wrong which are not properly within the provisions of Article **138** and nevertheless require redress or other corrective action. The complainant is not usually without some remedy. The precise form it may take will be discussed subsequently.

A matter which also requires discussion from a jurisdictional standpoint is: Who are the proper officers to receive and process formal complaints properly cognizable under the statutory redress procedure? In a recent *opinion*,<sup>82</sup> the view was expressed that if Article 138 is to be of any efficacy the complaint must be referred to the superior of the officer who took the action of which complaint is made rather than that officer himself. The present article provides that the individual may complain "to any superior commissioned officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made." This is the first time that an intermediate officer has been interposed between the complainant and the officer to whom the appeal for redress is being made. Article of War 121 authorized a complaint *directly* to the general commanding in the locality where the officer against whom the complaint was made was stationed, and amended Article of War 121<sup>83</sup> authorized a complaint *directly* to the officer exercising general court-martial jurisdiction over the officer against whom the complaint was made. What jurisdiction, if any, has been conferred upon this intermediary? He may be compared to the "regimental commander" who Article **30** of the

<sup>81</sup> Winthrop, *op. cit. supra* note 3, fn. 86, at 603.

<sup>82</sup> JAGA 1956/1452, 17 Feb 1956.

<sup>83</sup> Act of 4 Jun 1920, 41 Stat. 811, as amended by Act of 24 Jun 1948, 62 Stat. 642.

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1874 Code authorized to summon a “regimental court-martial” to hear a complaint. With respect to the 1874 provision, Colonel Winthrop made the following observation: “This provision is construed by the authorities as making it compulsory upon the commander to convene the court, and entitling the complainant, as of right, to have it ordered: it is held that the commander has no discretion in the matter, but that he is in all cases obliged to assemble the court within a reasonable time after receiving the complaint.”<sup>84</sup>

A similar interpretation had previously been given to the 35th Article of War of the 1806 Code. With respect to this provision, The Attorney General stated that “the commanding officer of the regiment. . . is required to summon a regimental court-martial on the case. This latter provision is imperative and compulsory. It is not a matter of favor or discretion, but of right. . . .”<sup>85</sup>

Thus, it is clear that this intermediate commander possesses no authority whatsoever to adjudicate a *proper* complaint. The complainant is entitled, as a matter of right, to have his complaint forwarded to the general court-martial authority. However, from an historical point of view, it may be said that this intermediate does perhaps have some power. Speaking again of the regimental commander, Colonel Winthrop observed that “the general injunction, however, of the Article<sup>86</sup> is to be viewed as subject to the condition that the matter of the complaint be within its purview: if the wrong complained of is not one which the regimental court is competent to entertain, the commander will properly decline to convene it.”<sup>87</sup> It would appear, therefore, that the officer with whom the complaint is first lodged has jurisdiction to determine whether the complaint is in fact properly cognizable under Article 138. This power must be considered as being very limited and should be exercised only in the most obvious cases.

Who is this intermediate commander? Must he be the immediate superior of the alleged wrongdoer? The enactment uses broad language. In the usual situation, both the complainant and the respondent, *i.e.*, the alleged wrongdoer, will be in the same command. At one time, it was the view that “the officer, [against whom complaint was made] equally as the complainant, should be within the command of the regimental commander, since otherwise the latter could not give effect to a specific recommendation made by the regimental court.”<sup>88</sup> This view, however, need not be considered binding

<sup>84</sup> Winthrop, *op. cit. supra* note 3, at 603.

<sup>85</sup> 1 Ops. Att’y Gen. 166, 167 (1811).

<sup>86</sup> He was referring to Article 30 of the 1874 Code.

<sup>87</sup> Winthrop, *op. cit. supra* note 3, at 603.

<sup>88</sup> *Ibid.*

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as the language “any superior officer” is clearly applicable not only to the officer immediately superior to the respondent but also to any officer higher in the chain of command. For example, in the case of a separate battalion, a soldier aggrieved by his battery commander would normally complain to the battalion commander; or, if such battalion was attached to a group headquarters or to a division artillery headquarters the complaint could properly be filed directly with the commanding officer of the group or the division artillery. In the case of an infantry regiment, an individual aggrieved by the company commander may properly file his complaint either with the battalion commander or directly with the regimental commander. In either situation, if the complaint was filed directly with the proper general court-martial authority, the redress procedure was legally invoked. The Article states that the aggrieved individual may complain to *any* superior commissioned officer. It is not mandatory, although customary, that he file through command channels. Lack of compliance with mere procedural requirements would not affect jurisdiction.<sup>89</sup>

In final analysis, it is of little consequence who the officer is with whom the complaint is initially filed. The important point is for the complaint to reach the officer who has the jurisdiction, the competency, to examine into the complaint. He is the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. Hence, it is also relatively unimportant that the complainant does not remain assigned to the unit or command of the officer who committed the alleged wrong. In that event, it would be proper for the aggrieved person (assuming he still has a proper grievance) to file his complaint with the commanding officer of the organization to which he has been transferred. Jurisdiction over the proceedings would remain with the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made and the complaint, of course, would have to be transmitted to that authority by the command with which it was filed.

Suppose after the wrong has been committed and redress has been refused, the alleged *wrongdoer* is transferred from the unit or command. Who has jurisdiction over the proceedings? In this situation, the complaint should, in accordance with plain wording of the Article, be forwarded to the commander then exercising general court-martial jurisdiction over the alleged wrongdoer. However, if the alleged wrongdoer has been separated from the military serv-

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<sup>89</sup> Cf. Art. 32(d), UCMJ, which provides in substance that the failure to have a proper pretrial investigation of court-martial charges shall not constitute jurisdictional error.

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ice, an Article 138 complaint would not lie.<sup>90</sup> But if the separation occurs while the complaint is pending, the complaint should, if the alleged grievance still exists, be processed to completion under a procedure other than Article 138.

Another situation which might arise would be the transfer of *both* the aggrieved person and the alleged wrongdoer. Transfers may occur for various reasons—normal rotations to and from overseas, change of duty assignments, reorganization of units or commands, inactivation of organizations. In these instances, the parties involved might very well find themselves under different general court-martial authorities. For example, Corporal *A* is assigned to Tank Company, 3d Armored Cavalry Regiment, which is attached to Fort George G. Meade, Maryland. *A* is reduced to private first class for inefficiency by Captain *X*, his company commander. Several days later the regiment is transferred to Germany in accordance with a “gyroscope” plan. *X*, however, is transferred to The Armored Center, Fort Knox, Kentucky, to attend school, and *A* is transferred to The Infantry Center, Fort Benning, Georgia, for airborne training in accordance with a previous request. *A*, shortly after his arrival at Fort Benning, submits a complaint to his company commander contesting his reduction. Four general court-martial authorities may be involved—the commander in Germany exercising general court-martial jurisdiction over the 3d Armored Cavalry Regiment and where many of the witnesses may be stationed; the commanding officer of Fort George G. Meade, Maryland, where other witnesses may be stationed; and the commanders of The Infantry Center and The Armored Center who, respectively, exercise general court-martial jurisdiction over *A* and *X*. The answer, nevertheless, would be the same. Regardless of with whom the complaint is initially filed, jurisdiction to determine the validity of the allegations rests with the officer presently exercising general court-martial jurisdiction over the respondent. In the foregoing example, the complaint should be sent to the commanding general of The Armored Center who would have the responsibility for making and taking action on the investigation. It may very well be that he would not have the power to redress the wrong. However, the lack of remedial action would not affect jurisdiction.

Another situation which is apt to arise in reduction cases is the following: Commanding officer of *A* Company, 116th Infantry Regi-

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<sup>90</sup> See Davis, *Military Law* 226 fn. 2 (1901), wherein it is stated: “So where a company commander who had entered on the pay-rolls an unauthorized stoppage against a soldier resigned, and the same stoppage was thereupon continued by his successor, *held* that the complaint should be presented against the latter.”

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ment, Fort Riley, Kansas, recommends that Sergeant First Class **X** be reduced to private first class for inefficiency. After considering the matter, the regimental commander effects such reduction. Shortly thereafter, the regimental commander is transferred to Korea. The soldier files a complaint as to his reduction, seeking redress. It would seem that the complaint must be transmitted to the commander presently exercising general court-martial jurisdiction over the regimental commander. The regimental commander is the one who actually made the reduction, and he allegedly is the wrongdoer. The complainant is seeking redress from his action, even though it was based primarily on the recommendations of the company commander.

Before discussing the duties and responsibilities incumbent upon the general court-martial authority, consideration should be given to certain procedural aspects which govern the submission and processing of complaints.

### III. PROCEDURE UNDER THE ARTICLE

Over the course of years, and by virtue of certain language appearing in the article concerning the redress of wrongs, certain set rules have developed with respect to the administration and processing of complaints. To some extent they may be termed conditions precedent. Thus, Article 138 provides that the individual who believes himself wronged by his commander must make "due application to such commander" for redress. He may only complain if he is refused redress.

Captain DeHart, writing of the prior grievance articles, indicated that the reason for the initial petition to the commander is that it "gives [him] the opportunity, where offenses have been inadvertently committed, for reparation by the officer complained of, and thus saves the service from being harrassed by vexatious actions . . . ." <sup>91</sup> This observation is equally applicable to current provisions. To preclude unnecessary interference with local command problems, the alleged wrongdoer should be given the opportunity to rectify the matter complained of. However, a prior application is not required where the application for redress would amount to a futile act. For example, an individual is reduced for inefficiency by his commanding officer after an informal hearing is held. Application to the same commanding officer for redress would not accomplish anything. Apparently, this was recognized in the Army regulations pertaining to reductions for inefficiency wherein it was provided in substance that such personnel would be advised

<sup>91</sup> DeHart, *Military Law* 255 (1862).

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of their rights under Article 138 to submit a complaint. The reduction having taken effect, further request to the same officer for relief should not be required.

How long must the aggrieved person wait before making complaint? Is there a time limitation for such action? The historical view was that "the refusal [to redress] must be an absolute one, or there must be such neglect of the application, on the part of the commanding officer, as shall constructively amount to a denial of justice."<sup>92</sup> Thus, in the reduction cases, once the demotion is announced the aggrieved person has the right to complain. Neither Article 138 nor any implementing directives create a statute of limitations for the submission of the complaint. The normal criminal statute of limitations is not applicable since an Article 138 hearing is not a "trial."<sup>93</sup> To fill the gap, military writers and authorities have created a "rule of reason." If the complaint is not presented with due diligence, it is waived since the complainant through his own fault has caused a stale claim, possible absence of witnesses and the like.<sup>94</sup>

In an early opinion, it was held that "the right to complain . . . is a right conferred by statute, and its exercise can not be prejudiced by requirements or regulations."<sup>95</sup> *Query*: Did the reduction regulations offend the statutory enactment by requiring affected personnel to submit complaints within ten days following the date of reduction?<sup>96</sup> This specific question is now moot as the regulations have been amended to delete the reference to the right to complain. Regulations which unduly restrict the right to file complaints would certainly be illegal. Reasonable restrictions, including a time limitation which contained provisions authorizing late filing upon a showing of good cause, would undoubtedly be considered unobjectionable.

There is no prescribed form published either by the Department of Defense or the Department of the Army for the recording of a complaint properly cognizable under Article 138. Yet it has been characterized as a formal complaint procedure.<sup>97</sup> Compare this to

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Dig Op JAG 1912 (Article of War XXX, § B)*, p 125.

<sup>94</sup> Winthrop, *op. cit. supra* note 3, at 604; Hough, *Precedents in Military Law 770 (1855)*.

<sup>95</sup> *Dig Op JAG 1912 (Article of War XXX, § E)*, p 126.

<sup>96</sup> *Par. 25b, AR 624-200, 31 May 1955*.

<sup>97</sup> In *JAGA 1955/7903, 20 Oct 1955*, it was indicated that the reason for deleting the reference to Art. 138 in *par. 25b, AR 624-200, 31 May 1955*, was for the purpose of reestablishing the *informal* procedure for handling of complaints concerning reductions.

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the regulations<sup>98</sup> governing complaints to inspectors general, wherein it is expressly provided that DA Form 1559 will be used to record complaints from individuals.

Although not required by the Article, it appears to be settled that the complaint should be in writing, setting forth the facts of the grievance and stating the substance of the original application to the commander for relief and its result.<sup>99</sup>

Captain DeHart expressed the view, at least with respect to complaints of officers, that the complaint must be identical to the original petition for relief to the commander and must be forwarded through command channels to again afford the commander the opportunity to change his mind or forward his own defense.<sup>100</sup>

Current Army regulations<sup>101</sup> concerning military correspondence prescribe in substance that correspondence is routed through the normal chain of command when the next higher chain of command is expected to exercise control, take action, or to be concerned.

In accordance with historical precedent, the individual seeking redress should, whenever possible, make application for it in writing. Upon being refused redress, he should then submit his complaint in writing addressed to the commanding officer of the alleged wrongdoer. The complaint should, however, be submitted through the normal chain of command; that is, through the aggrieved person's immediate commanding officer, regardless of who the alleged wrongdoer is. Thus, if the sergeant first class of Company A is reduced for inefficiency by the regimental commander, the letter of complaint should be addressed to the commander exercising general court-martial jurisdiction over the regimental commander but submitted through the commanding officer of Company A and the regimental commander. It is clear that such matters are of concern to both commanders.

As the general court-martial authority should have both sides of the controversy, the complainant and all intermediate commanders concerned should include with the letter of complaint, when appropriate, affidavits, certificates, or statements of other persons, official documents, and other evidence. For example, a complaint involving a reduction for inefficiency should be accompanied by a sworn statement from the complainant setting forth in detail the reasons why

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<sup>98</sup> Par. 27, AR 20-1, 29 Jan 1957.

<sup>99</sup> Winthrop, *op. cit. supra* note 3, at 601, 605.

<sup>100</sup> DeHart, *Military Law* 255 (1862).

<sup>101</sup> Pars. 8 and 31, AR 340-15, 8 Dec 1965.

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he believes himself aggrieved ; sworn statements from individuals who support his contentions ; commendations he may have received ; certificates or affidavits from commanders and others setting forth in detail the manner in which the complainant was inefficient in the performance of his duties; certificates showing the length and type of training complainant had received in connection with his duties; extracts from service record as to ratings received for efficiency during periods involved ; copies of special orders announcing reduction ; and other evidence bearing on the case.

The immediate commanding officer of the aggrieved person or the officer to whom the complaint has been submitted has, in reviewing the file, very little authority. He has a duty to insure that the complaint is in proper form and accompanied by appropriate supporting documents. Should the complaint concern a matter clearly not cognizable under Article 138, or a matter which could be more conveniently processed by some other method, it would be appropriate for intermediate commanders to advise the complainant accordingly. It is clear, however, that they would have no authority to decide the complaint on its merits. The article uses mandatory language—"shall forward the complaint." Unless the complainant voluntarily withdraws it or expressly consents to some other method of processing or disposing of it, or it is clearly without the scope of Article 138, the complaint must be sent to the officer exercising general court-martial jurisdiction over the officer against whom it is made. Direct communication and complaint to the general court-martial authority would be sanctioned if the intermediate commanders refused to transmit the complaint.<sup>102</sup>

### IV. CONSIDERATION OF COMPLAINT BY GENERAL COURT-MARTIAL AUTHORITY

#### A. *The Investigation*

Article 138 expressly states that the officer exercising general court-martial jurisdiction over the officer against whom it is made "shall examine into the complaint." The use of the word "shall" indicates that an inquiry of some sort is mandatory. In several recent opinions, The Judge Advocate General of the Army expressed the view that complaints concerning wrongful reductions for inefficiency received by the commanding general under Article 138 should be promptly investigated to determine their validity.<sup>103</sup>

With respect to complaints of officers, Colonel Winthrop observed that "the general will examine the statements, &c., and consider the

<sup>102</sup> Winthrop, *op. cit. supra* note 3, at 601.

