

COURT-MARTIAL  
JURISDICTION

by

Jan Horbaly

University of Virginia M.A.  
University of Virginia LL.M.  
Case Western Reserve University J.D.  
Case Western Reserve University B.A.

A Dissertation Submitted in Partial Fulfillment  
of the Requirement for the Degree of  
Doctor of Science of Law  
at the  
Yale Law School

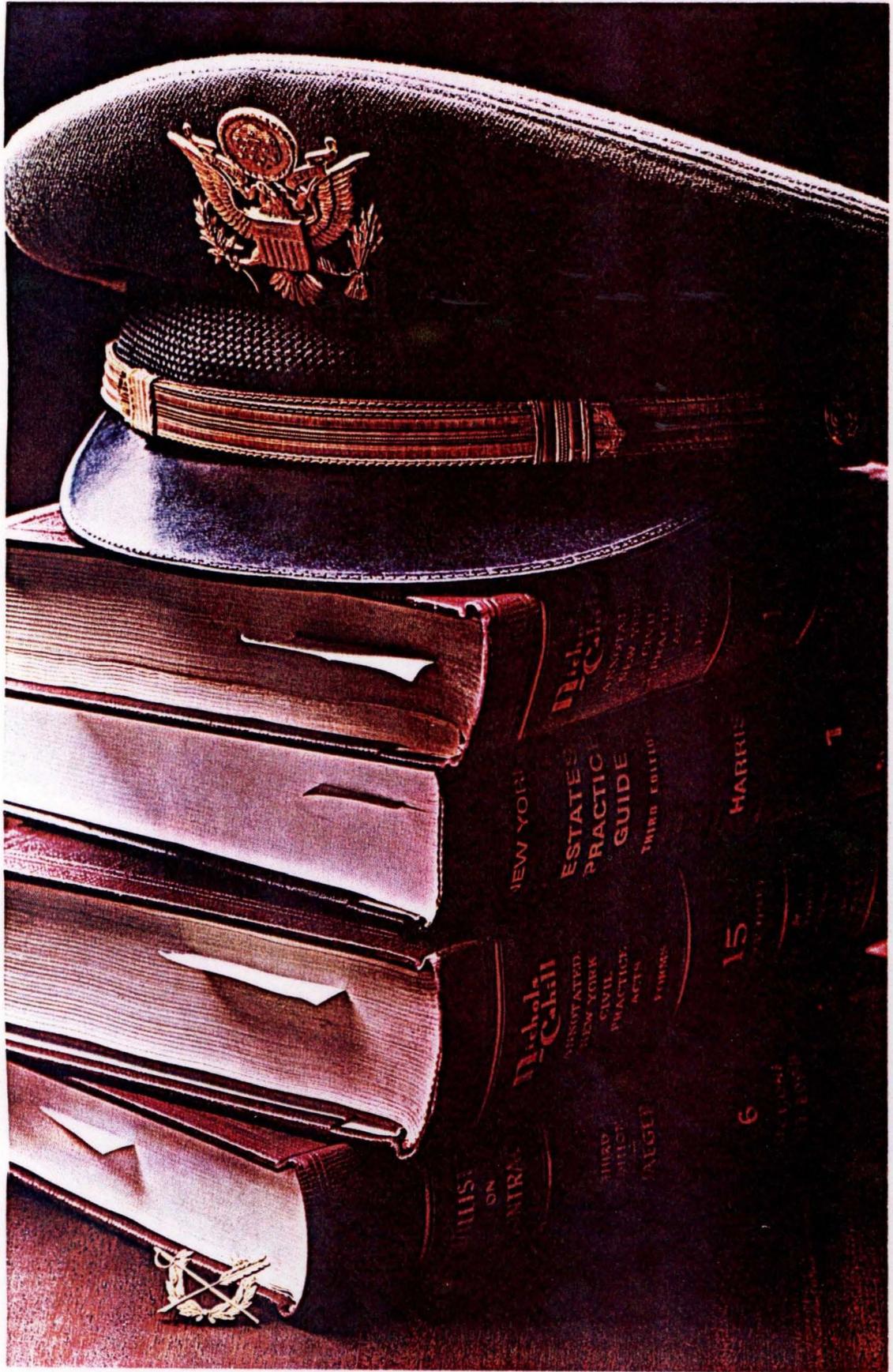
Degree Conferred  
June 10, 1986

"Military Law, from its early origin and historical associations, its experience of many wars, its moderation in time of peace, its scrupulous regard of honor, its inflexible discipline, its simplicity, and its strength, is fairly entitled to consideration and study[--and this] is a belief of the author which he trusts his readers will share."

William W. Winthrop\*

---

\* Preface to the W. WINTHROP, I MILITARY LAW vi (Washington, D.C.: W. H. Morrison Law Bookseller and Publisher, 1886).



## ACKNOWLEDGMENTS

I wish to thank the members of my committee for the time they spent reading and reviewing the material I submitted to them: Professor Robert H. Bork, Professor Eugene V. Rostow, Professor W. Michael Reisman, and Professor Kate Stith. I especially wish to thank Professor Joseph W. Bishop, Jr., and Professor Leon S. Lipson for serving as Chairmen of my committee and for their helpful comments and suggestions concerning my work. I also wish to thank Dean James W. Zirkle and Dean Jamiene S. Studley for their good cheer and logistical support. I am appreciative too of the grant of financial assistance I received from Yale University, and for the many good people I met and worked with at the Yale Law School.

J.H.

---

Picture on the previous page is reproduced from a United States Army Judge Advocate General's Corps brochure distributed in 1969 (RPI 130, September 1969).

## TABLE OF CONTENTS

	Page
<u>CHAPTER ONE</u>	
INTRODUCTION . . . . .	1
<u>CHAPTER TWO</u>	
200 YEARS OF COURT-MARTIAL JURISDICTION. . . . .	25
A. <u>English Beginnings</u> . . . . .	27
1. Military Ordinances. . . . .	29
2. Articles of War of 1666. . . . .	31
3. Mutiny Act of 1689 . . . . .	33
4. British Articles of War of 1774. . . . .	33
B. <u>The American Revolution</u> . . . . .	36
1. Revolutionary Courts-Martial . . . . .	37
2. American Articles of War of 1776 . . . . .	39
3. Jurisdiction of Early American Courts-Martial. . . . .	42
C. <u>Colonists Call for Civilian Control of     the Military.</u> . . . . .	45
1. The Lesson of the Roman Empire . . . . .	48
2. The Role of the Military in 18th Century England . . . . .	48
3. Colonial Fear of Military Power. . . . .	52
4. Steps Taken to Insure Civilian Control of the Military . . . . .	53

D.	<u>Court-Martial Jurisdiction under the Constitution.</u>	56
1.	The First Stage: 1789 to 1862.	56
2.	The Second Stage: 1863 to 1915	60
3.	The Third Stage: 1916 to 1947.	64
4.	The Fourth Stage: 1948 to the Present.	69

### CHAPTER THREE

	NATURE OF COURT-MARTIAL JURISDICTION	87
A.	<u>Types of Military Jurisdiction</u>	92
1.	Martial Rule	94
2.	Military Government.	101
3.	Law of War	108
4.	Military Justice	112
B.	<u>Agencies Exercising Military Court Jurisdiction.</u>	116
1.	Commanding Officers.	116
2.	Courts-Martial	122
3.	Military Commissions	131
4.	Courts of Inquiry	135
C.	<u>Sources of Court-Martial Jurisdiction.</u>	140
1.	Constitutional Law	141
2.	International Law.	157
D.	<u>Elements of Court-Martial Jurisdiction</u>	161
1.	Jurisdiction Defined	161
2.	Civilian and Military Courts	163
3.	Reluctance of Civilian Courts to Interfere in Military Trials.	167
4.	Limited Jurisdiction of Courts-Martial	170
5.	Collateral Review.	174
6.	Deciding What is Jurisdictional.	176
7.	Indispensable Prerequisites.	195

CHAPTER FOUR

PROPERLY CONVENED COURTS-MARTIAL . . . . . 204

A. Convening Authority. . . . . . 207

    1. President's Role . . . . . 217

    2. Commander's Role . . . . . 220

    3. Devolution of Command. . . . . 227

    4. Authority over "Separate or Detached"  
        Units . . . . . 241

B. Limitations on the Convening Authority . . . . . 248

    1. Convening Authority Cannot be an Accuser . 249

    2. Convening Authority Cannot Direct One  
        Junior in Rank to Sign and Swear  
        to Charges. . . . . 259

    3. Convening Authority Must be Senior in  
        Rank to the Accuser . . . . . 261

    4. Reservation of Power by Superior  
        Authority . . . . . 265

    5. Accused is Not a Member of the Convening  
        Authority's Command . . . . . 271

C. Proper Referral of Charges to Court-Martial. . 274

    1. Elements of a Proper Referral. . . . . 274

    2. Court-Martial Convening Order. . . . . 275

    3. 1984 Manual Provisions on Referral . . . . . 277

    4. Oral Convening or Amending Orders. . . . . 282

    5. Withdrawal of Properly Referred Charges. . 286

CHAPTER FIVE

PROPERLY CONSTITUTED COURTS-MARTIAL. . . . . 301

A. Accused. . . . . . 304

    1. Presence of the Accused Required . . . . . 304

    2. Trial of the Accused in Absentia . . . . . 306

    3. Voluntary and Knowing Absence. . . . . 310

    4. Temporary Absence of the Accused During  
        Trial . . . . . 313

B.	<u>Defense Counsel</u> . . . . .	316
1.	The Right to Counsel in the Military . . .	316
2.	Absence of Defense Counsel from the Trial.	328
3.	Waiver of Right to Counsel by Accused. . .	330
C.	<u>Trial Counsel</u> . . . . .	335
1.	Role of the Trial Counsel. . . . .	335
2.	Disqualification of Trial Counsel from Participating in a Court-Martial. . . .	336
D.	<u>Military Judge</u> . . . . .	339
1.	Qualifications of the Military Judge . . .	340
2.	Detailed Military Judge. . . . .	342
3.	Request for Trial by Military Judge Alone.	347
E.	<u>Court Members</u> . . . . .	357
1.	Selection of Court Members . . . . .	359
2.	Request for Trial by Enlisted Members. . .	362
3.	Need for Personal Selection of Court Members by the Convening Authority. . .	364
4.	Excusal of Court Members . . . . .	366
5.	Presence of a Nondetailed Court Member . .	372

CHAPTER SIX

	JURISDICTION OVER THE PERSON . . . . .	375
A.	<u>When Jurisdiction Attaches</u> . . . . .	383
1.	Enlistees. . . . .	384
2.	Inductees. . . . .	404
3.	Reservists . . . . .	411
4.	Fleet Reserve. . . . .	424
5.	Civilians. . . . .	429
B.	<u>Continuing Jurisdiction</u> . . . . .	438
1.	After Expiration of Term of Service. . . .	439
2.	Held with a View toward Trial. . . . .	440
3.	Self-Executing Orders. . . . .	444

C.	<u>When Jurisdiction Terminates</u> . . . . .	447
1.	Article 3(a) Offense Exception . . . . .	450
2.	Fraudulent Discharge Exception . . . . .	458
3.	Desertion Exception. . . . .	462
4.	Prisoner in Military Custody Exception . .	465
5.	Uninterrupted Status Exception . . . . .	469
6.	Retired Personnel Exception. . . . .	472

CHAPTER SEVEN

	JURISDICTION OVER THE OFFENSE. . . . .	483
A.	<u>Offenses Triable by Court-Martial.</u> . . . . .	484
1.	Punitive Articles. . . . .	484
2.	General Articles . . . . .	484
3.	Concurrent Jurisdiction. . . . .	485
B.	<u>An Appropriate Standard.</u> . . . . .	488
1.	Military Status Standard . . . . .	488
2.	Service Connection Standard. . . . .	491
C.	<u>Development of the Service Connection</u> <u>Standard</u> . . . . .	499
1.	Military Crimes. . . . .	501
2.	Crimes Against Military Personnel. . . . .	502
3.	Crimes Against Military Property . . . . .	507
4.	Crimes Committed On Post . . . . .	509
5.	Crimes Committed Off Post. . . . .	512
6.	Crimes Committed At or Near Post . . . . .	515
7.	Crimes Committed On Post and Off Post. . .	520
8.	Crimes Involving the Use of Military Status. . . . .	525
9.	Crimes Committed While in Uniform. . . . .	530
10.	Drug Offenses. . . . .	532
D.	<u>Exceptions to the Service Connection</u> <u>Requirement</u> . . . . .	534
1.	Overseas Exception . . . . .	535
2.	Petty Offenses . . . . .	544

CHAPTER EIGHT

SENTENCING . . . . . 548

A. The Code . . . . . 552

    1. Maximum Punishments for Offenses . . . . . 552

    2. Types of Courts. . . . . 556

    3. Special Sentencing Provisions. . . . . 559

B. Manual Provisions on Sentencing. . . . . . 560

    1. Maximum Punishment Chart . . . . . 560

    2. Other Limitations on Punishments . . . . . 562

CHAPTER NINE

EXTRAORDINARY RELIEF . . . . . 575

A. Extraordinary Writs in Military Courts . . . . . 576

    1. Court of Military Appeals. . . . . 578

    2. Courts of Military Review. . . . . 589

B. Extraordinary Writs in Federal Civilian  
    Courts . . . . . 590

    1. Military Justice System is Separate and  
        Complete. . . . . 592

    2. Finality of Court-Martial Judgments. . . . . 594

    3. Scope of Federal Court Review. . . . . 601

    4. Exhaustion of Military Court Remedies. . . . . 609

    5. Value of Civilian Court Review . . . . . 614

CHAPTER TEN

PROPOSALS FOR REFORM . . . . . 617

A. Matters Deserving Attention. . . . . . 619

    1. Lack of Uniformity in Imposition of  
        Article 15 Punishment . . . . . 620

    2. Unfair Withdrawal of Charges . . . . . 623

    3. Failure to Strictly Construe Detailing  
        Provisions of the Code. . . . . 626

    4. Exercise of Jurisdiction over Reservists . 631

    5. Expanding Reach of Court-Martial  
        Jurisdiction. . . . . 636

B. An Approach to Deciding Jurisdictional  
    Issues. . . . . . 638

    1. Jurisdictional Worksheet . . . . . 639

    2. Emphasis on the Elements of Court-Martial  
        Jurisdiction. . . . . 640

CHAPTER ELEVEN

CONCLUSION. . . . . 643

APPENDIX

APPENDIX A. . . . . 648

BIBLIOGRAPHY

STATUTES. . . . . 667

CASES . . . . . 685

BOOKS . . . . . 711

ARTICLES. . . . . 716

DISSERTATIONS . . . . . 743

## CHAPTER ONE

### INTRODUCTION

On September 17, 1787, the Constitution of the United States was signed at Independence Hall in Philadelphia by delegates from the 12 States who participated in the Constitutional Convention.<sup>1</sup> The delegates to the Convention had agreed that the proposed Constitution would become effective when nine States voted to approve it. On June 21, 1788, New Hampshire, the ninth State, ratified the Constitution by a vote of 57 to 47, and on that date a new form of government for the United States of America became a reality.<sup>2</sup>

---

<sup>1</sup> The State of Rhode Island was not represented at the Constitutional Convention.

<sup>2</sup> The Constitution was ratified by the original 13 States on the following dates:

Delaware. . . .	(30 unanimous) . . .	December 7, 1787
Pennsylvania. .	(vote 46 to 23). . .	December 12, 1787
New Jersey. . .	(38 unanimous) . . .	December 18, 1787
Georgia . . . .	(26 unanimous) . . .	January 2, 1788
Connecticut . .	(vote 128 to 40) . . .	January 9, 1788
Massachusetts .	(vote 187 to 168). . .	February 6, 1788
Maryland. . . .	(vote 63 to 11). . . .	April 28, 1788
South Carolina.	(vote 149 to 73) . . .	May 23, 1788
New Hampshire .	(vote 57 to 47). . . .	June 21, 1788
Virginia. . . .	(vote 89 to 79). . . .	June 26, 1788
New York. . . .	(vote 30 to 27). . . .	July 26, 1788
North Carolina.	(vote 194 to 77) . . .	November 21, 1789
Rhode Island. .	(vote 34 to 32). . . .	May 29, 1790

Eleven days later, on July 2, 1788, the Second Continental Congress was advised that nine States had ratified the Constitution of the United States.<sup>3</sup> The documents of ratification from the nine States were referred "to a com[mittee of the Continental Congress] to examine the same and [to] report an Act of Congress for putting the . . . constitution into operation in pursuance of the resolutions of the late federal Convention."<sup>4</sup>

Three and a half weeks later, on July 28, 1788, a committee consisting of Edward Carrington, Pierpont Edwards, Abraham Baldwin, Samuel Allyne Otis, and Thomas Tudor Tucker, presented the following recommendation to the Continental Congress:

That the first Wednesday in January next be the day for appointing electors in the several States which have or shall before the said day have ratified the said constitution; that the first Wednesday in [February] next be the day for the electors to assemble in their respective states and vote for a president and that the first Wednesday in March be the time and \_\_\_\_\_, the place for, commencing proceedings under

---

S. BLOOM, THE STORY OF THE CONSTITUTION 87 (Washington, D.C.: United States Constitutional Sesquicentennial Commission, 1937).

<sup>3</sup> 34 JOURNALS OF THE CONTINENTAL CONGRESS 281 (Washington, D.C.: U.S. Government Printing Office, Roscoe R. Hill, ed., 1937).

<sup>4</sup> Id.

the said Constitution.<sup>5</sup>

The committee made no recommendation as to where the new Government should sit and left a blank space in their recommendation concerning this matter. The subject of where the Government should be located was to become a topic of considerable debate and discussion.<sup>6</sup> Among the cities proposed were Philadelphia, New York, Baltimore, Lancaster, and Annapolis. "The problem was solved by the resolve of September 13 fixing the time for the several steps in the election and New York as the place of meeting for the new administration."<sup>7</sup>

On Wednesday, February 4, 1789, the Electoral College met in New York City and unanimously elected General George Washington to be the first President of the United States of America. On April 30, 1789, President Washington was inaugurated, and on March 4, 1789, the first Wednesday in March, the Constitution became effective and a new government was established.

Provisions for the creation of the land and naval forces were an important part of the new Constitution. The Framers of the Constitution all agreed, especially after the experience of the American Revolution, that a

---

<sup>5</sup> Id. at 359 (blank space in the original).

<sup>6</sup> Id. at 359, 367, 383, 395, 402, 415-18, 455-57, 481, 487-88, 495-97, 515-19, 521-22.

<sup>7</sup> Id. at viii. See id. at 521-23.

national military force was necessary to preserve, protect and defend the republic from attack by foreign nations. The Framers also were in agreement that the military should be governed and controlled by the Congress, and they provided in the Constitution that Congress should have the power to "make Rules for the Government and Regulation of the land and naval Forces."<sup>8</sup>

This power, set forth in Article 1, Section 8, Clause 14 of the Constitution, was taken almost verbatim from Article IX, Section 4 of the Articles of Confederation, which provided that the "United States in congress assembled shall . . . have the sole and exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces, and directing their operations."<sup>9</sup> In granting to Congress the power to make rules for governing the armed forces, the Framers gave Congress authority to create a criminal justice system for the military and to enact rules regarding its operation.

On September 29, 1789, pursuant to the provisions granted to it by the Constitution, the Congress of the United States enacted the American Articles of War of

---

<sup>8</sup> U.S. CONST. art. 1, § 8, cl. 14.

<sup>9</sup> U.S. ARTS. OF CONFED. art. IX, sec. 4 (1778), reprinted in J. GILMORE, ARTICLES OF CONFEDERATION AND CONSTITUTION OF THE UNITED STATES AND NOTES OF A COURSE OF LECTURES ON THE CONSTITUTION OF THE UNITED STATES 22-23 (Washington, D.C.; James Blakey, 1891).

1789.<sup>10</sup> Thus, exactly 208 days after the formation of the new Government, the nation had--in addition to a federal court system and numerous state court systems--a military court system which was empowered to try soldiers who were charged with committing criminal and military offenses while serving on active duty in the armed forces of the United States. The Articles of War of 1789 were much like the Articles of War of 1776. What is significant about the Articles of War of 1789 is the importance Congress placed on having a special code of criminal conduct for the military, and the speed with which Congress acted to put such a code in place.

In the beginning, the number of soldiers in the states who were subject to court-martial jurisdiction under the American Articles of War were few. In 1789 only 672 soldiers were on active duty in the army, and the navy had been disbanded.<sup>11</sup> Today, the number of those who are subject to court-martial jurisdiction is significant indeed. Over two million men and women who are presently serving in the armed forces of the United States are subject to the military criminal justice system--a group larger than the number of citizens subject to criminal codes in the States of Alaska,

---

<sup>10</sup> See infra notes 346-64 and accompanying text.

<sup>11</sup> See generally infra notes 133-207 and accompanying text for a discussion of the four stages in the development of the law of court-martial jurisdiction.

Wyoming, Vermont, Delaware, North Dakota, South Dakota, Montana, Nevada, New Hampshire, Idaho, Rhode Island, Hawaii, Maine, New Mexico, Utah, Nebraska, and West Virginia.<sup>12</sup>

Some commentators have stated that "military justice is the largest single system of criminal justice in the nation, not only in time of war, but also in time of peace."<sup>13</sup> This observation is based on the fact that the armed forces consist mostly of young men from 17 to 40 years of age, a group which statistically at least is responsible for committing the highest number of crimes in the nation.<sup>14</sup>

During World War II, many young men and women serving in the armed forces were tried by court-martial for committing criminal and military offenses. "There were about eighty thousand general court-martial convictions during the war, an average of nearly sixty convic-

---

<sup>12</sup> STATE DEMOGRAPHICS: POPULATION PROFILES OF THE 50 STATES VII (Homewood, Illinois; Dow Jones-Irwin, The American Demographics Magazine Editors eds., 1984). See Cook, Courts-Martial: The Third System in American Criminal Law, 1978 S. ILL. U.L.J. 1. In World War II, there were over 12,300,000 young men and women who served in the armed forces and who were subject to the military justice system. Karlen & Pepper, The Scope of Military Justice, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 285, 286 (1952).

<sup>13</sup> Karlen & Pepper, The Scope of Military Justice, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 285, 298 (1952).

<sup>14</sup> Id. at 286-87.

tions by the highest form of military court, somewhere in the world, every day of the war."<sup>15</sup> In addition, many service members were tried by special and summary courts. By the end of the war, it is estimated that approximately "two million convictions [were] handed down by American courts-martial."<sup>16</sup>

In the almost 200 years that have passed since the first American Articles of War were enacted in 1789, the jurisdiction exercised by military courts has been the subject of much litigation in both civilian and military courts. During periods of armed conflict and especially during the Civil War, World War I, World War II, the Korean War and the Vietnam War, those charged with committing military offenses frequently challenged the exercise of jurisdiction by military courts.

In the last 30 years, the number of decisions rendered by courts on the subject of court-martial jurisdiction has increased dramatically.<sup>17</sup> This is due in part to the enactment by Congress of the Uniform Code of Military Justice of 1950, to the creation by Congress of

---

<sup>15</sup> W. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 14 (Port Washington, New York: Kennikat Press, 1973) [hereinafter cited as *SWORDS AND SCALES*].

<sup>16</sup> *Id.*

<sup>17</sup> Not all are pleased with this development. See e.g., Heintz, *Military Justice Under Attack*, 110 *ARMED FORCES J. INTER.* 38 (June 1973).

the United States Court of Military Appeals, to a number of important decisions handed down by civilian and military courts, and to the trend in recent years toward the civilianization of the military justice system.

The enactment by Congress of the Uniform Code of Military Justice is the major reason for the growth of litigation on the subject of court-martial jurisdiction. The new Uniform Code of Military Justice, commonly referred to as the Code or UCMJ, was signed by President Harry S. Truman on May 5, 1950<sup>18</sup> and became effective on May 31, 1951.<sup>19</sup>

The Uniform Code of Military Justice was a major reform in military law.<sup>20</sup> Its purpose was to consolidate

---

<sup>18</sup> Act of May 5, 1950, 64 Stat. 107 (current version at 10 U.S.C. §§ 801-940 (1983)).

The Uniform Code of Military Justice was enacted as part of the act of 5 May 1950 which contained 16 additional sections. It was thereafter revised, codified, and enacted into law as part of title 10, United States Code, by the act of 10 August 1956 . . . .

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV. ED.), App. 2, Uniform Code of Military Justice, at A2-1 (Washington, D.C.; U.S. Government Printing Office, 1969) (footnotes omitted). The MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.; U.S. Government Printing Office, 1984) omits this interesting bit of legislative history. The Uniform Code of Military Justice was amended again in 1968, 1979 and 1983.

<sup>19</sup> Act of May 5, 1950, Art. 140, § 5, 64 Stat. 145.

<sup>20</sup> See generally Hearings on the Uniform Code of Military Justice before the House Subcommittee of the Committee on Armed Services, 81st Cong., 1st Sess. (1949).

the disciplinary rules of the Army, the Navy (including the Marine Corps), the Air Force and the Coast Guard into a single criminal code and to improve the overall quality of military justice in the armed forces. This was accomplished in 140 articles: the first 76 of which dealt with procedures to be followed in the operation and administration of the military justice system, and the remaining 64 which defined the criminal offenses triable by court-martial.

The Uniform Code of Military Justice Act of 1950 established a uniform system of military justice for the armed forces. In addition, it provided important procedural rights and protections for soldiers and civilians charged with violations of the Code. The Uniform Code of Military Justice also made significant changes too in court-martial procedure, and in the manner in which military court decisions are reviewed by appellate authorities. The Code also took steps to eliminate command influence in military proceedings.<sup>21</sup>

The Uniform Code of Military Justice is clearly a major milestone in the development of military law. The new code introduced many reforms into the operation of

---

<sup>21</sup> The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, and the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1394, 1407, did even more in this regard. See Douglass, The Judicialization of Military Courts, 22 HASTINGS L.J. 213, 219-20 (1971); Ervin, The Military Justice Act of 1968, 45 MIL. L. REV. 77, 93-94 (1969).

the military justice system and, perhaps, has done more to change the course of military law than any change since the elaborate codification of military law undertaken by Gustavus Adolphus in 1621.<sup>22</sup>

While the enactment of the Uniform Code of Military Justice is largely responsible for the increase in the volume of litigation on the subject of court-martial jurisdiction in the last 30 years, the simultaneous creation by Congress of the United States Court of Military Appeals is also responsible for much of the development of the law in this area. The creation of the United States Court of Military Appeals is the most important reform included in the Uniform Code of Military Justice. Article 67 of the Code provided for the establishment of a Court of Military Appeals and for the appointment of three civilian judges to serve on the Court for 15-year terms. Under the Code, the judges on the Court are to be appointed by the President, with the

---

<sup>22</sup> See generally White, Has the Uniform Code of Military Justice Improved the Courts-Martial System?, 28 ST. JOHN'S L. REV. 19 (1953); Landman, One Year of the Uniform Code of Military Justice: A Report of Progress, 4 STAN. L. REV. 491 (1952) [hereinafter cited as One Year: A Report of Progress]; White, The Uniform Code of Military Justice--Its Promise and Performance (The First Decade: 1951-1961): A Symposium--The Background and the Problem, 35 ST. JOHN'S L. REV. 197 (1961); Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 HARV. L. REV. 266, 294-298 (1958). See also ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE, S. REP. NO. 486, 81st Cong., 1st Sess. (1949); UNIFORM CODE OF MILITARY JUSTICE, H. REP. NO. 491, 81st Cong., 1st Sess. (1949).

advice and consent of the Senate. The creation of the Court of Military Appeals meant that for "the first time . . . the decisions of the Army, the Navy, the Air Force, and the Coast Guard were brought under a uniform head."<sup>23</sup>

The creation of this court was the product of the now famous Morgan Report on Military Justice which was largely responsible for the new code. The court itself was apparently the result of a compromise between those who wanted to put the administration of military justice entirely in civil courts and those who wanted it to remain a purely military function. All aspects of the court-martial system were to remain in the hands of the military except for the final review; this last stage--the court of last resort--was transferred to civilian control in the form of the United States Court of Military Appeals. The compromise was effected and adopted by the Congress and on May 31, 1951, the court came into existence.<sup>24</sup>

---

<sup>23</sup> One Year: A Report of Progress, supra note 22, at 491.

<sup>24</sup> Id. at 491-92.

U.C.M.J. Art. 140b, Sec. 5, provided that the article creating the Court of Military Appeals should be effective on February 28, 1951. However, the court could not act until May 31, 1951, and in fact heard the first appeal on September 7, 1951.

Id. at 492 n.5. The United States Court of Military Appeals is no longer technically the "court of last resort" since decisions of the Court of Military Appeals can now be reviewed by the Supreme Court of the United States on "writ of certiorari as provided in section 1259 of title 28." Art. 67(h)(1), U.C.M.J., 10 U.S.C. § 867(h)(1) (1985 Supp.). Review by the Supreme Court of Court of Military Appeals' decisions became effective on August 1, 1984. Only those cases, however, in which the Court of Military Appeals has granted a petition for

Professor Edmund M. Morgan, Jr., first suggested establishing "a court of military appeals staffed with civilian judges" on November 8, 1919 when he testified before a Subcommittee of the United States Senate Committee on Military Affairs, which at the time was conducting hearings on military justice.<sup>25</sup> Thirty-two years later his proposal became a reality.<sup>26</sup>

The impact of the United States Court of Military Appeals on the development of military law has been tremendous. Since September 7, 1951, the Court of

---

review may be appealed to the Supreme Court of the United States; cases in which the Court of Military Appeals has refused to grant a petition for review are not appealable to the Supreme Court. Id. See infra note 204 and accompanying text.

<sup>25</sup> Sutherland, Edmund Morris Morgan: Lawyer-Professor and Citizen-Soldier, 28 MIL. L. REV. 3, 4 (1965). See Testimony of Edmund M. Morgan, Jr., Yale Law School, Hearings on S. 64 Before a Subcomm. of the Senate Comm. on Military Affairs, 66th Cong., 1st Sess. 1371, 1381-86 (1919), reprinted in Morgan, Military Justice, 24 MD. STATE B. ASS'N. 197 (1919).

<sup>26</sup> Act of May 5, 1950, ch. 169, art. 67, 64 Stat. 129-30. See also Act of June 15, 1968, Pub. L. No. 90-340, Sec. 869(a), 82 Stat. 178-79; SWORDS AND SCALES, supra note 15, at 58-63. Initially, the drafters of the Uniform Code Military Justice considered naming the new Court the "Judicial Council" or the "Supreme Court of Military Appeals." Ultimately, the drafters settled on the name "The Court of Military Appeals" which was proposed by the Navy Judge Advocate General. Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. at 1276-78. In 1968, Congress changed the title of the Court to the "United States Court of Military Appeals." Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178.

Military Appeals has acted in over 50,000 cases and has rendered more than 4500 opinions.<sup>27</sup> While the number of opinions rendered by the Court is small in comparison to the approximately three million courts-martial tried since 1951, the Court's contribution cannot be measured in terms of numbers alone. What the Court has done through its decisions is to exercise firm control over military law and the operation and administration of the military justice system.<sup>28</sup>

In exercising its supervisory power over military courts and military law, the Court of Military Appeals has protected and preserved the Constitutional rights of men and women serving in the armed forces and has ensured that the operation of the military justice system is fair and impartial.<sup>29</sup>

From its inception the Court of Military Appeals has been an activist judicial body. Notwithstanding jurisdictional limitations and the lack of express authority, the court proclaimed early that its duty was to see that all

---

<sup>27</sup> See generally ANNUAL REPORTS OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD 1951 TO 1984. For a discussion of these annual reports, see SWORDS AND SCALES, supra note 15, at 86-92.

<sup>28</sup> Gale v. United States, 17 USCMA 40, 42, 37 CMR 304, 306 (1967).

<sup>29</sup> United States v. Frischholz, 16 USCMA 150, 152, 36 CMR 306, 308 (1967).

courts-martial were conducted fairly and that it possessed authority to supervise the administration of military justice. By first filling the gaps in military jurisprudence, then invalidating Manual provisions and finally by judicial rulemaking, the court has expanded its powers and exercised supervisory control over military justice.<sup>30</sup>

The United States Court of Military Appeals, thus, has been a major force in the growth and development of military law and the law of court-martial jurisdiction.<sup>31</sup>

---

<sup>30</sup> Willis, The United States Court of Military Appeals--"Born Again", 52 IND. L.J. 151, 158 (1976) [hereinafter cited as "Born Again"]. See also SWORDS AND SCALES, supra note 15, at 73-85.

The Court of Military Appeals, with the entire hierarchy of tribunals which it heads . . . is properly to be viewed as a specialized legislative court, comparable to the United States Court of Customs and Patent Appeals . . . . [The Court of Military Appeals appears to us to be court in every significant respect . . . . Certainly Congress intended that in its dignity and in its standards of administering justice the Court of Military Appeals should be assimilated to and equated with the established courts of the Federal system.

Shaw v. United States, 209 F.2d 811, 813 (D.C.C. 1954).

<sup>31</sup> See generally Walker & Niebank, The Court of Military Appeals--Its History, Organization and Operation, 6 VAND. L. REV. 228 (1953); "Born Again", supra note 30, at 151; The "Born Again" Court of Military Appeals, 8 JURIS DOCTOR 20 (March 1978); Brosman, Forward: Comments by the Court--The Court: Freer Than Most, 6 VAND. L. REV. 166 (1953); Latimer, Forward: Comments by the Court--"Good Cause" in Petitions for Review, 6 VAND. L. REV. 163 (1953); Quinn, The Court's Responsibility, 6 VAND. L. REV. 161 (1953); Larkin, Professor Edmund M. Morgan and the Drafting of the Uniform Code, 28 MIL. L. REV. 7 (1965); One Year: A Report of Progress, supra note 22, at 495-96; Ghent, Military Appellate

Like the Court of Military Appeals, the United States Courts of Military Review also have played an important role in the development of military law and the law of court-martial jurisdiction. Article 66 of the Uniform Code of Military Justice Act of 1950 set forth the jurisdiction, makeup and operation of the Boards of Review for the various services.<sup>32</sup> The Boards of Review were first established in 1918 and heard cases until 1969 when they became known as the "Courts of Military Review."<sup>33</sup> Today--

[t]here is a separate Court of Military Review for the Army, Navy, Air Force and Coast Guard, each consisting of one or more panels of three judges each. Although Article 66(a) permits civilian members of these tribunals, only the Coast Guard . . . and . . . the Navy [have had] any civilian judges. The judges are appointed by the various Judge Advocate Generals and are senior military attorneys.<sup>34</sup>

It is only since the enactment of the Uniform Code of Military Justice in 1950 that the decisions of the Boards of Review, and later the Courts of Military Review, have

---

Processes, 10 AM. CRIM. L. REV. 125, 130-35 (1971).

<sup>32</sup> Act of May 5, 1950, art. 66, 64 Stat. 107, 128. See generally, Fratcher, Appellate Review in American Military Law, 14 MO. L. REV. 15, 48-69 (1949); Hodson, Courts-Martial and the Commander, 10 SAN DIEGO L. REV. 51, 68-69 (1972).

<sup>33</sup> Art. 66, U.C.M.J., 10 U.S.C. § 866 (1983).

<sup>34</sup> "Born Again", supra note 30, at 154 n.16.

been systematically recorded and indexed, widely disseminated, and regularly reviewed by the United States Court of Military Appeals. The result has been an impressive number of decisions--more than a quarter of a million--dealing with all aspects of military law, many of which are persuasive and of important precedential value.<sup>35</sup>

The decisions of the United States Court of Military Appeals and the Courts of Military Review have contributed greatly to the development of the law of court-martial jurisdiction. But the increase in the amount of litigation on the jurisdiction of military courts is also due to decisions of the federal civilian courts.

The federal district courts and the federal circuit courts of appeal have rendered many decisions in recent years on all aspects of the law of court-martial jurisdiction. A quick review of the statutory provisions of the Uniform Code of Military Justice found in the United States Code Annotated reveals a wealth of decisions on the subject of the jurisdiction of courts-martial.<sup>36</sup> Almost all of the court-martial cases decided by

---

<sup>35</sup> See Currier & Kent, The Boards of Review of the Armed Forces, 6 VAND L. REV. 241 (1953); Ghent, Military Appellate Processes, 125, 127-30 (1971).

<sup>36</sup> See Arts. 1-140, U.C.M.J., 10 U.S.C.A. §§ 801-940 (1983).

Article III courts are based on petitions for extraordinary relief filed after an accused has exhausted his military remedies. The great majority of the petitions raise jurisdictional questions. The issues most often raised by military accuseds are whether the court-martial had jurisdiction over the person and whether the court-martial had jurisdiction over the offense. The main contribution of the federal courts in this area has been in creating a federal standard for judicial review of military cases by the civilian courts, and in performing the important function of exercising civilian control over the military justice system.

Recent decisions of the Supreme Court of the United States, which have limited significantly the scope of jurisdiction exercised by military courts, also have contributed to the increase in the number of cases decided in this area. In the 1950's and 1960's, the Supreme Court decided a number of important cases involving the exercise of court-martial jurisdiction. The result of these decisions was a significant reduction in the kinds of offenses, and the types of persons that could be tried by court-martial. The importance of these decisions, and the significance of the involvement of the federal courts in reviewing military cases, is the idea of civilian control of the military and the participation of civilians in the administration and operation of the

military justice system.

The general trend in recent years toward the civilianization of the military justice system also has contributed to the growth of litigation on the subject of court-martial jurisdiction. The term "civilianization of military law" was coined by Professor Edward F. Sherman in 1970 and is "defined as [the] process whereby civilian concepts of justice, procedural and substantive, are gradually adopted or assimilated into the court-martial system."<sup>37</sup> The effect of this trend has been to make the military justice system less military in its orientation and more civilian in its approach to procedural and substantive matters.

The litigation that has occurred as a result of the changes in the last 30 years has produced a substantial body of law on the subject of court-martial jurisdiction. Much of the law can be found in the opinions written by military and civilian judges. More law is found in constitutional provisions, in federal statutes, in military regulations, and in opinions of the Judge Advocates General of the various services.

The case law on the subject of court-martial jurisdiction has developed around five elements of jurisdiction--each of which the government must prove

---

<sup>37</sup> "Born Again", supra note 30, at 162. See Sherman, The Civilianization of Military Law, 22 U. ME. L. REV. 3 (1970).

by a preponderance of the evidence before a court-martial judgment can be given legal effect. To prove that a court-martial has jurisdiction, the government must establish: first, that the court was properly convened; second, that the court was properly constituted; third, that the court had jurisdiction over the person; fourth, that the court had jurisdiction over the offense; and fifth, that the sentence adjudged is within the jurisdictional limits of the court's sentencing power.<sup>30</sup>

The law of court-martial jurisdiction consists of various rules and regulations governing the existence and interpretation of these five elements. In the end, issues of military jurisdiction are always the same: Was the court properly convened and properly constituted? Did the court have jurisdiction over the person and the offense? And is the sentence adjudged within the jurisdictional limits of the court's sentencing power?

---

<sup>30</sup> See Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 MIL. L. REV. 5, 6 (1985). If the government fails to prove one or more of these elements, the court-martial judgment is void and can not be given effect. If the only jurisdictional defect is that the sentence adjudged is more severe than the jurisdictional limits of the court permit, the sentence will be reassessed to comply with the jurisdictional limits (United States v. Price, 48 CMR 645, 646 (AFCMR 1974); United States v. Zunino, 15 USCMA 179, 180, 35 CMR 151, 152 (1964)) or the case will be returned to the trial court for a rehearing on the sentence (United States v. Beard, 18 USCMA 337, 338, 40 CMR 91, 92 (1969)).

The issues are easy to identify, but they are not always easy to resolve. Difficulties arise because much of the law on the subject of court-martial jurisdiction is in the form of judicial opinions. When judges disagree, or decide to change a rule, or announce the creation of a vague new standard, the law becomes unclear, and for a time, at least, confusing.

In the past, for example, military judges have disagreed with judges on the federal circuit courts of appeals as to whether off post drug offenses are subject to military court jurisdiction.<sup>39</sup> On occasion too, the

---

<sup>39</sup> See e.g., United States v. Beeker, 18 USCMA 563, 565, 40 CMR 275, 277 (1969)(off post drug offenses held service connected and triable by court-martial) and Cole v. Laird, 468 F.2d 829, 833 (5th Cir. 1972)(off post drug offense held not service connected and not triable by court-martial). The disagreement between military and civilian courts over whether or not off post drug offenses are service connected and triable by court-martial was settled temporarily in 1976 when the United States Court of Military Appeals ruled in United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976), that it was abandoning its ruling in Beeker. In McCarthy, the court stated it would no longer follow Beeker and, instead, would examine the facts of each drug offense in light of the criteria outlined by the Supreme Court of the United States in Relford v. Commandant, 401 U.S. 355 (1971). 2 M.J. at 29. By 1980, however, the Court of Military Appeals had "come to the conclusion that almost every involvement of service personnel with the commerce in drugs is 'service connected'." United States v. Trotter, 9 M.J. 337, 350 (C.M.A. 1980).

In the Military Justice Act of 1983, Congress, because of its concern about the amount of drug abuse in armed forces, added a new article, Article 112a, to the Uniform Code of Military Justice prohibiting the use, possession, manufacture, distribution, importation, or exportation of dangerous drugs. The new article also prohibited the introduction of dangerous drugs into an installation, vessel, vehicle, or airplane when under the

Court of Military Appeals has reversed itself as it did recently in the area of continuing jurisdiction.<sup>40</sup> In addition, the Supreme Court of the United States has made changes in the law affecting the jurisdiction of military courts, as when it held that civilians could not be tried by courts-martial during peacetime,<sup>41</sup> and when it ruled that offenses had to be service-connected before they could be subject to trial by court-martial.<sup>42</sup>

---

control of the United States. Art. 112a, U.C.M.J., 10 U.S.C. §912a (Supp. 1985). See MILITARY JUSTICE ACT OF 1983, S. REP. NO. 53, 98th Cong., 1st Sess., 29 (1983). The wrongful use, possession, introduction or manufacture of a dangerous drug is punishable by a dishonorable discharge, total forfeitures, reduction to the lowest enlisted grade and confinement at hard labor for 2 to 5 years, depending on the nature of the drug involved. The wrongful distribution, importation, or exportation of a dangerous drug is punishable by a dishonorable discharge, total forfeitures, reduction to the lowest enlisted grade, and 10 to 15 years confinement at hard labor, depending on the nature of the drug involved. See App. 12, Maximum Punishment Chart, MCM, 1984, at A12-4.

<sup>40</sup> United States v. Clardy, 13 M.J. 308, 316 (C.M.A. 1982) overruling United States v. Ginyard, 16 USCMA 512, 516, 37 CMR 132, 136 (1967). See also United States v. Hedlund, 2 M.J. 11, 13 n.1 (C.M.A. 1976) overruling United States v. Everson, 19 USCMA 70, 71, 41 CMR 70, 71 (1969).

<sup>41</sup> See e.g., United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955) (discharged serviceman held not subject to court-martial jurisdiction); Reid v. Covert, 354 U.S. 1, 5 (1957) (civilian dependents held not subject to court-martial jurisdiction); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (civilian employee of the government held not subject to court-martial jurisdiction).

<sup>42</sup> O'Callahan v. Parker, 395 U.S. 258, 274 (1969) (nonservice connected offenses committed in the United States held not triable by court-martial); Relford v. Commandant, 401 U.S. 355, 369 (1971) (offenses committed by serviceman on or at the geographical boundary of a

Judicial activity of this kind complicates the rules governing the exercise of jurisdiction by courts-martial and makes it difficult to resolve questions of military jurisdiction. New changes in the law of court-martial jurisdiction recently announced by the United States Court of Military Appeals,<sup>43</sup> and statutory changes enacted by the Congress within the last few years, also have added to the confusion.<sup>44</sup>

The changing nature of the law of court-martial jurisdiction and the growing complexity of the rules and regulations governing the exercise of such jurisdiction has been the topic of much discussion. Since 1950 when

---

military post held triable by court-martial).