<sup>103</sup> JAGA 1955/8903, 9 Dec 1955; JAGA 1956/2592, 9 Mar 1956 (both commands had general court-martial jurisdiction).

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arguments . . . .”<sup>104</sup> Captain DeHart expressed the opinion that “no discretion is allowed to the general to whom complaint is made, to arbitrarily dispose of it by his own will.”<sup>105</sup> The reference to “arguments” would indicate that a hearing, formal or informal, was held at which witnesses were heard and complainant or his counsel was permitted to make an argument. In those days, complaints of enlisted personnel were heard by courts-martial. The article concerning such complaints also used mandatory language—“who shall summon a regimental court-martial.”<sup>106</sup>

A review of the functions of this court will perhaps lead to a better understanding of the type of hearing that should be held in this day and age. The Article “does not contemplate or provide for a *trial* of an officer as an *accused*, but simply an investigation and adjustment of some matter in dispute . . . . The regimental court does not really act as a court but as a board, and the ‘appeal’ authorized is practically from one board to another.”<sup>107</sup> Upon receipt of the complaint, the commander convened the regimental court, stating in the order the purpose for which it was assembled. No arrest was made of the officer whose actions were in question.<sup>108</sup> At the hearing each party, if he desired, appeared, exercised challenges, presented testimony, cross examined and argued his position. The “court” then reached conclusions in the form of recommendations to the regimental commander. If either party was dissatisfied with the decision of the regimental commander, he had an absolute right to “appeal” and thereby secure a *de novo* rehearing of the case by a general court.<sup>109</sup>

What type of inquiry, then, is required by the provisions of the current article? Complaints of both officers and enlisted personnel are now governed by the one and same article. Only an “examination into” is demanded. No mention is made in either the Article or in any implementing directives of a proceeding in the nature of a court-martial, or of a court or board of inquiry, or of a board of officers.<sup>110</sup>

The last clause of the Article, reading—“with the proceedings had thereon”—should be particularly noted. The general court-

<sup>104</sup> Winthrop, *op. cit. supra* note 3, at 601.

<sup>105</sup> DeHart, Military Law 253 (1862).

<sup>106</sup> Article 30 of the 1874 Code. Article 35 of the 1806 Code used the phrase “who is hereby required to summon a regimental court-martial.”

<sup>107</sup> Dig Op JAG 1912 (Article of War XXX, § A), p 125. See also Winthrop, *op. cit. supra* note 3, at 603.

<sup>108</sup> An arrest order would be “irregular and premature.” 1 Ops. Att’y Gen. 166, 168 (1811).

<sup>109</sup> Winthrop, *op. cit. supra* note 3, at 604, 605.

<sup>110</sup> JAGA 1956/6505, 12 Sep 1956.

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martial authority is required to transmit to the Secretary of the Army a true statement of the complaint with the proceedings had thereon. If a question of first impression, it would be arguable that the word "proceedings" means a formal examination of the evidence pertaining to the subject matter of the complaint. Without such inquiry, what "proceedings" do you have which you can forward to the Department? Note the rights which the enlisted person had at one time with respect to his complaints. He was assured of two independent, formal hearings. Did Congress intend to eradicate this right entirely when it provided that complaints of soldiers would be processed in the same manner as those of officers? It was undoubtedly intended to make the proceedings less cumbersome, but was it necessarily intended to obviate the necessity for some sort of formal investigation? At least one command staff judge advocate thought not when he promulgated the policy that "to process such a complaint properly, the following action should be taken by the officer exercising general court-martial jurisdiction over the officer against whom the complaint has been made: (1) appoint an investigating officer or a board of officers (one or more) pursuant to AR 15-6;<sup>111</sup> (2) take such action as may be appropriate on the report of proceedings submitted pursuant to paragraph 29,<sup>112</sup> AR 15-6."<sup>113</sup> However, a recent opinion of The Judge Advocate General of the Army has ruled that there is *no* requirement that formal investigations be made of complaints under Article 138.<sup>114</sup> Apparently the word "proceedings" as used in the Article is synonymous with "report;" that is, merely a report of the action taken on the complaint must be forwarded.

What then is the general court-martial authority required to do upon receipt of a complaint? He may not, as the early military writers have indicated, arbitrarily dispose of it. A recent opinion, referring to the 13th and 14th Articles of War of 1775, expressed it thusly: ". . . from the phraseology of the foregoing, under those articles the commander concerned was to have personal knowledge of the complaint, but he could have the complaint investigated by a subordinate or by a court-martial."<sup>115</sup> It is clear that his action should be based on some sort of inquiry. Whether it will be a formal

<sup>111</sup> AR 15-6, 25 Jul 1955, as changed, is the procedural guide for investigating officers and boards of officers in conducting investigations.

<sup>112</sup> Par. 29, AR 15-6, sets forth some general instructions with respect to preparation of the report of the proceedings of an investigating officer or a board of officers. Appendix II of AR 15-6 sets forth a model report, and indicates that the "action by the convening authority" should be in writing and attached to the report.

<sup>113</sup> Par. 5, "Complaint of Wrongs Pursuant to Article 138, UCMJ," of letter, AFPE JA 312.1, Hq AFPE/8A(Rear), O/JA, 14 Nov 1955, subj: "Informational Letter 2-55."

<sup>114</sup> JAGA 1956/6505, 12 Sep 1956.

<sup>115</sup> *Ibid.*

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or informal investigation will usually depend upon the seriousness of the allegation, the whereabouts of the complainant, respondent and witnesses, available time, and exigencies of the service.

An investigation may be considered informal when the officer exercising general court-martial jurisdiction personally makes the necessary inquiry without formal hearings, or when he instructs a subordinate officer to check informally into the matter and report. The investigation is considered formal when the matter is referred to a court of **inquiry**,<sup>116</sup> or board of inquiry, or a board of officers is convened, or an investigating officer is appointed to inquire into and report on the allegations. If a formal investigation is initiated, it must be conducted in accordance with AR 15-6.<sup>117</sup>

Suppose the following situations: (1) Corporal *W* of Company **A**, 116th Infantry Regiment, is reduced for inefficiency by his company commander; (2) Sergeant *X* of Company **A**, 116th Infantry Regiment, is reduced for inefficiency by the regimental commander; (3) Sergeant First Class *Y* of 1st Engineer Battalion is reduced for inefficiency by his battalion commander; (4) Master Sergeant *Z*, of Hq Co, 1st Infantry Division, is reduced for inefficiency by orders of the division commander. In each case the aggrieved soldier complains, pursuant to Article 138, to the commanding general, 1st Infantry Division, the officer exercising general court-martial jurisdiction over all the units mentioned. Who may investigate the complaint? In the last situation, it is clear, of course, that the complaint should be sent to the commander exercising general court-martial jurisdiction over the division commander for processing. But in the other situations, would it be proper for the division commander to return the files to the commanding officer of the 116th Regiment for necessary action, assuming that the regimental commander would in each case appoint an investigating officer?

In situations (1), (2) and (3), the normal and better course of action is for the general court-martial authority to appoint, by division special orders,<sup>118</sup> a board of officers or an investigating

<sup>116</sup> Art. 135, UCMJ. AR 22-30, 10 Dec 1951, provides in part that a court of inquiry is a formal, factfinding tribunal.

<sup>117</sup> JAGA 1956/6505, 12 Sep 1956.

<sup>118</sup> The order may read substantially as follows: "Under the provisions of Article 138, UCMJ (the following named officers are appointed as members of a board of officers) (Major ----- is appointed investigating officer) for the purpose of investigating into the complaint of (Sergeant -----) concerning (his reduction for inefficiency announced in (par., -----, SO No., -----, HQ, ----- (date)) (the alleged refusal of his company commander (Capt. -----) to issue him a Class A pass) (the alleged improper extra duties imposed upon him by his company commander (Capt. -----)) (-----). The (board of officers) (investigating officer) will be guided by the provisions of AR 15-6."

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officer of grade and rank higher than the reducing officer. The investigating officer or members of the board should be commissioned officers and not members of the organization or commands involved. This course of action, however, is not mandatory. In situations (1) and (3), the file may be returned to the regimental commander for investigation and action. With respect to the reduction imposed upon Sergeant X by the regimental commander, the board of officers or investigating officer must be appointed by the division commander or by the commander of another regiment or corresponding unit. The following opinion on these specific points is illuminating:

“The general court-martial authority concerned may instruct a subordinate commander to make an investigation of a complaint under Article 138, UCMJ, but (1) he may not direct that the officer being complained of or any officer subordinate thereto investigate the complaint; (2) only an officer senior in rank to the officer being complained of may be appointed to investigate the complaint; and (3) a complaint under Article 138, UCMJ, against a general court-martial authority must be addressed to the next higher general court-martial authority.”<sup>119</sup>

Some brief comments with respect to the formal investigation itself are appropriate. The individual under investigation is normally the person against whom the complaint has been lodged. The aggrieved person, *i.e.*, the complainant, is usually not considered the respondent. However, a respondent or party in a board proceeding or investigation is one whose conduct, fitness, efficiency, standing or pecuniary liability is under investigation. An individual may be a respondent at the outset if his interest is known to the board or investigating officer, or at any later stage in the proceedings when the board or investigating officer discovers that he is involved. Hence, in a proceeding involving a reduction for inefficiency, the enlisted person who was reduced and who instituted the proceedings pursuant to Article 138, although technically not under investigation, may nevertheless be considered a party. Although the initial respondent is the officer who effected the reduction, the proceeding really involves a controversy between the complainant and the officer effecting the reduction. The conduct and efficiency of both parties may be in question. Therefore, the rights and privileges of AR 15-6, particularly with respect to the giving of notice of the hearing and the allegations,<sup>120</sup> and the provisions as to counsel<sup>121</sup> should be afforded to both parties.

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<sup>119</sup> JAGA 1956/6505, 12 Sep 1956. See Par. 3b, AR 15-6, 25 Jul 1955, which reads in part as follows: “An investigating officer appointed to investigate the conduct, status, liability, or rights of another must be senior in rank to the person under investigation.”

<sup>120</sup> Par. 6, AR 15-6, 25 Jul 1955.

<sup>121</sup> Par. 8, AR 15-6, 25 Jul 1955.

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If the board of officers or the investigating officer adheres to the provisions of AR 15-6, a fair and impartial investigation, doing justice to all concerned, will result. It is essential that the investigating agency prepare an accurate and informative report. The most diligent investigation is of small value unless and until its results are properly communicated to the appointing authority. The report must relate all the facts upon which the conclusions are founded so that the appointing authority and higher authority will have a basis for intelligent action.

### B. The Action

It is appropriate to consider the duties of the officer who is required in the language of the Article "to take proper measures for redressing the wrong complained of." Regardless of who investigated the complaint, or who convened the board of officers, the officer exercising general court-martial jurisdiction over the officer against whom the complaint was made has primary responsibility for redress. The investigating officer or board merely acts as a fact-finding agency and as an advisory body to this commander. It is, therefore, the general court-martial authority who is required to evaluate the complaint and the proceedings had thereon, and to determine the validity of the complaint. In doing this, he may accept *in toto*, in part, or wholly ignore the findings and recommendations of the board or investigating officer. His criteria for evaluating the proceedings should be whether the allegations of the complainant are supported by substantial evidence. This is the customary standard in administrative proceedings.<sup>122</sup>

The early military writers and authorities were of the opinion, it appears, that the commander responsible for redressing the wrong had broad discretionary powers either to take remedial action himself, forward to the Department of War for action or quash an insufficient complaint.<sup>123</sup> However, the type of redress that was available under the early articles, especially those concerning complaints of inferior officers and soldiers, was very limited. No form of penalty such as a fine or apology could be awarded.<sup>124</sup> An early English case<sup>125</sup> points out vividly the inadequacy of the remedy under the complaint articles appearing in the British Articles of War. In this case a captain's civil action for libel against a superior officer alleging that a letter addressed by the defendant to The

<sup>122</sup> Administrative Procedure Act § 10(e), 60 Stat. 243, 5 U.S.C. 1009(e) (1952).

<sup>123</sup> Winthrop, *op. cit. supra* note 3, at 601; DeHart, Military Law 254 (1862); JAGA 1955/8903, 9 Dec 1955; JAGA 1956/2592, 9 Mar 1956.

<sup>124</sup> Winthrop, *op. cit. supra*, at 603.

<sup>125</sup> *Dawkins v. Lord Paulet* [1869] L.R. 5 Q.B. 94.

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Adjutant General of the Army reflected on the character and competency of the plaintiff as an officer was dismissed on the ground that his only remedy was the military grievance procedure—even though that remedy afforded no right to pecuniary compensation.

What are some of the problems in effecting redress which confront the general court-martial authority when reviewing proceedings conducted pursuant to Article 138? A frequent type of wrong for which redress is sought—reductions for inefficiency—deserves detailed study.

With respect to those proceedings wherein it appears that the reduction is void, no reduction occurs<sup>126</sup> and no difficulty is encountered in restoring the complainant. That is, if the commander who attempted to reduce was completely without authority to impose a reduction, the reduction would be void, and the order purporting to impose such a reduction should be set aside.<sup>127</sup> A more complicated situation occurs when the general court-martial authority disagrees with the reducing authority and determines that there was insufficient evidence as to inefficiency or that the reduction was too severe. In such instances, the reduction has been accomplished by competent authority, and the question is whether superior authority has the power, in order to give the redress to which complainant is entitled, to set aside or mitigate the reduction. In such a case he, apparently, does not have the power to grant complete redress.

It is now settled that where the commanding officer concerned possesses the authority to terminate the appointments of noncom-

<sup>126</sup> CSJAGA 1948/8601, 15 Feb 1949, cited with approval in JAGA 1952/3287, 18 Apr 1952, 2 Dig Ops, EM, § 39.2.

<sup>127</sup> Par. 28, AR 624-200, 8 Jun 1956, as changed by C2, 7 Mar 1957, provides that "Except as prescribed in paragraph 30a [pertains to misconduct cases], orders announcing the reduction of enlisted personnel issued by authority competent to effect such reduction will not be revoked or rescinded other than to correct an administrative error." Where the reduction is void because it was imposed by improper authority, the order was not issued by competent authority and may legally be set aside. It could be argued that in such case it would also be proper to revoke or rescind the order. Such position is probably sound, as legally no orders whatsoever are necessary. However, it must be remembered that the order merely announced the reduction. Likewise, it is the decision of the reviewing authority, in determining that the reduction was void and setting aside the illegal reduction, which clarifies the record. Hence, his decision should be recorded not merely by revoking the original order, but by issuing an order announcing his decision. Thus, the command having power to take action on the complaint should issue an order reading, for example, substantially as follows: "The reduction of Sergeant ----- to the grade of private first class, under the provisions of paragraph 24b, AR 624-200, announced in paragraph ---, Special Orders -----, headquarters -----, dated -----, is hereby declared null and void (as the reduction was not imposed by proper authority) (-----)."

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missioned officers of his command, the reduction of such individual is ordered by competent authority, and administrative action purporting retroactively to restore the soldier to his former grade would be illegal and ineffective.<sup>128</sup>

“Retroactive orders may not be issued restoring a man, already effectively reduced, to his former grade. This is in accord with the policy that Army records may only be changed to reflect the true facts at the time in question . . . . To the same effect, a purported reduction by means of a revocation, change, deletion, etc., of the original promotion orders will not effectuate a reduction. . . . So, too, a reduction once legally effected may not be set aside by revoking or modifying the original orders of reduction, except by the Secretary of the Army.”<sup>129</sup>

On this basis, the Comptroller General held that a restored enlisted man was not entitled to his higher rate of pay retroactively from the date of his original reduction.<sup>130</sup>

As the matter of appointment and reduction of noncommissioned officers of the Army is one of regulation, the view was expressed that there were no legal objections to amending pertinent regulations.<sup>131</sup> Accordingly, Army regulations were promulgated which expressly authorized restoration to former grades effective as of the issuance of the restoration orders but with the *same date of rank* as before reduction.<sup>132</sup>

This change, however, fails to empower the general court-martial authority to give the complainant complete redress. If the complainant's reduction was unjustified because the supporting evidence was not substantial, is he not entitled to be made whole? Although entitled to proper redress he does not receive it, because when he regains his former grade, he occupies that position financially only from the date of his reappointment. For example, Sergeant First Class **A** is reduced for inefficiency to private first class by his regimental commander on 1 February 1956. **He** complains immediately and the general court-martial authority directs an investigation. The report of the proceedings is submitted 20 February 1956 recommending that complainant should be restored to the grade of sergeant first class as there was insufficient evidence of inefficiency. The proceedings are reviewed by the staff judge advocate and on 10 March 1956 the general court-martial authority approves the recommendation. Special orders appointing **A** to his

<sup>128</sup> JAGA 1946/10542, 20 Mar 1947, 6 **Bul** JAG 105.

<sup>129</sup> JAGA 1950/7603, 29 Dec 1950. See also JAGA 1956/2592, 9 Mar 1966; JAGA 1955/8903, 9 Dec 1955.

<sup>130</sup> 15 **Comp.** Gen. 935 (1936).

<sup>131</sup> JAGA 1955/7903, 20 Oct 1955.

<sup>132</sup> Par. 30b, **AR** 624-200, 8 Jun 1956, as changed by **C** 2, 7 Mar 1957.

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former rank are issued 10 March 1956.<sup>133</sup> According to the regulations, A would be entitled to pay of sergeant first class from 10 March 1956 although his date of rank would be the one he held before the reduction. For the period 2 February to 9 March 1956, he may be paid only as a private first class. Thus, through no fault on his part he has suffered a monetary loss.

The foregoing result is based not only on the Army regulations but also on the following view of the Comptroller General :

“ . . . [M]ere administrative action purporting to rescind and annul prior reduction orders retroactively from date of issuance is effective to restore the member to the higher grade only from the date such action is taken. There the reduction in grade was valid and the subsequent action taken administratively to restore the former grade was not exercised pursuant to any authority to set aside the prior reduction or to restore all rights, privileges, and property affected by the reduction.”<sup>134</sup>

The military authorities realizing the injustice suffered by such complainant queried the Comptroller General “whether an enlisted member of the uniformed services who is reduced in grade for misconduct or inefficiency and who is restored to his former grade pursuant to the authority contained in Article 15(d) or Article 138 of the Uniform Code of Military Justice may be restored to his former grade for pay purposes retroactive to the date of his reduction.” The Comptroller General, however, adhered to his former position in so far as it concerned the restoration of individuals who had been reduced for inefficiency.

“Article 138 of the Uniform Code of Military Justice, unlike Article 15(d), apparently contemplates administrative action which will be prospectively effective, rather than a setting aside of punishment or a restoration of rights and property affected. It will be noted that Article 138 relates to ‘wrongs’ generally and not particularly to those resulting from the imposition of punishments, as in Article 15(d). If a reduction in grade is imposed as punishment, the member may have redress under Article 15(d). If it is not imposed as a punishment, Article 15(d) does not apply, but if it is nevertheless a ‘wrong’ the member may have redress under Article 138. Under that article, however, action by superior authority is authorized only if the commanding officer refuses redress. If the command-

<sup>133</sup>

The special orders should be issued by the headquarters and over the command line of the general court-martial authority and should, for example, read substantially as follows: “Pursuant to the provisions of paragraph 30b, AR 624-200, Private First Class ----- is appointed Sergeant First Class with date of rank from -----. The reduction of Sergeant First Class ----- to the grade of Private First Class, under the provisions of paragraph 24b, AR 624-200, announced in paragraph -----, Special Orders -----, headquarters -----, dated -----, has been determined to be unjustified (as the reduction is not supported by evidence of inefficiency) (-----).”

<sup>134</sup>

36 Comp. Gen. 137, 139 (1956) which summarizes Ms. Comp. Gen. B-118767, 11 May 1954.

## ARTICLE 138 COMPLAINTS

ing officer grants the redress and restores the higher grade, such action in the absence of any language in Article 138, such as that in Article 15(d), expressly authorizing the restoration of 'all rights, privileges, and property affected,' is viewed as effective only from the date the order announcing the restoration is issued. There is nothing in the language of Article 138 to suggest that action by superior authority would have any different effective date. Accordingly, it is concluded that a restoration to a higher grade made under Article 138 is effective only from the date the restoration action is taken." 135

The construction placed on the provisions of Article 138 by the Comptroller General is an overly narrow and limited one. A more liberal position can be justified. True enough, the Article does not contain the express authority to set aside and restore which is set forth in Article 15(d), but does it not contain language which is entitled to the same interpretation? The phrase "take *proper* measures" should be construed in the light of the historical intentment of the redress enactment, This legislative intent encompasses not only prospective corrective action but also the power to restore rights, privileges and property, including pay, which was affected by the wrong committed.

Suppose you have a case where the general court-martial authority determines that there was sufficient evidence of inefficiency but the reduction to the grade to which reduced was too severe. For example, a specialist first class is reduced to the grade of private first class because of inefficiency. Upon complaint, investigation and review, it is determined that the complainant has the necessary qualifications, training, proficiency, and willingness to perform certain type of duties which call for a specialist third class rating. It is further determined that in view of all the facts and circumstances a reduction to private first class was not warranted. May the general court-martial authority mitigate the reduction and reappoint him to that grade? The regulations referred to above grant the reviewing authority power to appoint to the grade from which reduced upon a showing that the reduction was unjustified. This power should include, assuming it is determined that the reduction to the grade reduced was unjustified, the authority to reappoint to a grade lower than that from which reduced.<sup>136</sup> In the absence

<sup>135</sup> *Zbid* The inquiry to The Comptroller General was made prior to Change 2, 7 Mar 1957, to par. 30, AR 624-200, 8 Jun 1956.

<sup>136</sup> Special orders should be issued by the headquarters and over the command line of the general court-martial authority and should, for example, read substantially as follows: "Pursuant to the provisions of paragraph 30b, AR 624-200, Private First Class ----- is appointed Specialist Third Class with date of rank from ----- The reduction of Specialist Third Class ----- to the grade of Private First Class, under the provisions of paragraph 24b, AR 624-200, announced in paragraph -----, Special Orders -----, headquarters -----, dated -----, has been determined to be unjustified (as the evidence of inefficiency does not warrant a reduction to the grade of Private First Class) (-----)."

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of specific prohibitory language in the regulations concerning reductions, no legal objections are perceived to such construction.

The foregoing extensive discussion of reductions for inefficiency should not lead one to believe that it is solely in that field wherein difficult problems may arise. The reason for the detailed attention is that currently Article 138 proceedings concern mainly such reductions. However, another problem area is foreseen; namely, complaints as to discharges, separations, and board proceedings imposing pecuniary liability or affecting rights, privileges, and property. This prognostication is made in view of the recent holding by The Judge Advocate General of the Army which indicated that an Article 138 complaint may properly involve an attack on the proceedings of a board of officers convened under Army regulations and raise the issue whether the board was properly constituted.<sup>137</sup>

It must be remembered that the Article 138 complaint may not properly attack errors committed by the board of officers itself, such as procedural errors and the like. As the complaint is against his commanders, the attack may only involve the manner in which the board was constituted by his commander, or the action taken on the findings and recommendations by the appointing authority or the superior commander. The appointment of boards is usually prescribed by the specific statute or regulation which authorizes the particular board. In the absence of a specific statute or regulation, the eligibility of the member is determined by the general regulations<sup>138</sup> governing boards of officers. Frequently, the question will arise whether it was proper to appoint a civilian employee of the Army, or a warrant officer, as a member of the board. Occasionally, members of certain components or members with special qualifications or other specified persons must be appointed to particular boards. If the required type of person has not been appointed, the board is not competent to act.<sup>139</sup>

The more troublesome problems will no doubt occur when the complaint seeks a review of the convening authority's action on the findings and recommendations of the board. In many cases, the controlling statutes or regulations circumscribe the action which may be taken by the appointing authority. In the greater number of cases, the appointing authority may approve, modify, or set aside the findings and recommendations of the board. If he approves the proceedings, his action should be based on a determination that the

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<sup>137</sup> JAGA 1956/1452, 17 Feb 1956.

<sup>138</sup> AR 15-6, 25 Jul 1955, as changed.

<sup>139</sup> JAGA 1954/7505, 14 Sep 1954, 4 Dig Ops, Res F, § 69.21.

## ARTICLE 138 COMPLAINTS

findings are supported by substantial evidence.<sup>140</sup> Hence, if the board proceedings lack sufficient evidence to warrant the findings, the action of the appointing authority is groundless, and the complainant is entitled to relief from the wrong generated by the action.

The foregoing shows that the redress procedure pursuant to Article 138 may be a means whereby a respondent or party in a board proceeding may obtain an impartial review of the proceeding. The general rule has been that there is seldom any right to an appeal from the action taken on a board's report; but that the appointing or reviewing authority may at his discretion receive and act on any request in the nature of an appeal or a petition for a new hearing.<sup>141</sup> A complaint under Article 138 would, however, compel a review of the proceedings by superior authority.<sup>142</sup>

A step-by-step analysis of all subject matters which have been, or may be, considered pursuant to a complaint under Article 138 is, of course, not possible. Difficult problems will from time to time arise, but not, as a general rule, in the lower echelons of command. Unit commanders do not knowingly seek an examination or inquiry into the manner in which they have conducted themselves toward their subordinates. With respect to prospective actions likely to affect the standing, privileges, rights, liability, and property of the personnel under their command, commanding officers will, should they have doubts of the legality or propriety of such actions, normally seek in advance the advice, concurrence, or approval of competent superior authority.

The staff judge advocate of the officer exercising general court-martial jurisdiction over the person against whom the complaint has been made will, no doubt, play an important role with respect to such proceedings. In most commands, he will have the responsibility for the entire processing. Of course, there are no legislative enactments or military regulations or directives which make it mandatory that he have that responsibility. It is the prerogative of general court-martial authority to determine who on his staff will have that administrative function. Army regulations<sup>143</sup> preclude the command inspector general. Hence, it will probably fall upon the adjutant, the assistant chief of staff for personnel, or upon the

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<sup>140</sup> This is the quantum of proof generally required in administrative proceedings. See note 122, *supra*.

<sup>141</sup> JAGA 1954/9279, 7 Dec 1954.

<sup>142</sup> In JAGA 1956/1452, 17 Feb 1956, it was recommended that the proceedings of a board of officers convened pursuant to AR 615-368 by CG, 5th Infantry Division, be returned to CG, Seventh Army, for his consideration of the complaint and such action as he deemed appropriate.

<sup>143</sup> Par. 30b, AR 20-1, 29 Jan 1957.

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staff judge advocate. It is reasonable to assume that the latter, if not charged with the processing thereof, will be requested to review the proceedings for legal sufficiency, although his review is not mandatory.

Regardless of who reviews the proceedings on the complaint, the general court-martial authority may not delegate the authority to take final action on the complaint. It is not necessary, however, that the statement of the action of the general court-martial authority on such proceedings be signed by him personally.<sup>144</sup>

After the complaint has been examined into and appropriate decision has been made by the general court-martial authority, the complainant should be advised in writing as to the action taken with regard to his grievance. Although this is not required by the express provisions of Article 138, this seems to be established policy with respect to complaints. Thus, as to complaints submitted to an inspector general, Army regulations<sup>145</sup> provide that "the complainant must be informed of the action taken." A similar policy with respect to Article 138 complaints was expressed by a theater staff judge advocate as a result of a request from The Adjutant General, Department of the Army, for a copy of the reply transmitted to the complainant.<sup>146</sup>

### V. DISPOSITION OF THE PROCEEDINGS

Article 138 expressly provides "and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings thereon." Is such action mandatory in all cases, including those cases where the general court-martial authority determines that the complaint is unfounded? The early commentators on military law did not think it was. Thus, Colonel Winthrop made the following observation with respect to complaints of officers: "On the other hand, if he considers that no wrong was done by the regimental commander, he will formally disallow the complaint, leaving the officer, if not satisfied, to appeal to higher

<sup>144</sup> JAGA 1956/6505, 12 Sep 1956 (authorizing use of the command line).

<sup>145</sup> Par. 27c(1), AR 20-1, 29 Jan 1957.

<sup>146</sup> Par. 5b, letter, AFPE JA 312.1, O/JA, Hq AFPE/8A(Rear), 14 Nov 1955, subject: "Information Letter 2-55," provides in part that to process properly a complaint of wrong pursuant to Article 138 the general court-martial authority should "advise the complainant in writing as to the action taken with respect to his allegations." The writer was responsible for the drafting of this particular directive, and caused it to be issued to subordinate staff judge advocates after receiving an indorsement from the Office of The Adjutant General, DA, requesting a copy of the reply furnished complainant in a proceeding which had been forwarded to it by a division commander in Korea through AFPE/8A(Rear).

authority.”<sup>147</sup> Captain DeHart was of the opinion that it was discretionary with the general whether to forward the complaint to the Department of War for further inquiry.

It should be noted that both of these eminent writers were considering a statute which was applicable only to officers. The current enactment concerns complaints of both officers and enlisted personnel. In view of the plain wording of the statute and the fact that the word “shall” is normally construed as mandatory, it is reasonable to assume that one who submits a complaint pursuant to Article 138 anticipates, in fact presumes, that his complaint with the proceedings had thereon will be forwarded to the Department of the Army for final disposition. Two recent holdings seem to support this view. In one it was stated that “the Department concerned as used in Article 138 is considered to mean Department of the Army with respect to *all* complaints involving commanding officers who are members of the **Army**.”<sup>148</sup> In the other case, a theater staff judge advocate was advised by The Judge Advocate General that “the report of proceedings with respect to a complaint under Article 138, UCMJ, should be forwarded directly to The Adjutant General, Department of the Army.”<sup>149</sup> The latter case involved an inquiry as to what action the commander higher in the chain of command than the officer exercising general court-martial jurisdiction over the officer against whom the complaint has been filed may take with respect to the complaint. Staff judge advocates of subordinate commands had previously been advised that the file would be forwarded, ordinarily over the signature of the commander, to The Adjutant General through command channels and would include the following : (1) the original or a certified copy of the complaint; (2) report of the proceedings conducted pursuant to AR 15-6, including the action taken by the convening authority thereon; and (3) a copy of the reply to complainant with respect to his allegations.<sup>150</sup> The prime issue was whether the theater commander could properly set aside or modify the action taken by the general court-martial authority where it was determined, after a review of the proceedings, that the complainant was entitled to redress but

<sup>147</sup> Winthrop, *op. cit.* *supra* note 3, at 601. He was referring to the 29th Article of the 1874 Code which used language similar to that quoted.

<sup>148</sup> JAGA 1955/8275, 20 Oct 1955 (emphasis added). Prior to the codification of Article 138, which was effective 1 January 1957, the phrase under discussion read “transmit to the Department concerned.” It now reads “send to the Secretary concerned.”

<sup>149</sup> JAGA 1956/8505, 12 Sep 1956. This was a reply to a letter from the staff judge advocate of Hq, AFFE/8A(Rear), APO 343, in whose office the writer served from 4 January 1954 to 28 July 1956.