<sup>43</sup> See e.g., United States v. Caputo, 18 M.J. 259, 268 (C.M.A. 1984) (reservist released from a two week tour of active duty could not be tried by court-martial at a later drill for offenses committed during his two week tour of active duty); United States v. Clardy, 13 M.J. 308, 316 (C.M.A. 1982) (offenses committed during a prior enlistment were triable by court-martial where the accused was discharged solely for the purpose of re-enlisting and where his status was uninterrupted); United States v. Trotter, 9 M.J. 337, 350 (C.M.A. 1980) (most, if not all, off post drug offenses held to be service connected and triable by court-martial).

<sup>44</sup> See Amendments to Articles 2 and 36 of the Uniform Code of Military Justice as part of the FY 1980 Defense Authorization Act, Pub. L. No. 96-107, 93 Stat. 803, 810-11, and the amendments to Articles 2, 3, 4, 6, and 12 of the Uniform Code of Military Justice by the Military Justice Act of 1983, Pub. L. No. 98-203, 97 Stat. 1394, 1407. The statutory changes in 1979 to Articles 2 and 36 of the Code dealing with fraudulent enlistments and fraudulent discharges, however, may have cleared up some of the confusion concerning jurisdiction over the person.

the UCMJ was enacted, numerous articles and monographs have been written on the jurisdiction of military courts. Most deal with the Supreme Court's well-known decisions in Reiford v. Commandant,<sup>45</sup> O'Callahan v. Parker,<sup>46</sup> Grisham v. Hagan,<sup>47</sup> Reid v. Covert,<sup>48</sup> and United States ex rel. Toth v. Quarles.<sup>49</sup> Others focus on specific aspects of military court jurisdiction or comment on recent developments in particular areas. No major work, however, has been written on the subject of court-martial jurisdiction as a whole.<sup>50</sup>

The purpose of this dissertation is to review the law of court-martial jurisdiction and to discuss specific proposals for improving the exercise of such

---

<sup>45</sup> 401 U.S. 355 (1971)(offenses committed by serviceman on or at the geographical boundary of a military post held triable by court-martial).

<sup>46</sup> 395 U.S. 258 (1969)(nonservice connected offenses committed in the United States held not triable by court-martial).

<sup>47</sup> 361 U.S. 278 (1960)(civilian employee of the government held not subject to court-martial jurisdiction in time of peace for capital offense committed overseas).

<sup>48</sup> 354 U.S. 1 (1957)(civilian dependents held not subject to court-martial jurisdiction for capital offenses committed overseas).

<sup>49</sup> 350 U.S. 11 (1955)(discharged serviceman held not subject to court-martial jurisdiction).

<sup>50</sup> The United States Army publishes a Department of the Army Pamphlet on the subject of court-martial jurisdiction entitled MILITARY JUSTICE: JURISDICTION OF COURTS-MARTIAL (Department of Army Pamphlet 27-174, May 1980).

jurisdiction by military courts. What also will be addressed is the concept of civilian control of the military, the nature and elements of court-martial jurisdiction, the extraordinary writs available to service members for challenging the exercise of court-martial jurisdiction, and some proposals for reforming the jurisdiction exercised by military courts.

To understand fully the law of court-martial jurisdiction and the significance of the proposals for reform, it is important to have an appreciation of the concept of civilian control of the military and its effect on the exercise of jurisdiction by military courts. It is important too to be able to identify the essential elements of court-martial jurisdiction and to know how the courts have interpreted these elements in recent decisions. And finally, it is important to be aware of the different types of extraordinary writs that are available to service members and to understand how, in granting applications for writs of assistance, civilian judges are able to exercise control over military tribunals.

What follows is a brief history and summary of the law of court-martial jurisdiction and a discussion of some specific recommendations for improving the exercise of jurisdiction by military courts.

## CHAPTER TWO

### 200 YEARS OF COURT-MARTIAL JURISDICTION

Laws governing the exercise of court-martial jurisdiction in the United States have been in existence for almost 200 years. The earliest provisions in the United States defining court-martial jurisdiction appear in the first American Articles of War of 1775. The Articles of War of 1775 were enacted on June 30, 1775 by the Second Continental Congress at the beginning of the American Revolution.<sup>51</sup> In form and substance, the first American Articles of War closely resembled The Massachusetts Articles of War of 1775 which had been passed just a few months before.<sup>52</sup> The Massachusetts Articles of War, enacted on April 5, 1775, were patterned after the British Articles of War which had been in existence for more than a century.<sup>53</sup>

---

<sup>51</sup> The American Articles of War of 1775 are reprinted in W. WINTHROP, MILITARY LAW AND PRECEDENTS 953 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 reprint)[hereinafter cited as WINTHROP]. Winthrop's text originally was published in 1886 and was revised in 1896.

<sup>52</sup> Id. at 947.

<sup>53</sup> See Articles of War of James II (1688) and the British Articles of War of 1765 reprinted in WINTHROP, supra note 51, at 920, 931.

Those serving in the Colonial Naval forces in 1775 were governed by the "Rules for the Regulations of the Navy of the United Colonies." These "Rules" consisted of 40 paragraphs that were similar to the laws which governed the British Royal Navy. The British laws for the Royal Navy were based on the "King's Regulations and Admiralty Instructions" of 1731, which later "were incorporated into national law by an Act of the British Parliament in 1749."<sup>54</sup>

The development of the law of court-martial jurisdiction in the United States, from its earliest English beginnings to its present form, has been extensively researched and thoroughly discussed.<sup>55</sup> In light

---

<sup>54</sup> DeVico, Evolution of Military Law, 21 JAG J. 63, 65 (Dec. 1966-Jan. 1967).

<sup>55</sup> See e.g., J. SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL 1-63 (Annapolis, Maryland: United States Naval Institute, 1954); J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 80-101 (New York: Charterhouse, Inc., 1974)[hereinafter cited as BISHOP]; Bishop, Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists and Discharged Prisoners, 112 U. PA. L. REV. 317, 319-31 (1964)[hereinafter cited as Military-Civilian Hybrids]; Wiener, Courts-Martial and the Bill of Rights: The Original Practice I, 72 HARV. L. REV. 1, 13-22 (1958)[hereinafter cited as The Original Practice]; Wurfel, Military Habeas Corpus I, 49 MICH. L. REV. 493-505 (1951)[hereinafter cited as Military Habeas Corpus]; Schlueter, The Court-Martial: An Historical Survey, 87 MIL. L. REV. 129, 144-165 (1980); Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 VAND. L. REV. 435, 440-55 (1960)[hereinafter cited as The Constitution and the Standing Army]; Testimony of Edmund M. Morgan, Jr., Yale Law School, Hearings on S. 64 Before a Subcomm. of the Senate Comm. on Military Affairs, 66th Cong., 1st Sess. 1371

of the numerous historical studies that are available, it is not necessary to review again in detail the long history of military court jurisdiction. What follows instead is a short summary of important events in the history of the jurisdiction of courts-martial and a brief discussion of the policies that have influenced the growth and development of the law of court-martial jurisdiction in the United States.

#### A. English Beginnings

The history of military law can be traced back to the time of the Roman Empire<sup>56</sup> and even beyond.<sup>57</sup> Indeed, the "idea of a special discipline and a special body of law applicable to the armed forces" is probably "[a]s old as armies and navies" themselves.<sup>58</sup> Unfortunately, no military laws from ancient times have survived. Evidence nevertheless suggests that laws governing the behavior of soldiers in military service

---

(1919), reprinted in Morgan, Military Justice, 24 MD. STATE B. ASS'N 197 (1919)[hereinafter cited as Military Justice].

<sup>56</sup> WINTHROP, supra note 51, at 17, 45. See C. BRAND, ROMAN MILITARY LAW (Austin, Texas: University of Texas Press, 1968)[hereinafter cited as ROMAN MILITARY LAW]; Sherman, The Modernness of Roman Military Law, 13 ILL. L. REV. 581 (1919); Page, Military Law--A Study in Comparative Law, 32 HARV. L. REV. 349 (1919).

<sup>57</sup> BISHOP, supra note 55, at 3.

<sup>58</sup> Id.

did exist in the early civilizations. Some offenses punishable under the early codes, like disobedience of orders, misconduct in battle, and desertion, are still punishable today under military law.<sup>59</sup> Some of the ancient penalties imposed, like deprivation of pay, reduction in rank, and dishonorable discharge, are also found in court-martial sentences today.<sup>60</sup>

During the 5th century, the first written laws appeared in medieval Europe.<sup>61</sup> The laws of the early medieval states were modeled after Roman military laws which appeared late in the Roman Empire. Like other ancient legal codes, the feudal codes made little distinction between civilian and military law. This is because "a state of war was the normal condition" among the militaristic societies of the period.<sup>62</sup> During the 14th and 15th centuries, several elaborate codes of

---

<sup>59</sup> ROMAN MILITARY LAW, supra note 56, at 101. Rollman, Of crimes, Courts-Martial and Punishment--A Short History of Military Justice, 11 AIR FORCE JAG L. REV. 212 (1969)[hereinafter cited as A Short History of Military Justice].

<sup>60</sup> ROMAN MILITARY LAW, supra note 56, at 103-07; A Short History of Military Justice, supra note 59, at 212.

<sup>61</sup> WINTHROP, supra note 51, at 17-18. See A Short History of Military Justice, supra note 59, at 212-13.

<sup>62</sup> Military Habeas Corpus, supra note 55, at 494.

military justice were in existence.<sup>63</sup>

The most notable military code of the 17th century was that published in 1621 by King Gustavus Adolphus of Sweden.<sup>64</sup> The Code of Articles drafted by King Gustavus Adolphus consisted of 167 articles and is important because it became a model for the English Articles of War which were drafted later.<sup>65</sup>

### 1. Military Ordinances

Military laws were introduced to England by William the Conqueror in 1066. The early laws were

---

<sup>63</sup>

The date of the first French ordonnance of military law is given as 1378; the first German Kriegsartikel are attributed to 1487.

WINTHROP, supra note 51, at 18.

<sup>64</sup> Id. at 19. See M. ROBERTS, THE MILITARY REVOLUTION 22-23 (Belfast, Northern Ireland: Matjury Boyd, 1956). See also Cooper, Gustavus Adolphus and Military Justice, 92 MIL. L. REV. 129 (1981); Military Habeas Corpus, supra note 55, at 496-97; BISHOP, supra note 55, at 4; E. BYRNE, MILITARY LAW 6 (Annapolis, Maryland: Naval Institute Press, 3rd ed., 1981)[hereinafter cited as MILITARY LAW]; A Short History of Military Justice, supra note 59, at 213, 214. See generally M. ROBERTS, I GUSTAVUS ADOLPHUS: A HISTORY OF SWEDEN 1611-1632 (London: Longman, Green & Co., 1957); N. AHNLUND, GUSTAV ADOLF THE GREAT (Princeton, New Jersey: Princeton University Press, trans. Michael Roberts, 1940). The Code of Articles published by King Gustavus Adolphus of Sweden is reprinted in WINTHROP, supra note 51, at 907.

<sup>65</sup> There were two English Articles of War--one Royalist and the other Parliamentary--and both were based on the Articles of War of Gustavus Adolphus. See generally M. ROBERTS, THE MILITARY REVOLUTION 22-23 (Belfast, Northern Ireland: Matjury Boyd, 1956); MILITARY LAW, supra note 64, at 6.

military ordinances issued to English armies during wartime or prior to expeditions.<sup>66</sup> The military ordinances, which were drawn up by the English kings, set out rules and regulations governing the behavior of soldiers and sailors during wars and expeditions.

The most notable of the early military ordinances is the Ordinance of Richard I of 1190<sup>67</sup> designed "to prevent disputes between soldiers and sailors in their voyage to the holy land" during the Third Crusade.<sup>68</sup> The Ordinance of Richard I was only eight sentences long, but it was direct and to the point. One sentence simply provided that:

He who kills a man on [s]hipboard,  
[s]hall be bound to the dead man and  
thrown into the [s]lea: if the man is  
killed on [s]hore, the [s]layer [s]hall  
be bound to the dead body and buried with  
it.<sup>69</sup>

Few could claim that the law was not clear. The punishments authorized for violations of the Ordinance were varied and diverse; penalties ranged "from fines and

---

<sup>66</sup> Military Habeas Corpus, supra note 55, at 495-96. WINTHROP, supra note 51, at 18.

<sup>67</sup> The Ordinance of Richard I of 1190 is reprinted in WINTHROP, supra note 51, at 903.

<sup>68</sup> F. GROSE, II MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY FROM THE CONQUEST TO THE PRESENT TIME 63 (London: I. Stockdale, 1812).

<sup>69</sup> Id. See WINTHROP, supra note 51, at 903 whose version is somewhat different.

ignominious expulsion from the army . . . to tarring and feathering, loss of hand, and burial alive."<sup>70</sup>

From 1190 to 1689 important changes occurred in English military law. The crude ordinances issued by English kings for specific wars and expeditions soon were replaced by more elaborate ordinances.<sup>71</sup> In 1385, permanent articles of war were issued in place of the military ordinances which had been drawn up on an ad hoc basis.<sup>72</sup> By the time of the civil war in the mid-1600's royalist and parliamentary soldiers could be tried by court-martial for violating articles of war issued by the King or enacted by Parliament.

## 2. Articles of War of 1666

The English Articles of War of 1666 were the first Articles of War to authorize the trial of soldiers by "General Court-martial."<sup>73</sup> Prior to 1666, English soldiers charged with violating the articles of war were tried by various types of tribunals: martial courts or

---

<sup>70</sup> BISHOP, supra note 55, at 4.

<sup>71</sup> WINTHROP, supra note 51, at 904.

<sup>72</sup> The Articles of War of Richard II of 1385 are reprinted in WINTHROP, supra note 51, at 904. See Military Habeas Corpus, supra note 55, at 496.

<sup>73</sup> C. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW, AS APPLICABLE TO THE ARMY, NAVY, MARINES, AND AUXILIARY FORCES 14 (London: John Murray, Albemarle Street, 2d ed., 1874).

councils, courts of chivalry, constable courts, and marshal courts "from which is derived the present term court-martial."<sup>74</sup> The Articles of War of 1666 provided for a "General Court-Martial" which could try only "offenses punishable by life or limb."<sup>75</sup> The articles also established Regimental and Detachment courts for the trial of less serious offenses.<sup>76</sup>

---

<sup>74</sup> Military Habeas Corpus, *supra* note at 55, at 495. See generally WINTHROP, *supra* note 51, at 46-47; T. MACAULAY, I THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 93-94 (Boston, Massachusetts: Phillips, Sampson & Co., 1856). It is not clear when the term "court-martial" first came into use. The Code of Articles of King Gustavus Adolphus did not use the term "court-martial", but did provide for two types of military courts: "a high Court" and "a lower court", the former referred to as "our highest Marshall Court." Arts. 138 & 142, Code of Articles of King Gustavus Adolphus of Sweden (1621), reprinted in WINTHROP, *supra* note 51, at 907, 915, 916. King Gustavus Adolphus did use the term "court-martial," however, in connection with the administration of the Army. "[T]he first real central office of government for the army--established in May 1630--was called simply a Court-Martial (Krigsnatt). This, however, was a misnomer, for in addition to its judicial powers, it exercised numerous administrative functions dealing for instance with recruiting, mustering, and provisions of arms and equipment." M. ROBERTS, I GUSTAVUS ADOLPHUS: A HISTORY OF SWEDEN 1611-1632 276 (London: Longman, Green & Co., 1957). See J. SNEDEKER, A BRIEF HISTORY OF COURT-MARTIAL 13-14 (Annapolis, Maryland: United States Naval Institute, 1954); Schlueter, The Court-Martial: An Historical Survey, 87 MIL. L. REV. 129, 139 n.34 (1980).

<sup>75</sup> C. CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW, AS APPLICABLE TO THE ARMY, NAVY, MARINES, AND AUXILIARY FORCES 14 (London: John Murray, Albemarle Street, 2d ed., 1874).

<sup>76</sup> Id.

### 3. Mutiny Act of 1689

In 1689, Parliament enacted the first Mutiny Act.<sup>77</sup> This act is historically important because it allowed for the creation of a standing army in England during peacetime--the first since the dreaded standing army of Oliver Cromwell,<sup>78</sup> and the unlawful standing army of James II.<sup>79</sup> The Mutiny Act is also important because for the first time in English history Parliament authorized the use of courts-martial to try soldiers for mutiny, sedition and desertion committed in England in time of peace. The creation of a standing army during peacetime was not undertaken without some reservation, however, and for centuries to follow the Mutiny Act had to be reenacted annually.<sup>80</sup>

### 4. British Articles of War of 1774

As time passed, the Articles of War of 1666 and the Mutiny Act of 1689 were replaced by more elabo-

---

<sup>77</sup> The British Mutiny Act of 1689 is reprinted in WINTHROP, supra note 51, at 929, and discussed at 19-20. See BISHOP, supra note 55, at 7-9; Military-Civilian Hybrids, supra note 55, at 322; Military Habeas Corpus, supra note 55, at 497-98; The Constitution and the Standing Army, supra note 55, at 444.

<sup>78</sup> W. DOUGLAS, THE RIGHT OF THE PEOPLE 171-72 (Garden City, New York: Doubleday & Co., Inc., 1958).

<sup>79</sup> BISHOP, supra note 55, at 6.

<sup>80</sup> Reid v. Covert, 354 U.S. 1, 23 n.23 (1957).

rate articles of war and more detailed statutes governing the military. By the 1700's English military law was well developed and quite extensive. The English Articles of War of 1774,<sup>81</sup> which served as a model for the Massachusetts Articles of War of 1776 and the American Articles of War of 1776, are representative of the status of military law in England during the 1700's. The English Articles of War of 1774 consisted of 20 sections and 112 articles and extended to "His Majesty's Horse and Foot Guards, and All Other of His Majesty's Forces in Great Britain and Ireland, Dominions Beyond the Seas, and Foreign Parts."<sup>82</sup>

By 1718, the jurisdiction of the Articles of War was expanded by Parliament so that the articles were applicable at home as well as abroad.<sup>83</sup> In 1881, the Articles of War and the Mutiny Act were joined together into one statute--the Army Act of 1881.<sup>84</sup> Under the Army Act of 1881, the jurisdiction of military courts was expanded to military offenses committed anywhere in peacetime and wartime.

---

<sup>81</sup> British Articles of War of 1774 are reprinted in G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 581 (New York: John Wiley & Sons, Inc., 3rd ed., 1915)[hereinafter cited as DAVIS].

<sup>82</sup> Id.

<sup>83</sup> BISHOP, supra note 55, at 81.

<sup>84</sup> WINTHROP, supra note 51, at 20, 47; Military Habeas Corpus, supra note 55, at 498.

From the Ordinance of Richard I in 1190 to the Army Act of 1881, the exercise of military court jurisdiction over soldiers serving in the English armed forces expanded considerably. Under the early military ordinances, soldiers were subject to military law only during wartime. In time of peace, soldiers were not subject to military law, but instead were subject to local civilian law and the jurisdiction of the civilian courts. Even purely military offenses were tried by civilian courts. This because-

the common law of England knew nothing of courts martial, and made no distinction, in time of peace, between a soldier and any other subject. . . . A soldier, therefore, by knocking down his colonel, incurred only the ordinary penalties of assault and battery, and, by refusing to obey orders, by sleeping on guard, or by deserting his colors, incurred no legal penalty at all.\*<sup>5</sup>

Under military ordinances and the early articles of war, the problems of military jurisdiction were simple and easy to resolve.

With the issuance of the Articles of War of 1666 and the enactment of the Mutiny Act of 1689, the scope of military jurisdiction was broadened; English soldiers could be tried by court-martial in wartime and peacetime

---

\*<sup>5</sup> T. MACAULAY, I THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 231 (Boston, Massachusetts: Phillips, Sampson & Co., 1856).

for numerous offenses committed beyond the borders of England and for crimes of mutiny, sedition and desertion committed within England during peacetime. Under the Army Act of 1881, the scope of military jurisdiction was extended further to cover more offenses committed by soldiers at home and abroad.

In short, in the approximately 700 year period from the issuance of the Ordinance of Richard I. in 1190 to the enactment of the Army Act of 1881, the scope of jurisdiction exercised by English military courts expanded considerably. In the beginning soldiers could be tried only in time of war for violations of the ordinances and only for offenses committed outside of England. By 1881, however, English soldiers could be tried by court-martial for violations of the Army Act committed at home and abroad in time of peace and in time of war.

#### B. The American Revolution

In the early 1700's, colonial troops who "served with the royal forces operating in America during the wars immediately preceding the outbreak of the War of the Revolution[, that is, the Seven Year's War from 1756 to 1763, were] subject to the British Mutiny Act and Articles of War."<sup>84</sup> Later, when the American Revolution

---

<sup>84</sup> DAVIS, supra note 81, at 342.

began, the Second Continental Congress acted immediately to raise an army and draft rules and regulations for the government of those serving in the land and naval forces. The Second Continental Congress was granted this power under Article 9, Section 4 of the Articles of Confederation which provided that the "United States in congress assembled shall . . . have the sole and exclusive right and power . . . of making rules for the government and regulation of the said land and naval forces, and directing their operations."<sup>7</sup>

#### 1. Revolutionary Courts-Martial

Soon after the British soldiers fired on the local militia at the North Bridge in Concord, Massachusetts, on April 19, 1775, and shortly after colonial troops were ordered and sent to Boston on June 14, 1775, the Second Continental Congress passed the first American Articles of War.<sup>8</sup> The Articles of War became effective

---

<sup>7</sup> U.S. ARTS. OF CONFED. art. IX, § 4 (1778) reprinted in J. GILMORE, ARTICLES OF CONFEDERATION AND CONSTITUTION OF THE UNITED STATES AND NOTES OF A COURSE OF LECTURES ON THE CONSTITUTION OF THE UNITED STATES 23 (Washington, D.C.; James Blakey, 1891).

<sup>8</sup> II JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 111 (Washington, D.C.: U.S. Government Printing Office, Worthington Chauncey Ford, ed., 1905)[hereinafter cited as JOURNALS OF CONGRESS].

The second Continental Congress having . . . "resolved" that a military force should "be immediately raised," to "march and join the army near Boston," proceeded, on the same day,

on June 30, 1775 and were amended shortly thereafter on November 7, 1775.<sup>99</sup> At the suggestion of General George

---

to appoint a committee, consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, "to prepare rules and regulations for the government of the Army." On June 28th following, there was reported by the committee, and on June 30th adopted by Congress, a set of Articles, prefaced by a preamble reciting the causes which had induced the Colonies to assume a defensive attitude and raise an armed force--"for the due regulating and well ordering of which," it is declared, "the following rules and orders are established."

WINTHROP, supra note 51, at 21. The Articles of War of 1775 contained 69 Articles. For a discussion of these articles see A Short History of Military Justice, supra note 59, at 215-16.

<sup>99</sup> "Sixteen additional articles were enacted November 7, 1775." Military Habeas Corpus, supra note 55, at 500.

On November 7, 1775, "additions alterations and amendments" were made to the foregoing "Rules and Regulations of the Continental Army." The action involved only punitive articles and was no doubt compelled by the exigencies of the service premised on months of experience in the field. Death was added as punishment for corresponding with the enemy, mutiny or inciting thereto and failure to suppress or report it; desertion to the enemy; striking a superior officer or lifting up a weapon or offering violence; misbehavior before the enemy or abandoning a post entrusted to one's care or "inducing others to do like." A maximum of thirty-nine lashes were prescribed for an additional number of offenses. The lashes were delivered publicly and laid on with vigor. To add a little more life to the affair the ends of the "cat-o-nine-tails" were often knotted and/or the lacerated back of the offender was washed down with salt brine.

A Short History of Military Justice, supra note 59, at 216.

Washington, Commander in Chief of the American armies, the articles were revised again the following year.<sup>90</sup>

## 2. American Articles of War of 1776

In revising the Articles of War of 1775, John Adams, a member of the committee appointed to redraft the articles, suggested adopting the British Articles of War in total on the theory that they had served the British Empire well.<sup>91</sup> He noted that:

---

90

The revision of the Articles of 1775 was made at the suggestion of Gen. Washington, and the work of preparing a new code was entrusted to a committee of Congress composed of John Adams and Thomas Jefferson [and John Rutledge, James Wilson, and R.R. Livingston]. The modifications suggested by General Washington were submitted to the committee in his behalf by Colonel Tudor, the Judge-Advocate of the Army.

DAVIS, supra note 81, at 342 n.3.

<sup>91</sup> There is some confusion as to whether John Adams was referring to the British Articles of War of 1765 or the British Articles of War of 1774. Winthrop contends that the American Articles of War of 1776 were modeled after the British Articles of War of 1765. WINTHROP, supra note 51, at 22 n.31 and 931. Major General George B. Davis, former Judge Advocate General of the Army, argues that "the [British Articles of War] of 1774 were probably those from which our own Articles of 1775 and 1776 were obtained." DAVIS, supra note 81, at 341. General Davis states that:

The British Articles of War, although they remained substantially unchanged in matters essential to discipline, were frequently modified in respect to details; and new editions were issued from time to time, especially during the last half of the eighteenth century, a period during which great

There was [in existence] one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline.<sup>92</sup>

---

wars were undertaken and large acquisitions of territory made throughout the world, involving as a consequence the employment of considerable military forces on foreign service. In evidence of this seven sets of Articles were issued between the years 1766 and 1775. Of these the Articles of 1774 were probably those from which our own Articles of 1775 and 1776 were obtained.

Id. at 340-41. "This view," he notes, "is sustained by the fact that in two places our Articles of 1775 and 1776 correspond more closely with the British Articles of 1774 than with those of 1765." Id. at 341 n.1.

<sup>92</sup> 3 THE WORKS OF JOHN ADAMS 68 (Freeport, New York: Books for Libraries Press, Charles F. Adams ed., 1969).

There were never any Roman Articles of War, and Adams is not correct in saying that there were. There was no such thing as military justice in Roman times and "[t]here was no Roman military law, a fact which, of course, largely accounts for the scant mention we find made of it in Roman legal literature." ROMAN MILITARY LAW, supra note 56, at 43. "Although the imperial statutes enacted from time to time in the administration of the armies necessarily touched upon matters of discipline, as other statutes governed selected matters of criminal administration of the city and in the provinces, in neither case was there ever attempted what we should consider either a criminal or military code." Id. at 126-27. Indeed, much of the law governing the Roman armies consisted of nothing more than discretionary orders issued by the military commander.

Adams may have been referring to the Military Laws of Ruffus written in the later days of the Roman Empire. See id. at 46, 69 n.23, 126-27, 142-44, 149-69. These, however, were not considered to be Articles of War like the British Articles of War. While there are some similarity between the Military Laws of Ruffus and the

The other members of the committee agreed with Adams' suggestion and shortly thereafter the revision committee submitted a copy of the British Articles of War with minor changes to the Continental Congress for approval.<sup>93</sup>

After much debate and considerable opposition,<sup>94</sup> the proposed articles of war were adopted by Congress on September 20, 1776.<sup>95</sup> The Articles of War of 1776

---

British Articles of War, the British Articles of War were far more important to the administration of military justice than were the Roman laws. Id. at 144.

<sup>93</sup> 3 THE WORKS OF JOHN ADAMS 68-69 (Freeport, New York: Books for Libraries Press, Charles F. Adams ed., 1969).

<sup>94</sup> Id. at 83-84.

In Congress, Jefferson never spoke, and all the labor of the debate on those articles, paragraph by paragraph, was thrown upon me, and such was the opposition, and so undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause, that to this day I scarcely know how it was possible that these articles could have been carried.

Id.

<sup>95</sup> II JOURNALS OF CONGRESS, supra note 88, at 365-81. The American Articles of War consisted of eighteen sections and "was the first to speak of ' . . . the respective Armies' of the United States' and omitted all references to the Crown." Military Habeas Corpus, supra note 55, at 500.

The code of 1776, which was an enlargement, with modifications, of that of 1775, was also a complete re-casting of the same; the articles being assembled, (according to the form of arrangement of the British articles,) under separate Sections, each comprising the provi-

remained in force until 1806, with the exception of minor changes made in 1777 and 1786.<sup>96</sup>

3. Jurisdiction of Early American Courts-Martial

Court-martial jurisdiction under the American Articles of War of 1775 and 1776 was extremely narrow. It applied as a general rule only to soldiers and only to a limited number of military offenses. Military offenses like "theft from or robbery of an officer, soldier, post trader, or camp-follower [or] forgery of the name of an

---

sions relating to some specific or general subject.

WINTHROP, supra note 51, at 22. For a discussion of the Articles of War of 1776, see A Short History of Military Law, supra note 59, at 216-17.

<sup>96</sup> In 1777 the "general or commander-in-chief was given power to pardon or mitigate punishments authorized by the Articles of War." Military Habeas Corpus, supra note 55, at 501. See DAVIS, supra note 81, at 607 n.1, 608 n.1, 614 n.1, & 618 n.1, for notation of the changes made in 1777. In 1786 the Articles of War were amended to reduce the number of members required to sit on courts-martial convened to try "offenders 'serving with small detachments.'" WINTHROP, supra note 51, at 23. In addition, sentences of death or dismissal, or sentences affecting general officers, were to be referred to the Secretary of War "to be laid before Congress for their confirmation or dismissal. . . ." IX JOURNALS OF CONGRESS, supra note 88, at 107. Also under the amendment of 1786, convening authorities or their replacements were given authority to approve and execute all other sentences imposed by military courts. Id. See A Short History of Military Justice, supra note 59, at 217; DAVIS, supra note 81, at 619.

officer" were triable by court-martial.<sup>97</sup> When these same offenses, however, were "committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order", they were regarded "as civil rather than military offenses" and were tried in the civilian courts.<sup>98</sup>

Under certain circumstances too "persons without military status occupying a functional relationship to the armed forces" were subject to trial by court-martial

---

<sup>97</sup> WINTHROP, supra note 51, at 724.

<sup>98</sup> Id. Winthrop notes, however, that this rule was not always followed:

A strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders generally lean to the sustaining of the jurisdiction of courts-martial in cases of crimes so committed against civilian, particularly when committed on the frontier, wherever the offense can be viewed as affecting, in any material though inferior degree, the discipline of the command.

Id. at 725. Professor Joseph W. Bishop, Jr., agrees with Winthrop's conclusion.

Certainly, plenty of heroes of the Revolution were court-martialed for stealing the pigs and poultry, and molesting the wives, daughters, and maid-servants of farmers. Justice Douglas dismissed these precedents by remarking that many of the trials took place between 1773 and 1783--i.e., in time of war--and of the others, that "in almost every case . . . it appears that some special military interest existed." But the evidence is not really so clear.

BISHOP, supra note 55, at 81-82.

for violations of the Articles of War."<sup>99</sup> However, most of the trials of civilian dependents and camp followers conducted during the Revolution "apparently occurred in an area of active hostilities where the civilian courts of the struggling colonies were not effectively functioning."<sup>100</sup>

In 1775 and 1776 great numbers of American colonists were involved in the Revolutionary conflict and for the first time in American history, soldiers in the service of the nation were subjected to rules and regulations designed to regulate conduct and to maintain good order and discipline.<sup>101</sup> The scope of military

---

<sup>99</sup> See Girard, The Constitution and Court-Martial of Civilians Accompanying the Armed Forces--A Preliminary Analysis, 13 STAN. L. REV. 461, 483 (1960).

<sup>100</sup> Id. With regard to the exercise of military court jurisdiction over civilians, Professor Bishop notes that:

The first American Articles of War, faithfully copying the British, provided that "All suttlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." But this jurisdiction over civilians, of some antiquity even then, had always been restricted to time of war and usually to places in which active hostilities were being carried on.

BISHOP, supra note 55, at 56.

<sup>101</sup>

Henry Knox's post-war return (as Secretary of War) recognized three classes of patriot troops: the Continental Lines, who were

court jurisdiction during the Revolutionary War was quite narrow. In the years of peace that followed the Revolution, the exercise of military court jurisdiction was even more restricted.

C. Colonists Call for Civilian Control of the Military

The events that led to the Declaration of Independence and the American Revolution, in addition to the experience of the English with the Mutiny Acts, had a major influence on the development of the law of court-martial jurisdiction in the United States. The history of the Revolutionary period is particularly significant because it was during this period that the colonists' worst fears about the dangers of standing armies were realized; and it was during this period too that Ameri-

---

regulars enlisted and paid by Congress though retaining their state designations; the regularly enlisted state forces, amounting to thirteen little "regular" armies with their own bounty, pay and promotion systems, and the militia proper, summoned from their farms or shops for brief service when opportunity offered or emergency demanded.

According to the Knox return, in the year 1776, which saw the largest American forces under arms, there were in service 46,901 Continentals, 26,000 state militia, and an estimated 16,700 short-service militia proper, for a total of 89,661--perhaps 3 per cent of the population.

W. MILLIS, ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY 35 n.12 (New York: G.P. Putnam's Sons, 1956) [hereinafter cited as ARMS AND MEN].

cans developed their strong appreciation for the principle of civilian control of the military.

In the Declaration of Independence, the colonists specifically cited the abuse of military power by the "King of Britain" as one of the reasons justifying their right to independence. In short, they charged the King of England with rendering "the Military independent of, and superior to, the Civil Power."<sup>102</sup> Their fear of military power and its use to suppress civilian freedoms also found expression in the early State constitutions as well.<sup>103</sup>

---

<sup>102</sup> See C. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (New York: Harcourt, Brace and Co., Inc., 1922).

<sup>103</sup>

By the constitution of New Hampshire, it was declared that "in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by the constitution of Massachusetts of 1780, that "no power can in any case be subjected to law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature;" by the constitution of Pennsylvania 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by the constitution of Delaware of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by that of Maryland of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and control of the civil power;" by that of North Carolina, 1776, that the military should be kept under strict subordination to, and governed by the civil power;" by that of South

It was the colonists' deep-seated fear of military power and their strong desire for civilian control of government that largely accounts for the limited scope of jurisdiction exercised by military courts in the late 1700's and early 1800's. And it is this same fear of military power and desire for civilian control of government which caused the Supreme Court of the United States in the 1950's and 1960's to restrict severely the exercise of military court jurisdiction over civilians and nonservice connected offenses.

At the time of enactment of the American Articles of War of 1775 and 1776, and more particularly during the Constitutional Convention, the colonists greatly feared the presence of standing armies. They knew, that too often in the history of man, military forces had snuffed out the freedoms and liberties of the very people they were supposed to protect and safeguard.<sup>104</sup> The history

---

Carolina, 1778, "that the military be subordinate to the civil power of the State;" and by that of Georgia, 1777, that "the principles of the habeas corpus act shall be part of this constitution; and freedom of press, and trial by jury, to remain inviolate forever."

Argument of Petitioner in Ex parte Milligan, 71 U.S. (4 Wall.) 2, 37-38 (1866).

<sup>104</sup> See generally THE FEDERALIST No. 41 (Madison) 271 (Middletown, Connecticut: Wesleyan University Press, Jacob E. Cooke, ed., 1961). "[George] Washington warned that: 'Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend . . . .' 26 THE WRITINGS OF GEORGE WASHINGTON [388 (Westport, Connect-

of the Roman Empire was a good example.

1. The Lesson of the Roman Empire

From their reading the colonists knew that "the Roman Republic began with a citizen army, [and that] after the overthrow of Carthage, Rome took on imperial ambition and magnitude."<sup>105</sup> The colonists were aware that the Roman army was largely responsible for Rome's greatness; and they were aware too that, in the course of conquering its enemies, the Roman army had taken control of the republic as well.<sup>106</sup> In its pursuit of greatness, Rome, in short, traded a civilian form of government for a government run by the military. In the end, it was clear to the colonists that "the liberties of Rome proved the final victim of her military triumphs."<sup>107</sup>

2. The Role of the Military in 18th Century England

In addition to their familiarity with Roman history, the colonists were conscious of the very important role played by the military in the Government

---

icut: Greenwood Press, Publishers, John C. Fitzpatrick ed., 1938).]" Reid v. Covert, 354 U.S. 1, 24 n.43 (1957).

<sup>105</sup> Military Justice, supra note 55, at 199.

<sup>106</sup> Id.

<sup>107</sup> THE FEDERALISTS No. 41 (Madison) 271 (Middletown, Connecticut: Wesleyan University Press, Jacob E. Cooke, ed., 1961).

of the British Empire. It is true that after 1688, civilians controlled the military during periods of peacetime, but the military nevertheless still played an important role in the affairs of the government.<sup>108</sup> England had become wealthy and powerful as a result of its involvement in many wars, and much of the English Government's success in this regard is attributable to the accomplishments of its military forces. In sum, the military was critical in protecting the nation from external dangers, for acquiring new territories and colonies, and for implementing the national policies of the Government.<sup>109</sup>

English military strength in the 18th century was impressive indeed.<sup>110</sup> The English Navy was first-

---

108

After the Revolution of 1689, Parliament had undertaken to control the establishment of standing armies in peacetime, but it had not attempted to usurp the power of the Crown to exercise command and direction over the army.

The Constitution and the Standing Army, supra note 55, at 447.

<sup>109</sup> ARMS AND MEN, supra note 101, at 16. See Earle, National Defense and Political Science, 55 POL. SCI. Q. 481, 482 (1940).

110

Both the British Army and the Royal Navy, as the colonists confronted them in 1775, were established institutions, hammered by frequent wars into experienced and well-organized military instruments, much more efficient and effective under the conditions of their times than later generations have realized.

rate and probably, at the time, the finest in the world. And the English Army was strong too; in fact, it is said that "the nearest analogy to [the] world conquering army of the Roman Republic [was] the English Army of the eighteenth century."<sup>111</sup> The problem with English military strength, from the colonists' point of view, was that it was controlled by the King and his ministers, and not by the English people.

In the 18th century, the King of England was still a major force in the structure of English Government.<sup>112</sup> He and his ministers conducted foreign policy and decided when war was necessary and appropriate.<sup>113</sup>

---

ARMS AND MEN, supra note 101, at 15.

<sup>111</sup> Military Justice, supra note 55, at 200.

<sup>112</sup> ARMS AND MEN, supra note 101, at 16.

<sup>113</sup>

In theory, at least, the conduct of foreign policy and war was the prerogative of the king, not of the community. In practice, the king was no doubt prompted by those powerful national economic or political interests which have always governed chiefs of state, no less than by his personal and dynastic ambitions. But the theory that war was the king's rather than the community's business helped to confine its scope and destructiveness. "In England," Tom Paine scornfully declared, "a King hath little more to do than to make war and give away places; which in plain terms is to impoverish the nation and set it together by the ears." . . . .

It was the king's task to protect the national interest, the national honor and the national safety against invasion. To enable him to fulfill it he was allowed, very grudgingly as a rule, the funds necessary to procure

When King George III decreed that "he was determined to smash by force [the] rebellious war manifestly being carried on" by the American colonists<sup>114</sup> and took steps to accomplish this end, the threat that the King of England might someday use his military force against his own citizens became a reality. In 1776, when British troops were stationed in Boston and military governors invoked military rule, the colonists' worst fears concerning the dangers of standing armies were realized.<sup>115</sup>

---

his "king's ships" and the proprietary battalions of "his" army. Such forces, both because they were expensive and because of the ever-present danger that the king would use them to tyrannize over the great domestic interests, were only cautiously expanded in time of danger and were reduced as rapidly as possible upon the outbreak of peace.

Id.

<sup>114</sup> J. FLEXNER, GEORGE WASHINGTON: IN THE AMERICAN REVOLUTION (1775-1783) 65 (Boston, Massachusetts: Little, Brown & Co., 1967).

<sup>115</sup> The heart of the objection to rule by the military had been eloquently stated by Samuel Adams, in 1768, who protested against the British army stationed in Boston:

. . .let us then assert & maintain the honor--the dignity of free citizens and place the military, where all other men are, and where they always ought & always will be plac'd in every free country, at the foot of the common law of the land.--To submit to the civil magistrate in the legal exercise of power is forever the part of a good subject: and to answer the watchmen of the town in the night, may be the part of a good citizen, as well as to afford them all necessary countenance and

### 3. Colonial Fear of Military Power

The lessons of Roman history and the colonists' own experiences in fighting the British army had convinced them beyond any doubt that standing armies were a menace to republican institutions and civil freedoms.<sup>116</sup> They believed that the great danger posed by standing armies was that they could be used by certain groups in society to exercise control and authority over other groups in the community.<sup>117</sup> In 1775 and 1776, the colonists considered themselves the victims of just such coercion.<sup>118</sup>

In light of the past and their own experience, the colonists were convinced that civilian control of the military was absolutely necessary in a republican form of government. Later in drafting the Constitution of the United States and in drawing up the Bill of Rights, the commitment of the colonists to the principle of civilian control of the military was very much in

---

support: But, to be called to account by a common soldier, or any soldier, is a badge of slavery which none but a slave will wear.

W. DOUGLAS, *THE RIGHT OF THE PEOPLE* 173 (Garden City, New York: Doubleday & Co., 1958).

<sup>116</sup> *ARMS AND MEN*, supra note 101, at 39, 86.

<sup>117</sup> See Reid v. Covert, 354 U.S. 1, 24 (1957).

<sup>118</sup> Id. at 27.

evidence.<sup>119</sup>

The memories of British abuse of military power were still fresh in the minds of the framers who gathered in Philadelphia on May 14, 1787 to revise the Articles of Confederation. In reforming the Articles, the framers were determined to take steps to insure that the future exercise of military power by the Government of the United States would always be subject to civilian control.

4. Steps Taken to Insure Civilian Control of the Military

In drafting the Constitution, the framers gave Congress the power to "provide for the common Defence and general Welfare of the United States."<sup>120</sup> The framers also gave Congress the power to raise and support an army and a navy, but provided with regard to the army that "no Appropriation of Money to that Use shall be for a longer Term than two Years."<sup>121</sup> In addition, the framers gave Congress the power to "make Rules for the Government and Regulation of the land and

---

<sup>119</sup> See supra note 101, and accompanying text.

<sup>120</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>121</sup> U.S. CONST. art. I, § 8, cl. 12. This is similar to the English practice of reenacting the Mutiny Act annually. See supra note 80 and accompanying text.

naval Forces."<sup>122</sup> Congress too was given power to call up the state militias when necessary "to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>123</sup>

The President of the United States, a civilian, was made the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."<sup>124</sup> He also was given the power to appoint officers in the Army and Navy with the advice and consent of the Senate,<sup>125</sup> and he was charged with insuring that the laws of the United States are "faithfully executed."<sup>126</sup>

In the Bill of Rights, further controls on the use of the military power were added in an effort to satisfy the fears of American citizens who believed that not enough had been done to eliminate the possibility of military interference in the lives of private citizens. In response to these fears, the Second Amendment was added to the Bill of Rights guaranteeing to the people

---

<sup>122</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>123</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>124</sup> U.S. CONST. art. II, § 2.

<sup>125</sup> Id.

<sup>126</sup> U.S. CONST. art. II, § 3.

the right "to keep and bear Arms."<sup>127</sup>

The Third Amendment was added to the Bill of Rights for the same reason. It provided that "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."<sup>128</sup>

It is because of the colonists' great fear of standing armies that the exercise of military power in the United States today is under the strict control of the civilian community.<sup>129</sup> In light of the colonists' preoccupation with the principle of civilian control of the military, it is not surprising that military tribunals during the Revolution were restricted, as they are restricted today, "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among

---

<sup>127</sup> U.S. CONST. amend. II.

<sup>128</sup> U.S. CONST. amend. III.

It is significant that since the Bill of Rights no constitutional amendment has dealt with a military subject. Apparently, the American people have continued satisfied with the views expressed in this field by the founding fathers.

W. AYCOCK AND S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 13 (Chapel Hill, North Carolina: The University of North Carolina Press, 1955).

<sup>129</sup> See generally, Comment, Civilian Control: New Perspectives for New Problems, 49 IND. L.J. 654, 655 (1974); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 IND. L.J. 539, 580 (1974).

troops in active service.<sup>130</sup> The idea of limiting the scope of jurisdiction of military tribunals to the narrowest possible limits began with the American Revolution and has continued to be an important theme in the development of the law of military court jurisdiction in the last 200 years, although at times (during the Civil War, during the early 1900's, and after World War II, for example,) Congress seemed to have forgotten the principle.<sup>131</sup>

D. Court-Martial Jurisdiction Under the Constitution

It is against this background of revolutionary experience and experimentation with new ideas in political thought<sup>132</sup> that the law of court-martial jurisdiction began to evolve. In the approximately 200 years that have elapsed since the founding of the republic, the law of court-martial jurisdiction has passed through four stages of growth and development.

1. The First Stage: 1789 to 1862

The first stage in the development of the law

---

<sup>130</sup> United States v. ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955)(emphasis in the original).

<sup>131</sup> See infra notes 146-53, 162, 179-81 and accompanying text.

<sup>132</sup> See generally ARMS AND MEN, supra note 101, at 14.

of court-martial jurisdiction begins in 1789 and extends to 1862. It was in 1789 that the First Congress of the United States, in one of its earliest actions, reenacted the Articles of War of 1776 and the amendments made to it in the Articles of 1777 and 1786.<sup>133</sup> These articles and the amendments to them were reenacted again by Congress a year later in 1790<sup>134</sup> and again in 1795<sup>135</sup> and 1796.<sup>136</sup>

The first real revision of the Articles of War occurred when Congress enacted the Articles of War of 1806.<sup>137</sup> In the new statute, the Act of April 10, 1806, Congress renumbered the articles of war, added some new offenses, and changed the maximum punishment author-

---

<sup>133</sup> Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. See also The Original Practice, supra note 55, at 8; WINTHROP, supra note 51, at 22-23.

[The court-martial] was in existence when the framers of the Constitution met to decide the fate of the military justice system itself. Congress did not create the court-martial--it simply permitted its existence to continue. In effect, the court-martial is older than the Constitution and predates any other court authorized or instituted by the Constitution.

Schlueter, The Court-Martial: An Historical Survey, 87 MIL. L. REV. 129, 149 (1980).

<sup>134</sup> Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121.

<sup>135</sup> Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432.

<sup>136</sup> Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486.

<sup>137</sup> Act of April 10, 1806, ch. XX, 2 Stat. 359, reprinted in WINTHROP, supra note 51, at 976-85. For a discussion of the enactment of the Articles of War of 1806, see The Original Practice, supra note 55, at 16-22.

ized for the conviction of certain crimes.<sup>138</sup> On the whole the changes Congress made to the Articles of War of 1776 were minor in nature. The Articles of War of 1806 are important, however, because they are the first new set of articles of war to be enacted under the Constitution, and they are also important because they remained in force, except for minor amendments, until 1863.<sup>139</sup>

The exercise of jurisdiction by military courts in the period immediately following the ratification of the Constitution presented no real problems because the American army was very small--in 1789, the number of men in the army was "a mere 672 of the 840 authorized by Congress."<sup>140</sup> By 1794, the number of soldiers in the United States Army had increased to 3,692,<sup>141</sup> but the

---

<sup>138</sup> A Short History of Military Justice, supra note 59, at 217.

<sup>139</sup> "[D]uring the Civil War 17 articles were amended and eight articles added." F. MUNSON, MILITARY LAW 7 (Baltimore, Maryland: The Lord Baltimore Press, 1923). Winthrop notes that "[b]etween 1806 and 1874, a fourth court-martial--the Field-Officer's Court, authorized however only in time of war--was added to those previously established; the authority to order general courts was still further extended, and their jurisdiction and powers were enlarged." WINTHROP, supra note 51, at 48.

<sup>140</sup> Warren, The Bill of Rights and the Military 37 N.Y.U.L. REV. 181, 187 (1962)(footnotes omitted). See The Original Practice, supra note 55, at 9.

<sup>141</sup> The Original Practice, supra note 55, at 9. While the size of the United States Army was small, the size of the state militia was not.

In the earliest militia return extant, dated January 1803, President Jefferson submitted to

size of the army was still not large when compared to the 89,000 or more Americans who were in military service in 1776.

In the first stage of development from 1789

---

the House of Representatives the numbers of the militia in Massachusetts, Connecticut, Pennsylvania, Virginia, South Carolina, Georgia, and Mississippi Territory. 1 AM. ST. PAP. MIL. AFF. 159-62. This showed 31 major generals, 91 brigadier generals, 14,992 other officers, and 273,003 enlisted men.

Id. at 9 n.51. The militia, however, were not part of the American army and were not subject to court-martial, except when called into federal service.

It is true that every state had its militia, in numbers that were impressive, whatever might be said of its martial effectiveness. Militiamen when on [state] duty were subject to state military codes of varying degrees of rigor. Except in instances of insurrection or when called into the service of the United States, the militia were liable for only a few days of exercise each year. The fine levied on enlisted men for nonappearance might be collected administratively, or by court-martial, or by a military court for the levying of fines, or even before a justice of the peace; provisions varied from state to state, though the fines were invariably enforced by civil process. The few trials of officers turned on disobedience of orders and on the terms of official communications made to superiors in an age of exaggerated punctilio, when the low boiling point of a military temper was intertwined with honor itself. But, except for the annoyance over the militia fines increasingly felt by the urban male population in the second quarter of the nineteenth century, it is fair to say that the impact of state military law on the population was substantially nonexistent.

Id. at 9-10. See also Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 MIL. L. REV. 5, 24-28 (1985).

to 1862, the exercise of court-martial jurisdiction was very limited. Military offenses like "desertion, absence without leave . . . , mutiny, . . . [and] making false official statements," were triable by court-martial.<sup>142</sup> Civilian offenses committed by military personnel, on the other hand, were tried by civilian courts.<sup>143</sup> If the civilian authorities failed or refused to prosecute military personnel for civilian offenses, however, the military offenders were tried by court-martial.<sup>144</sup>

## 2. The Second Stage: 1863 to 1915

The second stage in the development of American court-martial jurisdiction begins with the Civil War and extends through World War I. At the beginning of the Civil War, Congress expanded considerably the scope of jurisdiction exercised by military courts. In 1862, Congress--

[P]resumably acting on the premise that civilian due process was too good for the slippery and prehensile entrepreneurs who were then supplying the Army of the United States with decayed beef, shoddy

---

<sup>142</sup> The Original Practice, supra note 55, at 10.

<sup>143</sup> Articles of War of 1776, § X, art. 1, reprinted in WINTHROP, supra note 51, at 964-65.

<sup>144</sup> Articles IX and X of the Articles of War of 1776, when read together, give support to this conclusion. Id. See Rice, O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman, 51 MIL. L. REV. 41, 51-54 (1971).

pantaloon, and wornout muskets at extortionate prices, provided that civilian contractors for arms, munitions, and supplies should be "deemed and taken as a part of the land or naval forces . . . , for which . . . [they] shall contract to furnish said supplies.  
. . . . "145

Under the statute enacted by Congress,<sup>146</sup> civilian contractors doing business with the armed forces of the United States became subject to the Articles of War and could be tried by court-martial for "fraud or willful neglect of duty."<sup>147</sup> In 1863, the following year, discharged soldiers who assisted such contractors or otherwise defrauded the government likewise were made subject by Congress to trial by court-martial "despite [their] subsequent separation from the service, and without regard to whether [they] could be tried in a civilian court."<sup>148</sup>

Numerous civilian contractors and military servicemen were prosecuted for violating the provisions enacted in 1862 and 1863. A federal court decision in 1878, however, limited much of the litigation in this

---

<sup>145</sup> Military-Civilian Hybrids, supra note 55, at 324.

<sup>146</sup> Act of July 17, 1862, ch. 200, § 16, 12 Stat. 596.

<sup>147</sup> Id. See W. DOUGLAS, THE RIGHT OF THE PEOPLE 188-92 (Garden City, New York: Doubleday & Co., Inc. 1958).

<sup>148</sup> BISHOP, supra note 55, at 57-58.

area when it held that the term "contractor" referred to the "military storekeeper," discussed in Article 36 of the Articles of War and other federal statutes, and did not apply to contractors who supplied materials to the military service.<sup>149</sup> In effect, the court found that "[C]ongress did not mean to convert [the civilian] contractor into an enlisted soldier, subject to perform military duty."<sup>150</sup> The court said, that to the extent the language of the statute can be read "to place [a private contractor] in the army so as to subject him to trial by court-martial for delinquencies in respect to his contracts . . . , such a declaration is unconstitutional as well as nugatory."<sup>151</sup>

In 1863, Congress also "expressly authorized courts-martial to try [soldiers for] various civil crimes, regardless of whether the circumstances of their commission prejudiced good order and discipline."<sup>152</sup> Under the Act of March 3, 1863, military courts were authorized by Congress to try soldiers for

---

<sup>149</sup> Ex parte Henderson, 11 Fed. Cas. 1067, 1070 (Case No. 6349)(C.C.D. Ky. 1878).

<sup>150</sup> Id. at 1078.

<sup>151</sup> Id. See Military-Civilian Hybrids, *supra* note 55, at 324 n.29 and accompanying text. See also W. DOUGLAS, THE RIGHT OF THE PEOPLE 190-91 (Garden City, New York: Doubleday & Co., Inc., 1958).

<sup>152</sup> The Constitution and the Standing Army, *supra* note 55, at 449-50.

offenses, like rape and robbery, and mayhem and manslaughter, in time of war, insurrection, or rebellion.<sup>153</sup> Until this time, such offenses could only be tried in the civilian courts, even if committed in wartime.

In 1874, Congress revised the articles of war and made some minor changes in the exercise of court-martial jurisdiction.<sup>154</sup> In general, however, the Articles of War of 1874 did nothing more than incorporate the amendments of 1862 and 1863, and rearrange and clarify the provisions of the Articles of War of 1806.<sup>155</sup>

---

<sup>153</sup> Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736.

<sup>154</sup> Rev. Stat. § 1342 (1875), reprinted in WINTHROP, supra note 51, at 986. The Articles of War of 1874 made changes in the maximum punishments that could be imposed for certain types of offenses. The new statute also provided that in time of war, insurrection or rebellion, civilian authorities no longer could request the release of servicemen for trial in civilian courts for commission of civilian offenses. Rev. Stat. § 1342, arts. 58 & 59 (1875). See generally The Constitution and the Standing Army, supra note 55, at 450-51.

<sup>155</sup> A Short History of Military Justice, supra note 59, at 217-18.

The so-called Code of 1874, which was in force when General Crowder first proposed his alleged revision of 1912-1916, is thus described by him:

"It is substantially the Code of 1806, as 87 of the 101 articles which made up that Code survive in the present articles unchanged, and a considerable number of the remaining articles survive without substantial change."

Military Justice, supra note 55, at 198.

The statutes enacted by Congress in 1862 and 1863 mark the beginning of the second stage in the development of the law of military court jurisdiction. These statutes are particularly significant because for the first time in American history, military courts were empowered to exercise jurisdiction over civilian contractors doing business with the armed forces and military personnel committing common law offenses during time of war. In short, because of the important changes made by Congress during the Civil War, the scope of jurisdiction exercised by military courts from the time of the Civil War to the beginning of World War I was significantly broader than that exercised during the previous stage.

### 3. The Third Stage: 1916 to 1947

The third stage in the development of the law of court-martial jurisdiction begins with World War I and extends through World War II. This stage begins with the enactment by Congress of the Articles of War of 1916.<sup>156</sup> Like the revision of 1874 and the previous revisions, no major substantive or fundamental changes were made to the articles of war.<sup>157</sup> Some important jurisdictional

---

<sup>156</sup> Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 650.

<sup>157</sup> A Short History of Military Justice, supra note 59, at 218.

[The British Articles] were adopted in 1776 and

changes in the articles, however, were made.

The most important change affecting court-martial jurisdiction in the Articles of War of 1916 was the inclusion of provisions authorizing military courts to try soldiers for civilian noncapital offenses, like arson, burglary and robbery, committed in time of peace.<sup>158</sup> Under the old articles, the military could try soldiers for committing civilian crimes only "in time of war, insurrection or rebellion."

Under the new articles too, military courts were given jurisdiction to try soldiers for capital offenses, namely rape and murder, committed outside the United States in peacetime.<sup>159</sup> But the new articles of

---

subsequent legislation made no fundamental change. Even the Articles enacted in 1916 were only a rearrangement and reclassification without much alteration in substance.

Morgan, The Background of the Uniform Code of Military Justice, 6 VAND. L. REV. 169 (1953). See also Testimony of General Enoch H. Crowder in Hearings Before Comm. on Military Affairs on H.R. 23628, 62d Cong., 2d Sess. 16 (1912). But see, Ansell, Some Reforms in Our System of Military Justice, 32 YALE L.J. 146 (1922), in which General Ansell states that "[n]o changes of a truly organic character took place in our system of military justice from the time we adopted it from the British upon our separation until the enactment of the new Articles of War by Congress [in 1920]." Id. See generally SWORDS AND SCALES, supra note 15, at 5-10.

<sup>158</sup> Act of August 29, 1916, ch. 418, § 1342, art. 93, 39 Stat. 664. See generally The Constitution and the Standing Army, supra note 55, at 452.

<sup>159</sup> Act of August 29, 1916, ch. 418, § 1342, art. 92, 39 Stat. 664.

war continued to provide that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."<sup>140</sup> Under the old articles, no person could be tried by court-martial for committing capital offenses either inside or outside of the United States in time of peace.<sup>141</sup>

In addition, Congress in the 1916 Articles of War made civilian employees and military dependents, accompanying or serving with American forces outside the United States in peacetime, subject to military court jurisdiction for violations of the articles of war.<sup>142</sup> In wartime, however, all civilians accompanying or

---

<sup>140</sup> Id.

<sup>141</sup> The Constitution and the Standing Army, supra note 55, at 452.

<sup>142</sup>

The following persons are subject to these articles . . . .

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.

Act of August 29, 1916, ch. 418, § 1342, art. 2, 39 Stat. 651 (emphasis added). The meaning of "in the field" has never been precisely defined. But see Reid v. Covert, 354 U.S. 1, 34 n.61 (1957) and accompanying text.

serving with American armed forces, whether in or out of the United States were subject to trial by court-martial for violations of the Articles of War.<sup>163</sup>

The Articles of War of 1916 came under severe criticism during World War I; they were criticized for being "not only archaic but also anachronistic and un-American" as well.<sup>164</sup> At the conclusion of the war, General Samuel T. Ansell, The Acting Judge Advocate General of the Army, proposed sweeping reforms of the Articles of War.<sup>165</sup> Only a few of General

---

<sup>163</sup> Act of August 29, 1916, ch. 418, § 1342, art. 2, 39 Stat. 651. In addition, Article 96, the General Article, was amended to "sweep within court-martial jurisdiction all non-capital civil crimes, not elsewhere expressly denounced by the articles." The Constitution and the Standing Army, *supra* note 55, at 451. The new offenses subject to court-martial jurisdiction, however, were only those that were violations of federal penal law, that is, offenses which "violated an applicable statute enacted by or under authority of Congress." Para. 213a, MCM, 1969, Rev'd. Ed., at 28-71. The Articles of War of 1916 for the first time too classified military courts as general, special and summary (Article 3), and provided that court-martial sentences imposed by these courts had to be approved by the authority who convened the court or by the officer exercising command in his absence (Article 46).

<sup>164</sup> Military Justice, *supra* note 55, at 197.

<sup>165</sup> See generally General Samuel T. Ansell, Hearings on S. 64 Before the Senate Comm. on Military Affairs 66th Cong., 1st Sess. 51 (1919). See also, Ansell, Military Justice, 5 CORNELL L.Q. 1 (1919); Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 YALE L.J. 52 (1919); Bogert, Courts-Martial: Criticisms and Proposed Reforms, 5 CORNELL L.Q. 18 (1919). The criticism voiced by General Ansell caused a bitter dispute between him and Major General Enoch H. Crowder, The Judge Advocate General of the Army. See Brown, The Crowder-Ansell Dispute: The

Ansell's reform proposals, however, were included in the new articles of war enacted by Congress in 1920;<sup>166</sup> the rest unfortunately were rejected as being inappropriate or unacceptable.

Of the changes incorporated in the Articles of War of 1920, the two most important were the requirement that a record of trial be submitted to a staff judge advocate for review and recommendations prior to action by a convening authority, and that Army Boards of Review be created to "review all court-martial convictions that resulted in sentences including disciplinary discharges, confinement for one year, or anything more severe."<sup>167</sup> In addition, the Articles of War of 1920 provided for a separate prosecutor, defense counsel, and legal adviser (law member) of the court, all of whose responsibilities previously had been performed by a single staff judge advocate.<sup>168</sup> The Articles of War of 1920, however, made

---

<sup>166</sup> Act of June 4, 1920, ch. 227, 41 Stat. 787. See Ansell, Some Reforms in Our System of Military Justice, 32 YALE L.J. 146 (1922).

<sup>167</sup> Walker & Niebank, The Court of Military Appeals--Its History, Organization and Operation, 6 VAND. L. REV. 228, 230 (1953). See A Short History of Military Justice, supra note 59, at 218.

<sup>168</sup> ROMAN MILITARY LAW, supra note 56, at xvii. The law member performed "many of the functions of the judge in a civil court, and was required to be specially qualified in the law for that purpose." Id.

no changes in the scope of the exercise of military court jurisdiction.

The Articles of War of 1920 are significant because they remained in force through World War II and because many of the reforms proposed by General Ansell in 1918 were later incorporated in the Uniform Code of Military Justice Act of 1950.

In the third stage of development, from the end of World War I to the conclusion of World War II, Congress made significant changes in the law of court-martial jurisdiction. The Articles of War of 1916, in particular, greatly expanded the scope of court-martial jurisdiction. Under the Articles of War of 1916, soldiers for the first time were subject to trial by court-martial for civilian offenses committed in the United States in time of peace, and civilians for the first time became subject to trial by court-martial for violations of the Articles of War committed overseas in peacetime.

#### 4. The Fourth Stage: 1948 to the present

The fourth stage in the legislative development of court-martial jurisdiction in the United States begins at the end of World War II and extends to the present day. During World War II, the Articles of War were criticized severely by many who had served in the

armed forces.<sup>169</sup> In response to great numbers of complaints from former servicemen and numerous calls for reform, special committees representing various groups were formed to investigate the problems in the administration of military justice.<sup>170</sup> The Secretaries of the various Departments also--

commissioned a series of study groups during and immediately following the war. These included, in the Navy, the two Ballentine committees, 1943 and 1946; the Taussig study in 1944; the McGuire committee in 1945; the Keefe General

---

169

The outpouring of demands for the reform of military justice was tremendous. For a collection of newspaper editorials see Hearings on H.R. 2575 Before the Subcomm. of the House Comm. on Military Affairs, 80th Cong., 1st Sess. 2166-75 (1947). For a journalistic account see Keefe, Drumhead Justice: Our Military Courts, READERS' DIGEST, Aug. 1951, at 37; Rosenblatt, Justice on a Drumhead, 162 NATION 501 (1946). Numerous committees (military, legislative, and ad hoc) were established to review complaints and make recommendations. One committee held hearings in eleven major cities. See Report of War Dep't Advisory Comm. on Military Justice to the Secretary of War (1946) (committee composed of American Bar Association members; submitted 2519 page report).

"Born Again", supra note 30, at n.14 (1976). See Sherman, The Civilianization of Military Law, 22 U. ME. L. REV. 3, 28-29 (1970); R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 9 (Westport, Connecticut: Greenwood Press Publishers, 1976 reprint).

<sup>170</sup> White, The Uniform Code of Military Justice --Its Promise and Performance (The First Decade: 1951-1961): A Symposium--The Background and the Problem, 35 ST. JOHN'S L. REV. 197, 202-09 (1961) [hereinafter cited as The First Decade: 1951-1961].

Court-Martial Sentence Review Board, 1946; and Father White's study of prisoners, 1946. Similar bodies worked on Army problems: the Robert's board on clemency, 1945-47, the Vanderbilt Committee and the Doolittle Board, both in 1947.<sup>171</sup>

The immediate response to the criticism and studies was enactment by Congress of the Articles of War of 1948.<sup>172</sup>

Soon after the Articles of War of 1948 were enacted, Secretary of Defense James E. Forrestal appointed Professor Edmund M. Morgan, Jr., to serve as Chairman of the Committee to draft a Uniform Code of Military Justice that would be applicable to all of the armed services.<sup>173</sup> Seven months later the committee submitted to the Secretary of Defense a proposed draft of a Uniform

---

<sup>171</sup> SWORDS AND SCALES, supra note 15, at 16.

<sup>172</sup> Act of June 24, 1948, ch. 625, 62 Stat. 627. Wiener, The New Articles of War, 63 INF. J. 24 (Sept. 1948). See SWORDS AND SCALES, supra note 15, at 22-29.

By the end of the regular session of Congress in 1948, . . . military justice had reached a halfway house. The Army had a new, relatively modern system on the books [the Articles of War of 1948], but it was not thought satisfactory by large numbers of reformers. The Navy was still operating under a court-martial system that, in essence, was three hundred years old. The best that could be said of the Air Force was that it was a question mark.

Id. at 33.

<sup>173</sup> The First Decade: 1951-1961, supra note 169, at 199.

Code of Military Justice consisting of 140 articles.<sup>174</sup>  
The proposed code was enacted by Congress on May 5,  
1950,<sup>175</sup> and it became effective on May 31, 1951.

The Uniform Code of Military Justice made  
important changes in the operation and administration of  
the military justice system.<sup>176</sup> The new Code also

---

<sup>174</sup> See generally Larkin, Professor Edmund M. Morgan and the Drafting of the Uniform Code, 28 MIL. L. REV. 7 (1965).

<sup>175</sup> Act of May 5, 1950, ch. 169, 64 Stat. 107.

[T]he Articles for the Government of the Navy (AGN) as they stood in 1950 were essentially unchanged since 1862.

Like the Articles of War, the AGN were borrowed wholesale from the British. The Articles for the Government of the Royal Navy of 1649, as modified in 1749, formed the basis of the American naval regulations of 1775. When the U.S. Navy itself was permitted to disband after 1783, the 1775 rules went with it. But with the reconstitution of the fleet during the quasi-war with France in 1798 came the enactment of "Rules and Regulations of 1799." These were slightly revised in 1800, and a few new wrinkles were added thereafter, but these rules stood virtually intact until the 1862 codification, which primarily reflected the fact that the United States had become transcontinental and its Navy worldwide.

SWORDS AND SCALES, supra note 15, at 10-11. See Wiener, The Original Practice I, 72 HARV. L. REV. 1, 13-15, 32-36 (1958); DeVico, Evolution of Military Law, 21 JAG J. 63, 65-66 (Dec. 1966-Jan. 1967); Pasley & Larkin, The Navy Court-Martial: Proposals for Its Reform, 33 CORNELL L.Q. 195, 197 (1947); D. WALKER, MILITARY LAW 107 (New York: Prentice Hall, 1954).

<sup>176</sup> For a discussion of the reforms and other changes included in the Uniform Code of Military Justice of 1950 see supra pages 6-8 and accompanying text. See also A Short History of Military Justice, supra note 59, at 220-21; F. WIENER, THE UNIFORM CODE OF MILITARY

provided for further expansion of the jurisdiction of courts-martial. Under the new Code, soldiers could be tried by court-martial for capital and noncapital offenses committed in time of peace and in time of war. This change is particularly significant because now for the first time in the history of the nation soldiers could be tried by court-martial in peacetime and sentenced to death for "murder and rape committed within the United States."<sup>177</sup> The 1920 Code had prohibited trying soldiers for such offenses specifically providing that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."<sup>178</sup> There was little or no opposition, however, to changing this provision in the 1950 revision.

Under the new Uniform Code of Military Justice, provisions in the 1916 Articles of War giving courts-martial the power to try "all persons" serving with or

---

JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY  
1-24 (Washington, D.C.: Combat Forces Press, 1950).

<sup>177</sup> The Constitution and the Standing Army, *supra* note 55, at 453. See Act of May 5, 1950, ch. 169, arts. 118, 120, 64 Stat. 140.

<sup>178</sup> Act of June 4, 1920, ch. 227, art. 92, 41 Stat. 805.

accompanying the armed forces overseas were retained.<sup>179</sup> In addition, the new Code gave courts-martial jurisdiction to try civilians employed by the armed forces for offenses committed overseas.<sup>180</sup> The new Code also gave courts-martial jurisdiction to try discharged servicemen for certain types of offenses, namely, (1) serious offenses punishable by five years or more in confinement, (2) that were committed prior to discharge, and (3) which could not be prosecuted in federal or state courts.<sup>181</sup> The extension of court-martial jurisdiction by 1950 to civilian employees, to certain types of discharged servicemen for offenses committed overseas in time of peace, and to servicemen, for capital offenses committed in the civilian community in time of peace, represents the furthest extension of military jurisdiction ever authorized by Congress.

The Supreme Court of the United States later held that the exercise of court-martial jurisdiction over civilian employees and dependents accompanying the armed

---

<sup>179</sup> Act of May 5, 1950, ch. 169, arts. 2(8), 2(11), 2(12), 64 Stat. 109. See supra note 162 and accompanying text.

<sup>180</sup> Act of May 5, 1950, ch. 169, art. 2(11), 64 Stat. 109.

<sup>181</sup> Act of May 5, 1950, ch. 169, art. 3(a), 64 Stat. 109-10.

forces overseas in time of peace was unconstitutional.<sup>182</sup>  
In 1969, the Supreme Court also ruled that it was unconstitutional for the military to exercise court-martial jurisdiction over servicemen charged with committing nonservice connected offenses in the United States.<sup>183</sup>

In 1968, Congress revised the Uniform Code of Military Justice.<sup>184</sup> The most important change in the 1968 Act was granting to military accuseds the right to choose, in all but capital cases, trial by military judge alone instead of a trial by court members. In the Military Justice Act of 1968, Congress also required that the services of certified military lawyers be made available to servicemen tried by special court-

---

<sup>182</sup> United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955)(discharged serviceman held not subject to court-martial jurisdiction); Reid v. Covert, 354 U.S. 1, 5 (1957)(civilian dependents held not subject to court-martial jurisdiction); Grisham v. Hagan, 361 U.S. 278, 280 (1960)(civilian employees of the government held not subject to court-martial jurisdiction).

<sup>183</sup> O'Callahan v. Parker, 395 U.S. 258, 274 (1969) (nonservice connected offenses committed in the United States held not triable by court-martial). See also Relford v. Commandant, 401 U.S. 355, 369 (1971)(offenses committed by serviceman on or at the geographical boundary of a military post held triable by court-martial).

<sup>184</sup> Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. See A Short History of Military Justice, *supra* note 59, at 222; Mounts & Sugarman, The Military Justice Act of 1968, 55 A.B.A.J. 470 (1969); Ervin, The Military Justice Act of 1968, 45 MIL. L. REV. 77 (1969).

martial.<sup>185</sup> In addition, the new act restricted the use of special courts-martial to adjudge a bad conduct discharge to cases where "a complete record of the proceedings and testimony [had] been made, counsel having the qualifications prescribed under [Art. 27(b) had been] detailed to represent the accused, and a military judge [had been] detailed to the trial."<sup>186</sup>

In 1979, Congress amended Article 2 of the Uniform Code of Military Justice to deal specifically with the problems of recruiter misconduct and defects in the enlistment process which were being used by military accuseds to defeat court-martial jurisdiction. The main purpose of the amendment was to overrule the Court of

---

<sup>185</sup> Article 27(c) of the Code was amended by adding the following new paragraph:

(1) The accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) . . . unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained.

Military Justice Act of 1968, Pub. L. No. 90-632, art. 27(c), 82 Stat. 1337. The exception for trial without counsel was included primarily for the Navy, and rarely, if ever, has been used.

<sup>186</sup> Military Justice Act of 1968, Pub. L. No. 90-632, art. 19, 82 Stat. 1336.

Military Appeals' decision in United States v. Russo<sup>187</sup> which in large part created the problem. In Russo, the Court held that where a recruiter participates in the fraudulent enlistment of a service member, the enlistment is void and the soldier is not subject to court-martial jurisdiction for any offenses committed while on active duty.<sup>188</sup> As a result of the Court's decision in Russo and similar cases,<sup>189</sup> "many military [accuseds] were simply discharged after raising the defense [of recruiter misconduct] because of the difficulty of affirmatively proving that the enlistment was valid."<sup>190</sup> Most of the accuseds were given administrative discharges and, thus, escaped punishment for their crimes, unless of course, the state decided to prosecute the offense.<sup>191</sup>

---

<sup>187</sup> 1 M.J. 134 (C.M.A. 1975).

<sup>188</sup> Id. at 137.

<sup>189</sup> See e.g., United States v. Catlow, 23 USCMA 142, 48 CMR 758 (1974) ("join the army or go to jail" held to be a coerced enlistment and void); United States v. Brown, 23 USCMA 162, 48 CMR 778 (1974) (government precluded from showing a constructive enlistment where the government knows an enlistment is defective).

<sup>190</sup> Extract of Senate Report 97-107, Title VII--General Provisions, cited in Schlueter, Personal Jurisdiction under Article 2, UCMJ: Whither Russo, Catlow, and Brown?, THE ARMY LAWYER 3, 14 (Dec. 1979).

<sup>191</sup>

An accused who committed an offense commonly prosecuted by the civilian community might be subject to criminal sanctions, provided there was concurrent jurisdiction over the location where the offense took place. Civilian interest in such prosecutions is decreased by

To remedy this situation, Congress in 1979 amended Article 2 of the Code in two respects.<sup>192</sup> First, Congress provided that one who enlists voluntarily and who has the capacity to understand the significance of such an enlistment becomes, upon taking the oath of enlistment, a member of the armed forces and subject to the Uniform Code of Military Justice.

Second, Congress provided that anyone serving with the military who voluntarily submits to the authority of the military, who meets the minimum mental and age qualifications, who receives pay and allowances, and who performs military duties, is subject to the Uniform Code of Military Justice until the period of his service is lawfully terminated. This amendment was not so much an expansion of court-martial jurisdiction, as it was an attempt by Congress to preserve military jurisdiction over offenses which traditionally have been subject to court-martial jurisdiction. In its 1979 Amendment, Congress also amended Article 36 of the Code to clarify

---

the fact that the offender might soon be leaving the state.

Ross, Russo Revitalized, THE ARMY LAWYER 9, 11 n.15 (May 1983). Obtaining a fraudulent discharge is also an offense under the Code, but it is not a problem that arises as often as fraudulent enlistments. Art. 3(b), U.C.M.J., 10 U.S.C. § 803(b) (1983). See Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981).

<sup>192</sup> See FY 1980 Department of Defense Authorization Act, Pub. L. No. 96-107, 93 Stat. 810-811.

the President's power to prescribe rules for pretrial, trial and post-trial procedures for courts-martial, military commissions, and other military tribunals, as well as courts of inquiry.<sup>193</sup>

On December 6, 1983, the Uniform Code of Military Justice was amended again when President Ronald Reagan signed the Military Justice Act of 1983.<sup>194</sup> Most of the changes in the Military Justice Act of 1983 as well as a newly revised Manual for Courts-Martial became effective on August 4, 1984.<sup>195</sup> The Military Justice Act of 1983 made some significant changes with regard to the jurisdiction of courts-martial and appellate procedures.<sup>196</sup>

Under the new Act, the convening authority's responsibility for selection, detail, and excusal of court-martial personnel has been greatly diminished. No longer, for example, is the convening authority responsible for detailing the military judge or counsel to serve on a court-martial.<sup>197</sup> In addition, the

---

<sup>193</sup> Id.

<sup>194</sup> Pub. L. No. 98-209, 97 Stat. 1393 (1983), amending, the Uniform Code of Military Justice, arts. 1-140, 10 U.S.C. §§ 801-940 (1976).

<sup>195</sup> See Peluso, Safe Passage Through the Manual for Courts-Martial, 1984, 15 THE ADVOCATE 89, 90 (Sept.-Oct. 1983).

<sup>196</sup> The Military Justice Act of 1983, 15 THE ADVOCATE 293, 295-96 (Sept.-Oct. 1983).

<sup>197</sup> Uniform Code of Military Justice, arts. 26, 27, 10 U.S.C. §§ 826, 827 (1983).

convening authority no longer has sole responsibility for excusing court members detailed to sit on a court-martial; under Article 25, the convening authority may now delegate this responsibility to "his staff judge advocate or legal officer or to any other principal assistant."<sup>198</sup> There are some restraints on the convening authority's power to delegate this responsibility,<sup>199</sup> but on the whole it will help improve the operation of the military justice system.

The Military Justice Act of 1983 also changes the rules regarding requests for trial by military judge alone. Before the change, requests for trial by military judge alone had to be filled out properly, signed by the accused, and submitted in writing to the military judge. Failure to follow this procedure, for a while at least,

---

<sup>198</sup> Art. 25(e), U.C.M.J., 10 U.S.C. § 825(e) (1983).

<sup>199</sup>

The convening authority will remain solely responsible for the selection and detailing of members. In order to ensure that the convening authority retains fundamental responsibility for the composition of the membership, the . . . MCM rule provides that the convening authority's delegate may not excuse more than one-third of the total number of members detailed by the convening authority.

After assembly, the delegate may not excuse members.

Cooke, Highlights of the Military Justice Act of 1983, THE ARMY LAWYER 40, 41 (Feb. 1984). See R.C.M. 505(c)(1)(B)(ii) & (c)(2)(A), MCM, 1984, at 11-56.

was jurisdictional error.<sup>200</sup> Now, under the new Act requests for trial by military judge alone may be submitted either in writing or made orally on the record.<sup>201</sup>

The changes in the selection and excusal of court-martial personnel are significant and represent a major change in the law with regard to whether courts-martial are properly constituted. The effect of the changes is to make the law of court-martial personnel less technical and to eliminate much of the emphasis on form over substance.

The Military Justice Act of 1983 also relieves the convening authority of the responsibility to give an opinion, either before trial or after trial, on the legal sufficiency of the evidence presented or on the legal correctness of rulings made on questions of law. Under the new Act, these matters are left to the staff judge advocate and the appellate authorities.<sup>202</sup> The convening authority still retains the power to refer cases to

---

<sup>200</sup> See United States v. Dean, 20 USCMA 212, 215, 43 CMR 52, 55 (1970)(court-martial lacked jurisdiction when no written request for trial by military judge alone was submitted). But see United States v. Stearman, 7 M.J. 13, 14 (C.M.A. 1979)(failure to include name of military judge on the request for trial by military judge alone held not to be jurisdictional error).

<sup>201</sup> Art. 16(1)(B), U.C.M.J., 10 U.S.C. § 816(1)(B) (1983). See R.C.M. 903(a)(2), MCM, 1984, at 11-106.

<sup>202</sup> Cooke, Highlights of the Military Justice Act of 1983, THE ARMY LAWYER 40, 42 (Feb. 1984).

trial, and to disapprove or reduce findings and sentences imposed by courts-martial, but the convening authority no longer is required to comment on the legal sufficiency of trials.

With regard to appellate review, the Military Justice Act of 1983 makes three important changes:

First, it authorizes the government to appeal certain adverse rulings by the military judge. Second, it permits the accused to waive appellate review, except in capital cases. [And t]hird, it provides for review, on writ of certiorari, by the Supreme Court [of the United States] of cases reviewed by the Court of Military Appeals.<sup>203</sup>

For purposes of court-martial jurisdiction, the first and third changes are particularly significant. Under the old Code, if a military judge determined that the court-martial was without jurisdiction to try the accused or the offense, that was the end of the matter and the charges and specifications against the accused were dismissed. Now, the government has the right to "appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification."<sup>204</sup>

The most important change in the area of appel-

---

<sup>203</sup> Id. at 43.

<sup>204</sup> Art. 62(a)(1), U.C.M.J., 10 U.S.C. § 862(a)(1) (1983). See R.C.M. 908, MCM, 1984, at 11-115.

late review, however, is the provision in Article 67 granting both the accused and the government the right to file petitions for certiorari in the Supreme Court of the United States from cases decided by the Court of Military Appeals.<sup>205</sup> In the long run, this change may have a greater impact on the law of court-martial jurisdiction, than all of the other changes combined.

During the fourth stage of the development of the law of court-martial jurisdiction, from the end of World War II to the present day, Congress again broadened the scope of jurisdiction exercised by military courts when it authorized trial by court-martial of civilian employees of the armed forces for offenses committed overseas, and discharged service members for serious offenses committed on active duty which were not subject to prosecution in American courts. Within a decade, the Supreme Court of the United States ruled that the exercise of court-martial jurisdiction over discharged soldiers and sailors and over civilian employees and dependents was unconstitutional.

---

<sup>205</sup> Art. 67(h), U.C.M.J., 10 U.S.C. § 867(h) (1983). See R.C.M. 1205(a), MCM, 1984, at II-195. The first case filed with the Supreme Court of the United States under Article 67 of the Code was Hutchinson v. United States, 18 M.J. 281 (C.M.A. 1984), cert. denied, \_\_\_ U.S. \_\_\_ (No. 84-254, Nov. 5, 1984), and the first case in which the Supreme Court acted on the merits of a military case filed under Article 67 was Goodson v. United States, 18 M.J. 243 (C.M.A. 1984), cert. granted, decision vacated, and case remanded, \_\_\_ U.S. \_\_\_ (No. 84-1015, April 29, 1985), rev'd, 22 M.J. 22 (1986).

In general, the inclination of Congress over the last 200 years has been to expand the scope of court-martial jurisdiction. The various steps Congress has taken to broaden the jurisdiction of military courts can be explained in terms of the great demands placed on the nation's armed forces by three major wars (the Civil War, World War I, and World War II), and the genuine need on the part of commanders to be able to govern effectively the extremely large number of military service personnel under their command and control.

The expansion of the jurisdiction of the military courts and the increased size of the American military forces have had a noticeable affect on the development of the law of court-martial jurisdiction. The rules governing the exercise of military court jurisdiction are much more complex today than ever before, and attacks challenging the exercise of court-martial jurisdiction are more frequent and varied too.

In the discussion of the law of court-martial jurisdiction which follows, it is important to remember that civilian control of the military has been a strong force in the historical development of court-martial jurisdiction in the United States and that it continues to be such today.<sup>206</sup> While it is true that the military

---

206

People of many ages and countries have feared and unflinchingly opposed the . . .

is "a specialized society"<sup>207</sup> and that the military criminal justice system operates with a substantial degree of autonomy, it is also true that the civilian community continues to exert considerable control over the extent of jurisdiction exercised by military courts.

Congress, for example, still has the power "to make rules for the Government and Regulation of the land and naval forces", and the President still has authority to prescribe the rules of procedure to be followed in military tribunals and to set maximum punishments for military offenses. In addition, the United States Court of Military Appeals, with its three civilian judges, continually supervises the administration of the military criminal justice system, and the federal courts of the United States regularly review writs for extraordinary relief from military personnel challenging the exercise of military jurisdiction

---

subordination of executive, legislative and judicial authorities to complete military rule. . . . In this country that fear has become part of our cultural and political institutions.

Duncan v. Kahanamoku, 327 U.S. 304, 319 (1946). For a discussion of examples civilian control of the military see id. at 319-24.

<sup>207</sup> Parker v. Levy, 417 U.S. 733, 743 (1974). See also Brown v. Glines, 444 U.S. 348, 354, 368-70 (1980); Schlesinger v. Councilman, 420 U.S. 738, 746 (1975); O'Callahan v. Parker, 395 U.S. 258, 265 (1969); Burns v. Wilson, 346 U.S. 137, 140 (1953); Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

over them.

It is in these ways, through the three branches of the federal government, that the civilian community continues to control the jurisdiction exercised by courts-martial. The specific nature of the limitations placed on the exercise of jurisdiction by military courts and the actual extent to which civilians control the exercise of court-martial jurisdiction will become evident in the discussion of the material that follows.

## CHAPTER THREE

### NATURE OF COURT-MARTIAL JURISDICTION

The role of the armed forces in providing for the defense and protection of the United States is critical and unique. In 1788 James Madison observed that "[s]ecurity against foreign danger is one of the primitive objects of civil society [and] an avowed and essential object of the American union."<sup>208</sup> Because it was important to protect the United States from outside attack, and to have a national military force rather than to have to rely on the State militias, the Framers gave the federal government the power to raise and support an army and a navy.

It is unfortunate that there is still a need today for the nations of the world to possess and maintain large military forces. But since the threat of attack is always a possibility, and since nations must have the capability to strike preemptively when the need arises, large standing armies and navies are a continuing necessity. To be effective, officers and noncommissioned

---

<sup>208</sup> THE FEDERALIST NO. 41 (Madison) 269 (Middletown, Connecticut: Wesleyan University Press, Jacob E. Cooke, ed., 1961).

officers who serve in the armies and navies of the world must be proficient in "planning and waging campaigns, commanding troops, and engaging in military activity designed to prepare for armed conflict."<sup>209</sup> Enlisted personnel too must be physically fit and properly trained to perform adequately their assigned duties and responsibilities. It has been said that the "primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise"<sup>210</sup> and this observation is still valid.

The special function served by American military forces and the unique problems that arise as a result of the performance of the tasks assigned to it are the primary justification given for the existence of a separate military court system. In addition to the need to be self-policing, the nation's military forces must be independent and self-sufficient, and be able--

to move freely within [the] country, without regard to the local judicial machinery of the state, and, more important still, to project its operations beyond the territorial limits of the state, where the jurisdiction of the civil judiciary ordinarily ceases to function at all.<sup>211</sup>

---

<sup>209</sup> Hansen, Judicial Functions for the Commander?, 41 MIL. L. REV. 1, 30 (1968).

<sup>210</sup> United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>211</sup> ROMAN MILITARY LAW, supra note 56, at x.

It also is recognized that "the discipline necessary to the efficiency of the army and navy, require[s] other and swifter modes of trial than are furnished by the common law courts."<sup>212</sup>

The need to try special types of offenses and to impose certain kinds of punishments, and to treat some crimes more seriously than they would be treated in the civilian community is further reason for the military to have its own court system.<sup>213</sup> "Cowardice, desertion,

---

<sup>212</sup> Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

<sup>213</sup>

Apart from convenience and feasibility, there is an especially important reason for having service personnel subject to trial by military courts. There is a much higher probability that the persons who hear the case will understand and be responsive to the problems involved. . . .

Most important, a military court will often be better qualified than a civilian body to grapple with the problem of imposing a sentence on an accused, for it will have more acquaintance with the purposes which punishment should serve and more understanding of the seriousness of his crime in the military context.

R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 5 (Westport, Connecticut: Greenwood Press, 2nd ed., 1976 Reprint). See ROMAN MILITARY LAW, supra note 56, at xi.

Few would deny that the military justice system is not set up for the same purposes as the civilian system. Implicit in the differences between the two systems is the characterization of the military system as providing the justice of necessity. The special needs of the military have long been recognized as the

disrespect, sleeping on watch, [and] mutiny", for example, are grave crimes in the military community, but are not punishable under civilian laws.<sup>214</sup> The failure to obey orders also is a serious criminal offense in the military, but is not criminal in the civilian community.<sup>215</sup>

The military's role in protecting society from attack and invasion is important and its need to be able to act and act quickly in disciplining its members is generally understood. But there is another important reason for the military to have its own criminal justice

---

justification for the specialized procedures of the court-martial system.

Parker, Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction, 52 IND. L.J. 167, 168 n.9 (1976). See O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

<sup>214</sup> Heinl, Military Justice Under Attack, 110 ARMED FORCES J. INTER. 38, 40 (June 1973).

215

A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command, of a military nature; in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished, without the means of resistance.

Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-29 (1827).

system. It has long been recognized that society must be protected from those who serve in the military.