<sup>150</sup> Par. 5c of the letter mentioned in note 146, *supra*.

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had received none. The above quoted opinion was based on the following view :

“Nowhere is there any provision for review by intervening commanders. As commanders higher in the chain of command than the general court-martial authority concerned can take no action in Article 138 proceedings, no useful purpose would be served in forwarding reports in such cases through channels. Such commanders have no interest or concern in such matter within the meaning of the regulation governing the routing of military correspondence through channels. The foregoing is the mandatory procedure to be followed.”<sup>151</sup>

The “actions of the general court-martial authority concerned may be set aside or mitigated at the Department of the Army level only.”<sup>152</sup> Certainly this power was intended to apply to a case wherein the general court-martial authority determined that complainant was not entitled to redress. Hence, it must be concluded that a general court-martial authority would not have the authority to refuse arbitrarily to send the proceedings to the Secretary of the Army, or to dispose of the proceedings by merely sending them to file.

As indicated above, the Secretary of the Army has considerable authority with respect to complaints. At that level, the proceedings are processed by the office of The Adjutant General. The Judge Advocate General will consider Article 138 complaints only when the legality of the action taken by the complainant’s superior is in question.<sup>153</sup>

Normally, the review of the proceedings by The Adjutant General for the Secretary of the Army will be considered as closing the case. However, the complainant may have some auxiliary methods of redress, and a discussion of some of them is considered in order.

## VI, OTHER REMEDIES AVAILABLE TO COMPLAINANTS

This will be a brief discourse on procedures which a complainant may utilize to redress an alleged wrong in addition to, or in lieu of, the method available pursuant to Article 138. It is not intended to analyze such methods in detail but merely to highlight the manner in which they may supplement the statutory right set forth in the Uniform Code of Military Justice.

These additional remedies may be classified into two broad categories, namely, administrative and judicial. With respect to the

<sup>151</sup> JAGA 1956/6505, 12 Sep 1956.

<sup>152</sup> *Ibid.*

<sup>153</sup> JAGA 1956/9060, 14 Dec 1956; JAGA 195618862, 7 Dec 1956. In both of these cases, TAG apparently believed that the proceedings should be reviewed for legal sufficiency as a matter of course.

former, it will be seen that they are based either on statute, Army regulations, or considered as inherent in the administration of matters pertaining to members of the Armed Forces.

Most of the early writers on military law considered the procedure authorized by the redress enactment as only a guarantee of a right to complain, but by no means as the exclusive **remedy**.<sup>154</sup> However, Brigadier General Davis, writing in 1901 about the 29th Article of the 1874 Article of War, was of the opinion that "in a case properly arising under it, therefore, the remedy provided would of course be applied to the exclusion of every other."<sup>155</sup> He nevertheless recognized the probability of other means of redress since the Article provided an inadequate remedy for many wrongs.

The current view appears to be that the remedy provided by Article 138 is not, with respect to wrongs cognizable thereunder, all inclusive. This was expressly recognized in regards to complaints involving reductions for inefficiency. Concerning a proposed change to the Army regulations pertaining to reductions, whereby the reference to Article 138 would be deleted, the observation was made that "the intent of the proposed change is to permit an informal method of complaint in addition to the right of complaint under Article 138."<sup>156</sup>

This informal right to file a complaint or appeal with respect to an alleged grievance is not dependent upon statute or regulation. It is a right arising out of command relationships and customarily considered a part of the administration of discipline.<sup>157</sup> An individual, by virtue of being a member of the armed services, has a right to appeal for redress directly to one empowered to correct the alleged grievance. For example, in a case where a sergeant is reduced to private first class for inefficiency by his regimental commander, he would have a right to appeal such reduction directly to any superior commander, such as the division or army commander, without complying with the formalities required by Article 138. If the complainant does not indicate that he is relying on Article 138, his appeal will be considered in the nature of an informal complaint.

The aggrieved person is also given a right of complaint by **Army regulations**.<sup>158</sup> These regulations specifically provide that military

<sup>154</sup> Winthrop, *op. cit. supra* note 3, at 601, 602. Winthrop argued that enlisted men preferred to use informal complaint channels rather than Article 138 procedure which then contained penalties for vexatious appeals.

<sup>155</sup> Davis, *Military Law* 224 (1901). The 29th Article of War governed complaints of officers.

<sup>156</sup> JAGA 1955/7903, 20 Oct 1955.

<sup>157</sup> Davis, *op. cit. supra* note 155, at 225, fn. 1.

<sup>158</sup> AR 20-1, 29 Jan 1957.

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personnel on duty with the Army establishment will be kept informed of their right to register complaints. With the exception of certain limitations, these persons are afforded an opportunity of presenting, orally or in writing, their individual complaints to an inspector general not less frequently than once in each quarter of a year. All commands are required to make available to each person on duty with the Army an inspector general, or acting inspector general, to whom complaints may be submitted personally. Inspectors general are precluded from taking action in connection with certain types of appeals including those which are governed by regulations or the Uniform Code of Military Justice. The following are expressly mentioned : Complaints under Article 138; actions as result of report of survey; actions in connection with courts-martial; protests of types of discharges from the military service. It is interesting to note that the regulations do not purport to preclude all complaints of wrong which are cognizable under Article 138, but merely those wherein the complainant clearly indicates that he is seeking redress pursuant to Article 138. If there is no such indication, *or any limitation by regulations*, an inspector general may properly consider a complaint which is also cognizable under the statutory redress procedure. For example, inspectors general for a short period of time could not consider complaints involving reductions for inefficiency because the Army regulations expressly provided that the aggrieved person had a right to complain pursuant to Article 138. Since these Army regulations no longer contain this instruction, there is nothing to preclude an enlisted person from appealing his reduction through inspector general channels.

It should be noted, however, that a complaint to an inspector general does not insure an investigation in all cases, whereas a complaint invoking the procedure of Article 138 requires an examination of some sort.<sup>159</sup>

In addition to the foregoing regulations concerning complaints to inspectors general, there are numerous Army regulations which in view of the fact that they may affect individual rights, privileges,

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<sup>159</sup> Par. 27a, AR 20-1, 29 Jan 1957, provides in substance that inspectors general at their discretion may decline to act upon complaints which they deem trivial or inconsequential in nature. A complainant is protected from an abuse of discretion or arbitrary or capricious action, as par. 30a of these regulations further provides that in the event he believes redress obtained from his local inspector general has not been fair and just or in accordance with law and regulations, he may seek further redress of his complaint by writing a letter to the inspector general of the major command or Department of the Army agency concerned, or direct to The Inspector General, Department of the Army, setting forth all the facts in the case and including information as to action taken by the local inspector general.

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or property, specifically provide for the right of appeal or require an impartial view of the proceedings by a superior commander or by a review board created by a major commander or Department of the Army.<sup>160</sup>

What statutory rights may an aggrieved party invoke after, or prior to, an exhaustion of the remedy provided by Article 138? Article 135 of the Uniform Code of Military Justice provides in part that courts of inquiry to investigate *any matter* may be convened by certain designated authorities whether or not the persons involved have requested such an inquiry. Army regulations<sup>161</sup> implementing this statutory provision shed more light on the rights of an individual. They provide in part that any person subject to military jurisdiction who believes himself wronged by any accusation or imputation against him may, if he cannot secure adequate redress by any other means prescribed by law or regulations or authorized by the customs of the service, submit an application through his immediate commanding officer to the officer exercising general court-martial jurisdiction over the command for the convening of a court of inquiry to investigate and report on the alleged accusation or imputation. However, it is the policy of the Department of the Army to convene a court of inquiry only when the matter to be investigated is one of grave importance to the military service or to an individual thereof, and the testimony is expected to be so multifarious, complicated, conflicting, or difficult to obtain that a court of inquiry can best procure the pertinent evidence, ascertain the true facts, and assist the convening or superior authority in determining what action should be taken.<sup>162</sup> In the event the general

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<sup>160</sup> For example, AR 604-11, 2 Aug 1955, provides that in some instances a commander may withdraw, withhold, or deny a security clearance on the basis of suitability information which is not sufficient to support elimination action. In such instances, a detailed report with appropriate recommendations must be forwarded to the Department of the Army for final determination. With respect to the personnel security program, for example, AR 604-10, 29 Jul 1955, established a review board in the Department of the Army for the review of the actions of the field board of inquiry in cases within the purview of this program. AR 635-209, 17 Mar 1955, governing the elimination of enlisted personnel because of inaptitude or unsuitability, provides that the recommendation of the individual's commanding officer will be referred to a board of officers, and if the convening authority approves the recommendation of the board that the respondent should be discharged, then the proceedings are forwarded to the reviewing authority for final action. In regard to accounting for lost, damaged and destroyed property belonging to the Department of the Army, AR 735-10, 11 Oct 1955, expressly provides that military personnel are authorized to appeal from the action on reports of survey holding them pecuniarily liable. Additionally, many other regulations afford the member a full and fair hearing in the matters to which they pertain, irrespective of his right to complain pursuant to Article 138.

<sup>161</sup> Par. 2d, AR 22-30, 10 Dec 1951.

<sup>162</sup> *Id.* par. 2b.

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court-martial authority refuses to convene a court of inquiry, the applicant has the right to appeal to superior authority.<sup>163</sup> Historically, a court of inquiry was considered an investigative body which could be convened only by the President or, upon request by an individual whose conduct was in issue, by a commanding officer.<sup>164</sup> Today the purpose and procedures of the court of inquiry are substantially unchanged, but it is infrequently used in the Army. Nevertheless, the right exists and conceivably may be utilized by military personnel who have been seriously aggrieved by their commanders or others in the military service.

The most powerful statutory remedy afforded to aggrieved persons is the one that authorized the creation of boards for correction of military records. In 1946, Congress sought to free itself of the numerous private bills submitted annually on behalf of members and former members of the military service. To accomplish this, Congress enacted legislation which empowered the secretaries of the military departments, acting through boards of civilian officers of their respective departments, to change any military or naval records when necessary to correct an error or to remove an injustice.<sup>165</sup> Pursuant to this act, the Secretary of the Army appointed the Army Board for Correction of Military Records.<sup>166</sup> The first opinions concerning the Board failed to recognize the wide power which the legislature had given the Board. The pertinent regulations simply state that the Board is to make recommendations to the Secretary and provide that the Board has jurisdiction to consider all matters brought before it consistent with existing law.<sup>167</sup> It is now settled that the Board has very broad jurisdiction.<sup>168</sup> The Attorney General has ruled, in substance, that the Board was intended to provide relief in cases where previously Congress had acted; consequently, it was empowered to do what Congress could have done.<sup>169</sup>

The more important aspects of the Board's jurisdiction concerns cases where although the individual's military record accurately reflects the facts, the applicant has nonetheless suffered an injustice. In this situation, the Board may be the only source of

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<sup>163</sup> *Id.* par. 2*d.*

<sup>164</sup> See Winthrop, *op. cit. supra* note 3, at 516-533, for the origin and development of the court of inquiry.

<sup>165</sup> Legislative Reorganization Act of 1946 § 207, 60 Stat. 837, as amended, 5 U.S.C. 191a (1952), now codified as 10 U.S.C. 1552 (Supp. IV).

<sup>166</sup> AR 15-185, 18 Jul 1955.

<sup>167</sup> *Id.* pars. 4, 5.

<sup>168</sup> 41 Ops. Att'y Gen. No. 8 (1949); *id.* No. 19 (1952).

<sup>169</sup> 40 Ops. Att'y Gen. 504, 508 (1947).

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relief. For example, a master sergeant with 18 years of service who believes that he has suffered an injustice by being reduced to the grade of private for alleged inefficiency may first seek redress through the use of Article 138 and being unsuccessful may then petition to the Board for Correction of Military Records.<sup>170</sup>

Very often the redress which the applicant seeks leads to monetary or other benefits. Under the original statute, there was no authority to pay claims arising from corrective action recommended by the Board,<sup>171</sup> and it was necessary for the applicant to seek monetary relief from Congress.<sup>172</sup> In 1951, the statute was amended to confer such authority upon the Secretary.<sup>173</sup> This authority enables a complainant who has received inadequate redress in a proceeding which under Article 138 to recover any pecuniary loss he may have suffered.

Before discussing court decisions which have dealt with wrongs allegedly committed against military personnel, it may be appropriate to mention one further administrative remedy which might be available in some instances to an aggrieved party. The Secretary of the Army has authority to settle claims administratively, and Army regulations have been promulgated for the investigation and processing of claims against the United States. Instances conceivably may occur where a member of the service may be wronged by a commander, immediate or higher in the chain of command, or for that matter by an officer with whom a command relationship does not exist, and such wrong may also result in a claim against the United States for damages.<sup>174</sup>

What are the rights of military personnel in courts of law with respect to grievances? More specifically, what is their right to a

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<sup>170</sup> JAGJ 1957/2711, 20 Mar 1957.

<sup>171</sup> 28 Comp. Gen. 357 (1948); 27 Comp. Gen. 709 (1948) ; 27 Comp. Gen. 665 (1948).

<sup>172</sup> *Gordon v. U.S.*, 121 F. Supp. 625 (Ct. Cl. 1954); 27 Comp. Gen. 665 (1948).

<sup>173</sup> Act of 25 Oct 1951, 65 Stat. 655. See also par. 23, AR 15-185, 18 Jul 1955.

<sup>174</sup> For example, a post commander issues a directive that personnel of the command will not purchase or own motor vehicles without prior approval of their unit commander. A soldier, stationed at this post, while home on leave receives an automobile as a gift and upon his return to the company area the individual is restricted by his company commander and the automobile impounded and taken to the post motor pool. The soldier's complaint to superior authority pursuant to Article 138 brings favorable results, and the automobile is restored, lacking some valuable accessories. A claim against the United States Government, filed by the soldier with the local claims officer for the value of these articles, would, upon a showing that the automobile had not been properly safeguarded, be payable by the Army. *Cf. SPJGD/D-39695*, 27 Jul 1944.3 Bul JAG 348.

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review of proceedings under Article 138 which denied them redress, the right to damages, relief or the like?

Section 10 of the Administrative Procedure Act<sup>175</sup> permits judicial review of any agency action, unless a statute precludes judicial review or the action is by law committed to agency's discretion. This portion of the Act appears to apply equally to statutory or nonstatutory boards and conceivably might apply to an Army board of officers convened to examine into a complaint submitted pursuant to Article 138. The courts have not passed on the applicability of this section to the military services. However, administrative law is not usually defined to include internal problems of an agency or department.<sup>176</sup> Of course, some administrative processes within the Army are often sufficiently formal to be analogous to the process employed in administrative law. Some administrative actions, however, always have been and for practical reasons should continue to be beyond the reach of judicial review even for arbitrariness or for abuse of discretion.

Suppose an enlisted soldier who was a lawyer in civilian life complains to his commanders pursuant to Article 138 that in view of his education, civilian training, and standing, he should not be classified as a truck driver but should be given a legal clerk assignment. This proceeding not being fruitful, the legally-minded soldier files a petition in the local Federal court for a writ of habeas corpus seeking to obtain a judicial order that he be discharged from the Army on the ground that he has not been assigned the duties to which he is entitled under the classification regulations. A recent decision of the United States Supreme Court indicates that his court action would not lie.<sup>177</sup>

Habeas corpus would, however, be a proper remedy where a member of the military service is allegedly illegally confined and cannot obtain his release. In other words, suppose such individual invokes the proceedings authorized by Article 138 but does not

<sup>175</sup> 60 Stat. 243 (1946), 5 U.S.C. 1009 (1952).

<sup>176</sup> Davis, *Administrative Law* 3 (1951). In his opinion, section 10 of the Administrative Procedure Act does not authorize courts to review an agency's discretionary action even though it is arbitrary or capricious. For example, he points out, should the court inquire whether a commanding officer of a domestic military post has abused his discretion in denying a requested leave? *Id.* at 843.