[Indeed] there is nothing so dangerous to the [safety of the] civil establishment of a state, as a licentious and undisciplined army. . . . An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, they are kept in good order and discipline. All history and all experience . . . . give the strongest testimony to this.<sup>216</sup>

Thus, a government which creates and establishes an armed force has to ensure that "order and discipline [is] kept up in it."<sup>217</sup> In addition, the government must ensure that those serving in the armed forces are responsible to their commanders and that commanders have the power to deal quickly with violations of the law and disciplinary misconduct.<sup>218</sup> It is for these reasons, that the Framers in 1789 provided Congress with the power to create a separate court system for the military to try soldiers and sailors for offenses committed while in military service.

In peacetime, the scope of jurisdiction exercised by military courts in the United States is limited to

---

<sup>216</sup> Grant v. Gould, 2 H.Bl. 69, 99-100 (1792). See O'Callahan v. Parker, 395 U.S. 258, 281 n.9 (1969) (Harlan, J. dissenting).

<sup>217</sup> Grant v. Gould, 2 H.Bl. 69, 99 (1792).

<sup>218</sup> Id.

the narrowest scope necessary to enable the military to carry out its duties and responsibilities in operating the military justice system, that is, in trying active duty personnel and, under some circumstances reservists and retired personnel, for service connected offenses under the Uniform Code of Military Justice. But in time of war the scope of military court jurisdiction can be expanded considerably to try not only common crimes and purely military offenses, but also violations of the law of war.

A. Types of Military Jurisdiction

In the first 200 years of American history, military courts have been called upon to exercise jurisdiction in various ways. Military justice or military law,<sup>219</sup> which is primarily concerned with the prosecution of common crimes and military offenses by court-martial, is perhaps the most common form of jurisdiction exercised by military courts. As a general rule, military justice extends only to personnel in the armed forces, but in the past some civilians have been tried by court-martial for the commission of offenses overseas and for crimes committed while accompanying troops during periods of combat. Military courts also

---

<sup>219</sup> Mott, Hartnett, Jr., & Morton, A Survey of the Literature of Military Law--A Selective Bibliography, 6 VAND. L. REV. 333 (1953).

exercise jurisdiction during times of martial rule, that is, when the domestic court system has ceased functioning and martial rule is in effect. In addition, military courts exercise jurisdiction when American military forces occupy a foreign nation in wartime, or when there is a rebellion, insurrection or civil war in the United States. On occasion too, military commissions and courts-martial can be used to try persons charged with violations of the law of war.

In short, military court jurisdiction is exercised in the following four situations:<sup>220</sup> (1) when martial rule is declared by the government and the domestic courts have ceased operation; (2) when military government is imposed on occupied foreign nations in wartime, or in the United States in time of civil war or rebellion; (3) when individuals are prosecuted by the Government for violations of the law of war; and (4) when persons subject to military justice are prosecuted for violating provisions of the military criminal code.

---

<sup>220</sup> See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 13-14 (1866), where three types of military court jurisdiction were identified by the Government in argument and were incorporated later by Chief Justice Chase in his concurring opinion. Id. at 141-42. See also McCauliff, The Reach of the Constitution: American Peace-time Court in West Berlin, 55 NOTRE DAME LAW. 682, 698-99 (1980). "The fourth type [of military jurisdiction], operative during and after World War II, received the recognition of the Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942) and In re Yamashita, 327 U.S. 1 (1946)." Id. at 699 n.83.

## 1. Martial Rule

The first type of military court jurisdiction is that which is exercised under martial rule or martial law.<sup>221</sup> In his concurring opinion in Ex parte Milligan,<sup>222</sup> Chief Justice Chase defined martial rule or martial law as the exercise of military power--

by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.<sup>223</sup>

---

<sup>221</sup> Charles Fairman suggests that the term "martial rule" is more descriptive of this form of military jurisdiction than the term "martial law." C. FAIRMAN, THE LAW OF MARITAL RULE 28-30 (Chicago, Illinois: Callaghan and Company, 2d ed., 1943).

<sup>222</sup> 71 U.S. (4 Wall.) 2, 132 (1866).

<sup>223</sup> Id. at 142 (emphasis added). See generally, Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 HARV. L. REV. 833 (1946); Underhill, Jurisdiction of Military Tribunals in the United States Over Civilians, 12 CALIF. L. REV. 75, 77-78 (1924). Radin, Martial Law and the State of Siege, 30 CALIF. L. REV. 634 (1942); Fairman, Martial Rule and the Suppression of Insurrection, 23 ILL. L. REV. 766 (1929); Ballantine, Qualified Marital Rule: Part I, 14 MICH. L. REV. 102 (1915). "In France and certain other European and South American countries [martial rule or martial law] is called 'state of siege.' In other countries it is variously characterized as 'state of reinforced protection,' 'suspension of constitutional guarantees,' 'state of emergency,' and so on." ROMAN MILITARY LAW, supra note 56, at viii.

More simply stated, martial rule is "the carrying on of government in domestic territory by military agencies, in whole or in part, with the consequent supersession of some or all of civil agencies."<sup>224</sup> Martial rule is used only within the geographical and territorial boundaries of the United States and is exercised by the Government only in time of war or national emergency.

The authority for the government's use of martial law is found in the provisions of the Constitution of the United States. Article I, Section 8, Clause 15 of the Constitution provides that Congress shall have the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>225</sup> Article II, Section 3 of the Constitution directs the President to "take Care that the Laws be faithfully executed."<sup>226</sup> And Article IV, Section 4 states that the United States is to "guarantee to every

---

<sup>224</sup> F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW § 14, at 10 (Harrisburg, Pennsylvania: The Military Service Publishing Co., 1940). Another definition of martial rule is "the exercise of some or all of the powers of government by the military, as necessity may require, within domestic territory, over the populace and sojourners within that territory." Alley, The Litigious Aftermath of Martial Law, 15 OKLA. L. REV. 17 (1962). In Duncan v. Kahanamoku, 327 U.S. 304 (1946), the Supreme Court of the United States notes that "[t]he Constitution does not refer to 'martial law' at all and [that] no Act of Congress has defined the term." Id. at 315.

<sup>225</sup> U.S. CONST., art. I, § 8, cl. 15.

<sup>226</sup> U.S. CONST., art. II, § 3.

State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive . . . [,] against domestic Violence."<sup>227</sup> These provisions of the Constitution grant Government the power to use martial rule when necessary to keep the peace and restore order in a national emergency or in time of war.<sup>228</sup>

Martial rule is available to the President or the Congress when the local government is not functioning or when the local court system is unable to exercise jurisdiction. The breakdown of local government may be due to a fire, flood, famine, hurricane, tornado, riot, insurrection, invasion by a foreign force, nuclear attack or some other form of national emergency. In the absence of civilian government, the President or Congress may direct the military to assert control over an area until the civilian government is restored.<sup>229</sup> Because of this, some refer to martial rule as the law of government

---

<sup>227</sup> U.S. CONST., art. IV, § 4. These provisions have been implemented by Congress in 10 U.S.C. §§ 331-34 (1983).

<sup>228</sup> "Our constitutional system contains within itself all that is essential to its own preservation." C. FAIRMAN, *THE LAW OF MARTIAL RULE* 47 (Chicago, Illinois: Callaghan and Company, 2d ed., 1943).

<sup>229</sup> Betts, Constitutional Powers and Limitations Respecting the Military, 2 ALA. LAW. 426, 430 (1941) [hereinafter cited as Constitutional Powers].

self-defense; in effect, it is rule by the executive branch of government until civilian government can be restored.

When the military takes over the responsibilities of government, the extent of its activity depends on what is needed to control a situation and to restore order. In some instances, martial rule may mean the exercise of complete military control over a large area; in other instances, it may involve nothing more than aiding a local government in carrying out its responsibilities after a natural disaster. The amount of control that is required is that which is necessary to put down the disturbance, to deal with the crisis, or to restore the civilian government to power. Martial rule is triggered by necessity or exigency, and more often than not, it is the President or a Governor who imposes martial rule. What is important to recognize is that martial rule can be used incrementally; that is, that it need not be used to displace civilian government in every instance, but can be used to aid government only to the extent necessary to deal with the matter presented.

When the military displaces civilian government, military law replaces civilian law and the military authorities become the leaders of government. In such situations, military courts, in the form of military

commissions, provost courts (police courts), or courts-martial,<sup>230</sup> are set up to deal with violations of military law. Those who are charged with violations of the law and who are tried and convicted can be punished as military law directs.

Martial rule may be imposed in peacetime and wartime, and it can be imposed by state or federal officials.<sup>231</sup> In 1842, the State of Rhode Island used martial rule to put down the Dorr Rebellion.<sup>232</sup> And on

---

<sup>230</sup> Courts-martial rarely, if ever, are used in United States in conjunction with the imposition of marital rule.

<sup>231</sup>

The United States as a nation has now had 175 years of experience with the problem of extending military aid to restrain civil disorder [the first being President George Washington's dispersal proclamations] addressed to the participants in the Whiskey Rebellion of 1794.

The records show thirty-two such proclamations in all, twenty-two of them issued before World War II, including the basic proclamation issued after the firing on Fort Sumter in 1861. Nine of these involved assistance to federal authorities, ten assistance to state authorities, and three assistance to territorial authorities. Since World War II there have been ten more, five involving federal support, four state support, and the last the 1968 District of Columbia situation.

Wiener, Martial Law Today, 55 A.B.A.J. 723, 730 (1969).

<sup>232</sup> Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849). See J. MARKE, VIGNETTES OF LEGAL HISTORY 65-80 (South Hackensack, New Jersey: Fred B. Rothman & Co., 1965). See also W. DOUGLAS, THE RIGHT OF THE PEOPLE 202-03 (Garden City, New York: Doubleday & Co., Inc., 1958) for a discussion of instances when State Governors have abused the use of martial rule.

December 7, 1941, the Governor of the Territory of Hawaii placed the Territory of Hawaii under martial rule and, two days later his action was approved by President Franklin D. Roosevelt acting under the Hawaiian Organic Act.<sup>233</sup> In Dorr's Rebellion and in the attack on Pearl Harbor, the crisis presented was significantly greater than the local civilian government could handle and immediate assistance from outside was both needed and welcomed.

The extent of jurisdiction exercised under martial rule depends on the type of emergency involved and the extent to which the civilian government is able to function. What must be guarded against is the use of martial rule to exercise more control than a particular

---

<sup>233</sup> W. DOUGLAS, THE RIGHT OF THE PEOPLE 204 (Garden City, New York: Doubleday & Co., Inc., 1958).

After December 7, 1941, military control was extended to every aspect of civil life. It governed not only the courts, but municipal affairs, operation of taxis, rent control, garbage disposal, house numbering, traffic, labor, press censorship, civilian defense, health, jails, prices, liquor, food control, transportation, gas rationing, and almost everything else under the Hawaiian sun.

Frank, Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii, 44 COLUM. L. REV. 639, 651 (1944). See Duncan v. Kahanamoku, 327 U.S. 304, 307-09 (1946); Anthony, Martial Law in Hawaii, 30 CALIF. L. REV. 371 (1942); King, The Legality of Martial Law in Hawaii, 30 CALIF. L. REV. 599 (1942).

situation requires.<sup>234</sup> If the use of martial law is more than is necessary to restore order, the exercise of such power may be unlawful.

The federal judiciary is the final authority for deciding whether the use of martial rule is lawful or unlawful. Chief Justice Hughes in Sterling v. Constantin,<sup>235</sup> writing for a unanimous Court, stated that "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."<sup>236</sup> When presented with questions concerning the lawful use of martial rule by the government, the federal courts and the Supreme Court of the United States have not hesitated to decide when the use of such power is valid and invalid.<sup>237</sup>

The first way then in which military jurisdiction can be exercised is during periods of national crisis when civilian courts are not functioning. The

---

<sup>234</sup> See Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 HARV. L. REV. 833, 835-37 (1946); Lobb, Civil Authority Versus Military, 3 MINN. L. REV. 105, 106-13 (1919).

<sup>235</sup> 287 U.S. 378 (1932).

<sup>236</sup> Id. at 401. See Scheuer v. Rhodes, 416 U.S. 232, 248-49 (1974), which reaffirmed the importance of the judiciary's role in deciding questions concerning the limits on the use of martial rule.

<sup>237</sup> See e.g., Ex parte Milligan, 71 U.S. (4 Wall.) 2, 131 (1866).

extent to which jurisdiction is exercised by military courts when the local courts are closed or unable to function, that is, when they are unable to ensure fair trials in all cases, depends on the degree to which martial rule has been imposed. In some situations, as in Hawaii in 1941, military courts may exercise total and complete jurisdiction; in other situations, the jurisdiction exercised by military courts may be considerably less.

## 2. Military Government

The second kind of military jurisdiction is that exercised by military government courts. Military government is the exercise of authority "by a belligerent power over invaded territory and the inhabitants thereof."<sup>238</sup> It also is defined as dealing with "the administration of occupied enemy territory."<sup>239</sup>

---

<sup>238</sup> G. GLENN AND A. SCHILLER, THE ARMY AND THE LAW 46 (New York: Columbia University Press, 1943). See also id. at 115-51. In Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), Chief Justice Chase, in his concurring opinion, defined military government as that "superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress." Id. at 142.

<sup>239</sup> Deutsch, Military Government: Administration of Occupied Territory, 33 A.B.A.J. 133 (1947) [hereinafter cited as Military Government]. See also G. VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 263-72 (Minneapolis, Minnesota: The University of Minnesota Press, 1957).

The purpose of military government is:

(1) to relieve the combat troops of the responsibility of civil administration in occupied areas; (2) to restore law and order thereby rendering the communication and supply lines secure; (3) to make the economic resources of the country available for military operations; and (4) to carry out the military and political objectives framed by higher authority.<sup>240</sup>

When a belligerent power invades, conquers, and occupies a territory, it has a responsibility to restore law and order in the area and to begin discharging the functions of government over the inhabitants and their property.

The responsibility for establishing a military government starts upon invasion:

[As soon as there are civilians within the lines to be controlled, the military government officers in the advanced units go ashore and get to work--seeing to it that the civilian dead are buried, that the water system is put into operation, that stores of food are distributed in an orderly fashion, and similar measures of first aid [are taken care of].<sup>241</sup>

Life in the occupied areas continues and it is the

---

<sup>240</sup> Gorman, Military Courts in Occupied Areas, 17 OHIO BAR ASSOC. REP. 479-80 (Dec. 1944) [hereinafter cited as Military Courts in Occupied Areas]. See Nobleman, The Administration of Justice in the United States Zone of Germany, 8 FEB. B.J. 70, 72-73 (1946).

<sup>241</sup> Fairman, Some Observations on Military Occupation, 32 MINN. L. REV. 319, 321 (1948); Military Courts in Occupied Areas, supra note 240, at 479.

responsibility of the military commanders of the occupying force to take over the functions of the displaced government.<sup>242</sup>

In exercising military control over an occupied area, the occupying force does not become a sovereign nation, but it acquires some of the attributes and powers of a sovereign, and it retains them until the occupation ends.<sup>243</sup> The powers exercised by a military government are limited only by "certain provisions of the Hague Convention of 1907 concerning the laws and customs of war

---

242

The scene in the occupied areas is usually one of great confusion and chaos. Homes and buildings have been destroyed, public services wrecked by our fire or demolished by the enemy retreating, food supplies are generally low, and generally the shell shocked civilian population have either fled to the hills, or are roaming about in a dazed condition. Officials and police may have fled, and without the assistance of our troops the local inhabitants are powerless to restore law and order or prevent the looting of bombed homes and abandoned buildings.

Military Courts in Occupied Areas, supra note 240, at 479. See Colby, Occupation under the Laws of War, 26 COL. L. REV. 146 (1926).

243

A military government, once established, endures until the occupying force exercising it is driven out or is withdrawn from the territory over which it has jurisdiction, or the civil authority of the government of the occupying force is established, or the authority of the vanquished enemy is reestablished by treaty and taken over in fact.

Constitutional Powers, supra note 229, at 428.

on land,"<sup>244</sup> the provisions of the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War of 1949,<sup>245</sup> and the directives or regulations issued by the occupying force. Otherwise the Commanding General of the occupying force, subject of course to any directions from his government, is in total control of the military government, and whatever he deems necessary is considered an appropriate exercise of his power.

Once a belligerent force has taken control of an inhabited territory, it is required by international law to set up a government to exercise control over the inhabitants and the property in the occupied territory. One aspect of the military government is the creation of a court system to enforce the orders and enactments issued by the military government. In so doing-

the military may employ and utilize such of the established courts and other agencies of the vanquished government . . . as it sees fit. Or it may employ its own tribunals for administering civil and criminal laws in their application to the inhabitants and property in the occupied area, and, such tribunals may be created and their jurisdiction prescribed, enlarged or diminished

---

<sup>244</sup> Fairman, Some Observations on Military Occupation, 32 MINN. L. REV. 319, 321 (1948).

<sup>245</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War 3-9, opened for signature August 12, 1949, 6 U.S.T. 3516, 3559-60, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for the United States February 2, 1956).

at the will of the occupying military.<sup>246</sup>

What kinds of courts are set up, if any, and the scope of their jurisdiction is within the discretion of the Commanding General of the occupying force.

In World War II the national government of Austria was restored to power quickly after the invasion of the Allied Forces and there was no need to set up a military government or to establish a military court system.<sup>247</sup> Upon the arrival of the Allied Forces in Germany in September 1944, however, a military government and a military court system were set up immediately. General Eisenhower issued an order (1) establishing a Military Government, (2) suspending the operation of the German court system, and (3) creating a system of Military Government Courts.<sup>248</sup>

The Military Government Courts created by General Eisenhower in Germany consisted of three types:

General [Military Government] Courts  
[which] could impose any lawful sentence  
including death; Intermediate Courts  
[which] could impose any lawful sentence

---

<sup>246</sup> Constitutional Powers, supra note 229, at 428-29. For a detailed discussion of the legal aspects of military government, see Military Government, supra note 239, at 134-35.

<sup>247</sup> Military Government, supra note 239, at 134-35.

<sup>248</sup> Nobleman, Military Government Courts: Law and Justice in the American Zone of Germany, 33 A.B.A.J. 777, 778-79 (1947).

except death, imprisonment in excess of ten years or fines in excess of \$10,000, [and] Summary Courts [which] were limited to prison sentences of one year or fines up to \$1000 or both.<sup>249</sup>

These three types of courts tried only criminal cases. Later other types of Military Government Courts were established to try civilian cases.<sup>250</sup> By the end of the war, the Military Government Courts in Germany exercised jurisdiction over every German in the American Zone-- approximately 17 million people.<sup>251</sup>

As a general rule military government courts have "jurisdiction over violations of the laws and usages of war, of military government enactments and of laws of the occupied country itself."<sup>252</sup> In addition, they have jurisdiction over all persons "except members of the Allied forces, Prisoners of War and diplomatic agents."<sup>253</sup> In the end, however, it is the military commander of the occupied force who determines the extent of jurisdiction to be exercised by the military govern-

---

<sup>249</sup> Id. at 779.

<sup>250</sup> Id. at 779 nn.28-29.

<sup>251</sup> Nobleman, The Administration of Justice in the United States Zone of Germany, 8 FED. B.J. 70 (1946).

<sup>252</sup> Military Government, supra note 239, at 135-36. See Military Courts in Occupied Areas, supra note 240 at 481; Nobleman, American Military Government Courts in Germany, 40 AM. J. INTER. L. 803, 807 (1946).

<sup>253</sup> Military Government, supra note 239, at 136.

ment courts.

The second way then in which military jurisdiction can be exercised is through military government courts established in an occupied foreign nation. The extent of the jurisdiction exercised by military government courts is up to the Commanding General of the occupying force. In some situations, as happened in Germany during World War II, military government courts can replace completely the local court system and exercise full criminal court jurisdiction.<sup>254</sup> In other situations, as in Austria, there may be no need for military government courts or a military government to be created.

---

254

Although the Military Government Regulations make no mention of the jurisdiction of Military Government Courts over German civil litigation, it is submitted that they would have such jurisdiction if the Theater Commander chose to exercise it. However, it is readily apparent that Military Government Legal Officers are not equipped to determine disputes arising out of German Civil Law, and no attempt has been made to exercise such jurisdiction except in cases where the determination of some provision of the German Civil Code was necessary to a finding of guilt or innocence. This has arisen in connection with charges of theft, where a determination of the title to property was necessary in order to determine the guilt or innocence of the defendant.

Nobleman, American Military Government Courts in Germany, 40 AM. J. INTER. L. 803, 808-09 (1946).

### 3. Law of War

The third kind of military court jurisdiction is that exercised by the military over persons charged with violations of the law of war. The authority for the government's use of military tribunals to prosecute offenses against the law of war is found in various provisions of the Constitution and in numerous statutes of the United States.<sup>255</sup>

Article I, Section 8, Clause 10 of the Constitution provides that the Congress shall have the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>256</sup> The law of war is one aspect of the Law of Nations or International Law, as it is more commonly known, and it is applicable to all countries of the world.<sup>257</sup> The law of war prescribes "the status, rights and duties of enemy nations as well as of enemy individuals" during war-time,<sup>258</sup> and is provided for in Articles 18 and 21 of the Uniform Code of Military Justice.

---

<sup>255</sup> See generally Green, The Military Commission, 42 AM. J. INT. L. 832, 834-41 (1948), for a detailed discussion of the authority for the exercise of jurisdiction by military commissions to try violations of the law of war.

<sup>256</sup> U.S. CONST., art. I, § 8, cl. 10.

<sup>257</sup> See Cowles, Trial of War Criminals by Military Tribunals, 30 A.B.A.J. 330 (1944).

<sup>258</sup> Ex parte Quirin, 317 U.S. 1, 28 (1942).

Article 18 of the Uniform Code of Military Justice states that "[g]eneral courts-martial have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."<sup>259</sup> In addition, Article 21 of the Code provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other tribunals.<sup>260</sup>

Articles 104<sup>261</sup> and 106<sup>262</sup> of the Code also authorize trial by a general court-martial or a military commission for the offenses of aiding the enemy or spying.<sup>263</sup>

---

<sup>259</sup> Art. 18, U.C.M.J., 10 U.S.C. § 818 (1983) (emphasis added).

<sup>260</sup> Art. 21, U.C.M.J., 10 U.S.C. § 821 (1983).

<sup>261</sup> Art. 104, U.C.M.J., 10 U.S.C. § 904 (1983).

<sup>262</sup> Art. 106, U.C.M.J., 10 U.S.C. § 906 (1983).

<sup>263</sup>

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial

There is little question that the trial of persons by military tribunals for violations of the law of war is constitutional. The issue was raised in Ex parte Quirin<sup>264</sup> and In re Yamashita,<sup>265</sup> and in both cases the Supreme Court of the United States held the use of military commissions to try offenses against the law of war to be constitutional.

In these cases, the President of the United States decided that the violations of the law of war should be tried by specially convened military commissions. These types of military commissions are "short-lived with jurisdiction limited to hearing accusations against particular persons of violations of the law of war."<sup>266</sup> In this sense, they are different from the usual type of military commission--those used in combat or set up in conjunction with military government--which tend to sit for longer periods of time and handle many more cases.<sup>267</sup>

It is important to note that the jurisdiction of

---

and punishment by military tribunals.

Ex parte Quirin, 317 U.S. 1, 31 (1942).

<sup>264</sup> 317 U.S. 1, 24-31 (1942).

<sup>265</sup> 327 U.S. 1, 5-9 (1946).

<sup>266</sup> McCauliff, The Reach of the Constitution: American Peace-time Court in West Berlin, 55 NOTRE DAME LAW. 682, 699 (1980).

<sup>267</sup> Id.

military commissions is limited to trying only unlawful combatants, that is, "belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."<sup>268</sup> These are usually spies or those who slip through enemy lines without uniforms "for the purpose of waging war by destruction of life or property."<sup>269</sup> Prisoners of War, on the other hand, are considered to be lawful combatants and are subject to trial by court-martial under Article 2(a)(9) of the Uniform Code of Military Justice.<sup>270</sup>

Military commissions specially convened by the President to try violations of the law of war or the Code are not used often, but when the need arises, these courts are available for use by the President to try such offenses. Military commissions are used most often in time of combat, in conjunction with military government operations, and in periods of martial rule; but on occasion too, they can be used to try violations of the law of war.

---

<sup>268</sup> Ex parte Quirin, 317 U.S. 1, 31 (1942).

<sup>269</sup> Id.

<sup>270</sup> Art. 2(a)(9), U.C.M.J., 10 U.S.C. § 802(a)(9) (1983).

#### 4. Military Justice

The fourth kind of military jurisdiction is military justice or military law. It is exercised by court-martial, and of the four kinds of military jurisdiction, it is the form used most often.

Today, over two million men and women are serving on active duty in the armed forces of the United States. In addition, over 1 million service men and women are members of the reserves or have retired status. Under the provisions of the Uniform Code of Military Justice, all those serving on active duty, all those who are retired regulars, and under certain circumstances, all of those serving in the reserves, are subject to court-martial jurisdiction.

In fiscal year 1983, over 30,000 American soldiers were tried by court-martial for committing common crimes and various military offenses at home and abroad.<sup>271</sup> During the same period, military commanders imposed over 313,000 article 15's, or nonjudicial

---

<sup>271</sup> See generally ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION, 18 M.J. CXV, CXLII TO CXLIII, CLII-CLIII, CLXII to CLXIII, CLXIX to CLXX (1983) [hereinafter cited as ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS].

of the Uniform Code of Military Justice.<sup>272</sup>

What these figures confirm is what has been true for years, namely, that "there are [nearly as many] criminal prosecutions begun every year under the Uniform Code of Military Justice [as] in all the United States district courts combined."<sup>273</sup> While military practice is a specialized field requiring particular expertise, and while the jurisdiction exercised by courts-martial is limited to "the least possible power adequate to the end proposed,"<sup>274</sup> trials by court-martial nevertheless account for a large percentage of the federal criminal cases tried in the United States each year.

Chief Justice Chase, in his concurring opinion in Ex parte Milligan, defined military law as the law "found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces."<sup>275</sup> Some years later, Justice Gray speaking of military law said:

Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment

---

<sup>272</sup> Id.

<sup>273</sup> Schaap, Justice for G.I. Joe, 8 JURIS DOCTOR 14, 15 (March 1978).

<sup>274</sup> United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955).

<sup>275</sup> 71 U.S. (4 Wall.) 2, 142 (1866).

of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.<sup>276</sup>

In short, military law or military justice can be defined as the exercise of jurisdiction by the military over its personnel and under some circumstances, those connected with the military, for military and other offenses committed in time of war and peace.<sup>277</sup>

The 1984 Manual for Courts-Martial states that the purpose of military law "is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."<sup>278</sup> The enactment of the Uniform Code of Military Justice by the Congress, the issuance of the Manual for Courts-Martial by the President, and the regular review of military court decisions by the United States Court of Military Appeals, federal district and circuit courts of appeal, and the Supreme Court of the United States are evidence of an effort on the part of the civilian Government to

---

<sup>276</sup> Smith v. Whitney, 116 U.S. 167, 183-84 (1886).

<sup>277</sup> For a good discussion of military law see ROMAN MILITARY LAW, supra note 56, at vii-viii.

<sup>278</sup> Para. 3, MCM, 1984, at 1-1.

see that the purposes of military law set forth in the Manual are fulfilled.

The main source of law governing the exercise of jurisdiction by courts-martial is the Uniform Code of Military Justice.<sup>279</sup> This statute, consisting of 140 Articles, is basically a criminal code for the military services and is applicable to all men and women serving in the armed forces. Its provisions are supplemented by regulations issued by the President and by the various branches of the armed forces, and by decisions rendered by the United States Courts of Military Review, the United States Court of Military Appeals, the federal district courts, the federal circuit courts of appeal, and the Supreme Court of the United States. Military law also includes "the inherent authority of military commanders."<sup>280</sup>

The Uniform Code of Military Justice provides for the imposition of nonjudicial punishment under Article 15.<sup>281</sup> The Uniform Code of Military Justice also provides for three levels of courts: summary, special, and general--each dealing with crimes of different seriousness, and each having a limit on the sentence

---

<sup>279</sup> Arts. 1-140, U.C.M.J., 10 U.S.C. §§ 801-940 (1983).

<sup>280</sup> Para. 3, MCM, 1984, at I-1.

<sup>281</sup> Art. 15, U.C.M.J., 10 U.S.C. § 815 (1983).

which can be imposed.<sup>202</sup>

The Code is specific about who can impose nonjudicial punishment, and what kinds of punishment can be imposed under Article 15. The Code is also specific about who can convene a court-martial, what is a properly constituted court-martial, who is subject to court-martial jurisdiction, what types of offenses can be tried by a court-martial, and what kinds of punishment can be imposed.

These are the four types of military jurisdiction: martial rule, military government, law of war, and military justice. What is important now is to examine the agencies which exercise these four types of military jurisdiction.

## B. AGENCIES EXERCISING MILITARY COURT JURISDICTION

Military jurisdiction can be exercised by commanding officers, courts-martial, military commissions, and courts of inquiry.

### 1. Commanding Officers

Commanding officers exercise a considerable amount of military jurisdiction through the imposition of

---

<sup>202</sup> Arts. 16-20, U.C.M.J., 10 U.S.C. §§ 816-20 (1983).

nonjudicial punishment.<sup>283</sup> Under Article 15 commanding officers have the power to impose nonjudicial punishment on officers and enlisted personnel for minor offenses in violation of the Uniform Code of Military Justice. Article 15 of the Code provides that "any commanding officer may, in addition to or in lieu of admonition or reprimand, impose . . . disciplinary punishments for minor offenses without the intervention of a court-martial."<sup>284</sup> In Fiscal Year 1983, commanders in the Coast Guard imposed 3,142 Article 15's, commanders in the Air Force imposed 30,014 Article 15's, commanders in the Navy, 148,472 Article 15's, and commanders in the Army, 132,045 Article 15's. That is a total of 313,673 Article 15's for all branches of the armed forces imposed in a year.<sup>285</sup> Of the 2.1 million men and women serving in the armed forces, 15% received Article 15's in Fiscal Year 1983.

The types of punishment that can be imposed under Article 15 are different for officers and enlisted personnel. Officers can receive restriction to a

---

<sup>283</sup> Art. 15, U.C.M.J., 10 U.S.C. § 815 (1983). See generally SWORDS AND SCALES, supra note 15, at 122-27.

<sup>284</sup> Art. 15(b), U.C.M.J., 10 U.S.C. § 815(b) (1983).

<sup>285</sup> See generally ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271, at CXV, CXLII to CXLIII, CLII to CLIII, CLXII to CLXIII, CLXIX to CLXX.

specified area for up to 30 days, and depending on the rank of the commanding officer imposing the punishment, may also receive arrest in quarters for up to 30 days, forfeiture of pay up to one-half of one month's pay for not more than 30 days, restriction to a specific area for up to 60 days, and detention of up to one-half month's pay for up to three months.

The punishment which can be imposed on enlisted personnel under Article 15 is more varied. An enlisted person can receive correctional custody for up to 7 days, forfeiture of up to 7 days pay, reduction in rank to the next highest pay grade, extra duty for up to 7 days, restriction to a specified area for no more than 14 days, detention of pay for up to 14 days, and if on a vessel, confinement on bread and water for no more than three days.

The punishments provided for in Article 15 are less serious than those which can be imposed by a court-martial, but more serious than administrative punishment which can consist of "counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges."<sup>204</sup> The purpose of Article 15 is to give commanders "an essential and prompt means of maintaining good order and dis-

---

<sup>204</sup> Para. 1g, MCM, 1984, at V-2.

cipline" and to enable commanders to promote "positive behavior changes in servicemembers without the stigma of a court-martial conviction."<sup>287</sup> Since a court-martial is a federal trial under Article I of the Constitution, a court-martial conviction is, in effect, a federal court conviction. Because of this, receipt of nonjudicial punishment is often deemed more desirable by an accused than a trial by court-martial. In addition, if an accused believes that the punishment imposed by his commander under Article 15 is "unjust or disproportionate to the offense," the accused may appeal the punishment to the next higher commander.<sup>288</sup> The imposition of Article 15 punishment is also advantageous to the government because it is a quick and inexpensive way to handle minor offenses that otherwise would have to be referred to trial by court-martial.

Crimes punishable under Article 15 are the minor offenses set forth in the Punitive Articles of the Code, Articles 77-134.<sup>289</sup>

Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's

---

<sup>287</sup> Para. 1c, MCM, 1984, at V-1.

<sup>288</sup> Art. 15(e), U.C.M.J., 10 U.S.C. § 815(e) (1983).

<sup>289</sup> Arts. 77-134, U.C.M.J., 10 U.S.C. §§ 877-934 (1983).

age, rank, duty assignment, record, and experience; and the maximum sentence imposable for the offense if tried by general court-martial.<sup>290</sup>

As a general rule, "a minor offense is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial."<sup>291</sup>

The determination of whether a crime is a minor offense or not is a matter of discretion with the commanding officer who has the power to impose Article 15 punishment. The Manual states, however, that the imposition of "nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense."<sup>292</sup> An accused, in other words, can receive punishment under Article 15 for an offense and be tried by court-martial for the same offense if a superior commander determines that the offense is a crime that deserves to be tried by court-martial. In such case, the accused "may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in deter-

---

<sup>290</sup> Para. 1e, MCM, 1984, at V-1.

<sup>291</sup> Id.

<sup>292</sup> Id. See R.C.M. 907(b)(2)(D)(iv), MCM, 1984, at II-115.

mining an appropriate sentence."<sup>293</sup>

Except for service personnel attached to or embarked on a vessel, any service member, who is given an Article 15 by a commanding officer, has the right to refuse the Article 15 and demand trial by court-martial.<sup>294</sup> What this means is that, but for the exception noted, every Article 15 offense can potentially be tried by court-martial.<sup>295</sup> Thus, in charging an offense under Article 15, the commanding officer must ensure that the military has jurisdiction over the person and jurisdiction over the offense, and that there is sufficient evidence to prove each and every element of the offense beyond a reasonable doubt.<sup>296</sup>

---

<sup>293</sup> Para. 1e, MCM, 1984, at V-1. See Art. 15(f), 10 U.S.C. § 815(f) (1983); R.C.M. 1001(c)(1)(B), MCM, 1984, at II-142.

<sup>294</sup> Once an Article 15 is refused and a trial by court-martial is demanded, it may not be possible for the accused to withdraw his demand for trial and offer to accept the previously refused Article 15. See United States v. Davis, 18 M.J. 820, 822 (AFCMR 1984)(offer of accused to withdraw demand for trial and to accept previously offered Article 15 denied). See also para. 10b., Air Force Regulation 111-9 (31 Aug. 79), Nonjudicial Punishment under Article 15, UCMJ. See generally NONJUDICIAL PUNISHMENT, S. REP. NO. 1911, 87th Cong., 2d Sess. (1962).

<sup>295</sup> Para. 3, M.C.M., 1984, at V-2. "This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulation of the Secretary concerned." Id.

<sup>296</sup> But see Navy regulations which provide that nonservice connected offenses can be punished under Article 15 on board a ship. 0102b Navy Reg. Supp. to the Manual for Courts-Martial 1-7 (Change 5, 20 May 1986).

The commanding officer is the first agency which exercises military jurisdiction. Because of the volume of Article 15's imposed, well over a quarter of a million each year, and because every Article 15 can be refused and tried by court-martial if the accused desires (except on board ship), the role of the commander in the exercise of military jurisdiction is very important. What is clear, is that commanders probably handle as much "military justice" at the Article 15 level of the military justice system, as do commanders at all of the other levels combined.

## 2. Courts-Martial

While the number of courts-martial tried each year is significantly less than the number of Article 15's imposed, the impact and the long-range effect of a court-martial conviction is considerably more severe than receipt of nonjudicial punishment. The court-martial is the second agency exercising military jurisdiction and it is perhaps the form which is best known to the public.

The Uniform Code of Military Justice provides for three types of courts-martial: summary court-martial, special court-martial, and general court-martial. Each type of court-martial is distinguished by the type of commanding officer who can convene it and by the limits on the maximum punishments which it can impose.

The summary court-martial consists of a single commissioned officer serving on active duty.<sup>297</sup> In conducting a summary court-martial, it is the responsibility of the summary court-martial officer to "thoroughly and impartially inquire into both sides of the matter" and to "ensure that the interests of both the Government and the accused are safeguarded and that justice is done."<sup>298</sup> In effect, the summary court officer is the judge, jury, prosecutor, and defense counsel. For this reason, the Code provides that an accused cannot be tried by a summary court-martial unless he agrees to trial by such a court.<sup>299</sup> If the accused objects to trial by summary court-martial, the commander may forward the charges to the next higher commander for trial by special court-martial.

The purpose of the summary court-martial is to

---

<sup>297</sup> Arts. 16(3), 20, 24, U.C.M.J., 10 U.S.C. §§ 816(3), 820, 824 (1983).

The officer so acting must review the evidence in a case, counsel and assist the accused concerning his rights, and make findings of guilt or innocence. Should the summary court-martial officer find the accused guilty, he also must assist the military member in presenting matters in extenuation and mitigation before sentencing.

Young, An Overview of the Military Criminal Justice System, 19 PRAC. LAW. 45, 46-47 (Feb. 1973).

<sup>298</sup> R.C.M. 1301(b), M.C.M., 1984, at II-201.

<sup>299</sup> Art. 20, U.C.M.J., 10 U.S.C. § 820 (1983).

try minor violations of the Uniform Code of Military Justice using simplified court procedures. In Fiscal Year 1983, the Coast Guard tried 206 summary courts-martial, the Air Force 28, the Navy 8,361, and the Army 2,856.<sup>300</sup> The Navy as a rule tries far more summary courts-martial than do the other branches of the armed forces.

A summary court-martial can try only enlisted personnel and has no authority to try commissioned officers, warrant officers, cadets, aviation cadets or midshipmen. The punishment a summary court-martial can impose is somewhat limited:

The maximum penalty which can be adjudged in a summary court-martial if the accused is not attached to or embarked in a vessel is confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade.<sup>301</sup>

---

<sup>300</sup> See generally ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271 at CXV, CXLII to CXLIII, CLII to CLIII, CLXII to CLXIII, CLXIX to CLXX.

<sup>301</sup> Discussion, R.C.M. 1301(d)(1), MCM, 1984, at II-201.

If the accused is attached to or embarked in a vessel, the maximum penalty is confinement for 3 days on bread and water or diminished rations, confinement for 24 days (30 days if no confinement on bread and water or diminished rations is adjudged), forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade.

Id.

The limitations on punishment are even more restrictive with regard to those in the grade of E-5 and above. For such persons the only punishment that can be imposed by a summary court-martial is restriction to a specified area for up to 2 months, forfeiture of up to two-third's of 1 month's pay, and a one grade reduction.<sup>302</sup>

The special court-martial consists of a military judge and three or more court members, or upon the request of the accused, can be composed of a military judge alone.<sup>303</sup> The right to be tried by a military judge alone is a right that is frequently exercised by those tried by special court-martial, and most of the cases tried by special court-martial are cases tried before a military judge. In Fiscal Year 1983, 13,314 of the 15,762 cases tried by special courts-martial were tried by military judge alone, approximately 90%.<sup>304</sup>

The purpose of the special court-martial is to try more serious offenses warranting longer periods of confinement and heavier forfeitures and fines than can be imposed by a summary court-martial. A special court-martial can try all persons subject to the Uniform Code of

---

<sup>302</sup> R.C.M. 3001(d)(2), MCM, at II-201 to II-202.

<sup>303</sup> See generally Douglass, The Judicialization of Military Courts, 22 HASTINGS L.J. 213, 216-19 (1971).

<sup>304</sup> ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271, at CXV, CXLII to CXLIII, CLII to CLIII, CLXII to CLXIII, CLXIX to CLXX.

Military Justice for offenses against the Code. The Manual also provides that in some cases too, a special court-martial can try a capital case,<sup>305</sup> but it is unlikely that this power will ever be used since cases warranting the imposition of the death penalty can easily be forwarded to a general court-martial convening authority, except perhaps in combat.

Like the punishment power of a summary court-martial, the punishment that can be imposed by a special court-martial is limited: a special court-martial can adjudge up to 6 months confinement at hard labor, hard labor without confinement for up to 3 months, forfeiture of 2/3's pay per month for up to 6 months, and reduction to the lowest enlisted grade.<sup>306</sup> In some cases a special court-martial can adjudge a bad conduct discharge,<sup>307</sup>

---

<sup>305</sup> R.C.M. 201(f)(2)(A) & (C)(iii), MCM, 1984, at II-10 to II-11.

<sup>306</sup> R.C.M. 201(f)(2)(B)(i), MCM, 1984, at II-10. In some cases, the maximum sentence authorized by the Manual for Courts-Martial for minor offenses is less than the maximum sentence which can be imposed by a special court-martial; in such a case, the maximum sentence that can be imposed for the minor offense is the maximum punishment set forth in the Manual. See App. 12, Maximum Punishment Chart, MCM, 1984, A12-1 to A12-8.

<sup>307</sup> R.C.M. 201(f)(2)(B)(ii), MCM, 1984, at II-10.

The DD (dishonorable discharge) had been adjudged by general courts of both services apparently since the beginning in 1775. But in 1855, the Navy asked for permission to award a "lesser" punitive discharge at a lesser court-martial. The Navy's position was that, because most of its ships were small, they

but only where the convening authority (1) convenes the court as a Bad Conduct Discharge (BCD) special court-martial; (2) a military judge is detailed to hear the case; (3) the accused is represented by counsel, and (4) a verbatim record is prepared.<sup>308</sup>

In Fiscal Year 1983, the Coast Guard tried 206 regular special courts-martial, the Air Force 853, the Navy 5,842, and the Army 2,856. In the same year, the Coast Guard tried no BCD special courts-martial, the Air Force 416, the Navy 5,739, and the Army

---

lacked the requisite personnel to staff a general court. But despite this, the Navy claimed, all ships needed a means to rid themselves of chronic offenders. Congress accepted this argument, and what was then known as the Navy summary court was granted authority to hand down a BCD.

SWORDS AND SCALES, supra note 15, at 65. In 1948, Congress, in the "Elston Act [gavel] the Army permission to use the Navy's century-old Bad Conduct Discharge (BCD)." Id.

<sup>308</sup> See generally arts. 19, 23, U.C.M.J., 10 U.S.C. §§ 819, 823 (1983); R.C.M. 201(f)(2), MCM, 1984, at II-10. R.C.M. 201(f)(2)(C)(iii) states, however, that the "Secretary concerned may authorize, by regulation, officers exercising special court-martial jurisdiction to refer capital offenses, other than those described in subsection (f)(2)(C)(i) of [Rule 201], to trial by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command." Id. at II-11. Paragraph 2-16, Army Regulation 27-10 (Sept. 1984), provides that a BCD special court-martial must be convened by a general court-martial convening authority. See generally Blake, Punishment Aspects of a Bad Conduct Discharge, JAG J. 5 (Dec. 1952).

2,075.<sup>309</sup> Again the Navy tries far more special and BCD special courts-martial than do the other branches to the armed forces.

The general court-martial can consist of a military judge and five or more court members, or upon request of the accused, may consist of a military judge alone, except in capital cases. Like the special court-martial, most of the general courts-martial are tried before military judge alone. In Fiscal Year 1983, 1,967 of the 2,964 cases tried by general court-martial were tried by military judge alone or approximately 66%.<sup>310</sup>

The purpose of the general court-martial is to try the most serious offenses committed in the military, that is, felonies, serious misdemeanors and the more egregious military offenses. The general court-martial can try all persons subject to the Uniform Code of Military Justice and, in addition, it may try any service member or civilian "who by the law of war is subject to trial by military tribunal for any crime or offense against . . . [t]he law of war" or who, because of the imposition of military government, is subject to trial by

---

<sup>309</sup> ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271, at CXV, CXLII to CXLIII, CLII to CLIII, CLXII to CLXIII, CLXIX to CLXX.

<sup>310</sup> Id.

military tribunal for violations of the local law of occupied territory.<sup>311</sup>

A general court-martial may punish a violation of the Code up to the maximum sentence provided for in the Maximum Punishment Chart found in the Manual for Courts-Martial.<sup>312</sup> The death penalty can only be imposed where a case has been referred to trial by court-martial as a capital case, and it can only be imposed by a court consisting of members.<sup>313</sup> A military judge, in other words, cannot adjudge a death penalty. When a general court-martial sits as a law of war court, it can impose

---

<sup>311</sup> R.C.M. 201(f)(1)(B)(i)(a) & (b), MCM, 1984, at II-10. This general court-martial jurisdiction, however, is virtually never exercised.

<sup>312</sup> App. 12, Maximum Punishment Chart, MCM, 1984, at A12-1.

<sup>313</sup> The death penalty is mandatory for conviction of Article 106, (spies), and either death or life imprisonment must be imposed for a conviction of Article 118(1)(premeditated murder) or 118(4)(felony murder). The death penalty may be imposed for conviction of Article 94 (mutiny or sedition), Article 106a (espionage in peacetime), Article 110a (willfully and wrongfully hazarding a vessel), or Article 120 (rape), and in wartime for conviction of Article 82 (solicitation), Article 85 (desertion), Article 90 (assaulting or willfully disobeying a superior commissioned officer), Article 99 (misbehaving before the enemy), Article 100 (subordinate compelling a commander to surrender), Article 101 (improper use of a countersign), Article 102 (forcing a safeguard), Article 104 (aiding the enemy), or Article 113 (misbehavior of a sentinel). See generally Art. 52(a)(1) & (b)(1), U.C.M.J., § 852(a)(1) & (b)(1) (1983). See also R.C.M. 201(f)(2)(C)(iii), MCM, 1984, at II-11.

any punishment authorized under the law of war.<sup>314</sup>

In a general court-martial, unlike a summary or special court-martial, an accused is entitled to an Article 32 investigation before a general court-martial can take place.<sup>315</sup> The Article 32 investigation is a pretrial hearing in which the evidence against the accused is reviewed to determine if there is sufficient evidence to warrant a trial of the charges against the accused by general court-martial. At the Article 32 investigation "the accused is given the opportunity to cross-examine witnesses against him, if they are available, and to present anything he may desire either in defense or mitigation."<sup>316</sup> The record of the Article 32 investigation is reviewed then by the staff judge advocate and the convening authority and a decision is made by the convening authority as to whether or not to refer the charges to a general court-martial.

These three types of courts, the summary court-martial, the special court-martial, and the general court-martial, are the courts that exercise court-martial jurisdiction in the military. In Fiscal Year 1983, over 30,000 soldiers were tried and convicted by these three

---

<sup>314</sup> Art. 18, U.C.M.J., 10 U.S.C. § 818 (1983).

<sup>315</sup> Art. 32, U.C.M.J., 10 U.S.C. § 832 (1983).

<sup>316</sup> Young, An Overview of the Military Criminal Justice System, 19 PRAC. LAW. 45, 48 (Feb. 1973).

types of courts-martial for offenses committed in violation of the Uniform Code of Military Justice; an increase of about 1,000 cases from the previous year.<sup>317</sup>

### 3. Military Commissions

A military commission is the third agency exercising military jurisdiction and it is used during periods of war or martial rule to try persons who are not members of the armed forces and who are not subject to the Uniform Code of Military Justice.

Military commissions have been used primarily by the Army and in the past have been referred to by different names. Sometimes they have been called military commissions; at other times they have been called Councils of War, Military Tribunals, Provost Courts, Military Government Courts, Provincial Courts, Courts of Conciliation, Boards of Arbitration, Superior Courts or Appellate Courts.<sup>318</sup> In recent times most of the military commissions have been called Military Government Courts. While the names change and the formats, procedures and personnel differ slightly, the function served is the same, namely to administer

---

<sup>317</sup> See generally ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271, at CXV, CXLII to CXLIII, CLII to CLIII, CLXII to CLXIII, CLXIX to CLXX.

<sup>318</sup> See WINTHROP, supra note 51, at 803-04; Madsen v. Kinsella, 343 U.S. 347, 348 n.11 (1952).

justice in a wartime setting to those who are not subject to the Uniform Code of Military Justice.<sup>319</sup>

Military commissions have been used often in the history of the nation during periods of war and national conflict, and they have served the needs of the nation well. General Scott first used military commissions in 1847, during the occupation of Mexico, to try Mexican citizens for serious criminal offenses and offenses against the United States forces.<sup>320</sup> He also used them to try American soldiers for serious non-military offenses. In addition, military commissions were used during the Civil War and during Reconstruction, and during World War I and World War II. During the time of the Allied invasion and occupation of Germany, military government courts (military commissions) tried thousands of criminal cases a year.<sup>321</sup> And on July 2, 1942, President Roosevelt used a military commission to try the eight German saboteurs who had landed on the shores of the East Coast of the United States.<sup>322</sup>

Winthrop describes the need for the military

---

<sup>319</sup> See Note, Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War, 56 VA. L. REV. 947, 954-64 (1970).

<sup>320</sup> WINTHROP, supra note 51, at 832-33 n.66.

<sup>321</sup> See supra note 251, and accompanying text.

<sup>322</sup> Ex parte Quirin, 317 U.S. 1, 22 (1942). See infra note 394, and accompanying text.

commission as follows:

The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the force and to certain specific military offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.

. . . Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court, which . . . is essentially a distinct tribunal from the court-martial.<sup>323</sup>

The rules of evidence and procedure in military commissions are more relaxed than those applied in courts-martial and there is no appeal from the findings and sentence adjudged by a military commission. The military commission, thus, is an important asset to the military during periods of combat and national emergency.

Military commissions are convened by the theater commander, or by subordinate commanders to whom the authority to convene has been delegated. The jurisdiction of the military commission extends to all persons who violate the law of war, and to those who during periods of military occupation and government violate general orders and proclamations of military authorities

---

<sup>323</sup> WINTHROP, supra note 51, at 831.

and local civilian laws. In some instances, the jurisdiction of military commissions overlaps with the jurisdiction of courts-martial for offenses in violation of the law of war; in such cases, the commanding general has to decide which type of court to refer the charges for trial. As a practical matter, military personnel are usually tried by court-martial for violations of the Uniform Code of Military Justice.<sup>324</sup> Military commissions also may impose any punishment permissible under the law of war,<sup>325</sup> or which is authorized by military regulation or directives promulgated by the Congress or the President.

Like the court-martial and the commanding officer, the military commission is crucial to the smooth operation of the military justice system, especially in wartime. It serves an important function during periods of conflict and unrest and has a critical role to play in time of military government and martial rule.

---

<sup>324</sup> See United States v. Calley, 46 CMR 1131 (ACMR), aff'd, 22 USCMA 534, 48 CMR 19 (1973), rev'd sub nom., Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom., Calley v. Hoffman, 425 U.S. 911 (1976).

<sup>325</sup> See Arts. 52, 64-78, 117-28, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for the United States February 2, 1956).

#### 4. Courts of Inquiry

The fourth kind of agency exercising military jurisdiction is a court of inquiry. Article 135 of the Uniform Code of Military Justice provides for the use of courts of inquiry<sup>326</sup> and the Manual for Courts-Martial identifies the court of inquiry as one of the agencies which can exercise military jurisdiction.<sup>327</sup>

The purpose and function of a court of inquiry is described as follows:

A naval or military court of inquiry is not a judicial tribunal. It is instituted solely for the purpose of investigation, as an assistance to the President, the head of the Department, or the commanding officer, in determining whether or not any further proceeding, executive or judicial, ought to be taken in relation to the subject-matter of the inquiry. There is no issue joined between the parties, and its proceedings are not judicial.<sup>328</sup>

The court of inquiry is thus basically an investigatory body available for use by a convening authority or other government official when the need arises.

Article 135 of the Code provides that a court

---

<sup>326</sup> Art. 135, U.C.M.J., 10 U.S.C. § 935 (1983).

<sup>327</sup> Para. 2(b)(3), MCM, 1984, at 1-1.

<sup>328</sup> The W.B. Chester's Owners v. United States, 19 Ct. Cl. 681, 683 (1884). See WINTHROP, supra note 51, at 517-18.

of inquiry "may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned [to investigate any matter]."<sup>329</sup> Article 135 further provides that a court of inquiry shall consist of three or more officers and that the convening authority shall appoint a counsel to assist the court in conducting its investigation.<sup>330</sup> In addition, Article 135 states that the members of a court of inquiry, the reporter, counsel and interpreters are to be sworn and that witnesses may be called to testify and present evidence.<sup>331</sup> Article 135 provides too that if an individual, who is subject to the Code or employed by the Department of Defense, becomes a subject of the investigation, that person shall be identified as a party to the investigation and "shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence."<sup>332</sup>

---

<sup>329</sup> Art. 135(a), U.C.M.J., 10 U.S.C. § 935(a) (1983).

<sup>330</sup> Art. 135(b), U.C.M.J., 10 U.S.C. § 935(b) (1983)..

<sup>331</sup> Art. 135(e), U.C.M.J., 10 U.S.C. § 935(e) (1983).

<sup>332</sup> Art. 135(c), U.C.M.J., 10 U.S.C. § 935(c) (1983). See Stallknecht, Courts of Inquiry and Investigations: Some Observations Concerning Common Errors, JAG J. 5, 11 (Oct. 1953), for a discussion of the policy of The Judge Advocate of the Navy concerning the rights of parties in courts of inquiry.

At the conclusion of the proceedings, a court of inquiry will "make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority."<sup>333</sup> In addition, the court of inquiry will forward an authenticated record of the proceedings to the convening authority.<sup>334</sup> On the basis of the information submitted, the convening authority will decide what, if any, action is to be taken on the findings presented.

In the past, courts of inquiry have been used by Presidents to investigate matters of national concern. Winthrop notes that a court of inquiry was "convened by President Jefferson in 1808, in the case of Brig. Gen. Jas. Wilkinson, to investigate the charge of his having cooperated with the Spanish government of Louisiana adversely to the United States."<sup>335</sup> This, most likely, was in connection with the trial of Aaron Burr. On the basis of the information obtained from the investigation, General Wilkerson subsequently was tried by court-martial and was acquitted.<sup>336</sup> In 1836, President Jackson used a court of inquiry "to inquire

---

<sup>333</sup> Art. 135(g), U.C.M.J., 10 U.S.C. § 935(g) (1983).

<sup>334</sup> Art. 135(h), U.C.M.J., 10 U.S.C. § 935(h) (1983).

<sup>335</sup> WINTHROP, supra note 51, at 518.

<sup>336</sup> Id.

into 'the causes of the failure of the campaigns in Florida against the Seminole Indians, under the command of Gens. Gaines and Scott,' and also into the campaign against the hostile Creeks."<sup>337</sup>

In 1884, President Arthur appointed a court of inquiry to investigate an offense at the United States Military Academy concerning the first black cadet.<sup>338</sup> A few years later, President Arthur appointed another court of inquiry to examine the financial dealings of Brigadier General David A. Swaim, The Judge Advocate General of the Army. In General Swaim's case, the court of inquiry consisted of one major general and two brigadier generals and its purpose was to investigate General Swaim's relationship and business dealings with a brokerage house in New York. As a result of the court of inquiry The Judge Advocate General later was tried by court-martial.<sup>339</sup>

General court-martial convening authorities have used courts of inquiry to vindicate the character or the conduct of an officer who has been criticized in an official report or rebuked by a superior (usually

---

<sup>337</sup> Id.

<sup>338</sup> Robie, The Court-Martial of a Judge Advocate General: Brigadier General David A. Swaim, 56 MIL. L. REV. 211, 213-14 (1972).

<sup>339</sup> Id. at 218. See infra note 509, and accompanying text.

initiated by the officer criticized),<sup>340</sup> to gather facts on complicated matters for the purpose of informing or advising the command,<sup>341</sup> and to seek determinations "as to whether a disability or a death was the result of misconduct or whether it is to be given a line of duty status."<sup>342</sup>

General court-martial convening authorities also have used courts of inquiry to determine "whether there should be a trial by court-martial in a particular instance."<sup>343</sup> This occurs when--

accusations have been made, or circumstances of a criminating character have been reported, against a certain military person; or where, a crime or disorder having apparently been committed by several military persons, it may be

---

<sup>340</sup> WINTHROP, supra note 51, at 523.

<sup>341</sup> Id.

<sup>342</sup> Gordon, Responsibilities of the Investigating Officer, JAG J. 14, 15 (May 1952). See Stallknecht, Courts of Inquiry and Investigations: Some Observations Concerning Common Errors, JAG J. 5-10 (Oct. 1953).

<sup>343</sup> WINTHROP, supra note 51, at 522 (bold print deleted). See United States v. Shibley, 112 F. Supp. 734, 740 (S.D. Calif. 1953) (motion to dismiss complaint, which alleged failure to testify before a court of inquiry convened by the Commanding General of El Toro Marine Corps Air Base to investigate violations of the Uniform Code of Military Justice and nonservice income and activities of the named officers, denied by federal district court); Lucas v. Matthews, 90 F. Supp. 21, 23-24 (D. Me. 1950) (court-martial which tried the accused was properly convened and recommendation of the court of inquiry and action taken based on the recommendation of the court of inquiry held not material to the question of jurisdiction in the accused's court-martial).

doubtful what particular individual or individuals may be implicated or punishable;--in such cases a court of inquiry may often profitably be convened with directions to report all the facts, and, (as is generally required,) to express also an opinion whether or not a court-martial should be ordered for the trial of the person or persons accused or found chargeable.<sup>344</sup>

It is the use of a court of inquiry in this way that involves most directly the exercise of military jurisdiction. As is the case with nonjudicial punishment administered under Article 15, a determination must be made by the court of inquiry as to whether a court-martial would have jurisdiction over the person and the offense.

In conclusion, there are four kinds of military jurisdiction--martial rule, military government, law of war, and military justice--and there are four agencies which exercise military jurisdiction--commanders, courts-martial, military commissions, and courts of inquiry. The focus of this paper is on military justice and on the exercise of jurisdiction by courts-martial.

### C. Sources of Court-Martial Jurisdiction

Court-martial jurisdiction has two aspects to it. One aspect is domestic in its orientation and is concerned primarily with maintaining order and

---

<sup>344</sup> WINTHROP, supra note 51, at 522.

discipline in the armed forces during peacetime and wartime. The Articles of War and the Uniform Code of Military Justice are examples of this form of military jurisdiction and this is the form of military jurisdiction with which most citizens and military personnel are familiar. Its basic purpose is to provide a criminal justice system for the armed forces.

The other aspect of military criminal jurisdiction is international in character and is primarily concerned with implementing the laws and customs of war, that is, "the principles and rules of public international law which deal with the conduct, conditions, and incidents of warfare."<sup>345</sup> This aspect of military jurisdiction is not as well known as the domestic side, but it has played an important role in American history, especially during wartime and periods of national crisis.

#### 1. Constitutional Law

The Constitution is the most important source of authority for the exercise of court-martial jurisdiction. Chief Justice Chase noted this many years ago in his concurring opinion in Ex parte Milligan,<sup>346</sup> when he

---

<sup>345</sup> Cowles, Trial of War Criminals by Military Tribunals, 30 A.B.A.J. 330 (1944).

<sup>346</sup> 71 U.S. (4 Wall.) 2 (1866).

said "that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."<sup>347</sup>

Article I, Section 8, Clause 1 of the Constitution grants Congress the power to "provide for the common Defence . . . of the United States."<sup>348</sup> Clause 9 of the same section empowers the Congress to "constitute Tribunals inferior to the supreme Court."<sup>349</sup> Clause 10 of Section 8 also gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>350</sup> In Clause 11, Congress is given the power to "declare War . . . and make Rules concerning Captures on Land and Water."<sup>351</sup> And in Clauses 12 and 13, Congress is granted the power "to raise and support Armies"<sup>352</sup> and "to provide and maintain a Navy."<sup>353</sup> Perhaps the most important provision for purposes of the exercise of court-martial jurisdiction is the power granted to Con-

---

<sup>347</sup> Id. at 141.

<sup>348</sup> U.S. CONST., art. I, § 8, cl. 1.

<sup>349</sup> U.S. CONST., art. I, § 8, cl. 9.

<sup>350</sup> U.S. CONST., art. I, § 8, cl. 10.

<sup>351</sup> U.S. CONST., art. I, § 8, cl. 11.

<sup>352</sup> U.S. CONST., art. I, § 8, cl. 12.

<sup>353</sup> U.S. CONST., art. I, § 8, cl. 13.

gress in Clause 14 of Section 8, that being the power "to make Rules for the Government and Regulation of the land and naval Forces."<sup>354</sup> Every example of the exercise of jurisdiction by a military court can be traced to one of these seven clauses.

In addition to these provisions, there are others relating to the local militia which also serve as a source of authority for the exercise of court-martial jurisdiction. Clause 15 of Article I, Section 8, for example, gives Congress the power to call "forth the Militia to execute the Laws of the Union, [and to] suppress Insurrections and repel Invasions."<sup>355</sup> In addition, Clause 16 gives Congress the power "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."<sup>356</sup>

To resolve any doubts about the power of Congress to act in these areas, Clause 18 of Section 8 in Article I grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer there-

---

<sup>354</sup> U.S. CONST., art. I, § 8, cl. 14.

<sup>355</sup> U.S. CONST., art. I, § 8, cl. 15.

<sup>356</sup> U.S. CONST., art. I, § 8, cl. 16.

of."<sup>357</sup>

The President of the United States is also given military related powers under the Constitution. Section 2 of Article 2 declares that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."<sup>358</sup> This provision gives the President authority to command and control the armed forces and to implement the laws enacted by Congress concerning the regulation of military conduct and behavior.<sup>359</sup>

In addition, Article II, Section 3 of the Constitution provides that the President "shall take Care that the Laws be faithfully executed" and that the President "shall Commission all the Officers of the United States."<sup>360</sup> What is clear from these provisions is that the President of the United States is in charge of, responsible for, and exercises control over the

---

<sup>357</sup> U.S. CONST., art. I, § 8, cl. 18.

<sup>358</sup> U.S. CONST., art. II, § 2.

<sup>359</sup> Article 36 of the Code, 10 U.S.C. § 836 (1983) states that the President may prescribe "[p]retrial, trial and post-trial procedures . . . for cases . . . triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry." And Article 56 of the Code, 10 U.S.C. § 856 (1983), states that the "punishment which a court-martial may direct for an offense may not exceed [the] limits . . . the President may prescribe for that offense."

<sup>360</sup> U.S. CONST., art II, § 3.

military forces of the United States. The President is responsible, not only for signing the Uniform Code of Military Justice into law, but also for issuing rules and regulations governing trial by courts-martial, and for setting the maximum punishments for offenses. In short, the Constitution "invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war."<sup>361</sup>

The Fifth Amendment to the Constitution sometimes too is cited as a source of authority for the exercise of jurisdiction by courts-martial. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.<sup>362</sup>

The Fifth Amendment explicitly excludes "cases arising in the land or naval forces"<sup>363</sup> from the requirement of an

---

<sup>361</sup> Ex parte Quirin, 317 U.S. 1, 26 (1942).

<sup>362</sup> U.S. CONST., amend. V (emphasis added).

<sup>363</sup> Id.

indictment by a grand jury, and this is considered to be evidence that the military has authority to try soldiers by court-martial for violations of the Code.

In addition to the provisions in the Constitution, other legal sources are identified as supporting the exercise of jurisdiction by courts-martial. The Uniform Code of Military Justice,<sup>364</sup> for example, with its 140 articles is an important source of law on the subject of court-martial jurisdiction because it defines the legal and jurisdictional limits of the exercise of jurisdiction by court-martial.

Articles 2<sup>365</sup> and 3<sup>366</sup> of the Code identify the persons who are subject to trial by court-martial and Article 5<sup>367</sup> prescribes the territorial limitations of the Code. Articles 16 to 21<sup>368</sup> set out the legal and jurisdictional limits of summary, special, and general courts-martial and define the sentencing limitations of

---

<sup>364</sup> Arts. 1-140, U.C.M.J., 10 U.S.C. §§ 801-940 (1983). "The UCMJ establishes court-martial and military justice procedures, defines court-martial jurisdiction, enumerates substantive offenses, and authorizes the President to prescribe maximum punishments and further procedural rules." Parker, Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction, 52 IND. L.J. 167 (1976).

<sup>365</sup> Art. 2, U.C.M.J., 10 U.S.C. § 802 (1983).

<sup>366</sup> Art. 3, U.C.M.J., 10 U.S.C. § 803 (1983).

<sup>367</sup> Art. 5, U.C.M.J., 10 U.S.C. § 805 (1983).

<sup>368</sup> Arts. 16-21, U.C.M.J., 10 U.S.C. §§ 816-21 (1983).

each. Articles 22 to 29<sup>369</sup> deal with the convening and composition of courts-martial and article 37<sup>370</sup> discusses the problem of unlawful command influence. Articles 55 to 58<sup>371</sup> deal with sentencing matters, and Article 77 to 134,<sup>372</sup> the Punitive Articles, enumerate the types of offenses that are subject to court-martial jurisdiction. The Uniform Code of Military Justice also incorporates federal and state offenses through Articles 133 and 134<sup>373</sup> and violations of lawful general regulations of the government through Article 92.<sup>374</sup>

The Manual for Courts-Martial is another source of law supporting the exercise of court-martial jurisdiction.<sup>375</sup> The Manual is an executive order of the Presi-

---

<sup>369</sup> Arts. 22-29, U.C.M.J., 10 U.S.C. §§ 822-29 (1983).

<sup>370</sup> Art. 37, U.C.M.J., 10 U.S.C. § 837 (1983).

<sup>371</sup> Arts. 55-58(a), U.C.M.J., 10 U.S.C. §§ 855-58(a) (1983).

<sup>372</sup> Arts. 77-134, U.C.M.J., 10 U.S.C. §§ 877-934 (1983).

<sup>373</sup> Arts. 133-134, U.C.M.J., 10 U.S.C. §§ 933-34 (1983).

<sup>374</sup> Art. 92, U.C.M.J., 10 U.S.C. § 892 (1983).

<sup>375</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984) See Exec. Order No. 12,484, 45 Fed. Reg. 28,825 (1984).

The first official Manual for Courts-Martial was published in 1898, and was revised in 1901, 1905, 1908, 1917, 1921, 1928, 1949 and, with the implementation of the UCMJ, in 1951.

dent which supplements and explains the provisions of the Uniform Code of Military Justice.<sup>376</sup> It is issued by the

---

Willis, The United States Court of Military Appeals-- "Born Again", 52 IND. L.J. 151, 159 n.51 (1976). The Manual for Courts-Martial was revised again in 1969. The latest edition of the Manual, the first complete revision since 1969, was issued on August 1, 1984 by Executive Order No. 12473 (1984). See generally App. 21, Analysis, Introduction, MCM, 1984, at A21-1 to A21-3. See SWORDS AND SCALES, supra note 15, at 54-57; Quinn, CourtsMartial Practice: A View from the Top, 22 HASTINGS L.J. 201, 203-08 (1971).

<sup>376</sup> See 10 U.S.C. § 121 (1983). Prior to the enactment of the Uniform Code of Military Justice and the issuance of the Manual for Courts-Martial, the Navy used as its Manual a work entitled NAVAL COURTS AND BOARDS.

The last version of NAVAL COURTS AND BOARDS, dated 1937, was reprinted in 1945. Its predecessors were NAVAL COURTS AND BOARDS 1923 and NAVAL COURTS AND BOARDS 1917. Prior to the publication of NAVAL COURTS AND BOARDS 1917, the procedural law was set down in Navy Regulations and court-martial forms were contained in "Forms of Procedure for Courts and Boards" published in 1902 and 1910.

Mott, Hartnett, Jr., & Morton, A Survey of the Literature of Military Law--A Selective Bibliography, 6 VAND. L. REV. 333, 342 n.31 (1953). A textbook entitled NAVAL JUSTICE (Washington, D.C.: U.S. Government Printing Office, 1945) was prepared by the Office of the Judge Advocate General of the Navy and served as a supplement to the NAVAL COURTS AND BOARDS issued in 1937. Id.

The United States Coast Guard also had a Manual for handling disciplinary matters.

Prior to the effective date of the Code, when not serving under the Navy, the Coast Guard had its own disciplinary laws [the Articles for the Discipline of the United States Coast Guard found in the Act of 4 August 1949, 63 Stat. 495]. When operating under those laws, the Coast Guard had its own manual called Coast Guard Courts and Boards, of which editions appeared in 1949, 1935, and 1923.

President under the authority of Article 36 of the Code which provides that the President may prescribe "procedures, including modes of proof, for cases . . . triable in courts-martial, military commissions and other tribunals, and procedures for courts of inquiry . . . which shall not be contrary to or inconsistent with the code."<sup>377</sup> The procedures prescribed by the President in the Manual have the force and effect of law and "are on the same level of authoritativeness as the [Uniform Code of Military Justice]."<sup>378</sup> The United States Court of Military Appeals has described the Manual as "the 'Bible' for the military lawyer[er],"<sup>379</sup> and it is basically a handbook, albeit a long one, on the practice of law before courts-martial. It discusses in some detail pretrial, trial, and post trial procedures, motions that can be raised during trial, rules of evidence, substantive offenses, and the maximum sentences which can be imposed for each court-martial offense.

In addition, the Manual discusses the jurisdictional requirements of a court-martial. Rule 201, for example, discusses the nature of court-martial jurisdic-

---

Id. at 343.

<sup>377</sup> Art. 36, U.C.M.J., 10 U.S.C. § 836 (1983).

<sup>378</sup> United States v. Bridges, 15 CMR 731, 734 (ABR 1954).

<sup>379</sup> United States v. Hemp, 1 USCMA 280, 285, 3 CMR 14, 19 (1952).

tion and summarizes briefly the law of jurisdiction over the person and jurisdiction over the offense. Rules 501 to 506 and Rules 601 to 604 discuss matters concerning the convening of courts-martial and properly constituted courts-martial. Rules 1003 and 1004 discuss the types of punishment that can be imposed by court-martial and the procedures for dealing with capital cases. And in Appendix 12 of the Manual, a Table of Maximum Punishments sets forth the maximum punishment that can be imposed for each offense under the Code.

Both the Navy and the Coast Guard have issued supplements to the Manual for Courts-Martial.

The Naval Supplement includes regulations supplementing the Manual, material as to Courts of Inquiry and Investigations, regulations as to Admiralty claims procedure, instructions as the delivery of naval personnel to civilian authorities and other matters. The Coast Guard Supplement contains, substantially the same material as is contained in the Naval Supplement.<sup>380</sup>

The Army and the Air Force, on the other hand, have relied on the issuance of regulations to deal with the details of administering military justice.

The Code and the Manual are two important sources of law on the subject of court-martial jurisdic-

---

<sup>380</sup> Mott, Hartnett, Jr., & Morton, A Survey of the Literature of Military Law--A Selective Bibliography, 6 VAND. L. REV. 333, 343 (1953).

tion. Another source of law of court-martial jurisdiction are the regulations issued by the President,<sup>381</sup> by the Department of Defense, by the Department of Transportation (Coast Guard), and by the various branches of the armed forces (Army, Navy, and Air Force).<sup>382</sup> Both the Uniform Code of Military Justice and the Manual for Courts-Martial authorize the Secretaries of the various services to implement the provisions of the Code and the

---

<sup>381</sup> 10 U.S.C. § 121 (1983) (President can prescribe regulations to carry out the functions of his office). See Fratcher, Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals, 34 N.Y.U.L. REV. 861 (1959); Kurtz v. Moffitt, 115 U.S. 487, 503 (1885) (authority of the President to issue binding regulations acknowledged). See also e.g., 10 U.S.C. § 3061 (1983) (the President has authority to issue regulations for the government of the Army) and 10 U.S.C. § 8061 (1983) (the President has authority to issue regulations for the government of the Air Force).

382

All these regulations have the force of law, unless they conflict with, amend, or overturn a provision of the MCM or the UCMJ. In practice, an accused benefits when these regulations establish a procedure not required under the UCMJ or MCM. Further, these additional advantages for an accused are seldom overturned by an appeals court because the latter generally reviews only those matters that are prejudicial to the accused's interests, not those that are prejudicial to the government's interest.

E. BYRNE, MILITARY LAW 12 (Annapolis, Maryland: Naval Institute Press, 3rd ed., 1981). See generally H. MOYER, JR., JUSTICE AND THE MILITARY 6-8 (Washington, D.C.: Public Law Education Institute, 1972); Alley, The Overseas Commander's Power to Regulate the Private Life, 37 MIL. L. REV. 57 (July 1967).

Manual.<sup>303</sup> The regulations, directives and instructions issued by the President, the Department of Defense and the service Secretaries supplement the provisions of the Code and the Manual.

These regulations have the force of law<sup>304</sup> and the failure to obey them, at least those which are punitive in nature, may be a violation of Article 92 of the Code--the failure to obey a lawful general regulation.<sup>305</sup> The failure to obey a regulation that is advisory, informative or directing, however, is not a violation of Article 92.<sup>306</sup>

The directives set forth in regulations, especially those issued by the various services, can be important with regard to the exercise of jurisdiction by courts-martial. Information contained in the regulations regarding rules for the devolution of command, minimum

---

<sup>303</sup> See e.g., Art. 2(c), U.C.M.J., 10 U.S.C. § 802(c); R.C.M. 503(b)(1) & (c), MCM, 1984, at II-53 to II-54.

<sup>304</sup> Ex parte Reed, 100 U.S. 13, 22 (1879); Gratiot v. United States, 45 U.S. (4 How.) 80, 117 (1846); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-02 (1842).

<sup>305</sup> Art. 92, U.C.M.J., 10 U.S.C. § 892 (1983).

<sup>306</sup> United States v. Nardell, 21 USCMA 327, 329-30, 45 CMR 101, 103-04 (1972) (regulations must be definitive enough so that one knows what conduct is prohibited). See United States v. Kennedy, 11 M.J. 669, 671-72 (CGCMR), pet. denied, 12 M.J. 103 (C.M.A. 1981) (Coast Guard regulation prohibiting the use, sale, and possession of drugs was definite enough to give the accused notice of what conduct was unlawful).

qualifications for enlistments, and lists of drugs that are unlawful to use, possess, or sell, can be important in showing that the court-martial was properly convened and properly constituted, or in establishing that the court had jurisdiction over the person or the offense.

The decisions of the military and civilian courts are another source of law supporting the exercise of jurisdiction by courts-martial. Since 1951, the Boards of Review and United States Courts of Military Review have decided over a quarter of a million cases, many involving jurisdictional issues. The Courts of Military Review "review questions of both law and fact,"<sup>397</sup> and can consider jurisdictional questions whether they were raised at trial or not. The docket of the Court of Military Review is made up of cases in which the sentence adjudged consists of death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement at hard labor for a year or more, and in which the accused has not waived appellate review.<sup>398</sup> In such cases, review by the Courts of Military Review is automatic.

Since 1951, the United States Court of Military Appeals has decided over thirty thousand cases and many

---

<sup>397</sup> E. BYRNE, MILITARY LAW 13 (Annapolis, Maryland: Naval Institute Press, 3rd ed., 1981).

<sup>398</sup> Art. 66(b), U.C.M.J., 10 U.S.C. § 866(b) (1983).

of these have dealt with problems of court-martial jurisdiction. The Court of Military Appeals reviews only questions of law and can consider questions of jurisdiction whether they were raised at trial or not. The Uniform Code of Military Justice provides that the Court of Military Appeals shall review:

- (1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;
- (2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
- (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.<sup>309</sup>

After it reviews a case, the Court of Military Appeals may affirm the findings and sentence, or reverse the findings and sentence and return the case to The Judge Advocate General of the service concerned, or to the convening authority, for disposition not inconsistent with the Court's holding.

The decisions of these two courts, the United States Court of Military Appeals and the United States Court of Military Review, account for most of the court decisions on the subject of court-martial jurisdiction.

---

<sup>309</sup> Art. 67(b), U.C.M.J., 10 U.S.C. § 867(b) (1983).

The United States federal district courts and the circuit courts of appeals also have decided cases on the exercise of court-martial jurisdiction. As a general rule, the federal courts review military cases only after an accused has exhausted available military remedies. It is only then that a party can file a petition for extraordinary relief in a federal district court challenging a military conviction or sue for back pay in the Court of Claims. The federal court's main responsibility in such cases is to ensure that the court-martial had jurisdiction in the case and that no errors of constitutional nature occurred. In reviewing the jurisdictional aspects of the case, the federal courts should look for the presence of each of the five elements of court-martial jurisdiction. If the five elements of jurisdiction are present and no constitutional problems are found, then the court can find that the court-martial had jurisdiction to try the case and the judgment will be upheld.

The Supreme Court of the United States also reviews military cases and in the past has rendered some important decisions on the exercise of court-martial jurisdiction. The most recent decisions of the Supreme Court in this area have dealt mainly with issues concerning jurisdiction over the person and jurisdiction over the offense, and not with issues concerning properly convened or properly constituted courts-martial or

sentencing matters.<sup>390</sup> The decisions of the Supreme Court and the federal courts thus are another important source of law of court-martial jurisdiction.

A further source of law on court-martial jurisdiction are the decisions of The Judge Advocates General on cases appealed under Article 69 of the Code.<sup>391</sup> These cases are usually special courts-martial and involve findings and sentences that are not serious enough to be reviewed by the Courts of Military Review or the Court of Military Appeals. In such cases, the issues of jurisdiction may be addressed for the first time on review, and on occasion, a decision of The Judge Advocate General on an Article 69 appeal may be noted in print.<sup>392</sup> Sometimes too opinions of The Judge Advocates General are issued on matters concerning the jurisdiction of courts-martial, but these opinions are not generally available to the public.

These are the sources of the law of court-martial jurisdiction which can be traced to provisions of the Constitution. The other major source of law supporting the exercise of jurisdiction by courts-martial is found

---

<sup>390</sup> But see McClaghry v. Deming, 186 U.S. 49, 69 (1902)(conviction by an improperly constituted court-martial held a nullity).

<sup>391</sup> Art. 69, U.C.M.J., 10 U.S.C. § 869 (1983).

<sup>392</sup> See e.g., Criminal Law Section, THE ARMY LAWYER 15, para. 1 (Mar. 1977).

in international law.

## 2. International Law

The second aspect of military criminal jurisdiction is international in character and is primarily concerned with implementing the laws and customs of war. The source of authority for the exercise of such military jurisdiction is found in international law--specifically in the laws and customs of war. This is a body of law that "exists for the punishment of offenses committed in time of armed hostilities in violation of the laws of war."<sup>393</sup>

The trial of the German saboteurs who landed on the shores of the East Coast in 1942 is an example of the use of the international aspect of military jurisdiction; a trial using international law and not the domestic law. In the saboteur case, Ex parte Quirin,<sup>394</sup> the President of the United States convened a military commission consisting of seven generals to try the saboteurs for among other things violations of the law of war. Under Article 12 of the Articles of War, the President also could have convened a general court-mar-

---

<sup>393</sup> Cowles, Trial of War Criminals by Military Tribunals, 30 A.B.A.J. 330 (1944).

<sup>394</sup> 317 U.S. 1 (1942).

tial to try the same offenses.<sup>395</sup> When military jurisdiction is used this way, "the law of nations is the ultimate source of the authority [for establishing] military tribunals to try offenses against the law of war."<sup>396</sup>

The law of war is part of the law of nations

---

<sup>395</sup> See Act of June 4, 1920, ch. 227, art. 12, 41 Stat. 759, 789 (corresponds to Art. 18, U.C.M.J., 10 U.S.C. § 818 (1983)).

<sup>396</sup> Cowles, Trial of War Criminals by Military Tribunals, 30 A.B.A.J. 330, 331 (1944). Commenting on a Department of Justice policy, which precludes the trial of discharged service members for war crimes committed while on active duty, Professor Joseph W. Bishop, Jr. of the Yale Law School, notes how easily the distinction between the domestic and international aspects of military justice can be blurred:

Moreover, the Department of Justice seems to take the position that an honorably discharged serviceman cannot be tried for a war crime committed prior to his discharge. The Supreme Court did hold some years ago that such a discharged soldier could not be tried for an ordinary offense--i.e., one that was not a war crime--committed prior to his discharge. But it had earlier held, in World War II, that a Nazi saboteur who was an American civilian could constitutionally be tried by a military commission for a war crime, and it did not overrule that decision. I am myself of the opinion (though I seem to be in a minority) that a discharged serviceman can be tried by a military court on a charge of violating the law of war. In any case, Congress could and should give the federal courts jurisdiction to try such cases; under the Geneva Conventions, in fact, the United States is obligated to "enact any legislation necessary to provide effective penal sanctions" for persons committing "grave breaches."

BISHOP, supra note 55, at 292.

and is found in treaties, like the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1864, 1906, 1929, and 1949.<sup>397</sup> It is also found in the Visiting Forces Agreements entered into by the United States and countries in which United States service members are stationed.

Under international law, a friendly nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty.<sup>398</sup>

The North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) signed by 12 nations is an example of a visiting forces agreement.<sup>399</sup> The United States

---

<sup>397</sup> See e.g., Article 66, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature August 12, 1949, art. 66, 6 U.S.T. 3516, 3559-60, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for the United States February 2, 1956).

<sup>398</sup> Discussion, R.C.M. 201(b)(3), MCM, 1984, at 11-8. For a discussion of the visiting forces doctrine see Chief Justice Marshall's opinion for the Court in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 139-46 (1812).

<sup>399</sup> Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, signed June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (effective August 23, 1953). See also Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany (Supplement

also has signed similar agreements with other nations.<sup>400</sup>  
The law of war too can be "found in history, in books[,]  
. . . in opinions of the Judge Advocate General, and in  
accounts of what actually took place on the battle-  
field."<sup>401</sup>

The Manual makes reference to the international  
aspect of military jurisdiction when it provides that  
general courts-martial may be used to try "any person who  
by the law of war is subject to trial by military

---

Agreement), 14 U.S.T. 531, T.I.A.S. No. 5351 (effective  
July 1, 1963); Status of Forces Policies, Procedures, and  
Information, Army Regulation 27-50/Secretary of the Navy  
Instruction 5820.4F/Air Force Regulation 110-12 (Dec. 1,  
1984). See generally Schwartz, International Law and the  
NATO Status of Forces Agreement, 53 COLUM. L. REV. 1091  
(1953); J. SNEE & A. PYE, STATUS OF FORCES AGREEMENTS AND  
CRIMINAL JURISDICTION (New York: Oceana Publications,  
Inc., 1957); S. LAZAREFF, STATUS OF MILITARY FORCES  
UNDER CURRENT INTERNATIONAL LAW (Leyden, Netherlands:  
A.W. Sijthoff, 1971). See also United States v.  
Singleton, 15 M.J. 579, 580-82 (ACMR 1983) (importation of  
dangerous drugs into the Federal Republic of Germany by  
an American serviceman held to be an offense under the  
Code and triable by court-martial).

<sup>400</sup> See e.g., Mutual Defense Treaty between the  
United States of America and the Republic of Korea,  
Regarding Facilities and Areas and the Status of United  
States Armed Forces in the Republic of Korea, 17 U.S.T.  
1677, T.I.A.S. 6127 (effective Feb. 9, 1967). See United  
States v. Miller, 16 M.J. 169, 170-75 (C.M.A. 1983)  
(court-martial had jurisdiction to try an accused for  
voluntary manslaughter of a Korean National under the  
terms of the SOFA between Korea and the United States).

<sup>401</sup> Cowles, Trial of War Criminals by Military  
Tribunals, 30 A.B.A.J. 330, 331 (1944), quoting the  
response of Attorney General Francis Biddle to a question  
asked by Justice Jackson during the oral argument in Ex  
parte Quirin, 317 U.S. 1 (1942), concerning the sources  
of international law.

tribunal for any crime or offense against . . . [t]he law of war."<sup>402</sup> The Manual also provides that "when a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war."<sup>403</sup> The Manual, in addition, provides that nothing in Rule 203 (the Rule dealing with jurisdiction over the person) shall limit "the power of general courts-martial to try persons under the law of war."<sup>404</sup>

In conclusion, there are two aspects of military jurisdiction; one which draws its authority from the provisions of the Constitution of the United States and the other which relies on the principles and rules of international law. In matters concerning the punishment of everyday common crimes and military offenses committed in the armed forces, the former system is adequate and serves this need. When the offenses committed are violations of the law of war, then the latter form of military jurisdiction is given effect.

#### D. Elements of Court-Martial Jurisdiction

##### 1. Jurisdiction Defined

Jurisdiction is the power of a court to render a

---

<sup>402</sup> R.C.M. 201(f)(1)(B)(i), MCM, 1984, at II-10.  
See also R.C.M. 201(f)(1)(B)(i)(a), MCM, 1984, at II-10.

<sup>403</sup> R.C.M. 201(f)(1)(B)(ii), MCM, 1984, at II-10.

<sup>404</sup> R.C.M. 202(b), MCM, 1984, at II-13.

valid judgment; that is, a judgment which is legally binding on the parties and enforceable.<sup>405</sup> To render a valid judgment, a court must have authority, either by statute or decree, to decide the issue submitted to it for decision. For a judgment to be valid, the court also must have a case or controversy presented by the parties and the parties must have an opportunity to make an appearance before the court. The parties also should be permitted to present evidence and arguments to the court, and must agree to be bound by the court's decision.

In early times, legal disputes were decided in "Ordeals by Battle." In such cases, the party who was the most skillful, powerful, or cunning usually prevailed and questions of jurisdiction did not arise. When civilian courts were created, the resolution of disputes became more civilized and formal procedures for resolving legal disputes were adopted. With the appearance of different types of courts, the selection of the "right" court became critical and questions of jurisdiction became important.

The subject of jurisdiction became important because trial courts began to dismiss cases which they did not have jurisdiction to hear, and because appellate courts started to reverse the decisions of trial courts

---

<sup>405</sup> For a discussion of the term "jurisdiction" see United States v. Ferguson, 5 USCMA 68, 77-80, 17 CMR 68, 77-80 (1954).

on the grounds that trial courts did not have jurisdiction to decide issues or render judgments on the cases before them. As the number of courts grew, the subject of jurisdiction became an issue that the parties often litigated. It was an issue that could be raised before, during, or after a trial; on appeal; and sometimes after appeal as well. The presence or absence of jurisdiction, thus, became an important matter for judges and lawyers to consider in each case.

## 2. Civilian and Military Courts

In early English history, civilian courts and military courts exercised jurisdiction within their respective spheres. Military courts tried soldiers and sailors for violations of military law, and the civilian courts tried civilians for criminal offenses and disputes involving civilians.

In creating the Articles of Confederation, and later the Constitution of the United States, the Founding Fathers of the United States recognized that there was a need for the military to have a separate court system to try soldiers and sailors who were charged with violating the Articles of War. The Founding Fathers recognized, in other words, that the military services had to be able to try and punish "acts of military or naval officers which tend[ed] to bring disgrace and reproach upon the service

of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."<sup>406</sup>

It was recognized too that the military needed a separate court system to protect "its members from the misconduct of fellow servicemen."<sup>407</sup> Offenses committed by soldiers and sailors against one another can be a major problem in the military, where such individuals "live and work in close proximity to one another."<sup>408</sup> The military has to be able to deal with such incidents quickly in order to avoid morale problems and to prevent the victims of such offenses from taking measures into their own hands.

In addition, it was recognized that a separate court system would permit the military to keep "its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base, and by rehabilitating offenders to return them to useful

---

<sup>406</sup> See Smith v. Whitney, 116 U.S. 167, 183-84 (1886); Factor, Federal Civilian Court Intervention in Pending Courts-Martial and the Proper Scope of Military Jurisdiction Over Criminal Defendants: Schlesinger v. Councilman and McLucas v. DeChamplain, 11 HARV. CIVIL R.-CIVIL LIB. L. REV. 432, 455 (1976).

<sup>407</sup> O'Callahan v. Parker, 395 U.S. 258, 281 (1969) (Harlan, J. dissenting).

<sup>408</sup> Id.

military service."<sup>409</sup> In effect, a separate court system for the military would enable the military to exercise greater control over its personnel. Clearly--

A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.