<sup>177</sup> *Orloff v. Willoughby*, 345 U.S. 83 (1953). This particular case involved a doctor who was inducted into the Army under a statute which authorized the conscription of certain medical and allied specialist categories. After his induction, he was refused a commission, and the doctor in a habeas corpus proceeding sought his discharge because he was not assigned the duties nor given the commissioned rank to which the circumstances of his induction entitled him.

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obtain redress, may he seek relief in court? A recent Federal case indicates that habeas corpus would be proper.<sup>178</sup>

What civil remedies for damages does the aggrieved person have? First, what remedy exists against the United States Government? The Court of Claims would probably have jurisdiction to consider a suit for damages arising out of certain types of wrongs. By statute,<sup>179</sup> the Court of Claims has jurisdiction to render judgment upon any claim against the United States (a) founded upon any Act of Congress, such as cases involving the pay and allowances of members of the military services;<sup>180</sup> (b) founded upon any regulation of an Executive Department, The latter class embraces suits seeking judgments for compliance with regulations.<sup>181</sup> Several cases may be noted briefly.

The case of *Donnelly*<sup>182</sup> was an action to recover damages claimed to have resulted from unlawful proceedings under Article

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178 *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955). Petitioner was charged with collaboration with the enemy while he was a prisoner of war during Jun 1951-Apr 1953. He was honorably discharged 3 Aug 1953, and he reenlisted the following day. Thereafter he was imprisoned in an Army stockade to await trial by general court-martial of charges preferred on 8 April 1965. He sought his release on the ground that the Army was without jurisdiction to try him for the offense charged as it occurred during a previous enlistment. The following observation of the court is pertinent: "There remains for consideration only the question of the appropriateness of this Court's interposition at this time in the court-martial proceedings. The general and well-known rule is that court review should await the final disposition of such proceedings. But this rule is subject to the exception that if the deprivation of liberty is clear, and irreparable harm will be done, intervention immediately is justified.

"Here, petitioner is imprisoned by the Army to await trial for conduct clearly beyond its jurisdiction to adjudge and punish. He has already been confined for nearly six months and a trail date has not even been set. To await the final military decision, via the admittedly long military channels, would mean the incarceration of petitioner indefinitely, perhaps for years. That such a loss of liberty is irreparable is so clear as to require no further statement." *Id.* at 209.

179 28 U.S.C. 1491 (1952).

180 *Petersen v. U.S.*, 82 Ct. Cl. 214 (1935). In this case, plaintiff was an enlisted man officially stationed at Bolling Field. It was practically impossible for him to get his meals at Bolling Field on account of the distance between that place and the Munitions Building in Washington, D. C., where he was detailed for duty. The Chief of his section refused him permission to mess at Bolling Field. Defendant contended that under the law the soldier was entitled only to meals at Bolling Field, and that if the duties which he was ordered to perform prevented his getting meals there, that was his misfortune. Court of Claims held that plaintiff was entitled to meals; and if the duties which he was ordered to perform were such as to prevent him from taking meals at the station to which he was assigned, he was entitled to recover the value of the meals that he had lost by reason of the situation in which he was placed.

181 1 Ct. Cl. Dig. XXIX.

182 *Donnelly v. U.S.*, 133 Ct. Cl. 120 (1955).

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15.<sup>183</sup> While the plaintiff was serving in the grade of commissaryman first class, he took a service-wide test for promotion to the grade of commissary chief. He passed the examination and qualified for advancement but was not actually appointed to the higher grade. Instead, he was accused of cheating on the examination and pursuant to Article 15 was reduced one grade to commissaryman second class. Subsequently, the Board for Correction of Naval Records corrected his records to show that he had not been reduced to commissaryman second class, and offered him the difference between the pay of that grade and commissaryman first class, for the period that he had been in the lower grade. He refused to accept the offer and asserted a claim for the difference in pay between the grade of commissaryman second class and commissaryman chief. The Court of Claims held:

“We think the plaintiff, Donnelly, is limited to recovery of pay in accordance with the records as they now stand corrected. To allow him to recover pay for the grade of commissaryman, chief, would be to allow him to receive payment for a position to which he was never actually appointed. Perhaps it was wrong for the Navy not to have promoted plaintiff; perhaps this wrong was due to the allegedly illegal proceedings under the Uniform Code. Still the courts cannot undertake to treat plaintiff as though he had actually been promoted. . . . Appointment is an executive function involving the exercise of executive discretion. . . . This court cannot exercise this function . . .”<sup>184</sup>

In another case,<sup>185</sup> a member of the Army had enlisted in response to a stated need for certain specialists although he was over-age for conscription. While in service, he consistently protested his rank and the failure of the Army to give him a special service assignment. He was dishonorably discharged pursuant to a sentence of a court-martial. After obtaining correction of his records to show that he was honorably discharged, he sued not only for the pay which he had forfeited, but also for the additional pay which the Secretary of the Army had denied him. The court held that the plaintiff was not entitled to the additional pay because the records did not establish any “covenants” whereby the Army bound itself to grant him a particular assignment and rank. It was also held that the Court of Claims cannot undertake to grant promotions or assignments which the Army decided not to make.

Whether a member of the Armed Forces who suffers a supposed wrong at the hands of his superior may have a civil recovery of

<sup>183</sup> Conceivably a similar action should be brought for an alleged improper reduction for inefficiency effected pursuant to Army regulations. Presumably, the aggrieved soldier would have to exhaust his administrative remedies.

<sup>184</sup> *Donnelly v. U.S.*, 133 Ct. Cl. 120, 122 (1955).

<sup>185</sup> *Goldstein v. U.S.*, 131 Ct. Cl. 228 (1955).

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damages for the alleged wrong has been considered in several cases. It is well settled that a person in the military service has his civil remedies for any abuse of authority by his military superiors.<sup>186</sup> Actions of trespass for injuries to the person have been frequently brought and sustained in the common law courts against naval as well as military commanders by their subordinates for acts done both at home and abroad under pretense and color of naval or military discipline.<sup>187</sup> The law is clear, however, that an officer is not answerable for any injury done within the scope of his authority, unless influenced by malice, corruption, or cruelty, although he may have committed an error of judgment in the exercise of his discretionary authority.<sup>188</sup> As a general rule, a military officer is not liable to a subordinate for acts in the furtherance of discipline, so long as he acts within the scope of his duty and is not actuated by personal malice.<sup>189</sup>

Two recent cases are worthy of mention. In one<sup>190</sup> an Air Force sergeant brought suit against Air Force officers for false imprisonment alleging that they were instrumental in effecting his imprisonment upon unfounded charges of embezzlement. The court denied recovery relying on a leading Federal case which held that :

“ . . . if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages **because** of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law.”<sup>191</sup>

The case relied on did not involve a military officer, but the court stated that the quoted language applies with equal force to both civilian and military officers performing their official duties.

The other case<sup>192</sup> also involved an action by some airmen against Air Force officers. The plaintiffs sought damages because of slanderous remarks made by the officers. Recovery was denied on

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<sup>186</sup> 6 C.J.S., *Army and Navy* §35 (1937).

<sup>187</sup> 36 Am. Jur., *Military* § 119 (1941). In *Wilson v. Mackenzie*, 7 Hill (N.Y.) 95 (Sup. Ct. 1845), it was held that an action may be maintained against an officer of the Navy for illegally assaulting and imprisoning one of his subordinates, although the act was done upon the high seas and under color of naval discipline.

<sup>188</sup> *Wilkes v. Dinsman*, 49 U.S. (7How.) 89 (1849).

<sup>189</sup> 36 Am. Jur., *Military* § 119 (1941). An officer will, however, be liable to the soldiers under him for acting in an illegal and unauthorized manner toward them. *Nixon v. Reeve*, 65 Minn. 159, 67 N.W. 989 (1896).

<sup>190</sup> *Keppelman v. Upston*, 84 F. Supp. 478 (N.D. Cal. 1949).

<sup>191</sup> *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938).

<sup>192</sup> *Crozman v. Callahan*, 136 F. Supp. 466 (W.D. Okla. 1955).

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the theory that the remarks were not slanderous. The following language of the court should, however, be noted:

“ . . . [A member of the] military service has a civil remedy for any abuse of authority by his military superiors; and, remarks of a slanderous character are no exception. . . . [Where military officers are administering disciplinary action or are acting in a judicial or quasi-judicial capacity, such] officials must have the same freedom of action, without a fear of personal liability, as that enjoyed by civilian judicial authorities. Significantly, however, an officer, even when acting within the scope of his authority, can incur civil liability if his actions are influenced by malice, corruption, or cruelty.” 193

In the case of *Wright v. White*<sup>194</sup> it was held in substance that Article 121 of the Articles of War of the Army of the United States prescribed the measure and mode of redress to which an officer was entitled for a wrong done him by his commanding officer, and that military and naval officers, including National Guard officers, are immune from private suits for exercising their authority to order courts-martial for the trial of their inferiors or in putting their inferiors under arrest preliminary to trial, and no inquiry into their motives in doing so can be suffered in a civil suit.

The foregoing cases indicate that only in limited situations may a member of the military service who has been aggrieved by acts of his superiors obtain relief or redress in a judicial proceeding. The types of wrong subject to litigation are generally those which have involved monetary losses, physical injuries, or loss of liberty. Just as it is difficult to determine whether a particular wrong is in fact cognizable under Article 138, so it is equally difficult to say whether in a given case a civil court, Federal or State, will assume jurisdiction.

### VII. SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Article 138 is the successor to provisions appearing in the Articles of War as early as the first codification in 1775. There has not been any material modification of its provisions since the general revisions of the military code of justice shortly after the First World War.

<sup>193</sup> *Id.* at 467-468. But see *Cooper v. O'Connor*, *supra* note 191, which used the following language at page 140: “[I]t is now generally recognized that, as applied to some officers at least, even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority.”

<sup>194</sup> *Wright v. White*, 166 Ore. 136, 110 P.2d 948 (1941), cited with approval in *Crozman v. Callahan*, *supra* note 192.

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The current Article, as its predecessors, has some significant deficiencies. First, and foremost, it fails to indicate what classes of wrongs may be considered. Historically, such statutes have been consistently interpreted as providing a procedure through which soldiers and officers may be protected from arbitrary, unfair, or unjust actions of a commander. The early view was that they related principally to the interior economy of a company, that is, to matters such as pay, messing, and repairs, between the commander of a unit and the soldiers who were immediately under his command. This view has clearly been extended. It may be said that the provisions of the Article are now applicable to any commander who has deprived a subordinate of some privilege or property right, abused his command discretion or dealt with him unjustly in a field other than discipline. The early view was a major contributing factor to the nonuse of the Article 138 remedy and probably one of the reasons for the adoption of other means of redress. But even the most liberal interpretation that may be granted to the provisions of the enactment cannot make it applicable to all complaints. Thus, complaints as to wrongs committed by military personnel, although superior in grade or rank, with whom there is no command relationship must be settled by some other procedure. It is also well settled that Article 138 may not be utilized to obtain a review of the findings and sentence of a court-martial, or the merits of a case disposed of by nonjudicial punishment. Also, complaints as to wrongs which seek merely disciplinary action towards the alleged wrongdoer are clearly not within the scope of Article 138. In recent years, the most frequent type of wrong which has been the subject of complaint under this Article has involved reductions in grade for inefficiency. Its use in connection with board proceedings may broaden its scope considerably and result in its more frequent use.

Assuming then that the individual has been wronged by a commander and that the alleged wrong is of the type which is properly cognizable under the statutory enactment, there are, nevertheless, certain other prerequisites which must be met. It should be remembered that the utilization of the redress procedure authorized by Article 138 is considered as the initiation of a formal complaint. In order to be able to do this, the aggrieved person must have made application to the commander concerned for redress. He may complain only when he has been refused redress. However, when such action would be a futile gesture, the individual may file his complaint immediately.

This matter of filing the complaint involves another area in which difficulty is encountered. Neither the Article itself nor

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Army regulations or directives set forth the methods for the administration and processing of such complaints. Hence, there are no well settled guide lines, nor any uniformity in procedure. The Article permits the complaint to be submitted to any superior officer. In the usual case, this officer will be the one who is immediately superior to the officer against whom the complaint is alleged. Thus, the superior in a case involving a commander of a company or similar unit would be the battalion or regimental commander. In a case involving the commander of a separate battalion, it would be the group or post to which the battalion is assigned or attached. This procedural requirement should not, however, be equated to a condition precedent. The intermediate commander has, as it has been indicated, a minor role in the proceedings. His function is mainly administrative, that is, to insure that the file is as complete as possible and that it is transmitted to the proper commander, who is described by the Article as the officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. However, no reasons, legal or otherwise, are perceived which would preclude consideration of the complaint by the general court-martial authority should the complainant submit it to him directly, or send it through other than normal channels.

According to the plain wording of the Article, jurisdiction over the complaint for the purpose of determining its validity and, if warranted, appropriate redress rests with the aforementioned general court-martial authority. A troublesome situation occurs, however, when either or both of the parties to the controversy have been transferred from the command wherein the alleged wrong occurred. In such cases, two or more general court-martial authorities may be involved. Does the language of the Article control? Historically, at least when the regimental commander to whom the complaint was made was required to convene a court-martial, it was believed that the officer, as well as the complainant, should be within the command of the regimental commander. There is no clear-cut decision on this particular point. It could be contended, with some merit, that a complaint of a wrong made after either or both of the individuals are reassigned from the common general court-martial jurisdiction should not be cognizable under Article 138. Is such a restrictive view warranted? It must be considered that in such instance the investigation of the allegations may be prolonged due to nonavailability in the area of the complainant or the witnesses. But the same difficulty would be encountered if the complaint was processed through inspector

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general channels or by direct submission to the Department of the Army. Regardless of method, some field commander will have the responsibility of making an inquiry. Hence, a proceeding under Article 138 in such circumstances is equally feasible and should not be precluded merely because of the lack of a common commander. In this situation, a commander receiving a complaint from an individual who believes that he has been wronged should forward it directly, and not through the usual channels of communication, to the commander exercising general court-martial jurisdiction over the alleged wrongdoer.

The Article enjoins the general court-martial authority to examine into the complaint. The use of the word "proceedings" and the customs of the service with respect to the early Articles clearly indicate that an inquiry of some sort must be conducted. There is no express requirement by regulation or directive that a formal inquiry be held. However, the underlying spirit and intent of the Article, that is, to do justice to the complainant, would seem to require an impartial investigation. This investigation is more effective if formal in nature and conducted by a duly appointed investigating officer or a board of officers, pursuant to the provisions of the Army regulations<sup>195</sup> governing investigations. The failure to have this type of an investigation in the past may be the real reason why military personnel pursued remedies other than the course of action provided by the Article. The arbitrary disposal of complaints by some commanders in all probability created need for an impartial investigating officer. It is reasonable to assume that this may have been one of the reasons for the establishment of the inspector general complaint procedure.<sup>196</sup>

A further flaw in the current Article is that, again like its predecessors, it fails to indicate what authority may be exercised by commanders in carrying out their conclusions. The general court-martial authority is directed to take proper measures for redressing the wrong complained of. One would presume that the term "proper measures" would give him all the authority which may be necessary to redress the wrong. Unfortunately, his power has been construed to be more limited. It is considered that his initial function is to determine the validity of the complaint, that is, to review the proceedings concerning the allegations and decide whether they have been sustained or found to be groundless. If he decides in favor of the complainant, he must then determine the redress to which the complainant is entitled. However, he

<sup>195</sup> AR 15-6, 25 Jul 1955.

<sup>196</sup> AR 20-1, 29 Jan 1957.