In contrast, a person awaiting trial by court-martial may simply be restricted to limits, and may "participate in all military duties and activities of his organization while under such restriction."<sup>410</sup>

It was generally understood too, that "military or naval officers, [because of their special] training and experience in the service, are more competent judges [as to matters of unwritten military law and usage] than [are] the courts of common law."<sup>411</sup>

For these reasons, provisions were added to the Articles of Confederation and to the Constitution of the United States which granted to the Continental Congress and to the Congress of the United States

---

<sup>409</sup> Id. at 282.

<sup>410</sup> Id. at 282-83.

<sup>411</sup> Smith w. Whitney, 116 U.S. 167, 178 (1886).  
See Swaim v. United States, 165 U.S. 553, 562 (1897).

authority to enact the Articles of War and Articles for the Government of the Navy. What is significant is that the Framers of the Constitution gave the responsibility for creating a separate court system for the military to the Congress and not to the Federal Judiciary.<sup>412</sup> The Framers gave this responsibility to the Congress because it did not want federal judges to become involved in matters of military justice.

The Framers looked upon the military as a "specialized community," governed by a set of rules which are different from those that govern the civilian community.<sup>413</sup> "Orderly government," they believed, "requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters."<sup>414</sup> The Framers, in addition, believed that if the military system was not separate and apart from the federal court system, "the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation

---

<sup>412</sup> Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). See United States v. Maney, 61 F. 140, 143 (Cir. Minn. 1894).

<sup>413</sup> Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

<sup>414</sup> Id.

has been confided by the laws of the United States."<sup>415</sup>

Some also thought that "a court-martial [was] not a court at all but simply an instrumentality of the Executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein,"<sup>416</sup> and that it, therefore, should not be considered part of the federal judiciary.

For all of these reasons, provisions providing for the creation of special courts to deal specifically with matters of military justice were included in the Constitution of the United States. The intent of the Framers, in giving Congress the power to create a military court system, was to keep the military justice system away from the control of federal judges so that it could meet the special needs of the military, without unnecessary civilian interference.

### 3. Reluctance of Civilian Courts to Interfere in Military Trials

As a result of the intentional separation of the military court system from the civilian court system, the

---

<sup>415</sup> Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857). See Barker, Military Law--A Separate System of Jurisprudence, 36 U. CINN. L. REV. 223, 226-29 (1967).

<sup>416</sup> Covington, Judicial Review of Courts-Martial, 7 GEO. WASH. L. REV. 503, 505-06 (1939). See also WINTHROP, supra note 51, at 49.

military has been able to operate its own system of military justice for almost 200 years with relatively little interference from the Federal Judiciary. The reluctance of federal judges to involve themselves in military justice matters is explained by a number of factors.

The first and most obvious reason for the lack of involvement on the part of the Federal Judiciary in military justice affairs is that the military court system is not under the control of the Federal Judiciary. Because the Federal Judiciary has no supervisory control over military justice, federal judges do not have much interest in what takes place in military courts.

Another reason the federal courts have failed to interfere in the operation of the military court system is because federal judges really have no meaningful way to participate in the development of military law. Military court decisions are not reviewed by the federal courts in the normal course of appellate review,<sup>417</sup> and what little review occurs through extraordinary writs, is limited to questions of jurisdiction and errors of

---

<sup>417</sup>

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

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

constitutional magnitude. In short, the federal courts are not appellate courts for military court decisions and federal judges have no role to play in supervising or overseeing the operation of military law.

The third reason the Federal Judiciary is not involved in military decisionmaking is because federal judges are generally not familiar with the customs and traditions of military service. While the statutes governing the military are plain and simple, their application to various situations is not so clear. This is because of the need of military courts to take into account various military customs and traditions in applying the law to particular fact situations.

The fourth and last reason for the lack of federal court involvement in the development of military law is that Congress has provided the military with a code of laws which is regarded by most to be fair and just. Under these laws, the military justice system operates efficiently and effectively and has been held to protect adequately the constitutional rights and liberties of those serving as members of the armed forces.<sup>418</sup> So long as courts-martial function in accordance with the judicial procedures outlined in the Code, jurisdic-

---

<sup>418</sup> See Schlesinger v. Councilman, 420 U.S. 738, 758 (1975). But see Burns v. Wilson, 346 U.S. 137, 140 (1953); Note, Civilian Court Review of Court-Martial Adjudications, 69 COL. L. REV. 1259, 1277-78 (1962).

tional or constitutional errors do not occur, and the federal courts have nothing to review and no reason to get involved with military law.

It is for these reasons that the federal courts do not interfere with the operation of military courts. This does not mean, however, that military court decisions and procedures are not continually reviewed by civilians. Senators and Congressmen serving in the legislative branch of the government are constantly monitoring the laws which govern the way military courts function and operate. In addition, the three civilian judges, who serve on the United States Court of Military Appeals, regularly supervise the manner in which military trials are conducted and continually review findings and sentences that have been imposed by courts-martial. Federal judges also have the power to review military judgments on collateral attacks. Thus, while the military court system is not supervised directly by the federal courts, it is closely monitored, supervised and controlled by civilians in a number of different ways.

#### 4. Limited Jurisdiction of Courts-Martial

The only way that the federal civilian courts exercise direct control over military courts is through collateral review. A court-martial is an Article I court specially created to exercise jurisdiction in a limited

number of cases. "It is called into existence for a special purpose . . . to perform a particular duty [and when the object of its creation has been accomplished it is dissolved."<sup>419</sup> A court-martial is not a court of general jurisdiction. It does not have authority to rule on all types of cases and controversies presented to it; nor does it have the power to decide a variety of issues or the power to impose different types of legal remedies.<sup>420</sup> It is, instead, a special court of limited jurisdiction with the power to decide only a particular type or class of cases assigned to it by statute.

Such courts are known as "inferior courts."<sup>421</sup> They are referred to as inferior courts because they are created by Congress under Article I of the Constitution. They are, in effect, legislative courts whose judgments standing alone can be "entirely disregarded"<sup>422</sup> and considered a nullity, unless it is clearly established in

---

<sup>419</sup> Runkle v. United States, 122 U.S. 543, 555-56 (1887).

<sup>420</sup> A "presumption of legality or jurisdiction . . . normally attaches to the judgments or sentences of permanently established courts of general jurisdiction," but this is not so with courts-martial. United States v. Goudge, 39 CMR 324, 328 (ABR 1968).

<sup>421</sup> Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 185 (1809)(Marshall, C.J.). See Ex parte Watkins, 28 U.S. (3 Pet.) 193, 205 (1830).

<sup>422</sup> Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173, 185 (1809)(Marshall, C.J.).

the record of the proceedings that they had jurisdiction to decide the matters in dispute before them.

The distinction between Article III courts, courts of general jurisdiction, and Article I courts, courts of limited jurisdiction, has been described as follows:

The courts of the United States [Article III courts] are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but [the Supreme Court of the United States] is not prepared to say that they are absolute nullities, which may be totally disregarded.<sup>423</sup>

The point is that, unlike Article III courts, the judgments of inferior courts created under Article I can be held to be an "absolute nullity" and "totally disregarded," if it is not clear from the record of trial that the court had jurisdiction to hear the case before it.

The jurisdiction of "inferior courts" and Article III courts must be present in every case and in no instance will it be presumed. In Brown v. Keene,<sup>424</sup> Chief Justice Marshall stated the general rule that is to be followed in the courts of the United States concerning issues of jurisdiction:

---

<sup>423</sup> Id.

<sup>424</sup> 33 U.S. (8 Pet.) 112 (1834).

The decisions of [the Supreme Court of the United States] require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.<sup>425</sup>

This rule, the Supreme Court has noted, is applicable to "proceedings of courts-martial" as well.<sup>426</sup>

Once it is established that an "inferior court" has jurisdiction, that court "has a right to decide every question which occurs [before it]; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court."<sup>427</sup>

A court-martial is an "inferior court" created by Congress under Article I of the Constitution. When it is established that a court-martial has jurisdiction, no civilian court can interfere with the proceedings or disrupt the findings and sentence that a court-martial renders. This is so even though minor errors are observed in the manner in which the proceedings were conducted. The point is that when a court-martial

---

<sup>425</sup> Id. at 115.

<sup>426</sup> McClaughry v. Deming, 186 U.S. 49, 63 (1902).

<sup>427</sup> Elliot v. Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828); Thompson v. Tolmie, 27 U.S. (2 Pet.) 157, 169 (1829).

operates within the scope of its jurisdiction, Article III courts have "no supervisory or correcting power over the proceedings" and have no authority to correct "mere errors in [the] proceedings."<sup>428</sup>

In sum, courts-martial have limited jurisdiction and are considered to be "inferior courts." Because they are courts of limited jurisdiction, their judgments are subject to collateral attack in the federal courts. If an "inferior court" is found to have acted within the scope of the jurisdiction granted to it by statute, its judgment will be upheld as valid. If, on the other hand, an "inferior court" is found to have acted outside the scope of its jurisdiction, its judgment will be held invalid and void.

##### 5. Collateral Review

While court-martial judgments are not subject to supervisory or appellate review by Article III courts, they are subject to collateral attack in the federal courts. What is important to recognize, however, is that on collateral attack, it is only "the judgment, not the opinion, of the court below" that is subject to review.<sup>429</sup> It is only the court's power to act, in other words, that can be attacked in an Article III court, and

---

<sup>428</sup> In re Grimley, 137 U.S. 147, 150 (1890).

<sup>429</sup> Smith v. Whitney, 116 U.S. 167, 175 (1886).

not the court's "opinion."

The right of Article III courts to collaterally review judgments of courts-martial was first recognized in Wise v. Withers.<sup>430</sup> In Withers, the Supreme Court of the United States, on a writ of error, collaterally reviewed an accused's court-martial conviction and unanimously held that the court-martial which tried the accused did not have jurisdiction to try him. As a result, the accused's conviction by court-martial was held void.<sup>431</sup> The Court's opinion in Withers was very short and did not discuss the power of Article III courts to review court-martial convictions collaterally. It was not until 24 years later in Ex parte Watkins<sup>432</sup> that Chief Justice John Marshall commented on his earlier opinion in Withers. He said in Watkins that the Court's decision in Withers "proves only that a court martial was considered one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record."<sup>433</sup> Thus, it is because a court-martial is an "inferior court" with limited jurisdiction that the Supreme Court ruled the judgments

---

<sup>430</sup> 7 U.S. (3 Cranch) 330 (1806).

<sup>431</sup> See infra notes 437 & 1577 and accompanying text.

<sup>432</sup> 28 U.S. (3 Pet.) 193 (1830).

<sup>433</sup> Id. at 209.

of such courts can be reviewed collaterally by the Article III courts.

In short, it has been clear since the early 1800's that the judgments of courts-martial and other Article I courts can be reviewed collaterally in Article III courts. The judgments rendered by Article I courts are subject to collateral review because "inferior courts" are not courts of general jurisdiction, but are courts of limited jurisdiction created by Congress under Article I to perform a specific function. So long as courts-martial and other "inferior courts" act within the scope of the jurisdiction granted to them by statute, their judgments are valid and cannot be reviewed or reversed by any civilian courts. If, however, a court-martial or other "inferior court" acts outside the scope of the jurisdiction granted to it by statute, its judgment is subject to collateral review in Article III courts on the issue of whether the "inferior court" had jurisdiction to act on the case before it. In sum, "[e]very act of [an Article I] court beyond its jurisdiction is void,"<sup>434</sup> and the role of the Article III courts is to ensure that inferior courts exercise only the jurisdiction allowed by statute.

---

<sup>434</sup> Ex parte Reed, 100 U.S. 13, 23 (1879).

## 6. Deciding What is Jurisdictional

All federal circuit court of appeals and federal district courts agree that in order for the judgment of an Article I court to be valid, the Article I court must have jurisdiction over the matter presented to it for decision. To determine if an Article I court has jurisdiction in a particular case, Article III courts must examine the statute which created the Article I court to determine what types of limitations Congress has placed on the exercise of jurisdiction by the Article I court. The task of deciding whether or not an Article I court, in fact, has acted outside the jurisdiction granted by Congress is not always easy.<sup>435</sup>

Some years ago, Justice Holmes described the problem this way:

---

435

This Article V of the Amendments [to the Constitution of the United States], and Articles VI and VII, contain other provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the courts? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?

Ex parte Bigelow, 113 U.S. 328, 330 (1884).

No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parole promise made without consideration; but it has the power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense.<sup>436</sup>

In the case of collateral attack on a court-martial judgment, the federal courts must examine the laws which govern the exercise of jurisdiction by courts-martial to determine what limitations Congress has placed on a court-martial's power to act.

What the Article III court must examine are the provisions of the Uniform Code of Military Justice to determine if the court-martial was conducted in accordance with the provisions of the statute. There are 140 Articles in the Uniform Code of Military Justice and numerous subsidiary provisions, and what the federal courts must decide is which provisions of the Code are

---

<sup>436</sup> Fauntleroy v. Lum, 210 U.S. 230, 234-35 (1908) (emphasis added). See Swain v. United States, 165 U.S. 553, 561 (1897).

jurisdictional, and which are simply substantive or procedural.

If the federal courts were writing on "clean slate," the problem of determining which provisions of the Code are jurisdictional and which set forth substantive or procedural rules would be a substantial task. But the federal courts today do not have to write on a "clean slate."

For over 180 years, since Chief Justice Marshall's opinion in Wise v. Withers,<sup>437</sup> hundreds and thousands of court-martial judgments have been collaterally attacked in Article III courts, and during this period of time considerable thought and attention has been given to determining which provisions of the Articles of War and the Uniform Code of Military Justice were intended by Congress "to establish a rule of substantive law, and thus to define the duty of the [court-martial, and which were] meant to limit [the] power [of courts-martial to act]."<sup>438</sup> What has evolved is a consensus as to what statutory requirements are jurisdictional and which are not.

In 1806, the Supreme Court of the United States

---

<sup>437</sup> 7 U.S. (3 Cranch) 330 (1806).

<sup>438</sup> Fauntleroy v. Lum, 210 U.S. 230, 235 (1908) (emphasis added).

held in Wise v. Withers<sup>439</sup> that a justice of the peace for the District of Columbia was improperly tried by court-martial where it was clear under the militia law of the District of Columbia that he was exempt from military duty. Because the justice of the peace was "exempt from the performance of militia duty,"<sup>440</sup> the Supreme Court ruled that the court-martial, which tried him for failure to perform military duty, had no jurisdiction over the accused and that the decision of the court-martial was void. In short, the Court ruled that the court-martial had "no jurisdiction over [the] justice of the peace, as a militiaman [since] he could never be legally enrolled" and that, for this reason, the court-martial was "clearly without its jurisdiction"<sup>441</sup> in trying the justice of the peace for a military offense.

In Withers, the Supreme Court ruled that a court-martial must have jurisdiction over the person if the judgment of the court-martial is to be valid. If the court-martial does not have jurisdiction over the person, as it did not in Withers, its judgment is void. In essence, the Court ruled that when Congress enacted legislation prescribing who could be tried by court-martial and who could not, it was not establishing a simple

---

<sup>439</sup> 7 U.S. (3 Cranch) 330 (1806).

<sup>440</sup> Id. at 337.

<sup>441</sup> Id.

rule of substantive law, but rather was placing limits on the exercise of jurisdiction by court-martial. In effect, the Court found, that in defining who could be tried by court-martial and who could not be tried by court-martial, Congress was setting limits on the scope of jurisdiction that could be exercised by a court-martial. What has developed is the general rule that if a court-martial does not have jurisdiction over the person, the court-martial does not have jurisdiction to act and its judgment is void.<sup>442</sup>

In 1969, the Supreme Court of the United States ruled in O'Callahan v. Parker<sup>443</sup> that since the accused's crimes were not service connected, he could not be

---

442

We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial. Thus, discharged soldiers cannot be court-martialed for offenses committed while in service. Toth v. Quarles, 350 U.S. 11. Similarly, neither civilian employees of the Armed Forces overseas, McElroy v. Guagliardo, 361 U.S. 281; Grisham v. Hagan, 361 U.S. 278; nor civilian dependents of military personnel accompanying them overseas, Kinsella v. Singleton, 361 U.S. 234; Reid v. Covert, 354 U.S. 1, may be tried by court-martial.

These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline.

O'Callahan v. Parker, 395 U.S. 258, 267 (1969).

<sup>443</sup> 395 U.S. 258 (1969).

tried by court-martial. In O'Callahan, the accused, a sergeant in the United States Army, "was charged with attempted rape, housebreaking, and assault with intent to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice."<sup>444</sup> He was tried and convicted of these offenses and was sentenced to "10 years' imprisonment at hard labor, forfeiture of all pay and allowances and dishonorably discharged."<sup>445</sup>

Subsequent to his court-martial, Sergeant O'Callahan filed a writ of habeas corpus in the federal courts.<sup>446</sup> In reviewing O'Callahan's petition for habeas corpus, the Supreme Court of the United States held that the court-martial which tried him did not have jurisdiction over the offense, and that as a result, his court-martial conviction was void.

In O'Callahan, the Supreme Court ruled that a court-martial must have jurisdiction over the offense if the judgment of the court-martial is to be valid. In deciding O'Callahan, the Supreme Court concluded that when Congress enacted the Uniform Code of Military Justice and listed the offenses that could be tried by court-martial, its intent was to limit the types of offenses that could be tried by court-martial. In

---

<sup>444</sup> Id. at 260.

<sup>445</sup> Id. at 260-61.

<sup>446</sup> See infra note 1257 and accompanying text.

carefully defining the types of offenses subject to trial by court-martial, Congress, the Court concluded, was not establishing a rule of substantive law, but was intentionally limiting the types of crimes that could be tried by court-martial. The Supreme Court thus held in O'Callahan that the jurisdiction of a court-martial is limited to the offenses listed in the Code, and that such offenses have to be service-connected before they can be tried by court-martial.

In years past and in earlier decisions, the Supreme Court of the United States often had stated, that in order for the judgment of a court-martial to be valid, the court-martial had have jurisdiction over the offense.<sup>447</sup> In the cases where the issue was raised, the Court found that the court-martial did have jurisdiction over the offense and that the judgment of the court-martial was valid.<sup>448</sup> The O'Callahan decision is one of the few decisions rendered by the Supreme Court where the

---

<sup>447</sup> See e.g., Ex parte Mason, 105 U.S. 696, 697 (1881)(offense of attempted murder held subject to court-martial jurisdiction); Dynes v. Hoover, 61 U.S. (20 How.) 65, 82-83 (1857)(offense of attempted desertion held subject to court-martial jurisdiction).

<sup>448</sup> See e.g., Smith v. Whitney, 116 U.S. 167, 186 (1886)(offense of conduct unbecoming an officer held subject to court-martial jurisdiction where the accused was a paymaster general and an officer in the Navy); Ex parte Mason, 105 U.S. 696, 697 (1881)(offense of attempted murder held subject to court-martial jurisdiction); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79-80 (1857)(offense of attempted desertion held subject to court-martial jurisdiction).

Court ruled that a court-martial did not have jurisdiction over the offense. What has evolved from this line of cases is the general rule that a court-martial judgment must have jurisdiction over the offense if its judgment is to be valid. If jurisdiction over the offense is not established, the judgment of the court-martial is void.

In 1953, the Tenth Circuit Court of Appeals in McKinney v. Finletter<sup>449</sup> held that when an accused's court-martial sentence is in excess of that authorized by law, the part of the sentence that is in excess of the statute is void and unenforceable. In McKinney, the accused, a member of the United States Air Force, was charged with a violation of Article 92 of the Articles of War. Article 92 provided that "any person subject to military law found guilty of murder or rape shall suffer death or imprisonment for life, as a court-martial may direct."<sup>450</sup> The accused was tried and convicted for violating Article 92 and was "sentenced to confinement at hard labor for the term of his natural life."<sup>451</sup>

In his petition for a writ of habeas corpus filed in the Tenth Circuit Court of Appeals, the accused "attacked the validity of the sentence of the court-mar-

---

<sup>449</sup> 205 F.2d 761 (10th Cir. 1953).

<sup>450</sup> Id. at 762.

<sup>451</sup> Id. (emphasis added).

tial in its entirety on the ground that it was in excess of that authorized by law."<sup>452</sup> In considering the accused's claim, the Tenth Circuit noted that while the "court-martial [which tried the accused] was vested with unquestioned jurisdiction to sentence [him] to imprisonment for life," it "did not have jurisdiction to sentence him to confinement at hard labor."<sup>453</sup> The Court therefore held that that part of the sentence which was within the law was valid, but that part which was in excess of the law was void.<sup>454</sup>

In deciding McKinney, the Tenth Circuit Court of Appeals confirmed for courts-martial what had long been recognized in the civilian law, namely, that a sentence which is in excess of what is authorized by statute is void.<sup>455</sup> The reasoning of the federal courts in this area is that when the Congress enacted legislation setting maximum sentences for certain types of offenses, its purpose in doing so was to limit the types of sentences that courts could impose. Its intent, in other words, was not to give the courts a rule of substantive

---

<sup>452</sup> Id.

<sup>453</sup> Id. at 763.

<sup>454</sup> Id.

<sup>455</sup> See e.g., United States v. Pridgeon, 153 U.S. 48, 63 (1894)(accused's sentence upheld valid even though part of the punishment imposed by the court consisted of confinement at hard labor).

law to follow, but rather to place limits on the types of sentences that could be imposed by courts. What developed is the general rule that a court-martial sentence which in excess of what is permitted by statute, or regulation, or executive order is void and unenforceable.

In 1902, the Supreme Court of the United States ruled that another aspect of the court-martial process had jurisdictional significance and had to be clearly established before a court-martial judgment could be considered valid. In McClaughry v. Deming<sup>456</sup> the Supreme Court held that the judgment of a court-martial was void because it was clear from the record that the court-martial which tried the accused was not properly constituted. In McClaughry, the accused was a Captain in the Volunteer Army of the United States. He was tried and convicted by a general court-martial and sentenced to "be dismissed from the service of the United States, and [to] be confined in such penitentiary as the reviewing authority might direct for the period of three years, and that the crime, punishment, name and place of abode of the accused should be published in the newspapers in and about the City of San Francisco, and in the State where the accused usually resided."<sup>457</sup> The accused filed a petition for a writ of habeas corpus in the federal

---

<sup>456</sup> 186 U.S. 49 (1902).

<sup>457</sup> Id.

courts challenging the validity of his conviction on the ground, that as a Volunteer Officer he "could not be legally tried by [a court composed entirely of Regular Officers], and that to convene and constitute a court-martial so composed, for the trial of a volunteer officer, was a violation of the seventy-seventh article of war."<sup>458</sup>

Article 77 of the Articles of War prohibited Regular Army officers from sitting on, or participating in, the trial of Volunteer Officers. The Supreme Court thus asked the following question: "What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, [that is, a court-martial that is composed] of officers who are placed in direct and plain violation of the act of Congress?"<sup>459</sup> The Court concluded that "there was no court, for it . . . cannot be contended[,] that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial."<sup>460</sup> Because the law concerning who is to serve on the court-martial was violated, the Court held that the court-martial which tried the accused "lacked any statutory authority for its existence, and it lacked,

---

<sup>458</sup> Id. at 53.

<sup>459</sup> Id. at 63.

<sup>460</sup> Id. at 64.

therefore, all jurisdiction over the [accused] or the subject-matter of the charges against him."<sup>461</sup>

In deciding McClaughry, the Supreme Court of the United States established the general rule that a judgment of a court-martial is not valid unless it is clearly established that the court-martial was properly constituted.<sup>462</sup>

In 1902, the Supreme Court also made clear in McClaughry, that a court-martial judgment would not be considered valid if the court-martial was improperly convened. Because "a court-martial is a creature of statute," the Court said, "it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."<sup>463</sup>

The idea that a court-martial must be properly convened before its judgment will be considered valid had

---

<sup>461</sup> Id. at 65.

<sup>462</sup> Not every statute enacted by Congress on how courts-martial are to be constituted is of jurisdictional significance. Those statutes which do not limit the power or authority of a court-martial to act, but simply prescribe procedural requirements or rules of substantive law have been held not to be jurisdictional in nature. See Swain v. United States, 165 U.S. 553, 559-60 (1897) (officers of lesser rank than the accused serving as court members in accused's court-martial held not jurisdictional); Martin v. Mott, 25 U.S. (12 Wheat) 19, 34 (1827) (less than 13 members serving in the accused's court-martial held to be within the 5 to 13 members required by statute and held not to be jurisdictional error).

<sup>463</sup> 186 U.S. at 62.

been noted by the Supreme Court of the United States five decades earlier in Dynes v. Hoover.<sup>444</sup> In Dynes, the Court stated that:

Persons . . . belonging to the army and the navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void--not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment.<sup>445</sup>

The Court went on to explain that "[w]hen we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."<sup>446</sup> In effect, the Supreme Court in 1857 was making the same point that Justice Holmes would later make in 1908, namely, that a distinction is to be drawn between statutory provisions of Congress which limit the power of courts to exercise

---

<sup>444</sup> 61 U.S. (20 How.) 65 (1857).

<sup>445</sup> Id. at 81.

<sup>446</sup> Id. at 82.

jurisdiction and those which merely present a rule of substantive or procedural law for the courts to follow.

What is clear from the Supreme Court's opinion in Dynes is that statutory provisions enacted by Congress governing the convening of courts-martial was intended to limit the power of courts-martial in exercising jurisdiction over military accuseds. The reason Congress did so was to protect "[p]ersons . . . belonging to the army and navy [from being subjected] to illegal or irresponsible courts martial."<sup>467</sup> In short, what Congress did was to set forth in statutory form the essentials that are required to be present before a court-martial can lawfully exercise jurisdiction over a military accused and render a valid judgment concerning the offense with which an accused has been charged.

Since courts-martial are legislative courts created under Article 1, they must be convened in accordance with the provisions set forth in the statute enacted by Congress. Congress in granting jurisdiction to courts-martial to try and punish military offenders, did not leave the exercise of such jurisdiction to the unrestricted discretion of the military. Instead, Congress carefully provided by statute who could convene a court-martial, and what procedures had to be followed when a court-martial was convened by a convening

---

<sup>467</sup> Id. at 81.

authority.

So long as courts-martial operate in accordance with the statutory requirements set forth by the Congress, their judgments are deemed valid and legally binding. This is as it should be, for the interpretation of military rules and regulations in time of peace and war should be left to those who have special expertise in the area and should not be exercised by those who have no understanding or appreciation for the operation of the military system.

If a court-martial is not conducted in accordance with statutory guidelines, it will be found to have acted outside the scope of its jurisdiction and any judgment rendered by it will be void. A court-martial, in other words, that is not properly convened, that is not properly constituted, that tries someone who is not subject to the Code, that tries an offense which is not a crime under the Code, or that imposes a sentence greater than that permitted by either the Code or the Manual, will be found to have acted outside the scope of its jurisdiction and any judgment rendered by it will be given no effect.

The principle--that a court must act within its statutory authority--applies to other courts as well as to courts-martial. If, for example, "a magistrate having authority to fine for assault and battery should sentence

the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed."<sup>468</sup> The point is that "[e]very act of a court beyond its jurisdiction is void."<sup>469</sup>

In the case of military courts, the jurisdictional requirements are different than those of the civilian courts. In large part, this is due to military tradition which predates even the Constitution. The early American Articles of War were modeled after the British Articles of War which had been in existence since 1600's. When Congress adopted the British model, it accepted the role of the convening authority in convening courts-martial, the designation by the convening authority of those who could serve as court members on courts-martial, the identification of who could be tried by court-martial, the listing of offenses that could be tried by court-martial, and the limits on the types of sentences that could be imposed by court-martial. In adopting the British Articles of War, Congress made no changes in what was necessary to the exercise of jurisdiction by a court-martial.

---

<sup>468</sup> Ex parte Reed, 100 U.S. 13, 23 (1879)(emphasis added).

<sup>469</sup> Id.

Thus, when Congress enacted the American Articles of War, it adopted the five elements of jurisdiction that were necessary for a court-martial to exist in the British system. It is these elements which are now recognized as being essential to the exercise of jurisdiction by American courts-martial. The Supreme Court of the United States has considered each of the elements and has determined that each must be present before the judgment of a court-martial is valid. The Court found that Congress, by statute, has provided that each element must be present in every court-martial and that the intent of Congress in having them present was to limit the power of courts-martial to try and punish military offenders. As a result, it is accepted now that in order for a court-martial to have jurisdiction, the government has to prove in each case that the court-martial is properly convened and properly constituted, that the court-martial has jurisdiction over the person and the offense, and that the sentence adjudged by the court-martial is within limits permitted by statute.

Not only must these elements be present in every court-martial, but the burden is on the government to prove them in each case. This is not so in the civilian courts, where the government has no burden and is under no obligation to prove the elements of jurisdiction in each case. It is not necessary for the government in a

civilian case, in other words, to prove that the court is properly established, that the judge and jury were properly appointed to serve on the court, that the court has jurisdiction over the accused, that the court has jurisdiction over the offense, or that the sentence adjudged is within the maximum limit the court could impose. In civilian courts, these matters are treated as "givens" and rarely, if ever, is there an issue concerning them.

In military courts, the government must be prepared in every case to prove that the court-martial was created properly, that the judge and jury were properly detailed to serve on the court, that the court-martial has jurisdiction over the accused, that the court-martial has jurisdiction to try the offense charged, and that the sentence adjudged by the court-martial is within the maximum limit authorized by law.

While the nature of a court-martial is totally different from nature of a civilian court, the main difference in the jurisdictional requirements is due to the way in which the statutes governing the respective courts have been drafted. In short, the elements of court-martial jurisdiction are basically the elements of jurisdiction found in the British Articles of War and they were carried over to the American system and have become an integral part of the American law of court-mar-

tial jurisdiction.

#### 7. Indispensable Prerequisites

In order for the judgment of a court-martial to be valid, it is clear that the court must have jurisdiction to try the case. This means that the government has the burden in each case to prove the five elements of court-martial jurisdiction which Congress has provided for in the Code. First, the government must prove that the court-martial is properly convened, that is, that the court-martial was convened by an official empowered to convene it. The Government must prove, in other words, that the convening authority has the power to convene the type of court-martial that was convened; that the convening authority is qualified to convene the court; that a superior competent authority has not withheld the power or delegated the power to convene the court-martial to someone other than the convening authority; and that the convening authority, in fact, properly referred the charges to trial by court-martial.

Second, the government must prove that the court-martial is properly constituted; that is, that the accused is present or his absence is accounted for; that a trial counsel and a defense counsel are detailed to the court and are present; that a military judge is detailed to hear the case and is present, and that if a

request for trial before military judge alone is submitted, that the request is part of the record; that the court members were personally selected and detailed to the court by the convening authority and are present or their absence accounted for, and if a request for a trial by enlisted personnel has been submitted, that at least one-third of the court members are enlisted personnel.

Third, the government must prove that the court-martial has jurisdiction over the person, that is, an enlistee, an inductee, a retired member, a national guardsman, a reservist, or in some cases, a civilian; that the court has jurisdiction over the person at the time of the offense and at the time of the trial; and that jurisdiction over the person has not been terminated for any reason.

Fourth, the government must prove that the court-martial has jurisdiction over the offense, that is, that the offense is a crime under the Code and is service connected. To prove service connection, the government must establish one of the following: that the offense is a military crime; that the offense was committed against military property or a service member; that the offense was committed on post or involves the use of military status; that the offense is concerned with the possession, use, or sale of drugs; or that the offense is one which has an adverse effect on the morale, integrity, and

reputation of those in the military community.

And Fifth, the government must show that the sentence adjudged is within the maximum permissible punishment authorized by law, that is, that the sentence is within the limits prescribed by the Code for summary, special or general courts-martial, and that it is not in excess of that which is authorized by the Maximum Punishment Chart in the Manual for Courts-Martial.

The existence of these five elements of court-martial jurisdiction must be present in every court-martial before the judgment of a court-martial will be considered valid. Unfortunately, these five elements are not always correctly identified by those who are called upon to decide or discuss issues of court-martial jurisdiction. This is due primarily to a lack of knowledge and understanding of the law of court-martial jurisdiction and is not necessarily the result of any disagreement among the courts as to the elements of court-martial jurisdiction.

Even the 1984 Manual for Courts-Martial is not clear on the elements of court-martial jurisdiction. The Manual fails to state, for example, that one of the elements of court-martial jurisdiction is that the sentence adjudged by a court-martial must be in accord-

ance with the law.<sup>470</sup> In addition, the Manual adds a new element to the list of the elements of jurisdiction: namely, that "[e]ach charge before the court-martial must be referred to it by a competent authority."<sup>471</sup> This element is clearly an aspect of a properly convened court-martial, the first element listed above, and there is no need for it to be listed as a separate element.<sup>472</sup>

The drafters of the 1984 Manual are not the only ones who are unclear concerning the identification of the elements of court-martial jurisdiction. Judges too are often confused. It is not unusual, for example, for a federal judge in reviewing a petition for extraordinary relief, to say:

The questions which I have to consider are two, and two only--to wit: First. Do the charges show the [accused] to be a person who is subject to be tried by a court-martial? Second. Do the charges set forth an offense for which he can be tried by such court?<sup>473</sup>

---

<sup>470</sup> For a discussion of this element of court-martial jurisdiction, see infra notes 1430-1503 and accompanying text. See generally Fratcher, Review by the Civil Courts of Judgments of Federal Military Tribunals, 10 OHIO STATE L.J. 271, 274-79 (1949); Covington, Judicial Review of Court-Martial, 7 GEO. WASH. L. REV. 503, 508-11 (1939).

<sup>471</sup> R.C.M. 201(b)(3), MCM, 1984, at 11-8.

<sup>472</sup> For a discussion of the subject of the proper referral of charges to a court-martial by a convening authority see infra at 274.

<sup>473</sup> Ex parte Henderson, 11 Fed. Case 1067, 1069 (No. 6,349)(C.C.D. Ky., 1878).

What the federal judge overlooks in this statement are three of the elements of court-martial jurisdiction.

What the judge should have said is the following:

The questions which I have to consider are five--to wit: (1) Was the court-martial which tried the accused properly convened? (2) Was the court-martial which tried the accused properly constituted? (3) Did the court-martial have jurisdiction over the person? (4) Did the court-martial have jurisdiction over the offense? and (5) Is the sentence adjudged within the legal limits authorized by statute?

Had the judge asked these five questions and answered each of them affirmatively, he would have been certain that the court-martial had jurisdiction and that its judgment was valid.

In 1902 Judge Walter H. Sanborn, in his opinion in Deming v. McClaughry,<sup>474</sup> clearly identified the five elements of court-martial jurisdiction. In Deming, Judge Sanborn said that:

[T]he jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that

---

<sup>474</sup> 113 F. 639 (8th Cir.), aff'd, 186 U.S. 49 (1902).

tuted was invested by the acts of congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes.<sup>475</sup>

Judge Sanborn joined together in part (3), two of the elements of court-martial jurisdiction, that is, "the power to try the person and the offense charged," but he nevertheless correctly identified the five elements of court-martial jurisdiction. He also correctly stated the general rule that "[t]he absence of any of these indispensable conditions renders the judgment and sentence of a court-martial . . . absolutely void."<sup>476</sup>

In discussing generally the subject of court-martial jurisdiction, Judge Sanborn noted that courts-martial are "courts of inferior or limited jurisdiction,"<sup>477</sup> and that they are not courts of general jurisdiction. There is a "legal presumption," he said, "that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid."<sup>478</sup> This principle, however, does not apply to "courts of inferior or limited jurisdic-

---

<sup>475</sup> 113 F. at 650.

<sup>476</sup> Id.

<sup>477</sup> Id.

<sup>478</sup> Id.

tion,"<sup>479</sup> like courts-martial. Indeed, with regard to such courts, the legal presumption may be said to be just the opposite, namely, that in order for the judgment and sentence of a court of limited jurisdiction to be valid, "[its] jurisdiction [must] be clearly and equivocally shown."<sup>480</sup> Because a "court-martial is a court of limited jurisdiction" and "a creature of statute,"<sup>481</sup> it "follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned"<sup>482</sup> on the presence of each of the "indispensable prerequisites," that is, the five elements of jurisdiction.

Once the Government establishes the five elements of court-martial jurisdiction described above, it will have met its burden of proving that the court-martial had jurisdiction in the case and that the judgment rendered by the court-martial is valid and enforceable. The law of court-martial jurisdiction involves these five elements and it is the law surrounding these elements that make up the subject of court-martial jurisdiction in the military.

What is important now is to examine the law that

---

<sup>479</sup> Id.

<sup>480</sup> Id.

<sup>481</sup> Id.

<sup>482</sup> Id.

has developed around the five elements identified by the courts as being "indispensable prerequisites" to the exercise of court-martial jurisdiction to see how Congressional policy in this area has been implemented. In the last 200 years, Congress, with the exception of 1863, 1916, and 1950, has been fairly consistent in restricting the exercise of court-martial jurisdiction. Since 1789, however, the Federal Judiciary has been more consistent and, in response to the warnings of the Framers, has curtailed any unnecessary expansion of the exercise of court-martial power by the military. It has been the Federal Judiciary, in other words, which has held statutes unconstitutional when the Congress had gone too far in expanding the reach of military court jurisdiction.

In conclusion, it is important to remember in discussing the nature of court-martial jurisdiction that there are four types of military jurisdiction: martial rule, military government, the law of war, and military justice. In addition, it is important to know that there are four types of agencies exercising military jurisdiction: commanders, courts-martial, military commissions, and courts of inquiry. The purpose of this dissertation is to examine military justice, one of the four types of military jurisdiction, and the exercise of jurisdiction by courts-martial, one of the four agencies exercising

military jurisdiction. The sources of authority for the exercise of jurisdiction by courts-martial are found in the Constitution, the Code, court decisions, regulations, and in opinions issued by The Judge Advocates General. The law of court-martial jurisdiction consists of five elements noted and it is the law concerning these elements that is the subject of the remaining chapters of this work.

## CHAPTER FOUR

### PROPERLY CONVENED COURTS-MARTIAL

The first element of court-martial jurisdiction is whether a court-martial is properly convened, that is, was the court-martial properly created by an official empowered to convene it and brought into existence in accordance with prescribed procedures. A court-martial, like a state or federal civilian court, is a court of limited jurisdiction in that it is created by statute and can exercise only the power granted to it by statute.<sup>483</sup> The extent of jurisdiction exercised by a court-martial is controlled by the Congress, in the same way that the Congress controls the jurisdiction exercised by federal courts, and that state legislatures control the jurisdiction exercised by state courts.

While military courts are similar to state and federal courts in this way, they are very different in other ways. As a general rule, state and federal courts exercise continuous jurisdiction hearing cases on a day-to-day basis without interruption. A court-martial, in contrast, usually has jurisdiction to hear only a

---

<sup>483</sup> Chicot County Distr. v. Bank, 308 U.S. 371, 376 (1940).

single case; it is convened to try whatever charges are referred to it for trial, and then its jurisdiction ends. A court-martial, in short, "is called into existence for a special purpose . . . to perform a particular duty [and when the object of its creation has been accomplished it is dissolved."<sup>404</sup> This is because:

The exigencies of combat, administrative transfer of units, and orders transferring individual officers and enlisted men to new stations all combine to make it unusual, even in peacetime, for any one court-martial to be able to try cases for a period of as long as three months. Members can be relieved and others added by amending orders, but to curtail the number of orders pertaining to any one case it is administratively desirable to appoint an entirely new court at frequent intervals.<sup>405</sup>

For this reason, a court-martial is described as "a special purpose tribunal of limited jurisdiction and transitory existence."<sup>404</sup> Because there is no such thing as a standing court-martial waiting to try cases referred to it, each court-martial must be created or convened individually. This means that there must be someone in

---

<sup>404</sup> Runkle v. United States, 122 U.S. 543, 555-56 (1887).

<sup>405</sup> Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 4 (1953). "Large 'jurisdictions,' that is commands with authority to convene courts, often have several different general and special courts operating at the same time." Id. at 4-5.

<sup>406</sup> United States v. Goudge, 39 CMR 324, 328 (ABR 1968).

authority, who has the power to order or direct that a court-martial be held.

In the military, this person is known as the convening authority. As a general rule, the convening authority is a commanding officer of the troops assigned to his command. If the commanding officer is the summary court-martial convening authority, the commander's authority to convene courts-martial may extend only to troops serving in the unit which he commands. On the other hand, if the commanding officer is a general court-martial convening authority, with the power to convene general courts-martial, the limits of his authority can extend to the geographical limits of the post or his command.<sup>497</sup> Thus, the limits of a convening authority's power to convene courts-martial may be restricted to personnel in the unit, or it may extend to all of the troops within the geographical area of the commanding officer's command.

#### A. Convening Authority

A court-martial comes into existence when the convening authority refers charges and specifications to

---

<sup>497</sup> See United States v. Treakle, 18 M.J. 646, 649 n.2 (ACMR 1984)(convening authority had court-martial jurisdiction over the geographical area of the command); United States v. Gates, 21 M.J. 722, 723 (ACMR 1985) (three commanders at Fort Campbell had the power to convene general courts-martial).

trial.<sup>400</sup> In the Army and the Air Force this is accomplished through a formal written order called a court-martial convening order. In the Navy, it is accomplished through a letter from the convening authority to the president of the court advising the president that a court-martial is to be convened. The order or letter cites the source of the convening authority's power to convene the court-martial and lists those whom the convening authority has selected to serve as court members (or jurors) on the court.

The rules and regulations governing the convening of courts-martial are strictly construed.<sup>401</sup> This is so because a "court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constitut-

---

400

Prior to 1969, a court was "convened" at the physical meeting of the court after the parties were sworn. In the Manual for Courts-Martial, United States, 1969 (Revised edition), the term "assembly" . . . is used to describe the physical meeting (Para. 61j) and the term "convene" is used to denote the establishment of a court-martial by an order issued by the convening authority (Paras. 4-6, 36). Accordingly, we customarily speak of courts being convened and cases or charges being referred to trial or tried."

United States v. Saunders, 6 M.J. 731, 733 n.1 (ACMR 1978).

<sup>401</sup> See United States v. Durham, 15 USCMA 479, 481, 35 CMR 451, 453 (1965); United States v. Padilla, 1 USCMA 603, 606, 5 CMR 31, 34 (1952); United States v. Goodson, 1 USCMA 298, 300, 3 CMR 32, 34 (1952); United States v. Emerson, 1 USCMA 43, 45, 1 CMR 43, 45 (1951).

ed in entire conformity with the provisions of the statute, or else it is without jurisdiction."<sup>490</sup> As a general rule, a presumption of regularity is applied to the convening of courts-martial, and in the absence of an objection, it is presumed that a court-martial is properly convened.<sup>491</sup> However, when an accused, either at an Article 39(a) session or on appeal,<sup>492</sup> raises the issue of whether a court-martial is properly convened, the burden is on the government to show that the court-martial was convened properly by one who had the authority to convene it.<sup>493</sup> To meet its burden of proof, the

---

<sup>490</sup> McClaughry v. Deming, 186 U.S. 49, 62 (1902).

<sup>491</sup> United States v. Livingston, 7 M.J. 638, 640 (ACMR 1979), aff'd, 8 M.J. 278 (C.M.A. 1980) (presumption of regularity applied in the referral of charges to trial by the convening authority); United States v. Moschella, 20 USCMA 543, 546, 43 CMR 383, 386 (1971) (presumption of regularity applied in the referral of charges by a convening authority to special court-martial). See United States v. Pugh, 99 U.S. 265, 271 (1878) (courts will apply a presumption of regularity in the conduct of the affairs of government); United States v. Masusock, 1 USCMA 32, 35, 1 CMR 32, 35 (1951) (Army and its officers are presumed to have acted in accordance with Army Regulations).

<sup>492</sup> See infra note 1504-1507 and accompanying text.

<sup>493</sup> Brown v. Hiatt, 81 F. Supp. 647 (N.D. Ga. 1948).

Since the law requires that jurisdictional facts must affirmatively appear, either by the order establishing the court, or by extrinsic evidence in order to establish the jurisdiction of the court-martial, the burden of proving such facts rests upon the party asserting the existence of such necessary jurisdictional facts.

Government must establish the existence of jurisdiction by a preponderance of the evidence.<sup>494</sup> As a general rule, the question of whether a court-martial has jurisdiction is an issue of law which is to be decided by

---

Id. at 650. See also, United States v. Barrett, 23 USCMA 474, 475, 50 CMR 493, 494 (1975)(the Government's request at the appellate level for a limited rehearing on the issue of jurisdiction was rejected where the accused raised the jurisdictional question at trial and on appeal, and the Government presented no evidence either at the trial or on appeal to show that the court-martial had jurisdiction over the accused).

494

At trial the government's burden of establishing the court's jurisdiction over the accused is an interlocutory matter; the military judge must upon a defense motion to dismiss for lack of jurisdiction, apply the preponderance of the evidence standard.

D. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 132 (Charlottesville, Virginia: The Michie Company, 1982)(hereinafter cited as MILITARY PRACTICE AND PROCEDURE). See generally Thorne, Jurisdictional Issues at Trial and Beyond, THE ARMY LAWYER 15 (Sept. 1980). See United States v. Bailey, 6 M.J. 965, 966-69 (NCMR 1979)(en banc) for an excellent discussion of the burdens of proof on jurisdictional issues. In Bailey, the Court held that the military judge did not err in applying the preponderance of the evidence standard in finding jurisdiction over the accused. See also United States v. Jessie, 5 M.J. 573, 576 (ACMR), pet. denied, 5 M.J. 300 (C.M.A. 1978)(preponderance of evidence standard used by appellate court in reviewing factual questions of recruiter misconduct); United States v. Alef, 3 M.J. 414, 419 (C.M.A. 1977)(government must demonstrate in the charges the jurisdictional basis for trial of the accused and the offense). The preponderance of the evidence standard also is applied by the staff judge advocate in his post trial review of jurisdictional questions raised in the record, and by appellate courts in the review of jurisdictional issues on appeal. United States v. Jessie, 5 M.J. 573, 576 (ACMR), pet. denied, 5 M.J. 300 (C.M.A. 1978).

the military judge. In some cases the resolution of the issue of whether a court-martial has jurisdiction depends upon the finding of certain facts by the court members.<sup>495</sup> In such cases, the factual questions in dispute are referred to the court members for decision. In resolving questions of fact--like "was the accused a member of the armed forces?" or "did the offense occur on a military installation?"--the court members must apply a reasonable doubt standard in determining the existence of certain facts.<sup>496</sup>

Thus, there are two standards of proof that can

---

<sup>495</sup> See e.g., United States v. Ornelas, 2 USCMA 96, 101, 6 CMR 96, 101 (1952)(whether the accused, who reported for a physical examination at the reception center, but who stated that he never participated in an induction ceremony and who later went home to Mexico, was subject to court-martial jurisdiction presented a factual question which should have been submitted to the court members for decision and should not have been decided by the law officer).

<sup>496</sup>

For example, the purely military offenses of absence without leave and desertion include an underlying element of military status. See United States v. Buckingham, 9 M.J. 514 (A.F.C.M.R. 1980), aff'd on other grounds, 11 M.J. 184 (C.M.A. 1981). In United States v. Laws, 11 M.J. 475 (C.M.A. 1981) the court found no reversible error in a bifurcated proceeding; the judge did not submit the issue of guilt to the court until after it returned with a finding of personal jurisdiction.

MILITARY PRACTICE AND PROCEDURE, supra note 494, at 133 n.7. But see United States v. Williams, 17 M.J. 207, 209-10 (C.M.A. 1984)(factual question, as to whether the location of a parcel of land where the offense took place was part of Fort Hood or not, was left to the court members to decide).

be applied in deciding questions of court-martial jurisdiction:

[t]he standard of proof on all motions to dismiss for lack of . . . jurisdiction when presented to the military judge . . . [is] a preponderance of the evidence. If the motion is denied by the judge, the issue . . . , when it bears on the ultimate issue of guilt or innocence, may be raised again during trial on the merits, and at that time the Government must prove [the relevant facts] beyond a reasonable doubt[, for example,] that the accused is a member of the military.<sup>497</sup>

What is important to recognize is that the standard of proof to be applied by the military judge in deciding jurisdictional issues (a preponderance of the evidence) is different than the burden of proof that is to be applied by the court members in deciding jurisdictional facts on the merits of the case (reasonable doubt).

With regard to the element of a properly convened court-martial, as with the other four elements of court-martial jurisdiction, there are no presumptions of legality or inferences that can be relied on by the government to show jurisdiction.<sup>498</sup> The Government, in

---

<sup>497</sup> United States v. Bailey, 6 M.J. 965, 969 (NCMR 1979)(use by military judge of preponderance of evidence standard in denying the accused's motion to dismiss for lack of jurisdiction over the person held valid).

<sup>498</sup> See Runkle v. United States, 122 U.S. 543, 556 (1887)(statutes governing trials by courts-martial must be complied with); Brown v. Keene, 33 U.S. 112, 115 (1834)(facts establishing jurisdiction must be stated affirmatively and it is not enough that they can be

other words, has to prove facts necessary to show that the court was properly convened. However, the courts have held that if an accused fails to raise a jurisdictional issue at trial, an appellate court is entitled to draw "any reasonable inferences against [the accused] with respect to factual matters not fully developed in the record of trial."<sup>499</sup>

As a general rule, it is hard to show that a court was properly convened when in fact it wasn't, but the United States Court of Military Appeals and the Courts of Military of Review are quite liberal in allowing the government an opportunity to supplement the record on appeal with affidavits, amending orders, and allied papers to show that the court-martial was properly convened.<sup>500</sup> If the government, even after submitting additional materials and documents, is unable to establish that the court was properly convened, the

---

inferred from the record); United States v. Goudge, 39 CMR 324 (1968)(authority of convening authority to convene a court-martial upheld).

<sup>499</sup> United States v. Lockwood, 15 M.J. 1, 7 (C.M.A. 1983).

<sup>500</sup> See e.g., United States v. Guidry, 19 M.J. 984, 985 (AFCMR 1985)(government allowed to submit affidavits and special orders relevant to the issue of whether the accused's court-martial was properly convened). But see, United States v. Barrett, 23 USCMA 474, 475, 50 CMR 493, 494 (1975)(the Army Court of Military Review denied the Government's request for a limited rehearing on the issue of jurisdiction where the accused properly raised the issue at trial and the Government presented no evidence on the issue either at trial or on appeal).

findings and sentence of the court-martial will be set aside and a new trial may be ordered.<sup>501</sup>

Not every error associated with the convening of courts-martial is a jurisdictional error warranting reversal of the decision of the trial court. Typographical errors, administrative mistakes, or other clerical problems are usually not enough to show that the court-martial was improperly convened.<sup>502</sup> This is because--

---

<sup>501</sup> See e.g., United States v. Greenwell, 19 USCMA 460, 42 CMR 62 (1970). "A new trial may be ordered before a properly [convened] court-martial." Id. at 464, 42 CMR at 66.

<sup>502</sup> See e.g., United States v. Blascak, 17 M.J. 1081, 1082 (AFCMR 1984), pet. denied, 19 M.J. 21 (C.M.A. 1984)(typographical error on the charge sheet referring the case to a different court-martial order held not to be jurisdictional error when the convening authority's intentions were clear).

Unfortunately, this Court has recently seen a number of courts-martial convened by written orders containing a variety of administrative errors, such as those found in the instant case. We find these orders irregular and short of highest professional standards; however, we, have refrained from holding that they deprive the court of jurisdiction.

Id. See also, United States v. Simpson, 16 USCMA 137, 140, 36 CMR 293, 296 (1966) (erroneous procedures followed in assigning the case to a particular court held not jurisdictional error); United States v. Glover, 15 M.J. 419 (C.M.A. 1983)(general court-martial convened according to a special court-martial convening order by mistake held to be an administrative error where the intent of the convening authority was clear and the convening authority actually referred the charges to a general court-martial); United States v. Kellough, 19 M.J. 871, 874 (AFCMR 1985)(absence of command line from court-martial convening order held to be an administrative error and not a jurisdictional defect); United States v. Fields, 17 M.J. 1070, 1071-72 (AFCMR 1984)

A convening order which brings a court-martial into being is but an expression of the intent of the convening authority. The particular document which is prepared is merely a formal recordation of that expressed intent. If the document does not accurately reflect the convening authority's intent, it is the fault of the document's author, not the convening authority.<sup>503</sup>

Where the wrong court-martial convening order, however, is included in the record of trial and the authorities at the installation where the case was tried are not able to locate a copy of the correct convening order, the court will find that the government has failed to show "sufficient facts to support the conclusion that the court which tried the appellant was properly convened."<sup>504</sup>

---

(trial of accused by court to which charges were not referred held not to be jurisdictional error where accused did not object to any defects in the referral of his case to trial); United States v. Morgan, 50 CMR 589, 590-91 (ACMR 1975)(erroneous procedures used by the convening authority in convening five separate courts for a common trial of five accuseds held to be an administrative error and not a jurisdictional error); United States v. Blair, 45 CMR 413, 415-16 (ACMR), pet. denied, 45 CMR 928 (C.M.A. 1972) (Article 32 investigator, who was listed as one of the seven trial counsels on the court-martial convening order, but who did not participate in the trial of the accused, held not to be jurisdictional error).

<sup>503</sup> United States v. Glover, 15 M.J. 419, 421 (C.M.A. 1983).

<sup>504</sup> United States v. Porter, No. 73 0213 (NCRM, May 3, 1973)(unpublished opinion). See R.C.M. 1103(b)(2)(D), MCM, 1984, at II-162 to II-163; App. 21, Analysis, R.C.M. 1103, MCM, 1984, at A21-70. See also App. 14, Guide for Preparation of Record of Trial, MCM, 1984, at A14-2.

The test for determining if an error is jurisdictional is "whether the statutory provisions involved constitute an 'indispensable prerequisite' to the exercise of court-martial jurisdiction."<sup>505</sup> Under this test, the failure to produce the court-martial convening order is jurisdictional error. Where a case is not tried under the right court-martial convening order, but tried under another one issued by the same convening authority, the error is not jurisdictional.<sup>506</sup>

Who has the power to convene a court-martial is stated in the Code. Article 22 provides, for example, that a general court-martial may be convened by:

- (1) the President of the United States;
- (2) the Secretary concerned;
- (3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;
- (4) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

---

<sup>505</sup> United States v. Goodson, 3 CMR 32, 34 (NBR 1952)(participation of a warrant officer, who was not a lawyer, as trial counsel in a court-martial which tried the accused, held not to be jurisdictional error).

<sup>506</sup> United States v. Emerson, 1 USCMA 43, 45, 1 CMR 43, 45 (1951)(case referred to one court and tried by another held not to be jurisdictional error where the convening authority convened both courts, approved the sentence imposed, and ratified the referral).

- (5) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;
- (6) any other commanding officer designated by the Secretary concerned; or
- (7) any other commanding officer in any of the armed forces when empowered by the President.<sup>507</sup>

Similar authority exists in Articles 23 and 24 of the Code for the convening of special and summary courts-martial.<sup>508</sup> In short, Congress under the present Code has granted the power to convene courts-martial to the President, to the Secretaries of the various services, and to commanding officers. Courts-martial convened by these individuals are properly convened. If, for some reason, a court-martial is convened by someone other than the listed individuals, the court-martial will be held to be improperly convened and lacking jurisdiction to try the accused.

---

<sup>507</sup> Art. 22, U.C.M.J., 10 U.S.C. § 822 (1983). See United States v. Day, 1 M.J. 1167, 1170, 1176-80 (CGCMR 1975) (Commanding General of the District of Columbia held to have the power to convene a court-martial).

<sup>508</sup> See United States v. Surtasky, 16 USCMA 241, 244, 36 CMR 397, 400 (1966) (Commanding Officer, Military Personnel Department, Naval Station, Norfolk, Virginia, held to be in command within Article 23(a)(7) and thus had the power to convene a special court-martial).

## 1. President's Role

While the President of the United States has the power to convene courts-martial under Articles 4, 22, 23, and 24 of the Code, his power to do so was not always clear. In 1885, the President's power to convene a general court-martial was challenged in Swaim v. United States<sup>509</sup>. In Swaim, the President convened a general court-martial to try Brigadier General David A. Swaim on charges of neglect of duty and conduct unbecoming an officer and a gentleman. The charges arose out of private financial dealings between Brigadier General Swaim, The Judge Advocate General of the Army, and a brokerage house involving the assumption of a \$5,000 note. General Swaim was tried by general court-martial and was convicted of some of the offenses charged and acquitted of the others. After some confusion he was sentenced "to be suspended from rank and duty for twelve years and forfeit one half [o]f his monthly pay every month for the same period."<sup>510</sup>

Six years later, on February 23, 1891, General Swaim filed a petition in the Court of Claims requesting

---

<sup>509</sup> 165 U.S. 553 (1897). See Robie, The Court-Martial of a Judge Advocate General: Brigadier General David G. Swaim, 56 MIL. L. REV. 211, 221-22, 237-38 (1972) [hereinafter cited as The Court-Martial of a Judge Advocate General].

<sup>510</sup> 165 U.S. at 564.

payment of backpay that had been withheld from him because of his court-martial sentence. The Court of Claims denied his petition on February 27, 1893, and General Swaim appealed to the Supreme Court of the United States. In his petition to the Supreme Court, General Swaim alleged among other things that the general court-martial which tried him did not have jurisdiction because the President of the United States did not have the power to convene a general court-martial.

At the time, Article 72 of the Articles of War provided that:

Any general officer, commanding the army of the United States, or separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case.<sup>511</sup>

General Swaim argued that under this section, "the power of the President to appoint a court-martial is restricted to a single case where the commander of an officer charged with an offense is himself the accuser

---

<sup>511</sup> Id. at 556 (emphasis added).

or prosecutor."<sup>512</sup> In the present case, General Swaim maintained that "General Sheridan, the immediate commander of the appellant, was not the accuser or [the] prosecutor" and that for this reason, "the right of the President to make the order convening the court-martial did not arise."<sup>513</sup> In short, General Swaim argued that, except for Article 72, the Articles of War did not empower the President to convene a general court-martial, and that in the present case, Article 72 was not applicable because General Swaim's immediate commander was not the accuser or the prosecutor in the case.

The Supreme Court rejected General Swaim's argument, and accepted the view, that when the Articles of War expressly granted military officers authority to appoint courts-martial, "the power was necessarily vested in the commander-in-chief, the President of the United States."<sup>514</sup> For this reason, the Supreme Court concluded "that it is within the power of the President of the United States, as commander-in-chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser."<sup>515</sup> In

---

<sup>512</sup> Id.

<sup>513</sup> Id. See The Court-Martial of a Judge Advocate General, supra note 509, at 211, 221-22, 237-38.

<sup>514</sup> Id.

<sup>515</sup> Id. at 558.

effect, the Supreme Court ruled that the President has an inherent power to appoint courts-martial. While it is clear that the President has inherent power to convene courts-martial, it is also clear now that he has explicit power to convene courts-martial under Articles 4, 22, 23 and 24 of the Code.<sup>516</sup>

## 2. Commander's Role

Rarely is the President of the United States called upon to convene a court-martial or any other military tribunal. Most often, the convening authority is a commanding officer who is authorized by the Uniform Code of Military Justice to create a court-martial. Rule 504 of the Manual for Courts-Martial provides that a general court-martial "may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President."<sup>517</sup> The authority of a commanding officer to "convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated

---

<sup>516</sup> See Givens v. Zerbst, 255 U.S. 11, 18 (1921) (President held to have the power under Article of War 8 to empower a camp commander to exercise general court-martial authority).

<sup>517</sup> R.C.M. 504(b)(2), MCM, 1984, at II-54.

positions."<sup>518</sup>

To convene a court-martial a convening authority need not be a lawyer or legally trained, even though the role of the convening authority has been characterized by the Court of Military Appeals as "judicial in nature."<sup>519</sup> As a rule, a court-martial convened by a convening authority is valid and the judgment rendered by such a court will be given legal effect, unless the convening authority's power to convene courts-martial has been withheld or limited by a higher authority. The same general rule applies to special and summary courts-martial.<sup>520</sup> If the convening authority's power to convene a court-martial has been limited or withheld, and a court-martial is convened in contravention of such authority, the judgment rendered by the court-martial will be void.

---

<sup>518</sup> Discussion, R.C.M. 504(b)(1), MCM, 1984, at II-54. See AR 27-10, para. 2-4b (May 1969).

<sup>519</sup> "Assuming--without deciding--that a convening authority's decision to refer charges for trial is a 'judicial act' . . . .", United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983). See also United States v. Ellsey, 16 USCMA 455, 457, 37 CMR 75, 77 (1966); United States v. Simpson, 16 USCMA 137, 139, 36 CMR 293, 295 (1966); United States v. Williams, 11 USCMA 459, 461, 29 CMR 275, 278 (1960); United States v. Bunting, 4 USCMA 84, 87, 15 CMR 84, 87 (1954); Hansen, Judicial Functions for the Commander?, 41 MIL. L. REV. 1, 4-6, 19-50 (July 1968). But see United States v. Yslava, 18 M.J. 670, 674 (ACMR 1984)(en banc)(the referral of a case to trial is prosecutorial in nature).

<sup>520</sup> R.C.M. 504(b)(2) & (3), MCM, 1984, at II-54 and R.C.M. 1302(a), MCM, 1984, at II-202.

Once it is determined that a commander has the authority to convene a court-martial, the steps in creating or convening a court-martial are fairly simple. The process consists of four steps: the first step is receipt by a convening authority of charge sheets from a subordinate commander with the subordinate commander's recommendation that the charges be tried by court-martial; the second step is a decision by the convening authority as to whether the charges should be referred to a trial by court-martial, or handled in some other manner; if the convening authority decides that the charges should be tried by court-martial, the third step is a decision by the convening authority as to what kind of court-martial the charges should be referred to; and the fourth step is the referral of the charges to a court-martial by the convening authority.

The Code provides that, in addition to convening a court-martial, the convening authority is responsible for selecting the court members who will sit on the court. The rest of the parties to the trial are detailed in accordance with regulations issued by each of the services. In the Army, for example, the Chief Trial Judge, or the general court-martial judge to whom he has delegated authority, details a military judge to the case.<sup>521</sup> The Staff Judge Advocate or someone on his

---

<sup>521</sup> Para. 8-6, Army Regulation 27-10 (Sept. 1984).

staff designates a prosecutor to try the case,<sup>522</sup> and the Chief of the U.S. Army Trial Defense Service, or the person to whom has been delegated the power to detail counsel, details a defense counsel to represent the accused.<sup>523</sup>

The prosecutor is responsible for arranging for a trial date, for reserving a courtroom, and for notifying the parties and the court members of the date, time, and place of the trial. The defense counsel is responsible for representing the accused, and the military judge is responsible for presiding over the trial.

To show that the court-martial was properly convened, the government must first show that the convening authority had the power to convene the court-martial.<sup>524</sup> Article 22(a) of the Code provides that in the Army, a general court-martial may be convened "by the President and commanders empowered by him, the Secretary of the Army and commanders he designates, and commanders of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corre-

---

<sup>522</sup> Para. 5-3a, Army Regulation 27-10 (Sept. 1984).

<sup>523</sup> Para. 5-4a, Army Regulation 27-10 (Sept. 1984).

<sup>524</sup> United States v. Brown, 15 M.J. 620, 621 (NMCMR 1982) (special court-martial which tried the accused held properly convened because the convening authority had the power to convene a court-martial under Article 23 of the Code).

sponding unit."<sup>525</sup> For a general court-martial in the Army to have jurisdiction, it must be convened by one of these commanders; if it is not, the court-martial does not have jurisdiction and the judgment rendered by it is void.

In United States v. Cases,<sup>526</sup> the question presented was whether the commanding officer at Fort Monmouth, New Jersey, had authority to convene a general court-martial. Before January 1, 1978, the commanding officer of the U.S. Army Electronics Command (ECOM), at Fort Monmouth, New Jersey, was the general court-martial convening authority. On January 1, 1978, ECOM was discontinued and replaced by the U.S. Army Communications and Electronic Material Readiness Command (CERCOM). The only change that occurred was the redesignation of the unit, since the mission, personnel, and structure of the command remained basically the same.

Eight days after the redesignation, the commander of the new command convened a general court-martial to try the accused on charges of indecent assault. The accused pleaded guilty, was convicted, and was sentenced to "reduction to the grade of Specialist E-4 and forfei-

---

<sup>525</sup> United States v. Cases, 6 M.J. 950, 952 (ACMR 1979). See Art. 22(a), U.C.M.J., 10 U.S.C. § 822(a) (1983).

<sup>526</sup> 6 M.J. 950 (ACMR 1979).

ture of \$200.00 per month for four months."<sup>527</sup>

The case was reviewed by Judge Advocate General of the Army under the provisions of Article 69 of the Code, and was referred by him to the Army Court of Military Review for further review.<sup>528</sup> The Court of Military Review noted that the commanding officer of CERCOM was not one of the commanders listed in Article 22(a) as having authority to convene general courts-martial; that is, the commander was not "the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps."<sup>529</sup> For this reason, the commander's power to convene the general court-martial had to be derived from either the President or the Secretary of the Army. At the time of trial, no delegation of power from the President or designation from the Secretary had been received. On May 1, 1978, however, four months after CERCOM came into existence and three and a half months after the general court-martial was convened, the Secretary of the Army designated the commander of CERCOM to be a general court-martial convening authority.

---

<sup>527</sup> 6 M.J. at 951.

<sup>528</sup> Art. 66(b)(2), U.C.M.J., 10 U.S.C. § 866(b)(2) (1983).

<sup>529</sup> Art. 22(a)(3), U.C.M.J., 10 U.S.C. § 822(a)(3) (1983).

In holding that the court-martial did not have jurisdiction to try the accused, the Army Court of Military Review noted that the "commander lost his authority to convene general courts-martial when ECOM was discontinued[, and that his] authority was not transferred with him when he assumed command of the U.S. Army Communications and Electronics Material Readiness Command (CERCOM)."<sup>530</sup> In reaching its decision, the Court explained that the "power to convene courts[-martial] is not personal in nature but constitutes a part of the function of the office that the commander occupies."<sup>531</sup>

The point is that the convening authority must have the power to convene a court-martial, and that power must either be derived directly from the statute, or from a delegation of power by the President or a designation from the Secretary of the armed force concerned.<sup>532</sup> The authority to convene a court-martial,

---

<sup>530</sup> 6 M.J. at 952.

<sup>531</sup> Id.

<sup>532</sup> United States v. Wilson, 22 USCMA 416, 417, 47 CMR 353, 354 (1973) (U.S. Army Element I Corps (RQK/USA) Group was an "Army Corps . . . or corresponding unit" within the meaning of Article 22(b)). See United States v. Masterman, 22 USCMA 250, 253, 46 CMR 250, 253 (1973) (commander had authority to convene a general court-martial even though his unit was inactivated, where the unit continued to exist on paper as part of a joint command, and the commander continued to exercise the command of the unit while assigned to the joint command); United States v. Day, 1 M.J. 1167, 1170-71 (CGCMR 1975) (Commander of a Coast Guard District held to have power to convene a general court-martial); United States v.

whether its source is statutory, a delegation or a designation, must be spelled out in the court-martial convening order.

When a command is reorganized or redesignated, a request must be submitted through The Judge Advocate General to the Secretary of the service for a new grant of general court-martial authority.<sup>533</sup> A delay in the forwarding of such authority, as happened in Cases, can prove to be fatal from the point of view of court-martial jurisdiction.

### 3. Devolution of Command

The commanding officer's power to convene

---

Goudge, 39 CMR 324, 334-36 (ABR 1968) (commanding officer of an integrated command possessed authority to convene a general court-martial in his capacity as installation commander).

<sup>533</sup> See Court-Martial Authority under the Reorganization, THE ARMY LAWYER 18 (May 1973).

As a result of the reorganization of major CONUS commands during calendar year 1973, numerous Secretarial grants of general court-martial convening authority will be required. The affected convening authorities are those requiring Secretarial grants pursuant to Article 22(a)(b) of the Uniform Code of Military Justice. This will include those commands that are experiencing a redesignation, reorganization, or initial organization as a command requiring general court-martial jurisdiction. Staff Judge Advocates of the above described commands are requested to ensure that the necessary grants are requested in advance of their need.

Id. at 18-19.

courts-martial is personal and cannot be delegated to another.<sup>534</sup> This means that only the commanding officer can convene a court-martial or amend convening orders, and that no one can exercise such authority on his behalf. It means too that only the commanding officer can perform the duties associated with convening and reviewing a court-martial, that is, in selecting those who will serve as members on the court-martial, in amending the court-martial convening orders,<sup>535</sup> and in taking action on the findings and sentence once the court-martial is concluded.

On occasion, a commanding officer will be absent from the command and unable to convene a court-martial. When this occurs, the responsibility for commanding the unit and convening courts-martial devolves to the next senior ranking officer.<sup>536</sup> The procedures governing devolution of command are set forth in the

---

<sup>534</sup> United States v. Bunting, 4 USCMA 84, 87, 15 CMR 84, 87 (1954). This is because the "drafters of the Code saw fit to unequivocally require that personnel in the armed forces be tried only on charges referred by the convening authority." United States v. Roberts, 7 USCMA 322, 327, 22 CMR 112, 117 (1956).

<sup>535</sup> United States v. Dewitt, 50 CMR 13, 14 (NCOMR 1974) (court-martial lacked jurisdiction where a substitute military judge was appointed by one who was without authority to do so). But see Art. 26(c), U.C.M.J., 10 826(c) (1983) and R.C.M 505(e), MCM, 1984, at II-57, which eliminates this type of problem.

<sup>536</sup> See United States v. Bunting, 4 USCMA 84, 87-88, 15 CMR 84, 87-88 (1954).

regulations of each of the services. The Army Regulation on devolution of command, for example, provides that:

If a commander of any Army element dies, becomes disabled, retires, is reassigned, or is temporarily absent the next senior regularly assigned Army member will assume command. He will assume command until relieved by proper authority . . . . Assumption of command under these conditions will be announced as per paragraph 3-1b. However, the announcement will include assumption as acting commander unless proper authority has indicated that the command will be permanent. . . .<sup>537</sup>

When the responsibility of command devolves to the next senior ranking officer, the power to convene courts-martial also devolves.

On assuming command, the new commander acquires all of the powers possessed by the commander who is absent. This includes the power to convene new courts-martial, and to refer charges to trial which an absent commander has decided should be tried by court-martial. The problem is in determining when command devolves to the next senior ranking officer and when it doesn't. A presumption of regularity attaches to the convening of courts-martial, and in the absence of an obvious error or an objection, the military judge will assume that a court-martial was properly convened. As a practical

---

<sup>537</sup> Army Regulation 600-20, Command Policies and Procedures, para. 3-4, at 3-4 (15 October 1981).

matter too, the appellate courts do not look behind the record of trial to determine whether the court had jurisdiction, unless there is an objection from an accused. While the court will not presume that a court-martial has jurisdiction,<sup>538</sup> it nevertheless will apply a presumption of regularity and assume that the court-martial was properly convened.

Issues with regard to the devolution of command, thus, arise only when an accused, at trial or on appeal, argues that the trial was not properly convened or that the convening authority did not have the power to convene the court. In such cases, the burden is on the government to show that the court was properly convened.<sup>539</sup>

In United States v. Bunting,<sup>540</sup> the accused contended on appeal that the court-martial which tried him was not properly convened. The general court-martial which tried the accused was convened by Admiral Ofstie, who served as Chief of Staff to Admiral Joy, Commander of Naval Forces, Far East. When Admiral Joy became "the Senior United States Delegate and official spokesman for

---

<sup>538</sup> Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908).

<sup>539</sup> See note 494 supra for a discussion of the use of the preponderance of the evidence standard in deciding questions of jurisdiction.

<sup>540</sup> 4 USCMA 84, 15 CMR 84 (1954).

the United Nations Delegation in the armistice negotiations in Korea,"<sup>541</sup> he was informed by the Chief of Naval Operations that he would have to relinquish his command. In his absence, Admiral Ofstie took command and exercised authority as "Acting Commander Naval Forces, Far East."

Navy Regulations in existence at the time provided for this succession. Article 1371 stated:

1. In the event of the incapacity or death of a commander in chief of a fleet, or of a commander of a subdivision of a fleet, or when such officer is absent from his command and so directs, the senior line officer of the Navy, eligible for command at sea, in the fleet or subdivision of the fleet, shall succeed to the command thereof, unless succession to command by a deputy or other officer has been prescribed by competent authority.

2. During the absence of a commander in chief or of a commander of a subdivision of a fleet, and when such officer has not directed that he be succeeded in command as provided in paragraph 1, the chief of staff or chief staff officer shall have authority to issue the orders required to carry on the established routine and to perform the administrative functions of the command

. . .<sup>542</sup>

Under the provisions of this regulation, the Court of Military Appeals held that in the absence of Admiral Joy, command devolved on Admiral Ofstie and that he "had

---

<sup>541</sup> Id. at 86, 15 CMR at 86.

<sup>542</sup> Id. at 88, 15 CMR at 88.

the power to convene a general court-martial in his own right."<sup>543</sup>

What is significant about the Court's decision in Bunting is that Admiral Ofstie was not the next senior line officer in the chain of command who logically would have assumed command in Admiral Joy's absence. The Court of Military Appeals noted, however, that because Admiral Joy had not directed the next senior officer in the chain of command to succeed him, the command under the regulations could properly devolve to Admiral Ofstie, the Chief of Staff.<sup>544</sup> The Court of Military Appeals also noted that even though Admiral Joy was performing duties in the same geographical area as his command, the nature of his assignment was such that he was unable to give proper attention to the operation and function of his command, and hence, the succession of command to Admiral Ofstie was proper.<sup>545</sup>

In Bunting, the Navy Commanders followed the Navy Regulations "by the book" and the devolution of command was upheld.<sup>546</sup> In other cases where military

---

<sup>543</sup> Id. at 90, 15 CMR at 90.

<sup>544</sup> Id. at 89, 15 CMR at 89.

<sup>545</sup> Id. at 88, 15 CMR at 88.

<sup>546</sup> Id. at 90, 15 CMR at 90. See United States v. Kugima, 16 USCMA 183, 186, 36 CMR 339, 342 (1966) (Chief of Staff of a Marine Division had the power to convene a general court-martial in the absence of the Commanding General and the Assistant Division Commander);

commanders have not followed the regulations concerning devolution of command, the courts have held that the courts-martial have not been properly convened.

In United States v. Guidry,<sup>547</sup> the accused, a Captain in the Air Force, argued that his court-martial was not properly convened because command did not properly devolve in the commander's absence to the next senior ranking officer. The accused in Guidry had been tried and convicted by a general court-martial at Offutt Air Force Base, Nebraska, for "using marijuana in the presence of enlisted members in violation of Articles 134 and 133," and had been sentenced to "confinement at hard labor for one month, forfeiture of all pay and allowances, and dismissal from the service."<sup>548</sup>

The record of trial in Guidry showed that Colonel M was the convening authority on August 25, 1983, when the charges against the accused were referred to trial. The accused's trial, however, was delayed until February 29, 1984. On the day of trial, Colonel P was the convening authority and he issued an amending order which replaced "the trial counsel and four court mem-

---

United States v. Williams, 6 USCMA 243, 248, 19 CMR 369, 374 (1955)(in the absence of the corps commander, command devolved to the deputy corps commander who had authority to convene a general court-martial).

<sup>547</sup> 19 M.J. 984 (AFCMR 1985).

<sup>548</sup> Id. at 984 and n.2.

bers."<sup>549</sup> Later, on June 8, 1984, Colonel M was the convening authority, and he reviewed the record of trial and signed the action approving the findings and sentence in the accused's case.

On appeal to the Air Force Court of Military Review, the accused argued that "[t]here [was] no evidence in the record"<sup>550</sup> that there had been a change of command, and that it was not clear from the record of trial that "the court-martial which convicted [him] was properly convened and had jurisdiction to try [him]."<sup>551</sup>

In response, the Government presented evidence showing that Colonel P was the general court-martial convening authority, that he was temporarily absent from Offutt Air Force Base on August 25, 1983 and June 8, 1984, and that on the days he was absent, Colonel M assumed command. As evidence of this, the Government submitted a special order dated August 9, 1983 which stated:

Under the provisions of AFR 35-54 COLONEL [M] . . . assumes command of the 3902d Air Base Wing (SAC), during the temporary absence of Colonel [P] . . . . Effective 11 Aug 1983.<sup>552</sup>

---

<sup>549</sup> Id. at 485.

<sup>550</sup> Id. at 485.

<sup>551</sup> Id.

<sup>552</sup> Id.

A similar special order was issued on May 31, 1984, announcing that effective June 6, 1984, Colonel M was assuming command in the temporary absence of Colonel P.

In addressing the devolution of command issue raised by the accused, the Court examined the provisions of paragraph 18a of Air Force Regulation 35-54.<sup>553</sup> The Court noted that the regulation provided, in part, that:

In the event of death, prolonged disability, or absence of the commander in a nonduty status, the next senior officer present for duty within the organization or unit and eligible, according to this regulation, will assume command until relieved by proper authority. Assumption of command under these conditions is announced by administrative orders citing this regulation as authority . . . . Absence of the commander in a temporary duty status does not relieve him or her from discharging the functions of command and, except under unusual circumstances, another officer will not assume command during such absence.<sup>554</sup>

After reviewing the facts in Guidry, the Court concluded that "Colonel M did not properly assume command of the 3902d Air Base Wing either on 11 August 1983 or 6 June 1984."<sup>555</sup> In reaching this decision, the Court noted that "[a]t neither time was Colonel P dead,

---

<sup>553</sup> See Paragraph 18a, Air Force Regulation 35-54, Rank, Precedence, and Command (15 Sept. 1981).

<sup>554</sup> 19 M.J. at 986 (emphasis added).

<sup>555</sup> Id.

suffering from a protracted disability, or absent in a nonduty status."<sup>556</sup> "Neither," the Court stated, "was he absent in a temporary duty status . . . at a time when unusual circumstances existed requiring Colonel M to assume command."<sup>557</sup> Thus, the Court found that "Colonel M was not empowered to act as a general court-martial convening authority on those dates that he referred this case to trial and took action on the findings and sentence."<sup>558</sup> For this reason, the Court concluded that "a basic jurisdictional error is present and the court-martial proceeding against the accused was of no effect."<sup>559</sup> The Court set aside the accused's conviction and sentence, and stated that a new trial could be ordered.

In United States v. O'Connor<sup>560</sup> the accused, a technical sergeant, similarly argued that the court-martial which tried and convicted him was not properly convened because the command failed to comply with the provisions set forth in paragraph 18a of Air Force Regulation 35-54 on devolution of command. In O'Connor, the accused pleaded guilty in a bad conduct discharge

---

<sup>556</sup> Id.

<sup>557</sup> Id.

<sup>558</sup> Id.

<sup>559</sup> Id.

<sup>560</sup> 19 M.J. 673 (AFCMR 1984).

special court-martial to charges of wrongful use and possession of marihuana and was sentenced to "a bad conduct discharge, confinement at hard labor for six months, to forfeit \$200.00 per month for six months, and to be reduced to the grade of airman basic."<sup>561</sup>

On appeal to the Air Force Court of Military Review, the accused argued that his court-martial "was not convened by an officer authorized to convene courts-martial."<sup>562</sup> In O'Connor, the charges and specifications were referred to trial by Lieutenant Colonel A, the group commander, who had assumed command in the absence of Colonel N, who was on temporary duty in Puerto Rico participating in a military exercise. The assumption of command by Lieutenant Colonel A in the absence of Colonel N was announced by the following special order:

By direction of the President, LT COL [A], . . . , is appointed Commander 833d Combat Support Group, effective 6 April 1984, during the temporary absence of COL [N], . . . , effective 6 April 1984. Authority AFR 35-54.<sup>563</sup>

The accused argued that assumption of command by Lieutenant Colonel A was not proper because, under the provisions of Paragraph 18a of Air Force Regulation 35-54,

---

<sup>561</sup> Id.

<sup>562</sup> Id. (changed to lower case).

<sup>563</sup> Id. at 674.

"Lieutenant Colonel A was not the next senior officer present for duty within the command and Colonel N was not a commander absent in a nonduty status."<sup>544</sup>

The Court acknowledged that "Lieutenant Colonel A was, in fact, not the [next] senior officer present for duty within the 833d Combat Support Group and that Colonel N was absent in a duty status,"<sup>545</sup> and that, under the provisions of Air Force Regulation 35-54, he could not properly assume command in the absence of Colonel N.

But the Court ruled that Lieutenant Colonel A "assumed command of the 833d Combat Support Group as a result of being assigned by competent authority under the provisions of [Air Force Regulation] 35-54, paragraph 10a, and not under paragraph 18."<sup>546</sup> Paragraph 10a of Air Force Regulation 35-54 provides that commander of a major command has the power to appoint an officer to assume command of an air wing whether he is the next highest ranking officer or not.

In this case, the Court established that Lieutenant Colonel A was assigned to command by order of the Commander of the 833d Air Division, the commander of a major command. In assigning Lieutenant Colonel A to

---

<sup>544</sup> Id. at 674.

<sup>545</sup> Id.

<sup>546</sup> Id.

assume command in the absence of Colonel N, the Court found that the Commander of the 833d Air Division "acted pursuant to a delegation of authority granted by the Secretary of the Air Force, acting for the President."<sup>567</sup> For this reason, the Court concluded that "Lieutenant Colonel A was properly appointed to assume command of the 833d Combat Support Group and, as commander, was empowered to convene special courts-martial."<sup>568</sup>

When devolution of command occurs, assumption of command orders sometimes are issued for the new commander as in Guidry and O'Connor. The absence of such orders, however, will not preclude a commander from assuming command and exercising authority to convene courts-martial.<sup>569</sup> Nor will the presence of such orders empower a commander to act as the convening authority if command has not properly devolved to him.<sup>570</sup>

The concept of devolution of command is critical to the operation and administration of the military justice system. The key person in the military justice

---

<sup>567</sup> Id.

<sup>568</sup> Id.

<sup>569</sup> United States v. Jackson, 49 CMR 717, 718 (ACMR 1975)(actions taken by convening authority prior to announcement of assumption of command orders held proper).

<sup>570</sup> United States v. Guidry, 19 M.J. 984 (AFCMR 1985)(commander, who convened a court-martial to try the accused, did not have authority to act as the convening authority, even though assumption of command orders had been issued).

system is the convening authority who is usually the commanding officer of a territorial department, a Group, a Corps, a division, a brigade, a fleet, a naval station, an air command, an air force, an air division, or a separate wing. When the commanding officer of one of these units is absent from the command, the operation of military justice will cease to function unless provision is made for someone to assume and carry on the commander's duties in his absence.

The concept of devolution of command meets this need and ensures that the unit is able to function effectively in a military justice sense during the absence of the commanding officer. Since the commanding officer is the convening authority, his authority to convene courts-martial must be passed to another, if military justice is to operate in his absence. A new convening authority must be appointed in the commanding officer's absence to assume responsibility for the operation of the military justice system, and this is accomplished through devolution of command.

Devolution of command is a term of art and the regulations providing for it are strictly construed by the courts. The failure of commanders to follow the regulations on devolution of command to the "letter," will most assuredly result in a finding either at trial or on appeal that a court-martial convened by the new

commander was not properly convened. In short, the absence of the commanding officer from the unit is not detrimental to the operation of the military justice system. But, if the command devolves to the next highest ranking military person in the unit, it must devolve strictly in accordance with the appropriate regulations, if courts-martial convened by the new convening authority are to be upheld as having been properly convened.

4. Authority over "Separate or Detached" Units

As a general rule, the convening of courts-martial is a responsibility associated with the chain of command. Less serious offenses are tried by summary courts-martial convened by commanders at the lowest levels of the chain of command. More serious offenses are tried by special courts-martial convened by commanders in the middle range of the chain of command. And the most serious crimes are tried by general courts-martial convened by commanders at the highest levels of the chain of command.

In the Army, a summary court-martial can be convened by the commanding officer of "a detached company,"<sup>571</sup> a special court-martial can be convened by the commanding officer of "a brigade, regiment, detached

---

<sup>571</sup> Art. 24(a)(2), U.C.M.J., 10 U.S.C. § 824(a)(2) (1983).

battalion, or corresponding unit of the Army";<sup>572</sup> and a general court-martial can be convened by the commanding officer of "a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps."<sup>573</sup>

While a summary court-martial convening authority cannot convene a special court-martial or a general court-martial, a general court-martial convening authority can convene a summary or special court-martial. In short, the power to convene a higher court-martial necessarily includes the power to convene a lower court-martial.

Most commands are consolidated or unified and if a serious offense is committed, the charges can be forwarded easily up through the chain of command to the appropriate level for trial by special or general court-martial. Occasionally, however, a command unit is "separated or detached" from the main unit and is located in a different area. In such situations, the Code provides that "the commanding officer of a . . . detached battalion, or corresponding unit of the Army" may convene special courts-martial.<sup>574</sup> Similar provisions exist in

---

<sup>572</sup> Art. 23(a)(3), U.C.M.J., 10 U.S.C. § 823(a)(3) (1983).

<sup>573</sup> Art. 22(a)(3), U.C.M.J., 10 U.S.C. § 822(a)(3) (1983).

<sup>574</sup> Art. 24(a)(3), U.C.M.J., 10 U.S.C. § 824(a)(3) (1983).

the same article giving commanders of detached units in the Navy, Marines, Air Force, and Coast Guard like powers.<sup>575</sup>

The Manual states that:

[A] command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline.<sup>576</sup>

The Manual further states that the term "[s]eparate or detached" is "used in a disciplinary sense and not necessarily in a tactical or physical sense."<sup>577</sup>

A question that frequently arises is whether the commanding officer of a "separate or detached" command has the power to convene a court-martial. The answer usually depends on whether the unit is in fact a "separate and detached" command.

In United States v. Ortiz<sup>578</sup> the United States Court of Military Appeals was asked to decide whether the commanding officer of a Marine Corps company was a

---

<sup>575</sup> Art. 24(a)(6), U.C.M.J., 10 U.S.C. § 824(a)(6) (1983).

<sup>576</sup> Discussion, R.C.M. 504(b)(2)(A), MCM, 1984, at 11-54.

<sup>577</sup> Id.

<sup>578</sup> 15 USCMA 505, 36 CMR 3 (1965), pet. for reconsideration denied, 16 USCMA 127, 36 CMR 283 (1966).

"separate or detached" command for the purpose of exercising special court-martial jurisdiction under Article 23(6) of the Code. The company was commanded by a First Lieutenant, and consisted of "164 enlisted men, five officers, and one warrant officer."<sup>579</sup> The Commanding General, Force Troops, had designated it "as a separate and detached command . . . and purportedly authorized [it] to convene courts-martial."<sup>580</sup>

In ruling that the company was not a "separate or detached" unit for court-martial purposes, the Court of Military Appeals relied on the legislative history of Article 23 which makes clear that Congress did "not [intend] to confer special court-martial jurisdiction, as a matter of course, upon company-size units, though they be separate and detached units."<sup>581</sup> The Court also examined the other provisions in Article 23 and concluded that "the language employed in the Article . . . was designed to permit the exercise of such authority 'only as far as a detached battalion'"<sup>582</sup> and no further. For these reasons, the Court of Military Appeals held that "the commanding officer of a separate company does not possess authority to appoint special courts-martial under

---

<sup>579</sup> Id. at 506, 36 CMR at 4.

<sup>580</sup> Id.

<sup>581</sup> Id. at 508, 36 CMR at 6.

<sup>582</sup> Id. at 509, 36 CMR at 7 (emphasis added).

the several classifications of commands specified in . . . Article 23."<sup>583</sup>

The Court noted, however, that the Secretary of the Navy has the power to designate the commanding officer of a "separate or detached" company to be a special court-martial convening authority, if the Secretary decides that the unit needs such authority to operate effectively.<sup>584</sup> In Ortiz there was no evidence that the Secretary of the Navy had granted such authority to the commanding officer of the "separate or detached" company.