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may grant or effectuate remedial action only if it is within his authority to do so. Thus, the present rule is that if the complaint is valid and remedial action considered adequate is within the authority of the general court-martial authority, such action should be taken. If, however, remedial action considered adequate is not within the authority of such officer, the complaint together with a complete report of the pertinent facts should be transmitted to the Department of the Army with recommendations as to action to be taken.

In accordance with the provisions of the Article, a report must be sent to the Department of the Army in any event, whether the complaint is considered meritorious or not, and regardless of the action taken thereon. This report should include a true copy of the complaint, the proceedings had thereon, and a copy of the reply to the complainant concerning his allegations.

What conclusions may be deduced from the analysis of the various provisions of the Article? Is the current Article sufficiently effective to accomplish the purposes for which it was intended? Historically, it was considered that the Articles of War for the redress of wrongs were framed to afford a speedy and efficacious remedy to officer and soldier who were, or thought themselves, oppressed and aggrieved by their superiors. A different intent on the part of the various redrafters has never been demonstrated.

The effectiveness of the early Article to accomplish these purposes was seriously doubted by the eminent writers on military law, and the effectiveness of the current Article has been hampered mainly by its nonuse. The reason for the nonuse of the current procedure is chiefly because it has become customary over a period of many years to use the less formal method of complaint; that is, the aggrieved person merely appeals to whatever superior authority is empowered to take corrective action or files a complaint with an inspector general of the superior commander. A study of these two informal methods of redress is not necessary in order to conclude that they are no doubt just as effective as the Article 138 procedure. The realization on the part of members of the service that less cumbersome and equally adequate systems exist has relegated the statutory redress procedure to a back seat. Regardless of the reasons for the adoption of other methods and the comparative limited use of the Article 138 procedure, one may, nevertheless, conclude that it is an effective procedure. Its recent use in connection with reductions for inefficiency has clearly demonstrated its usefulness.

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It is submitted that so long as there exists an area in which this statutory procedure may properly and profitably be utilized by members of the service no reasons exist for its repeal. Under certain circumstances this remedy may be more appropriate than any other. A still more important reason exists, however, for the retention of the statutory enactment. So long as the remedy exists on the statute books, the military authorities are required as a matter of law to entertain, process, and adjudicate complaints of wrongs submitted by subordinates against superiors. It is not beyond the realm of probability that an emergency situation might occur which would prompt a military edict precluding complaints to inspectors general or appeals to superior commanders. It is well settled that customs of the service may have the force and effect of law, but to the novice in the military service a congressional enactment furnishes much greater protection. Hence, this writer believes that this enactment is more than a good preachment. It is a valuable right.

To enhance this right, it is recommended that Army regulations be promulgated to implement the provisions of the Article. These regulations should include provisions which in substance would provide (1) that with respect to any grievance whatsoever, application for correction should first be submitted to the commander who allegedly committed the wrong, except in certain specified instances;<sup>197</sup> (2) that the procedure is applicable to alleged wrongs committed not only by the immediate commander but by any officer superior or inferior to the immediate commander, with whom the complainant has a command relationship; (3) that certain type of wrongs should be processed by the use of this procedure rather than by complaints to inspectors general; (4) the details for the processing of complaints, including the manner in which they should be investigated; (5) the redress which may be granted; (6) the details for the disposition of the proceedings; and (7) the extent of review at the Department of the Army level.

Laws, regulations, or directives pertaining to complaints of wrongs may be considered in the nature of a necessary evil. They are based on the assumption that maladies are bound to exist in the relationships of superiors toward subordinates. Specific regulations seek to prevent such occurrences.<sup>198</sup> Thus, superiors are expressly forbidden to injure those under their authority by tyrannical or capricious conduct or by abusive language. While main-

<sup>197</sup> For example, where the complainant had an interview with the commander and favorable action is not likely to result, application to the commander should not be required.

<sup>198</sup> Par. 4, AR 600-10, 15 Dec 1953.

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taining discipline and the thorough and prompt performance of military duty, all officers when dealing with enlisted personnel are required to bear in mind the absolute necessity of treating them in such a manner as to preserve their self-respect. However, even in the best organization, there may be occasions when genuine cause for dissatisfaction may occur. The officer on duty with troops is bound sooner or later to have to deal with complaints on the part of some of his men. The handling of complaints is a good test of an officer's ability to manage men. Organization commanders should endeavor at all times to reduce to a minimum the necessity for a subordinate to resort to a complaint procedure. How may he do this? Mainly by following wholeheartedly the injunction of the Army regulations which reads: "Officers will keep in close touch with personnel within their command, will take an interest in their organization life, will hear their complaints, and will endeavor on all occasions to remove those causes which make for dissatisfaction."<sup>199</sup> The men must know that they may state a cause for complaint to their commander with the knowledge that he will give them a hearing and correct the grievance if he is convinced of its truth. They must believe that he will wish to remove causes for proper dissatisfaction. It takes good judgment to handle complaints satisfactorily, so as neither to weaken military discipline within the command, nor to allow the complainant to go away feeling that he has not had a square deal. If all commanders adhere to this principle, few tears will be shed over the nonuse of any and all redress procedures, whether prescribed by statute or regulations.

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<sup>199</sup> *Ibid.*

## THE YOUTHFUL OFFENDER AND THE ARMED FORCES\*

by Doyle Shackelford\*\*

Parole agencies, correctional institutions, and especially our courts and their juvenile probation departments are affected by our continuing need for a strong armed force, just as most other civilian services and fields of endeavor are. But military personnel, particularly those concerned with recruiting, training, personnel management, law enforcement, and correction, look on these agencies with a jaundiced eye, for all too often youthful offenders entering the services run afoul of military law and are court-martialed, confined, and discharged dishonorably. Obviously this is a poor return for the taxpayers' dollar, a loss of valuable man-hours for the military services, and an additional stigma for the individual who, in effect, has failed both the community and the nation. Yet case records in the major military confinement facilities reveal numerous instances in which youthful offenders were encouraged, urged, or induced to join the service in lieu of a sentence, continued probation or parole supervision, or further incarceration. Crowded dockets and heavy caseloads probably contribute to this practice.

The courts, like other nonmilitary groups and individuals, have some erroneous notions about military service. The existence of selective service produces the idea that military service is inevitable. Zealous recruiting campaigns and public sentiment support the idea that enlistment or induction is part of each man's responsibility to the community, and judges, probation and parole supervisors, and institution personnel share these attitudes. When military service is considered for convicted offenders, the "successful" service of offenders during World War II is often used as an argument to support this move. But these fairly widespread ideas are not in fact well founded. First of all, military service for every able-bodied man is not inevitable; a considerable number are rejected for various reasons. Second, many individuals can best aid national defense by working in industry, agriculture, or other civilian pursuits not requiring military training; it is not

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necessarily every man's duty to serve in the Armed Forces. Third, current conditions are not exactly similar to those of World War 11—for one thing, present manpower needs are not as acute as they were then—and procedures in use 15 years ago are no longer in effect.

Judges, referees, and probation and parole officers can best meet their community obligations to defense by carefully screening those offenders who desire to enter the military forces. Correctional workers have both the right and the responsibility to prevent the unfit and potentially unsuccessful from taking this step. Stated quite bluntly, this is the criterion: *only those who have proven themselves by successful performance on probation or parole should be encouraged to enlist*. Offenders only recently placed on probation or parole are yet unknown quantities, requiring close attention and scrutiny until their potential is revealed and fully evaluated. Probation and parole officers can do a far better and more thorough job of screening their charges than selective service or recruiting personnel, who will welcome such assistance.

I want to urge, through this article, that probation and parole officers and judges select with rigor and great care those offenders interested in military service. The Armed Forces, the taxpaying community, and the individual offender will receive the boon.

### KEEP THESE DIFFERENCES IN MIND

When you consider military service for an offender you must keep in mind the permanent environment created by military life. The basic "rules of the game" on which all the Armed Forces depend ought to loom large in the judge's or probation officer's weighing of the case because the offender will have to live by them to be effective and successful. The most important of them are :

1. *The specifically military character of the environment—which is vastly different from civilian life.*

Based on routine and authority, life in uniform poses a problem of adjustment to every individual who adopts it. Its blunt impersonality, subordination of individual desires to the good of the group, rigid rules and regulations, lack of privacy, and the "chain of command" can weigh heavily on the new recruit. A different code of laws, condemning behavior not necessarily frowned upon in civilian life, governs the inductee. Quitting his job, telling the boss off, taking the day off, sleeping late, absenteeism, all are illegal in military life. Every man and unit must be in an appointed place

for an indeterminate period and must perform a specific function. A new mode of behavior which is not subject to compromise is thus imposed, and it must be followed *concurrently* with the laws of civil society. Soldier, sailor, and marine are all subject to two codes of law and may, in certain instances, be tried twice (once under civil and once under military law) for the same offense. An enlistment is a contract with the Government which may be broken only with the consent of the Government and under the conditions it imposes.'

**2. *The specific aim of the Armed Forces***—which is to protect the nation, not to make men out of boys.

Civilians often ascribe to the military the magical power of endowing each of its recruits with maturity and poise where none existed before. We sometimes encourage our youth to enlist with the fond hope that they will emerge from service as men. But it ain't necessarily so! Group living in this necessarily authoritarian setting is not a panacea either for personal problems or for the ills of society. Yet no less a personage than "The Cocklebur" wrote, It seems to me a two-year hitch in the Army may be the answer to the irresponsible and vicious hoodlumism and vandalism of the eighteen-year-olds.<sup>2</sup> The myth lives on, perpetuated by all sorts of well-intentioned persons, even including professional soldiers.

It is difficult to determine whether a person matures as the *result* of military training. Changes in the adolescent offender noticed on furlough by his family or probation officer may actually be the result of a natural development which would have taken place without the enlistment.

**3. *The military's attitude toward those who break its laws***—which is different from the civilian attitude.

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<sup>1</sup> A discharge from any one of the Armed Forces is an official account or certificate denoting the nature of the service rendered and terminating the contract. An "honorable" discharge signifies satisfactory or exemplary completion of a specified term of service. A "general" discharge may signify an adequate, not-quite-up-to-snuff completion of an enlistment: it too is awarded under honorable conditions. "Punitive" discharges, "bad conduct" discharges, and "dishonorable" discharges are imposed only by court-martial action resulting from a conviction. Their intent is punitive and the result is certainly stigmatizing.

Another category of discharges is called administrative; they are prescribed by regulation and are utilized to weed out persons deemed incapable of or unfit for further service. They may, as the situation determines, be under either honorable conditions or conditions other than honorable. Untrainable, unadaptable, and medically unfit persons may be given a "general" discharge under honorable conditions. Those with "undesirable traits of character," certain sex offenders, persons convicted of a civil felony while in the Armed Forces, and selected non-malicious fraudulent enlistees are given "undesirable" discharges, which are without honor and have a stigma attached.

<sup>2</sup> *Prison World*, Jan.-Feb., 1964.

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Military offenders, with few exceptions, are dealt with quickly and severely in the interests of order and discipline. Together with the offenses recognized in civilian life, there are purely military offenses: going **AWOL**, deserting, being insubordinate, disobeying orders, for instance. These are, in the eyes of the military, as heinous as any civilian crime; committed during wartime they can drastically affect not only the efficiency but also the very existence of a unit. Few civilian crimes have so drastic an effect on other lives. Enforcers of the military code are understandably less compassionate than their civilian counterparts. While new procedures for court-martial are in use under the Uniform Code of Military Justice of 1951, and provide more chances for appeal of a verdict and better protection for the rights of the individual, the punishments prescribed are relatively unchanged.

Every branch of the Armed Forces has now embarked on programs of correction and rehabilitation for certain selected personnel. Though generally well conceived and directed, they are still in their infancy and narrow in scope. Their objectives are purely utilitarian: to retain only those men fit for active service. Relatively few of those sentenced to punitive discharge are returned to duty.

### SCREENING FACTORS

Judges and probation and parole officers must select only those of their charges who are most capable of succeeding in military life. This screening is the most difficult aspect of their job vis-a-vis the Armed Forces, because clinical tools are seldom available to aid them. But there is an aid they have on hand for this screening. It consists, in fact, of that intimate knowledge of the individual offender on which the judge bases his sentence and on which probation or parole supervision is based, contained in the presentence report. However, those factors which weigh heavily for probation or parole are not quite the same as those important for success in military life. The prime difference between the two situations is that the offender who remains a civilian will be supervised: the man who joins the services will not be. Screening, then, is tantamount to predicting future success or failure in an unsupervised but specifically military life. Some of the factors which will contribute to success or failure are :

1. *Motivation for enlisting.* There are many reasons for enlistment. First of all, most recruits approach military life with some trepidation, compounded of half-truths offered by friends, the tales of veterans, and the blandishments of recruiting personnel. They

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have taken this step under the pressures of society and of the Selective Service Act. These general reasons, and particularly the varying personal motives, require close scrutiny. Personal reasons arising out of dissatisfaction with existing situations such as the family, job, or probation status are immediately suspect. Impulses of the moment inspired by movies or by the local recruiting sergeant, for instance, also need dissection—they may be only the surface expression of some other motive. However, the recruiting slogan, “Learn a trade while you serve,” coupled with public sentiment and the pervasive idea that “I gotta go sometime” are predisposing factors that must be critically evaluated. Whatever the reasons, they should always be consistent with the individual’s personality. They will have to sustain the prospective recruit through the initial stress, conflict, and insecurity of indoctrination and basic training, until he can view his military future realistically. Case records in military confinement facilities often reflect the whimsical motives of some of its inmates when they enlisted.

*2. Adaptability and maturity.* Adaptability implies, at least, developing stability and maturity, together with the ability to cope with new situations, respond to guidance and instruction, and accept imposed limitations and controls. The recruit must learn to adjust himself to this new regime of behavior and get along with the diverse personalities with whom he must associate. There is less privacy than in civilian life and little choice in barracks mates. During the first few weeks of basic training most new recruits will wish themselves home again; this period, designed to effect a transition from civil to military living, will seem quite harsh, oppressive, and frustrating to the beginner. Yet most offenses do not occur during this fast-paced, varied, and challenging group experience. The specialized training and routine which follow it are far more wearing. As the neophyte begins to act on his own, time and opportunity create offenses.

Recruits these days range in age from **17** to **21**. They are not expected to act like elder statesmen. But some stability and consistency of purpose must be there to begin with. Military service may hasten greater maturity; it cannot make something out of nothing. The Armed Forces have minimum standards to meet and cannot afford to gamble on these standards being upheld in the future.

As I said above, most offenses committed in the services are purely military. They generally stem from an inability to get along with others—particularly those in authority—and usually take place during the first **2** years of service. The explanations—or

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rationalizations—given by the offenders are similar to those of young truants from school, errant husbands, and persons with erratic work records; they are the explanations of people who for one reason or another refuse responsibilities.

3. *Intelligence and education.* In addition to these personality components, innate ability and academic accomplishment are both important, though never exclusively so. The prospective recruit must be able to profit from the experience and training offered by the services. Sometimes education and intelligence ought to tip the balance either for or against military service; sometimes they ought to determine the branch of service most suitable for a particular offender.

Contrary to a prevailing belief, the Armed Forces *do* want men who are flexible and able to grow. Specialization is necessary in a highly technical army and navy; substandard personnel are useless when faced with complicated machinery. The legendary perennial private is no longer a fixture in any unit.

Men who cannot perform skilled jobs become dissatisfied with failure—but menial and routine duties are the only possibilities for them. Such frustrations lead to minor offenses which become habitual and grow more serious. Such persons can now be refused by the service; they are sometimes discharged because they cannot be trained.

All branches of the service emphasize self-improvement; each sponsors special classes on the post or in conjunction with nearby schools and colleges, as well as correspondence schools such as the widely used U. S. Armed Forces Institute. Promotions go to those who merit them by education and individual aptitude, performance, leadership potential, and adherence to military procedures.

4. *Responsibility vs. patterns of escape.* Close examination of the offender's social history and behavior under supervision will tell the judge or the probation or parole officer whether the prospective recruit has habitually been able to work independently, to conform without group pressure, and to relate favorably to authoritarian figures. If the individual has repeatedly tried to escape these situations, his pattern of behavior is obviously disqualifying for military service. It is this kind of recruit who usually commits the purely military offenses of going AWOL, deserting, or disobeying commands.

Insecure, dependent, or passive persons respond to frustrating situations by withdrawal or aggression as a means of avoiding

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stress. Youngsters striving for independence often leave home, become truant, resort to antisocial behavior, get a rapid succession of jobs, or get married too soon. They also join the service; it is a socially acceptable means of assuming the mantle of maturity and masculinity and avoids the restrictions of family and community living. Basic behavior patterns are not so easily broken, however, and the "new start" may soon become another dead end of irritation. Whether the old situation was real or imagined, the new one becomes as unattractive as the castoff.

Probation and parole officers often act as emotional crutches for such persons by supplying services, advice, and guidance along with strict supervision. Often this treatment yields good results after the individual gains self-confidence and stability. Good adjustment on probation or parole is not necessarily a diploma insuring success in the service, however, because manipulation of the offender's environment by the supervising officer may not prepare the individual for independent group living under rigidly enforced conditions. It may, in some cases, be good practice, for example, for a probation or parole officer to encourage or even require his charges to live away from home. Husbands can live away from home provided they support their families and work regularly. Changing the environment like this is impossible at a military camp or on a ship. First sergeants, mess sergeants, squad leaders, and commanding officers often appear in the guise of shrewish wife or mother, dominating parent, teacher, or boss; the probationer or parolee will respond to these people in the same way he did at home, at his job, or at school. Unless the offender is capable of independence, is able to cope with the everyday problems of human relations, and is adaptable to changing situations rather than dependent on a change in environment, he will not be successful in uniform. The judge and the probation officer should remember this.

### SEEING THE OFFENDER THROUGH

Once the court decides that the individual can meet the rigors of military service, the supervisor must help him through the red tape of enlistment or induction. It is imperative that the recruit be both legally and psychologically ready for entrance into service. Supervision must be over, but merely sending the probationer or parolee to the nearest recruiting officer or center to "sign up" is not enough. Here are some means to this end:

1. *Become familiar with recruiting and selective service practices.* Generally, the Armed Forces prefer voluntary recruits, but in

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emergencies must use a draft to fill their ranks. Volunteers enlist for 4 years, draftees for only 2 years; this difference in length of service is the primary difference between them. Currently the Army uses most of the inductees; the Navy and the Marine Corps resort to draft enlistments only irregularly, when their waiting lists are exhausted. The Air Force and Coast Guard rely entirely on volunteers. All branches allot quotas to recruiting or selective service regions, based on their projected personnel needs.

Eligibility of offenders for military service is restricted in the same way for both draftees and volunteers. Offenders waiting for court action are specifically excluded; so are those recently placed on probation or paroled, and serious felony offenders. Until August, 1955, the Department of Defense denied enlistment to offenders until 6 months after their release from probation, parole, or confinement. Under the amended policy the individual, if otherwise acceptable, may enter military service immediately after supervision is ended.

Rejection of applicants as unfit is now based on a complete review of each case rather than on the fact of a career of juvenile or adult delinquency. The probation or parole officer can play a major role in the selection of properly motivated and eligible individuals by informing recruiters and draft boards about such men. Recruiting agencies and draft boards can, in turn, provide court officers not only with useful information on induction procedures and policies and copies of forms, but also of the enlistment or impending induction of a parolee or probationer. (Some offenders enlist or submit to the draft without informing the court or parole office of their status.) Local recruiting stations are usually informed of the failure in service of those recruited by them and can share such information with the court, which can use it for future planning. Interchange of information should be continuous and, like contact with local employment agencies, should be a necessity to the probation or parole officer.

2. *Beware of "fraudulent enlistment"!* A fraudulent enlistment is one in which some item on an enlistment or draft form has been inaccurately reported, distorted, denied, or omitted. Court-martial, confinement, and punitive discharge can result from this offense, which, under certain circumstances, endangers the security of the service. Legally it is the *misrepresentation* of a fact rather than the fact itself which is punishable. When the omission or discrepancy is inadvertent, the individual can sometimes complete his enlistment, but he may be discharged even though his intent was not fraud. An official inquiry is made in every case discovered; its findings determine the action taken.

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The offender may be particularly tempted to deny his record of convictions or his court record. An adolescent may falsify his age or forge his parent's or guardian's signature on an affidavit. Persons with prior military service may attempt to deny it, hide a dishonorable discharge, or misrepresent their previous experience. Routine fingerprint checks with the FBI generally reveal discrepancies and open the door for punitive action. Each case is reviewed and decided individually — there is no set policy.

The prospective recruit can avoid such a situation if he is completely informed, via a face-to-face interview with recruiting or selective service officials. By all means make certain that he has all the facts. Discrepancies pertaining to civil offenses are particularly suspect and will result in dishonorable dismissal from the service unless the circumstances are obviously in favor of the man.

**3. Consider the branch of service.** An enlistee has a choice of services and it is appropriate to consider the branch of service in terms of his abilities and personality. Since probationers and parolees have already met with frustration and failure, it is particularly important that they should be steered into an environment in which they can succeed. While each branch screens its new recruits for efficient placement to avoid putting square pegs in round holes, the demands of the moment often dictate their assignment and training. The Army and the Marine Corps can absorb more persons in non-technical fields than the Navy, Air Force, or Coast Guard.

**4. Be prepared to discharge the individual completely from supervision.** For the purpose of joining the service, parolees and probationers can be released from supervision before their imposed terms expire. Temporary discharge or suspended supervision is not advisable, as the services cannot be expected to accept men who have such obligations to other agencies. Court costs or fines should similarly be paid or waived, for these may cause worry or financial hardship, particularly if there are normal obligations to a family or dependents.

**5. Use the terminal interview.** It is just as sound to have a terminating interview as it is to require an initial interview. During the terminal talk, the youth should be made fully aware of his obligations to the Armed Forces. The probation or parole officer, who is someone he knows and can trust, can do this best. The forms can be studied and the importance of properly filling them out should be explained.

Entry into service can, under these conditions, be truly a “new start”; it may compensate for the penalties imposed for previous

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misconduct, especially when the probationer or parolee leaves with the good wishes and genuine confidence of his supervisor. It is elating to be “on your own” again, and the sanction of the court or state is important to the probationer or parolee. Most persons depart for service with the approval and backing of friends and relatives; if the individual has no friends or relatives, the court stands *in loco parentis* for him.

Right now, every man capable of it is expected to take part in the country's defense effort—and we must expect this to continue to be true for years to come. Our manpower resources cannot equal those massed against it; our military leaders propose to meet this challenge by creating and maintaining a militarily well-prepared citizenry and an armed force superior in technical skill. Many offenders can serve successfully and effectively in such a force. If they are recruited indiscriminately, they will only waste man-hours, and our defense cannot afford such waste. Judges and probation and parole officers can help protect society by isolating and supervising those who have demonstrated their inability to stand alone.

## COMMENTS

ASSIMILATIVE CRIMES ACT—STATE LAWS ASSIMILATED\*: Article 134 of the Uniform Code of Military Justice provides for the punishment of “crimes and offenses not capital, of which persons subject to this code may be guilty” which are otherwise “not specifically mentioned in this code.” Within the boundaries of a military reservation subject to the “exclusive or concurrent” jurisdiction of the United States, the applicable noncapital crimes and offenses not specifically mentioned in the Uniform Code are likely to include State penal laws assimilated into Federal law by the Assimilative Crimes Act.<sup>2</sup> All doubts relative to the constitutionality of carte blanche assimilation of past and prospective state criminal laws into Federal jurisprudence have been put to rest by the United States Supreme Court in *United States v. Sharpnack*.<sup>3</sup> Therefore, penal laws propounded by the legislatures and courts of host States become a supplement to the Uniform Code of Military Justice upon many Federal reservations within the continental United States. However, are *all* the penal laws of the host State inexorably assimilated into Federal law?

In 1944, the Supreme Court in the case of *Johnson v. Yellow Cab Transit Company*<sup>4</sup> discussed the Assimilative Crimes Act with respect to what portions of a State criminal law are actually adopted and made Federal law under the provisions of the act. In that case, the court set forth three questions concerning a particular State criminal law all of which must be answered in the affirmative before that law may be considered assimilated.

1. Is the law not in conflict with Federal policies as expressed by other acts of Congress or by valid administrative regulations which have the force of law?
2. Is the statute or law so designed that it can be adopted under the act?
3. Does such law make penal the transaction alleged to have taken place?

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\* This note was adapted from a chapter of a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Va., while the author was a member of the Fifth Advanced Class. 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.

<sup>1</sup> The mode of acquisition of Federal jurisdiction over any particular reservation must be investigated to determine whether exclusive or concurrent jurisdiction was attained.

<sup>2</sup> 18 U.S.C. 13 (1952).

<sup>3</sup> 355 U.S. -----, 78 Sup. Ct. 291 (1958).

<sup>4</sup> 321 U.S. 383 (1944).

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There are two aspects to the problem of whether a Federal policy prevents assimilation. The first is a determination of whether other acts of Congress apply to the field in question and the second concerns administrative regulations. With respect to other acts of Congress, it is not necessary that the act of Congress specifically prohibit assimilation of a particular State law; it is sufficient if Congress has elsewhere provided that the act or omission prohibited by the State law is punishable as a crime in United States courts.<sup>5</sup> An examination of the United States Criminal Code reveals that certain crimes come under the jurisdiction of the United States because they interfere with governmental activities, such as stealing from or unlawfully interfering with the mail<sup>6</sup> or federally insured banks.<sup>7</sup> Another class of crimes such as transporting stolen automobiles in interstate commerce<sup>8</sup> or transporting a woman from one State to another for immoral purposes<sup>9</sup> fall within the jurisdiction of the United States by reason of delegated constitutional powers such as the power to regulate interstate commerce<sup>10</sup> or raise and support armies.<sup>11</sup> In the above classes of crimes the jurisdiction of the United States courts is not dependent upon the United States exercising jurisdiction over the specific geographical territory wherein the offense was committed. Crimes of the type just mentioned are for the most part committed within the territorial jurisdiction of the various States. It is obvious that these crimes have little effect upon the Assimilative Crimes Act, A person violating one of these statutes would be tried in a Federal court for the specific offense without regard to whether or not he committed the act within the territorial jurisdiction of a State or upon a military reservation under the exclusive jurisdiction of the United States. On the other hand, Congress has provided for the punishment of certain crimes

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<sup>5</sup> *Williams v. U.S.*, 327 U.S. 711 (1946). In this case, accused was convicted in Federal court of statutory rape in violation of an Arizona statute adopted as Federal law under the provisions of the Assimilative Crimes Act. The Arizona statute made 18 the age of consent. A specific Federal statute made carnal knowledge an offense if committed within the territorial jurisdiction of the United States and set 16 as the age of consent. The victim of the consent was 16 years of age and the accused was married. The court held the Arizona statute could not be assimilated for two reasons: (1) Congress had specifically legislated against the crime of statutory rape and therefore the Arizona statute could not be used to redefine or enlarge the offense nor could it be adopted separately. (2) The act committed was punishable as adultery under the United States Code and therefore there was an applicable Federal criminal statute under which the particular act of the accused could be punished.

<sup>6</sup> 18 U.S.C. 1691-1732 (1952).

<sup>7</sup> 18 U.S.C. 2113 (1952).

<sup>8</sup> 18 U.S.C. 2312 (1952).

<sup>9</sup> 18 U.S.C. 2421 (1952).

<sup>10</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>11</sup> *Id.* cl. 12.

if committed on lands reserved or acquired for the use of the United States and over which the United States exercises some form of territorial jurisdiction. These specifically denounced crimes form a partial criminal code for these Federal areas which is supplemented by the State law as adopted by the Assimilative Crimes Act. Consequently, a State criminal law denouncing the same or a similar offense cannot be assimilated.<sup>12</sup> The following crimes have been specifically prohibited by Congress if committed in these areas: Arson in two degrees,<sup>13</sup> three types of aggravated assault,<sup>14</sup> assault and battery,<sup>15</sup> simple assault,<sup>16</sup> larceny,<sup>17</sup> with a distinction as to punishment based on whether the property is of a value more or less than one hundred dollars, receiving stolen property,<sup>18</sup> murder in two degrees, voluntary manslaughter,<sup>20</sup> involuntary manslaughter,<sup>21</sup> attempt to commit murder,<sup>22</sup> or manslaughter,<sup>23</sup> rape,<sup>24</sup> carnal knowledge,<sup>25</sup> and robbery.<sup>26</sup> Nearly all the minor offenses or misdemeanors are not covered by the Federal code and are left subject to the State law as assimilated. Also, the Federal code does not make full provision for the punishment of such major felonies as burglary, forgery, and obtaining money by false pretenses. Burglary is punished as such only when of a post office building.<sup>27</sup> Forgery is prohibited only if the offense is committed by falsifying or altering specific Government documents.<sup>28</sup> Obtaining money by false pretenses is prohibited within the maritime jurisdiction or upon the high seas but not within the Federal territorial jurisdiction.<sup>29</sup> Of course, in the case of a military malefactor the Uniform Code satisfactorily covers these offenses and prevents assimilation of State burglary, forgery and theft statutes.<sup>30</sup> At this stage of the discussion, it would appear that a careful examination of Title 18 of the United States Code should in all cases reveal whether or not Federal policy as expressed by acts of Congress would prevent the assimilation of any particular

<sup>12</sup> *Williams v. U.S.*, 327 U.S. 711 (1946).

<sup>13</sup> 18 U.S.C. 81 (1952).

<sup>14</sup> 18 U.S.C. 113 (1952).

<sup>16</sup> *Zbid.*

<sup>16</sup> *Zbid.*

<sup>17</sup> 18 U.S.C. 661 (1952).

<sup>18</sup> 18 U.S.C. 662 (1952).

<sup>19</sup> 18 U.S.C. 1111 (1952).

<sup>20</sup> 18 U.S.C. 1112 (1952).

<sup>21</sup> *Zbid.*

<sup>22</sup> 18 U.S.C. 1113 (1952).

<sup>23</sup> *Zbid.*

<sup>24</sup> 18 U.S.C. 2031 (1952).

<sup>25</sup> 18 U.S.C. 2032 (1952).

<sup>26</sup> 18 U.S.C. 2111 (1952).

<sup>27</sup> 18 U.S.C. 2115 (1952).

<sup>28</sup> 18 U.S.C. 471-509 (1952).

<sup>29</sup> 18 U.S.C. 1025 (1952).

<sup>30</sup> Arts. 129, 123, and 121, UCMJ.

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State law. However, may not Federal policy be expressed by acts of Congress other than those defining crimes? To pose a purely hypothetical situation, assume that a Federal statute clearly expresses congressional intent that post exchanges be available daily to satisfy the needs of military personnel. Could it not be argued with force that the congressional policy expressed by this nonpenal statute prevents the assimilation of a State "blue law" imposing criminal sanctions upon the operation of a commercial establishment on the Sabbath? Although no cases can be found which bear directly upon this point, the language used in the *Yellow Cab* case<sup>81</sup> certainly seems broad enough to cover such a situation.

Presumably, under *Yellow Cab*, valid administrative regulations which have the force of law can also express a Federal policy preventing the assimilation of a state law. This concept presents a more difficult problem. In order to obtain a basic understanding of what is meant by the phrases Federal policy and valid administrative regulation consider the *Rentzel*<sup>82</sup> and *Nash*<sup>83</sup> cases. Both of these cases were decided by the Federal District Court for the Eastern District of Virginia.

In the *Nash* case, the plaintiff, a Negro woman, was refused service in the restaurant operated by the defendant at the Washington National Airport under a concession contract with the Civil Aeronautics Administration. She was informed by agents of the defendant that she could only be served in a separate cafeteria which was operated for colored people. As a result of this refusal of service, she sued for damages. It was uncontested that the property in question was under exclusive jurisdiction of the United States. Defendant argued that the Assimilative Crimes Act adopted the segregation laws of the State of Virginia and that no act of Congress or administrative regulation prevented the assimilation; further that the concession contract provided for the establishment of segregated eating facilities. The plaintiff contended that segregation was so against Federal policy that even in the absence of an administrative regulation to that effect it should prevent assimilation of the Virginia laws.

The court held that although an administrative regulation would be sufficient to prevent assimilation, in this case there was no such regulation and therefore the Virginia law on the subject was adopted as Federal law.

<sup>81</sup> See note 4, *supra*.

<sup>82</sup> *Air Terminal Services v. Rentzel*, 81 F. Supp. 611 (E.D.Va. 1949).

<sup>83</sup> *Nash v. Air Terminal Services*, 85 F. Supp. 545 (E.D. Va. 1949).

Shortly after the legal action was instituted in the *Nash* case, the Administrator of Civil Aeronautics published a regulation prohibiting segregation at the same Washington National Airport. Air Terminal Services, Inc., the defendant in the *Nash* case, then instituted action against Rentzel, the Administrator of Civil Aeronautics, to determine whether the regulation was invalid under the Assimilative Crimes Act. In this case, the court held that the action by Rentzel was a valid administrative order which effectively barred assimilation of the Virginia segregation laws. The court went on to say that the administrative order was valid because it expressed a Federal policy of avoiding race discrimination in Federal matters.

It is interesting to note that the Federal policy against segregation as expressed by court decisions existed at the time the *Nash* case arose<sup>34</sup> but was not considered adequate to prevent assimilation in the absence of an administrative regulation. In this connection, it is somewhat speculative as to whether or not a Federal administrative regulation which does not express a known Federal policy can effectively prevent assimilation. The Judge Advocate General of the Army was called upon to answer this question in a recent opinion.<sup>35</sup> The problem presented was whether or not the Secretary of the Army by publishing regulations authorizing the conduct of bingo games on military reservations could prevent the assimilation of State laws prohibiting gambling or lotteries of any type. The Attorney General of the United States had concluded in a written opinion dated 29 April 1955 that public policy was so against gambling that no regulation by the Secretary of the Army permitting bingo would be sufficient to prevent assimilation. Obviously, this discussion only applied to areas under the exclusive jurisdiction of the United States in that the independent operation of the State law itself would prevent such activities in areas under concurrent criminal jurisdiction.

The Military Affairs Division of the Office of The Judge Advocate General was hard pressed to justify the Army's position in this matter. In fact, the opinion of The Attorney General presented the hypothetical analogy of the Secretary of the Army attempting to prevent assimilation of a State law against prostitution by promulgating a regulation authorizing such activity on military reservations. In the Army opinion, it was concluded that the regulation was not against Federal policy because the Secretary of Defense and Secretary of the Army determine what is Federal policy as to the Army and not the Attorney General.

<sup>34</sup> *Hurd v. Hodge*, 334 U.S. 24 (1948).

<sup>35</sup> JAGA 1955/4833, 2 Jun 1955.

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It occurs to this writer that the type of Federal policy under discussion is not one determined by any one section of the executive branch of government, but is the type the courts refer to as public policy. This equates to a general opinion of the public as to what is good and what is evil and in the final analysis must be determined by the courts. The playing of bingo in clubs upon military reservations has reached such proportions as a desired form of recreation that its effect upon morale alone may render it consistent with Federal public policy.

In line with the *Rentxel* case, The Judge Advocate General of the Army had no difficulty in rendering an opinion to the effect that Federal policy was against racial discrimination and therefore regulations of the Secretary of the Army to that effect would prevent the assimilation of Louisiana laws which were designed to prevent white and colored people from engaging jointly in any type of sporting event.<sup>36</sup>

In summary, it is possible to state that if an administrative regulation promulgates a known Federal policy, it will prevent the assimilation of a State law ; but if it does not express such a known policy, there is some doubt. This doubt could be further resolved by looking to see if there is a policy against the purpose or effect of the regulation. Logic would then dictate that such a regulation was not an expression of Federal policy and therefore could not prevent assimilation ; but if there was no evidence of what the Federal policy was on the matter other than the regulation, then the regulation would perform a dual purpose. It would establish the Federal policy and also promulgate it in such a manner as to prevent the assimilation of a particular State law.

An administrative regulation in order to prevent assimilation must in addition to promulgating Federal policy be valid. What is meant by the term valid? Some regulations are promulgated as a direct result of specific statutory authority. For example, the Secretary of Defense was given authority by statute to promulgate regulations governing the sale and use of intoxicating liquors upon military reservations.<sup>37</sup> These regulations, unless in conflict with other Federal laws, are valid<sup>38</sup> and would be sufficient to prevent adoption of State laws pertaining to the use of liquor.<sup>39</sup> The next category of administrative regulation to consider are those promulgated by the head of an agency pursuant to his general statutory authority to regulate.<sup>40</sup> Such regulations, if reasonable<sup>41</sup> and not in conflict with

<sup>36</sup> JAGA 1956/5928, 8 Aug 1956.

<sup>37</sup> 65 Stat. 88 (1951), 50 U.S.C. App. 473 (1952).

<sup>38</sup> JAGA 1954/5868, 12 Jul 1954.

<sup>39</sup> *Ibid.*

<sup>40</sup> Rev. Stat. § 161, 5 U.S.C. 22 (1952).

<sup>41</sup> *Robinson v. Lundrigan*, 227 U.S. 173 (1913).

other acts of Congress, have the force and effect of law.<sup>42</sup> The requirement that the regulation be reasonable is very similar to the requirement that the regulation express Federal policy which has previously been discussed. But it also implies that the regulation can be neither arbitrary nor capricious in expressing that policy.<sup>43</sup> This type of regulation would also prevent assimilation.<sup>44</sup>

In the military departments of the Government there exists a power to regulate which is independent of statutory authority and is a part of the inherent powers of the President as Commander in Chief.<sup>45</sup> The courts have held that these regulations also have the force and effect of law if not in conflict with other acts of Congress.<sup>46</sup> This type of regulation does not appear to differ in any way from that discussed in the preceding paragraph.<sup>47</sup> While there are no court decisions as to whether this category of regulation would prevent assimilation of a State law, reason dictates that it would.

The statutory authority to regulate is limited to the heads of the various agencies or departments of the Government,<sup>48</sup> and even though the inherent right to regulate within the military is not so limited, only the regulations promulgated by the President or the head of a department have been held to have the force and effect of law.<sup>49</sup> Therefore, although there are no cases upon the point, it is reasonable to assume that the regulation of a post commander or similar officer in the civilian agencies of government could not effect the assimilation of State laws.

With complete academic fairness, it should be pointed out that the entire concept that an administrative regulation will prevent assimilation of State law rests on rather tenuous grounds. There are only three court decisions which indicate this result. The first is, of course, *Johnson v. Yellow Cab Transit Company*, *supra*. The Supreme Court in the majority opinion merely indicated in *dicta* that such a rule might exist.<sup>50</sup> Further, the opinion did not mention ad-

<sup>42</sup> *Caha v. U.S.*, 152 U.S. 211 (1894).

<sup>43</sup> *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 695 (9th Cir. 1949).

<sup>44</sup> *Air Terminal Services v. Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949).

<sup>45</sup> *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *U.S. v. Eliason*, 41 U.S. (16 Pet.) 291 (1842).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Rev. Stat. § 161, 5 U.S.C. 22 (1952).

<sup>49</sup> See note 45, *supra*.

<sup>50</sup> *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 390 (1944). In footnote 9, the Court states, ". . . . Whether the declaration of policies contained in these various regulations indicates an intention of the War Department to permit all liquor transactions not expressly prohibited, and whether, if it does, the War Department has the power under Acts of Congress to permit such transactions, seem open questions."

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ministrative regulations in general, but only Army regulations which had previously been held to have the force and effect of law. Justices Frankfurter and Roberts dissented in the case. Mr. Justice Frankfurter, speaking for the dissent, assumed that Federal administrative policy could prevent assimilation of State law but he certainly did not state it would in all cases have that result.<sup>51</sup> Seizing upon this decision, the Federal District Court for the Eastern District of Virginia held that Federal policy as expressed by a valid administrative regulation would prevent adoption of State law in two cases.<sup>52</sup> Neither of these cases were appealed. Opinions of the various governmental agencies have, without discussion, accepted the decisions of the Virginia court as the law in this field.<sup>53</sup> However, it should be no great surprise if some other Federal district court or appellate court should hold that Federal policy as expressed by administrative regulations has no effect whatsoever upon the Assimilative Crimes Act.

Is a particular State statute or law so designed that it can be adopted as Federal law? The issue presented by this question is illustrated by a recent case in the Federal District Court for the Western District of Louisiana.<sup>54</sup> The accused was charged with having killed a fawn deer in a national forest in violation of Louisiana law as assimilated. The fact established was that the accused shot a full grown male deer, but by some quirk of nature, it had no horns. The Louisiana statute provided as follows :

“No person shall:

(1) Take any fawn (a deer with horns less than three inches long) or any doe (a female wild deer), at any time; or a wild deer at any time when driven to the high lands by overflow of high water.”<sup>55</sup>

The district judge brushed aside the prosecution on the basis that the Louisiana statute was too trivial in nature to be considered assimilated into the Federal Criminal Code.<sup>56</sup> This decision would presumably be impossible today in the light of a recent Federal statute expressly assimilating State fish and game regulations for application on military reservations.<sup>57</sup>

<sup>51</sup> Id. at 401.

<sup>52</sup> See notes 32 and 33, *supra*.

<sup>53</sup> See notes 35, 36, and 38, *supra*.

<sup>54</sup> *U.S. v. Dowden*, 139 F. Supp. 781 (W.D. La. 1956).

<sup>55</sup> Louisiana Stats. Ann.—Rev. Stats., Title 56:124(1).

<sup>56</sup> The judge thought it farcical that the efforts of five game agents, two biologists, various attorneys, the United States Marshal and three deputies, the clerk, court reporter and a Federal judge should be brought to bear on so trivial a matter.

<sup>57</sup> 10 *U.S.C.* 2671(a), as added by Pub. L. No. 85-337, 85th Cong., 2d Sess. § 4(1) (28 Feb 1958).

A clearer example of a State law completely inappropriate for assimilation was the New York statute which provided for one punishment in one county for the offense of criminal libel regardless of the number of counties in which the publication was circulated.<sup>58</sup>

In general, a State penal statute is not susceptible of assimilation if written in terms peculiar to state institutions (single punishment for multiple publications of libel in various "counties") or incapable of effective administration and enforcement on Federal territory (prohibition against taking a "deer with horns less than three inches long").

The third test which a State law must undergo before assimilation is whether it is truly a penal statute. It must be understood that State laws are enacted to govern or regulate many fields of activity such as intrastate commerce, public utilities, sale of alcoholic beverages, sale of insurance, labor relations, practice of law and medicine. Although a violation of these statutes is in many cases punishable by fine or even imprisonment, they are for the most part considered regulatory measures rather than a part of the State criminal code. It is for this reason that this type of State statute is generally not subject to assimilation as part of the Federal law. In this connection, it has been held that state liquor laws,<sup>59</sup> milk regulations,<sup>60</sup> building regulations<sup>61</sup> and insurance laws<sup>62</sup> are not enforceable upon land under the exclusive jurisdiction of the United States. This test assures that only the criminal law of a State can be assimilated and not the vast maze of State and local regulations.

Until now, this discussion has been concerned with only the criminal statutes of a state. However, all state criminal law is not statutory. The States still recognize and punish many common law crimes. This raises the rather novel issue of whether the Assimilative Crimes Act adopts as Federal law the State common law crimes as well as the statutory crimes. Certainly it should not in view of the fact that it has long been established that the United States courts have no common law criminal jurisdiction as such.<sup>63</sup> Never-

<sup>58</sup> *U.S. v. Press Publishing Co.*, 219 U.S. 1 (1911).

<sup>59</sup> *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *Crator Lake Nat. Park Co. v. Oregon Liquor Control Commission*, 26 F. Supp. 363 (Ore. 1939).

<sup>60</sup> *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943).

<sup>61</sup> *Birmingham v. Thompson*, 200 F. 2d 505 (5th Cir. 1952).

<sup>62</sup> Op. JAGN 1952/80, 1 Jul 1952, 2 Dig. Ops., Posts, Bases and Other Installations, § 11.5.

<sup>63</sup> *Pennsylvania-v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *U.S. v. Gill*, 204 F. 2d 740 (7th Cir. 1953); *Oliver v. U.S.*, 230 Fed. 971 (9th Cir. 1916).

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theless, at least one case holds that State common law offenses are assimilated.<sup>64</sup>

Finally, assuming a statute appropriate for assimilation, is the statute assimilated *as construed* by the State courts? We know that such is the case in the civil division of the Federal courts.<sup>65</sup> In a civil case, the Federal court may be bound even by a State trial court's interpretation of the State law.<sup>66</sup> For some unknown reason the Supreme Court has not seen fit to impose the same burden upon the criminal division of the Federal courts with respect to State law adopted under the Assimilative Crimes Act.<sup>67</sup> In the case of *Johnson v. Yellow Cab Transit Company*, *supra*, Mr. Justice Black speaking for the court stated as follows:

“ . . . That broad question, though some parts of it involve a consideration of the proper scope of the state law adopted by the federal government, is in the final analysis a question of the correct interpretation of a federal criminal statute, and therefore an issue upon which federal courts are not bound by the rulings of state courts. . . . ”<sup>68</sup>

The statement of Mr. Justice Black indicates that a State law, if adopted, completely loses its identity as a part of the State criminal code. It then becomes purely a Federal statute subject only to interpretation by the Federal judiciary. Even so, the decisions of State courts should not be completely disregarded. In situations similar to the one at hand where State courts have been called upon to rule on constitutional or other Federal matters, the United States courts have frequently stated that the decisions of State courts, although not conclusive, are entitled to great weight.<sup>69</sup> For this reason, the Federal courts would in all probability accept and follow any reasonable decision of a State court upon this subject. Should a Federal court *not* adopt the State construction, an anomalous situation could result on territory subject to concurrent State and Federal jurisdiction: an act could be deemed a violation of a State statute in a prosecution by the State but not a violation of the identical statute as assimilated should the Federal authorities initiate the action. Surely persons subject to the criminal jurisdiction of dual sovereigns are entitled to a little greater clarity than this. MAJOR JAMES C. WALLER, JR.

<sup>64</sup> *U.S. v. Wright*, 28 Fed. Cas. 791, No. 16, 774 (Mass. 1871).

<sup>65</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>66</sup> *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

<sup>67</sup> Although, as has been seen, judge-made common law crimes are apparently assimilated as judicially defined.

<sup>68</sup> 321 U.S. 383, 391 (1944).

<sup>69</sup> *Puerto Rico v. Shell Co.*, 302 U.S. 253, 266 (1937); *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 206, 207 (1937).

[AGO 010.6 (21 Jul 58)]

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For explanation of abbreviations used, see AR 320-50.