The government petitioned for reconsideration arguing that the Court's "original decision, broadly read, [would] result in the nullification of seven to ten thousand special courts-martial."<sup>585</sup> The Court re-examined the issue and denied the petition for reconsideration. In doing so, the Court warned that:

It is unwise to generalize from the application of a jurisdictional concept involving a particular type of unit that other types of commands likewise lack the requisite appointing power. Differences in size, type, organization, mission and many other factors which cannot now be foreseen may lead to entirely different conclusions concerning the existence of

---

<sup>583</sup> Id. at 510, 36 CMR at 8 (emphasis added).

<sup>584</sup> Id.

<sup>585</sup> United States v. Ortiz, 16 USCMA 127, 128, 36 CMR 283, 284 (1966).

appointing authority under . . . Article 23, or Secretarial regulations promulgated pursuant thereto.<sup>586</sup>

The Court noted again that the Secretary of the Navy had not empowered the company commander in this case to convene special courts-martial. In the absence of such a designation, the power of the company commander could only be derived from Article 23 of the Code, and the language of Article 23, the Court found, did not grant the commander of the company the power to exercise such authority.<sup>587</sup>

Where the Secretary of a service personally authorizes a commander of a "separate or detached" command to exercise special court-martial jurisdiction, the exercise of such authority will be upheld. In addition, the commander of an organization, which fits "within the definition of a 'detached battalion, or corresponding unit' or of a 'separate or detached command,' has the power to exercise special court-martial authority."<sup>588</sup> In the past when the Secretary of a

---

<sup>586</sup> Id.

<sup>587</sup> Id. at 131, 36 CMR at 287.

<sup>588</sup> United States v. Woodward, 16 USMCA 266, 267, 36 CMR 422, 423 (1966)(commanding officer of a separate and detached command consisting of three companies and a platoon had authority to convene special courts-martial). See Art. 23(a)(5) & (6), U.C.M.J., 10 U.S.C. § 823(a)(5) & (6) (1983). See also United States v. Edwards, 49 CMR 305, 311-12 (NCOMR 1974)(commanding officer of Infantry Training School was a special

service did not personally authorize the commander of a "separate or detached" unit to exercise special court-martial jurisdiction, but instead delegated the responsibility to another, a flag or general officer, for example, the authorization to convene special courts-martial was held to be invalid.<sup>589</sup>

In the 1984 Manual, an effort was made to clear up some of the confusion concerning when a command is "separate or detached" for special court-martial convening purposes. Rule 504(b)(2)(B) states that:

If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) In the Army or the Air Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) In the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment.<sup>590</sup>

---

court-martial convening authority of a "separate and detached" unit).

<sup>589</sup> United States v. Cunningham, 21 USCMA 144, 44 CMR 198 (1971)(Secretary of the Navy must personally confer the power on a company commander to exercise special court-martial jurisdiction and he cannot delegate the authority to confer such power to a flag or general officer); United States v. Greenwell, 19 USCMA 460, 464, 42 CMR 62, 66 (1970)(Secretary of the Navy cannot delegate to others the power to confer special court-martial convening authority on company commanders).

<sup>590</sup> R.C.M. 504(b)(2)(B), MCM, 1984, at 11-55.

With senior officers now involved in the process of determining when a command is "separate or detached", the problems in this area should be reduced.

Where a command is "separate or detached" and larger than company size, the authority of the commanding officer to convene a special court-martial is clearly provided for in Article 23(a)(3)<sup>591</sup> and Article 23(a)(6)<sup>592</sup> of the Code. Where a command is company size or smaller, on the other hand, the decision of whether it is "separate or detached" for court-martial purposes will be decided now by senior officers.

#### B. Limitations on the Convening Authority

Once it is clear that the commanding officer has the power to convene a court-martial by statute, by devolution of command, or by being in charge of a "separate or detached" unit, it is necessary to inquire whether there are any limitations on the commander's authority to exercise his convening power. In some instances a commanding officer can be authorized by statute to convene a court-martial, but may not be able to exercise the power because he is disqualified for some reason. If the commanding officer, for example, is an

---

<sup>591</sup> Art. 23(a)(3), U.C.M.J., 10 U.S.C. § 823(a)(3) (1983).

<sup>592</sup> Art. 23(a)(6), U.C.M.J., 10 U.S.C. § 823(a)(6) (1983).

"accuser" in a case, or is junior in rank to the "accuser", or does not have the power to convene courts-martial because it has been withheld by a higher ranking officer, the commander will not be able to convene a particular court-martial even though he is granted the power to do so by statute.

1. Convening Authority Cannot Be An Accuser

The Code provides that a commanding officer who is an "accuser" can not convene a general or special court-martial, but must forward the charges to a "superior competent authority" for disposition.<sup>593</sup> An "accuser" is defined by the Code as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an

---

<sup>593</sup> Art. 22(b), U.C.M.J., 10 U.S.C. § 822(b) (1983); Art. 23(b), U.C.M.J., 10 U.S.C. § 823(b) (1983).

The prohibition against an accuser convening a court-martial was introduced into American military law by an Act of May 24, 1830. The legislation was prompted by the trial of an Adjutant General by a court convened by the Commander of the Army, who preferred the charges, was the prosecuting witness, reviewed the case and approved the sentence.

DeGiulio, Command Control: Lawful Versus Unlawful Application, 10 SAN DIEGO L. REV. 72, 85-86 (1972). See also WINTHROP, supra note 51, at 61-63.

official interest in the prosecution of the accused."<sup>594</sup>

The reason charges must be forwarded to a higher command when one is an "accuser" is because the person who convenes a court-martial must be objective and unbiased and have no personal interest in the outcome of the case. The convening authority has to decide if the charges should be referred to trial, and if so what kind of court-martial should try them, and these acts require impartiality and detachment on the part of the convening authority.

A commanding officer who swears to and signs charges against an accused, or directs a junior officer to do so, is not objective, impartial and unbiased. Indeed, a commander could not swear out charges against an accused, or direct another to do so, unless he thought the charges had merit and were supported by adequate evidence. For this reason, an "accuser" may not convene a court-martial, and if a commander is an "accuser", the decision as to whether the charges should be tried by court-martial must be made by a "superior competent authority" who has no bias or a personal interest in the case.<sup>595</sup>

---

<sup>594</sup> Art. 1(9), U.C.M.J., 10 U.S.C. § 801(9) (1983); Discussion, R.C.M. 103, MCM, 1984, at II-4.

<sup>595</sup> Art. 22(b), U.C.M.J., 10 U.S.C. § 822(b) (1983); Art. 23(b), U.C.M.J., 10 U.S.C. § 823(b) (1983). See United States v. Crossley, 10 M.J. 376, 379-80 (C.M.A. 1981)(Everett, C.J., concurring). See also

In the 35 years of the Code's existence, the appellate courts have decided numerous cases on when a commanding officer is an accuser--a reflection, no doubt, on the difficulty commanders have in resisting the temptation to take justice into their own hands. The easy cases for the appellate courts are those where the commanding officer swears to and signs the charges against the accused and then convenes the court-martial to try the accused on the charges he swore to and signed. In such cases, there is a clear violation of Articles 22 and 23 of the Code and the findings and sentence of the court-martial are quickly reversed.<sup>596</sup>

The harder cases are those where it is difficult to tell if the convening authority "has an interest other than an official interest in the prosecution of the accused."<sup>597</sup> In such cases, the courts must examine the facts to determine if the commander's involvement and relationship to the case is sufficient to disqualify him from acting on it.

---

DeGiulio, Command Control: Lawful Versus Unlawful Application, 10 SAN DIEGO L. REV. 72, 85-90 (1972).

<sup>596</sup> United States v. Crews, 49 CMR 502 (CGCMR 1974). See United States v. O'Quin, 16 M.J. 650, 651 (AFCMR 1983)(proceedings held invalid and new trial ordered where accuser became the convening authority when command devolved to him).

<sup>597</sup> Art. 1(9), U.C.M.J., 10 U.S.C. § 801(9) (1983).

In United States v. Gordon,<sup>598</sup> one of the first decisions on this issue and still one of the leading cases on the subject, the United States Court of Military Appeals held that a convening authority was an accuser because he was a victim of the accused's offense. The accused in Gordon was a private first class who was charged with burglary of a Lieutenant General's home and attempted burglary of a Brigadier General's home. Unfortunately for the accused, the Brigadier General happened to be the Commanding Officer of Headquarters Command, Bolling Air Force Base, and the general court-martial convening authority. The charge of attempted burglary of the Brigadier General's home was dropped, but the charge of burglary of the Lieutenant General's home was forwarded for disposition to the Brigadier General in his capacity as the general court-martial convening authority. The Brigadier General referred the case to a general court-martial and the accused was tried and convicted of the burglary charge and was sentenced "to be dishonorably discharged from the service, to forfeit all pay and allowances . . . and to be confined at hard labor for a period of five years."<sup>599</sup> The Brigadier General approved the findings, but reduced the confinement to a term of two years at hard labor.

---

<sup>598</sup> 1 USCMA 255, 2 CMR 161 (1952).

<sup>599</sup> Id. at 257, 2 CMR at 163.

On appeal, the Air Force Board of Review affirmed the findings and sentence as modified by the convening authority.<sup>600</sup> With regard to the issue of whether the convening authority was an accuser, and thus, disqualified from convening the accused's court-martial, the Board of Review concluded that the Brigadier General "had no personal interest, as distinguished from an official one, in the case at the time it was referred for trial."<sup>601</sup> In addition, the Board of Review found that the facts in the case "are indicative not only of complete fairness in the premises but of a lack of reason for animus of a personal nature."<sup>602</sup> In sum, the Board of Review found that the convening authority had "no more than an official interest in the case"<sup>603</sup> and did not commit error in referring the charge to a general court-martial.

The United States Court of Military Appeals reversed the decision of the Air Force Board of Review. On the issue of whether the Brigadier General was disqualified from convening and reviewing the accused's court-martial, the Court of Military Appeals carefully

---

<sup>600</sup> United States v. Gordon, 2 CMR 832, 834 (AFBR 1951).

<sup>601</sup> Id. at 834.

<sup>602</sup> Id.

<sup>603</sup> Id.

considered the origin and history of the rule which prohibits commanders who are accusers from convening courts-martial.<sup>604</sup> In this type of case, the Court concluded, the test is "whether, under the particular facts and circumstances . . . a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome of the litigation."<sup>605</sup> The Court's review of the record led it to conclude "that there is sufficient evidence to require a holding that [the convening authority] was disqualified to convene the court"<sup>606</sup> because he was a victim of one of the accused's offenses, although the offense was not referred to trial. This single fact, the Court concluded, was enough to cause a reasonable person to believe that the convening authority had a personal interest in the outcome of the case. For this reason, the Court held that the Brigadier General was an accuser and disqualified from convening the accused's court-martial.<sup>607</sup>

---

<sup>604</sup> 1 USCMA at 257-60, 2 CMR at 163-66.

<sup>605</sup> Id. at 260, 2 CMR at 166.

<sup>606</sup> Id.

<sup>607</sup> Id. at 260, 2 CMR at 167. See United States v. Beauchamp, 17 M.J. 590, 591 (ACMR 1983)(court-martial which tried the accused held not to have jurisdiction where the convening authority issued an order to the accused and then later convened the court-martial which tried the accused for willfully disobeying the order); United States v. Moseley, 2 CMR 263, 266 (ABR 1951)(convening authority held to be an accuser where he was the victim of a housebreaking and larceny).

In the years since this decision, convening authorities have been held to be accusers in cases where money was stolen from a consolidated nonappropriated fund for which the convening authority was the custodian,<sup>608</sup> where the convening authority was a witness and was closely involved with putting down a riot on board ship,<sup>609</sup> where an accused was charged with willful disobedience of a direct order issued "by command of" the convening authority,<sup>610</sup> where the convening authority interviewed an accused in connection with the pretrial investigation of the offense,<sup>611</sup> and where the convening authority was found to have a personal interest in the participation of personnel on post in a weight

---

<sup>608</sup> United States v. Bergin, 7 CMR 501, 509 (AFBR 1952).

<sup>609</sup> Brookins v. Cullins, 23 USCMA 216, 218, 49 CMR 5, 7 (1974).

<sup>610</sup> United States v. Marsh, 3 USCMA 48, 52, 11 CMR 48, 52 (1953). But see United States v. Teel, 4 USCMA 39, 41, 15 CMR 39, 41 (1954)(convening authority held not to be an accuser even though the written orders the accused was charged with disobeying were issued by the convening authority); United States v. Keith, 3 USCMA 579, 584, 13 CMR 135, 140 (1953)(in a failure to obey a lawful order case, the convening authority was held not to be an accuser, where the accused was issued a written order signed by direction of the convening authority directing him to proceed from Parris Island to Camp Pendleton).

<sup>611</sup> United States v. Hammork, 13 CMR 385, 390 (ABR 1953).

reduction program.<sup>612</sup>

On the other hand, convening authorities have been held not to be accusers in cases where the convening authority succeeded a convening authority who had a personal interest in the proceedings,<sup>613</sup> where the convening authority signed official documents offered in evidence at trial and subsequently testified as a witness for the prosecution as to the accuracy of extracts from the records offered into evidence,<sup>614</sup> where the convening authority forwarded a report of investigation to a staff judge advocate for preparation of charges,<sup>615</sup> where the convening authority, as unit commander, was the chairman of a fund campaign from which money was missing,<sup>616</sup> where

---

<sup>612</sup> United States v. Shepherd, 9 USCMA 90, 25 CMR 352 (1958).

<sup>613</sup> United States v. Gunterman, 13 CMR 668, 672 (AFBR 1953). But see United States v. Kostas, 38 CMR 512, 517 (ABR 1967)(convening authority held not to be able to convene a court-martial, if he is junior in rank to the convening authority he replaced and that convening authority had a personal interest in the case).

<sup>614</sup> United States v. McClenny, 5 USCMA 507, 512 18 CMR 131, 136 (1955). In a case where the convening authority appears as a witness at the trial, he is disqualified from taking action on the record. Id. at 513, 18 CMR at 137.

<sup>615</sup> United States v. Jewson, 1 USCMA 652, 657, 5 CMR 80, 85 (1952). See United States v. Grow, 3 USCMA 77, 82, 11 CMR 77, 82 (1953)(attendance of Secretary of the Army and Chief of Staff at a conference where charges against a major general were discussed did not make them accusers in the case).

<sup>616</sup> United States v. Doyle, 9 USCMA 302, 306, 26 CMR 82, 86 (1958).

the convening authority authorized a search of the accused's locker, and later convened the accused's court-martial,<sup>617</sup> and where the convening authority's command line was affixed to an endorsement setting out instructions for the trial counsel to follow in prosecuting cases before court-martial.<sup>618</sup>

Years ago Winthrop stated that a convening authority should disqualify himself--

if, influenced by hostile feeling, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with . . .<sup>619</sup>

His advice is still good.

One of the most consistent criticisms of military legal system has been the commander's role in the operation and administration of military justice. On the one hand, the commander is the one primarily responsible for maintaining order and discipline in the command. On the other hand, the commander, by statute, is involved directly in the court-martial process; it is the commander, for example, who is responsible for

---

<sup>617</sup> United States v. Brown, 47 CMR 522, 524 (NCOMR 1973).

<sup>618</sup> United States v. Haimson, 5 USCMA 208, 217, 17 CMR 208, 217 (1954).

<sup>619</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 63 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1920 reprint).

referring charges to trial by court-martial, for selecting court members to hear cases, for reviewing the findings and sentence after a trial is completed, and for approving or disapproving the results of the court-martial.

The Code is clear that a commander who is an "accuser" should not convene a court-martial. And the courts have ruled that the test for determining when a commander is an accuser is "where observers might reasonably conclude that a commander ha[s] more than a purely official involvement"<sup>620</sup> in charges against an accused. When such a situation presents itself, the commander "should turn over his responsibilities to a superior commander."<sup>621</sup> What is significant here is that when there is doubt concerning a commander's impartiality, the charges against an accused should be forwarded to a superior commander for appropriate disposition.

The problem is that commanders think they can be fair and impartial and act accordingly. But what they think and how they act is not the test. The test is whether a reasonable person would think the "convening authority was personally interested in the outcome of the

---

<sup>620</sup> United States v. Crossley, 10 M.J. 376, 379 (C.M.A. 1981) (Everett, C.J., concurring) (convening authority held to be an accuser and hence was disqualified from reviewing and taking action on the accused's court-martial).

<sup>621</sup> Id.

litigation."<sup>622</sup> What is important then is what a reasonable person thinks, not what a commander may think. In essence, "the appearance of evil is as intolerable as the evil itself."<sup>623</sup>

2. Convening Authority Cannot Direct One Junior In Rank to Sign And Swear to Charges

The fact that a commanding officer directs a lower ranking officer to sign and swear to charges against an accused does not resolve the problem of whether a commanding officer is an accuser. In United States v. Corcoran,<sup>624</sup> a case involving disobedience of orders, the Court of Military Appeals ruled that the commanding officer of a ship was an accuser on two counts: first, because he had an interest in the prosecution of the accused; and second, because he directed a junior officer to draw up the charges against the accused.

In Corcoran, a Lieutenant (junior grade), received a report that the accused "was missing from morning quarters."<sup>625</sup> In looking for the accused, the Lieutenant found him asleep in his room with a liquor

---

<sup>622</sup> Id. at 378-79.

<sup>623</sup> United States v. Hardy, 4 M.J. 20, 26 (C.M.A. 1977)(Cook, J. concurring).

<sup>624</sup> 17 M.J. 137 (C.M.A. 1984).

<sup>625</sup> Id. at 138.

bottle next to him. The Lieutenant reported this to the Captain of the ship, who counseled the accused. The Captain also suggested to the Lieutenant that the accused be ordered to "sweep the pier,"<sup>626</sup> a duty that would take two or three hours to perform.

The order was given by the Lieutenant and the duty was performed by the accused for about 30 minutes. The accused then stopped and approached the Lieutenant. He told the Lieutenant that he wanted to see the Captain. The Lieutenant said no and directed the accused to resume sweeping. The Captain, on overhearing the conversation, "came out of his stateroom and told [the Lieutenant] that he wanted the accused 'written up for disobeying a lawful order.'"<sup>627</sup>

In this case, the Court of Military Appeals ruled that the Captain of the ship was an accuser because of his involvement in the facts of the case and thus was disqualified from convening the accused's court-martial. In addition, the Court ruled that the convening authority was an accuser because he directed the Lieutenant to swear to and sign the charges against the accused.<sup>628</sup> The Captain was held to be an accuser because of his personal involvement in the case and

---

<sup>626</sup> Id.

<sup>627</sup> Id.

<sup>628</sup> Id.

because he directed another to sign and swear to charges against the accused.<sup>629</sup>

3. Convening Authority Must Be Senior in Rank to the Accuser

A convening authority, who receives charges sworn to and signed by a senior officer, also is disqualified from convening a court-martial to try an accused. This issue was presented in United States v. Ridley.<sup>630</sup> In Ridley, an Air Force Court of Military Review ruled that where the convening authority "was not superior in rank or command to the accuser,"<sup>631</sup> the court-martial lacked jurisdiction to try the accused. Here, the accused's commander, who commanded a tenant organization outside the chain of command, preferred charges against the accused. By signing and swearing to the charges, the commander of the tenant organization became an accuser under Article 23(b) of the Code and could not convene a court-martial to try the accused.

For this reason, the charges and specifications

---

<sup>629</sup> See United States v. Lawrence, 19 M.J. 609, 612-13 (ACMR 1984) (major general was held not to be an accuser, simply because he presented awards to prosecution witnesses, and his involvement in the awards ceremony was held not sufficient in itself to disqualify the brigadier general, an officer serving under him, from referring charges against the accused to trial by general court-martial).

<sup>630</sup> 18 M.J. 806 (AFCMR 1984).

<sup>631</sup> Id. at 808.

for "wrongful use and possession of marihuana, and of soliciting another to commit the offense of wrongful distribution of marihuana"<sup>632</sup> were forwarded to the special court-martial convening authority in the chain of command and he subsequently referred them to a special court-martial.

On appeal, the accused argued that the court-martial lacked jurisdiction because the special court-martial convening authority was "junior in rank to the accuser,"<sup>633</sup> that is, that the commander of the tenant organization was senior in rank to the special court-martial convening authority who referred the charges to trial by a special court-martial. The Court of Military Review agreed and held that "[s]ince the convening authority in this case was not superior in rank or command to the accuser, the court-martial lacked jurisdiction to try the accused."<sup>634</sup> For this reason, the court concluded that "the proceedings, findings and sentence . . . [were] void."<sup>635</sup>

In reaching its decision in Ridley, the Court noted that in construing the language of Article 23(b) of the Code, the United States Court of Military Appeals had

---

<sup>632</sup> Id. at 806.

<sup>633</sup> Id.

<sup>634</sup> Id. at 808.

<sup>635</sup> Id.

said:

Congress in unambiguous language made it an offense for a convening authority to influence in any way the court-martial in its deliberations, thus clearly indicating its views on one of the vices it intended to eliminate. If, as we stated in the Gordon case, . . . Congress intended to narrow the commander's influence on the court, by insulating the members from any type of control by his direction or by his moral suasion or persuasion, we would remove part of this insulation by a construction which would permit an officer junior in rank or command to the accuser to appoint the court and review the sentence. Such a construction would not cure the evil, it might have a tendency to revive it and bring about undesirable results.<sup>636</sup>

In holding that "[m]ere superiority in rank [is . . .] a possible source of command influence over the convening authority"<sup>637</sup> the Court noted that:

[T]he officer who convenes the court and reviews the sentence shall himself be free from any influence from the accuser. To now construe the provision [Article 23(b)] to permit an authority junior to the accuser, and in some instances one who could be under his command, to convene a court would ignore the lessons learned over the years. .

. . . <sup>638</sup>

---

<sup>636</sup> Id. at 807 quoting from United States v. LaGrange, 1 USCMA 342, 345, 3 CMR 76, 79 (1952).

<sup>637</sup> Id. at 807.

<sup>638</sup> Id. at 807-08 quoting from United States v. LaGrange, 1 USCMA 342, 345, 3 CMR 76, 79 (1952).

For many years now, the rule has been that an officer junior in rank to the accuser may not convene a court-martial. What the courts have held, in other words, is that "Articles 22(b) and 23(b) . . . preclude a commander who is the accuser from forwarding the case to trial to (1) another commander below him in the chain of command, or (2) [t]o one who, not in his chain of command at all, is junior to him in rank."<sup>639</sup>

The policy considerations here are the same as those that control the situation where the convening authority is personally involved in a case or signs and swears to the charges. The convening authority must be unbiased, impartial, and objective in deciding whether the charges should be tried by court-martial and in deciding by what kind of court they should be tried by, if he determines that they should be referred to trial. In performing his duties in this regard, the convening authority must not let anything or anyone, including the superior rank of the accuser, influence his decision-making.

---

<sup>639</sup> United States v. Avery, 30 CMR 885, 889 (AFBR 1960). See United States v. Kostas, 38 CMR 512, 517 (ABR 1967) (court-martial held to be improperly convened where the convening authority, who was the accuser, left the command, and the charges against the accused were referred trial by a new convening authority who was junior in rank to the accuser). See also A Convening Authority Junior in Rank to the Accuser, THE ARMY LAWYER 15 (March 1977).

If the commander who convenes a court-martial is junior in rank to the accuser, a reasonable person could easily conclude that the rank of the senior commander and his involvement in the case were factors that influenced a lower ranking commander's decision on a case. For this reason, commanding officers who are accusers cannot direct a lower ranking officers to sign and swear to charges against an accused, or direct lower ranking officers to exercise the power of a convening authority.

#### 4. Reservation of Power by Superior Authority

Not only can a convening authority not convene a court-martial if he is the accuser, but he cannot convene a court-martial if the power to convene courts-martial has been reserved by a superior commander. Article 22(b) of the Code provides, with regard to general courts-martial, that:

If any . . . commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.<sup>440</sup>

A similar provision also is found in Article 23(b) of the Code concerning special courts-martial.

The language in Rule 504 of the Manual is even more explicit. The discussion sections in the Manual

---

<sup>440</sup> Art. 22(b), U.C.M.J., 10 U.S.C. § 822(b) (1983).

relating to the convening of general and special courts-martial both begin with the phrase: "Unless otherwise limited by superior competent authority. . ."<sup>641</sup> The provisions of the Code and the Manual, thus, state that the power to convene general courts-martial can be reserved or limited by a superior competent authority.

The generally recognized right of a commander to exercise "control [over] his subordinates in their handling of disciplinary problems" has been codified in the Code and the Manual.<sup>642</sup> While the commander or superior convening authority cannot "attempt to influence [or control] the recommendation of the inferior commander"<sup>643</sup> or "dictate the type of punishment expected",<sup>644</sup> the commander nevertheless can issue "policy declarations generally conceded to be necessary to

---

<sup>641</sup> R.C.M. 504(b)(1) & (2), MCM, 1984, at II-54.

<sup>642</sup> United States v. Wharton, 33 CMR 729, 733 (AFBR 1962). pet. denied, 14 USCMA 670, 33 CMR 436 (1963). See United States v. Tallent, 7 BR (E.T.O.) 141 (Army 1944) (trial by general court-martial held void where accused had been tried previously by summary court-martial on the same charge contrary to the directive the general court-martial convening authority which specifically stated that the offense of statutory rape should not be tried by inferior courts). See also DeGiulio, Command Control: Lawful Versus Unlawful Application, 10 SAN DIEGO L. REV. 72, 84 (1972).

<sup>643</sup> 33 CMR at 733.

<sup>644</sup> Id.

[maintain] discipline and order."<sup>645</sup> The commander also can "properly inform . . . subordinate commanders that they must not refer robbery, grand larceny, or narcotics cases to special courts-martial without obtaining his special permission."<sup>646</sup> In addition, the commander can simply reserve the power to refer cases to himself and deprive the subordinate commanders of the right to exercise convening authority altogether.

In United States v. Rembert<sup>647</sup> a command directive was issued by the general court-martial convening authority reserving to himself the processing of certain types of serious offenses, like robbery, assault, and other crimes against persons and property. The accused in Rembert had been charged with assault with intent to inflict grievous bodily harm and his case, contrary to the command directive, had been referred to a special court-martial. When the general court-martial convening authority learned that the charges against the accused had been referred to a special court-martial, he ordered that the charges be withdrawn from the special court-martial and forwarded to him. This was done and the charges were then rereferred by the general

---

<sup>645</sup> United States v. Betts, 12 USCMA 214, 218, 30 CMR 214, 218 (1961).

<sup>646</sup> United States v. Hawthorne, 7 USCMA 293, 300, 22 CMR 83, 90 (1956)(Latimer concurring).

<sup>647</sup> 47 CMR 755 (ACMR 1973).

court-martial convening authority to a Bad Conduct Discharge special court-martial.<sup>648</sup> The accused was convicted and sentenced to "a bad-conduct discharge and confinement at hard labor for one-hundred and thirty days."<sup>649</sup>

On appeal, the accused argued that the charges were improperly withdrawn from the special court-martial and improperly rereferred to a Bad Conduct Discharge special court-martial. The Army Court of Military Review held that the withdrawal and rereferral was proper. In reaching this decision, the Court noted that the convening authority had reserved to himself the power to process serious cases and that he withdrew "this case for the purpose of adhering to his prior policy of evaluating each case on its own merits."<sup>650</sup> This, the court found

---

<sup>648</sup> "[I]n a nonjury trial, jeopardy attaches only when the proceedings have reached the point at which the defendant is 'put to trial before the trier of facts,' which means 'when the court begins to hear evidence.'" United States v. Browers, 20 M.J. 542, 552 (ACMR 1985). "In a jury trial, jeopardy attaches when the jury is sworn." Id. at 552 n.11. See United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983) (Court of Military Appeals in dicta states that convening authority cannot withdraw charges once double jeopardy attaches); United States v. Kinard, 15 M.J. 1052, 1053 (NMCMR 1983) (double jeopardy precluded retrial of accused on charges withdrawn by the convening authority after the Government had rested its case in the first case and referred the charges to a second trial). See also Weise, Double Jeopardy: Changes by the Supreme Court and Their Effect on the Military, 11 THE ADVOCATE 28 (Jan.-Feb. 1979).

<sup>649</sup> 47 CMR at 756.

<sup>650</sup> Id. at 758.

was a proper reason for withdrawing the case from the court to which it originally had been referred.

Rembert is significant because it illustrates the fact that a convening authority has the power to reserve to himself the authority to convene courts-martial and to deprive lower level commanders from exercising such authority. The decision in Rembert is significant too because it illustrates another limitation on the power of commanders to convene courts-martial, namely, the power of a superior commander to withdraw charges from a court-martial convened by a subordinate commander.

In exercising his powers over the administration of military justice in the ways listed above, the commander must always be sure to allow his subordinate commanders to "make individualized recommendations" in the cases before them.<sup>451</sup> The subordinate commanders must be able to exercise their own discretion in determining how cases before them are to be handled. If the commander's directive or policy "affords an inferior commander no freedom of choice to dispose of charges, and forecloses all of the commander's viable alternatives,

---

<sup>451</sup> United States v. Daley, 47 CMR 365, 367 (ACMR 1973).

that policy constitutes unlawful command [influence]."<sup>652</sup>

It is unlawful command influence because "the superior commander has unlawfully fettered the discretion legitimately placed in the inferior commanders."<sup>653</sup> The commander, in other words, should be careful not to engage in command influence by telling lower level commanders how to handle certain types of cases or by attempting to influence them to decide in accordance with his wishes rather than exercising their own discretion.<sup>654</sup>

---

<sup>652</sup> Id. See United States v. Hawthorne, 7 USCMA 293, 299, 22 CMR 83, 89 (1956)(commander's policy directive held to interfere with the judicial process); United States v. Rivera, 45 CMR 582, 584 (ACMR 1972)(convening authority usurped company commander's discretion in preferring charges, where after company commander recommended disposition of offense by a field grade Article 15, the convening authority directed the accused's commander to consider the file again "for action under special court-martial with Bad Conduct Discharge"). But see United States v. Wharton, 33 CMR 729, 732 (AFCMR 1962), pet denied, 14 USCMA 670, 33 CMR 436 (1963)(no command influence where nonjudicial punishment set aside by superior commander who directed that the accused be tried by general court-martial). See generally, Art. 37, 10 U.S.C. § 837 (1983); DeGiulio, Command Control: Lawful Versus Unlawful Application, 10 SAN DIEGO L. REV. 72, 78-90 (1972).

<sup>653</sup> 47 CMR at 367. United States v. Sims, 22 CMR 591, 594-96 (ACMR 1956)(convening authority's policy on handling repeated AWOL's held to remove discretion from subordinate commanders). But see United States v. Ferguson, 5 USCMA 68, 73-80, 17 CMR 68, 73-80 (1954) (improper exercise of command influence held not to be jurisdictional error).

<sup>654</sup> DeGiulio, Command Control: Lawful Versus Unlawful Application, 10 SAN DIEGO L. REV. 72, 79 (1972).

5. Accused Is Not a Member of the Convening Authority's Command

While a convening authority's power to convene courts-martial may be limited or withheld by a superior commander, it is not affected by whether or not the accused is a member of the convening authority's command,<sup>655</sup> except in cases where the accused is a member of another armed force. This means that a convening authority can convene a court-martial to try an accused of the same armed force for committing a violation of the Code, even though the accused is assigned to another command.<sup>656</sup> The error in processing charges against an accused who is assigned to another command is not a jurisdictional error, but is an error that must be tested for prejudice to the accused. In such situations, courts will examine the facts to determine whether the accused has been substantially prejudiced by being prosecuted in

---

<sup>655</sup> See Stevens & Farfaglia, Court-Martial Jurisdiction in a Unified Command, 10 AIR FORCE JAG L. REV. 37, 38-40 (May-June 1968).

<sup>656</sup> United States v. Talty, 17 M.J. 1127, 1129-30 (NMCMR 1984)(accused's removal from a submarine did not deprive the commanding officer of the submarine of the power to act as the convening authority with regard to charges preferred against the accused); United States v. Jones, 15 M.J. 890, 891 (ACMR 1983)(court-martial had jurisdiction to try the accused, even though the accused had been reassigned to another unit before he committed the offense for which he was being court-martialed); United States v. Lahman, 12 M.J. 513, 516 (NMCMR 1981) (court-martial convened by the convening authority to try an accused who was assigned to another command held not to be jurisdictional error).

a command to which he is not assigned. If no prejudice can be shown, the findings and sentence of the court-martial will be upheld.<sup>657</sup>

If an accused is a member of another armed force, the commander's power to convene a court-martial to try the accused is more restricted. The Manual for Courts-Martial states that an "accused should not ordinarily be tried by a court-martial convened by a member of a different armed force"<sup>658</sup> and that "two or more accuseds who are members of different armed forces should not be referred to a court-martial for a common trial."<sup>659</sup> However, the Manual provides that an accused who is a "member of one armed force may be tried by a court-martial convened by [the commander] of another armed force" in two situations:

- (A) The court-martial is convened by a commander of a joint command or joint task force who has been specifically empowered by the President, the Secretary of Defense, or a superior commander [of a joint command or joint task force];  
or

---

<sup>657</sup> United States v. Jones, 15 M.J. 890, 892 (ACMR 1983) (no prejudice found where an accused was convicted by a court-martial that was convened by a convening authority of a unit to which the accused was not assigned).

<sup>658</sup> R.C.M. 201(e)(3), MCM, 1984, at 11-9.

<sup>659</sup> Discussion, R.M.C. 201(e), MCM, 1984, at 11-9.

(B) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.\*\*°

The Manual makes clear that the failure to comply with these provisions is not jurisdictional error, and that the error in failing to follow these provisions will "not affect an otherwise valid referral."\*\*¹

In conclusion, it is important for the convening authority to be aware of any limitations on his power to convene courts-martial. As a rule, procedural errors in convening of courts-martial are not jurisdictionally significant.\*\*² Limitations placed on the exercise of the convening authority's power and the withholding of power by the convening authority's superior commander, however, are important to court-martial jurisdiction because they effect a convening authority's power to convene courts-martial. For this reason, restraints on

---

\*\*° R.C.M. 201(e)(3)(A) & (B), MCM, 1984, at II-9.

"Manifest injury" does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses.

Discussion, R.C.M. 201(e), MCM, 1984, at II-9.

\*\*¹ R.C.M. 201(e)(3), MCM, 1984, at II-9.

\*\*² Id. at 892 n\*. See also United States v. Vanderpool, 4 USCMA 561, 565, 16 CMR 135, 139 (1954) (not every violation of a statutory provision of the Code is a jurisdictional error).

the exercise of the power of the commander to convene courts-martial must always be observed and complied with. In short, commanders who convene courts-martial must be aware of any limitations on the exercise of their power and any matters which might disqualify them from acting as a convening authority.

C. Proper Referral of Charges to Court-Martial

1. Elements of a Proper Referral

Once it is clear that a commander has the power to convene a court-martial, then the focus shifts to the convening process. For a court-martial to be properly convened, four things must occur: First, a convening authority must receive charges from a subordinate commander with the subordinate commander's recommendation for disposition; Second, the convening authority must decide whether to refer the charges to court-martial; Third, if the convening authority decides to refer the charges to a court-martial for trial, he must decide what kind of court to refer the charges to; and Fourth, once the convening authority decides what kind of court will try the charges, he must take action to refer the charges to a trial by that court. Each of these elements, in addition to the requirement that the commander have the power to act as the convening authority, must be present before a court-martial is properly convened.

The mere fact that a convening authority receives charges from a subordinate commander with a recommendation that the charges be tried by court-martial, is not sufficient in itself to create a court-martial or to bring a court-martial into existence; nor is the fact that a convening authority decides that a case is to be tried by court-martial, or that it is to be tried by a particular kind of court-martial. Something more is still needed, and that is that the convening authority must refer the charges to a court-martial for trial. This is accomplished by the convening authority endorsing the charge sheet and referring the charges to a court-martial that has been created by a convening order signed by him or the previous convening authority. For a court-martial to be properly convened, each of these four steps in the convening process must be followed, and if they are not present, the court-martial is not properly convened.

## 2. The Court-Martial Convening Order

The "convening order" or "court-martial order" or "court-martial convening order", all meaning the same thing, is prepared at the direction of the convening authority and it is this order which actually creates the

court-martial.<sup>663</sup> Another way of expressing the same idea is to say that "[a] court-martial is created by a convening order of the convening authority."<sup>664</sup> The convening order is "an expression of the intent of the convening authority" and the document itself is "merely a formal recordation of that expressed intent."<sup>665</sup>

The convening order in special and general courts-martial is numbered, like CMCO No. 85, and states what kind of court is being convened. The court-martial convening order also lists the court members who have been selected by the convening authority to serve as jurors in the case. In addition, the convening order may state where the trial will take place. If the commander's authority to convene a court-martial is not statutory, but is derived from a designation by the Secretary of the service concerned, this fact must be reflected in the convening order.<sup>666</sup>

The failure of the convening authority to properly refer a case to trial is a jurisdictional error which will result in the trial being declared a

---

<sup>663</sup> See App. 6, Forms for Orders Convening Courts-Martial, MCM, 1984, at A6-1 for examples of orders used for convening courts-martial.

<sup>664</sup> R.C.M. 504(a), MCM, 1984, at II-54.

<sup>665</sup> United States v. Glover, 15 M.J. 419, 421 (C.M.A. 1983).

<sup>666</sup> R.C.M. 504(d)(1), MCM, 1984, at II-55.

nullity.<sup>667</sup> In this regard, the Court of Military Appeals recently has stated that "[i]n any given case, the question [to be] decided [is] whether, under the facts and the applicable law, there has been a proper referral. If not, no jurisdiction was vested in that court-martial to try that particular case."<sup>668</sup>

### 3. 1984 Manual Provisions

The 1984 Manual notes that a proper referral to trial is one of the "[r]equisites of court-martial jurisdiction."<sup>669</sup> It also defines a referral as "the order of a convening authority that charges against an accused will be tried by a . . . court-martial."<sup>670</sup> The referral of charges to a court-martial usually occurs when the convening authority signs the charge sheet.

A sample copy of charge sheet (DD Form 458) is found in Appendix 4 of the Manual.<sup>671</sup> The wording in Section V of the charge sheet provides a place for the

---

<sup>667</sup> See e.g., United States v. Hardy, 4 M.J. 20, 25 (C.M.A. 1977) (convening authority erred in ordering special court-martial authority to withdraw charges and specifications which the special court-martial convening authority had referred to a special court-martial). See infra notes 693 to 720 and accompanying text.

<sup>668</sup> Id.

<sup>669</sup> R.C.M. 201(b), MCM, 1984, at II-7 (emphasis deleted). See R.C.M. 201(b)(3), MCM, at II-8.

<sup>670</sup> R.C.M. 601(a), MCM, 1984, at II-61.

<sup>671</sup> App. 4, Charge Sheet, MCM, 1984, at A4-1.

convening authority to refer charges to trial: "Referred for trial to the general court-martial convened by [court-martial convening order] number 12 dated 1 August 1984], subject to the following instructions: None."<sup>672</sup> Section V of the charge sheet also provides a place for the convening authority's signature. With the signing of the charge sheet and the drawing up of the court-martial convening order, the convening process is complete.

The 1984 Manual identifies the referral of charges as one of the "requisites of jurisdiction" and states that:

[For a court-martial to have jurisdiction:

- (1) The court-martial must be convened by an official empowered to convene it;
- (2) The court-martial must be composed in accordance with these rules with regard to number and qualifications of its personnel . . . ;
- (3) Each charge before the court-martial must be referred to it by competent authority;
- (4) The accused must be a person subject to court-martial jurisdiction; and
- (5) The offense must be subject to court-martial jurisdiction.<sup>673</sup>

In the past, one of the steps in convening a court-mar-

---

<sup>672</sup> Id. at A4-2.

<sup>673</sup> R.C.M. 201(b), MCM, 1984, at 11-7 to 11-8 (emphasis added). See supra note 470 and accompanying text.

tial has been that the charges were properly referred to trial. The referral, in other words, was part of the convening process which consists of the four steps noted previously, namely, (1) receipt of the charges by a convening authority; (2) a decision by the convening authority on whether to refer the charges to court-martial; (3) if so, a decision of what kind of court to refer the charges to; and (4) the referral of charges to a court-martial created by a court-martial convening order. Traditionally, then, the referral of charges to a court-martial has been part of the first element of court-martial jurisdiction and the fourth step in the convening process.

What the Manual has done is to identify the referral of charges as a separate "requisite" or element of court-martial jurisdiction. Not only is this analytically unsound, but no court has ever held that one of the elements of court-martial jurisdiction is a proper referral of charges to a court-martial. Indeed, the courts have always talked in terms of a properly convened court-martial, but never in terms of a properly convened court-martial and properly referred charges. One of the oldest and one of the best descriptions of the elements of court-martial jurisdiction, and the one referred to earlier,<sup>674</sup> is as follows:

---

<sup>674</sup> See note 474 supra and accompanying text.

[T]he jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites:

1. that it was convened by an officer empowered by the statutes to call it;
2. that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose;
3. that the court thus constituted was invested by the acts of congress with power to try the person and the offense charged; and
4. that its sentence was in accordance with the Revised Statutes.<sup>675</sup>

The first element noted--"that it was convened by an officer empowered by statute to call it"--consists of two parts. The first part ("that it was convened") deals with whether the court-martial was properly convened: that is, whether the four steps in the convening process were complied with. The second part ("by an official empowered by the statutes to call it") is concerned with whether the convening authority was empowered to convene the court-martial: that is, whether he had the statutory authority to do so, whether he was an accuser, whether he was senior in rank to the accuser, etc. . . .

---

<sup>675</sup> Deming v. McClaughry, 113 F. 639, 650 (8th Cir.), aff'd, 186 U.S. 49 (1902). See also Para. 8, MCM, 1969 (Rev. ed.), at 4-1; Para. 8, MCM, 1951, at 14; Para. 7, MCM, 1949, at 9; Para. 7, MCM, 1928, at 7; Para. 34, MCM, 1917, at 18.

What the drafters of the Manual have attempted to do is to rewrite the elements of court-martial jurisdiction without explaining why or discussing the need to do so. The problem is that the new element or "requisite" of court-marital jurisdiction identified by the Manual is not new or different, but redundant. It is merely a restatement of the first element of court-martial jurisdiction that a "court-martial must be convened by an official empowered to convene it."

In discussing the new "requisite of jurisdiction", the Manual notes that the--

[r]eferral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified . . . ; preferred charges which have been received by the convening authority for disposition . . . ; and a court-martial convened by that convening authority or a predecessor . . . .<sup>676</sup>

These three elements sound very much like what a properly convened court-martial consists of. In addition, it is hard to understand how the first element of court-martial jurisdiction--"a court-martial must be convened by an official empowered to convene it"--can be one of the "indispensable prerequisites" of court-martial jurisdic-

---

<sup>676</sup> Discussion, R.C.M. 601(a), MCM, 1984, at II-61.

tion,<sup>677</sup> and at the same time be one of the "three elements" in the referral of charges noted above. What makes more sense organizationally and analytically is to consider the referral of charges as the fourth step in the convening process and not consider it as a separate element of jurisdiction.

The problem here may be more academic than practical, but it is important to understand conceptually what is involved in the convening process. The point is that the Manual's analysis in this area is not analytically sound, and may be misleading in the sense that something is being identified as a separate element of court-martial jurisdiction which, in fact, is nothing more than an aspect of a properly convened court-martial. This matter will be addressed and decided by the courts in the future, but it will be a source of confusion until it is resolved.

#### 4. Oral Convening or Amending Orders

The court-martial convening order, by which a convening authority refers the charges for trial, are usually written orders. If there is an ambiguity in the order, the order will be interpreted by courts in such a way as to give effect to what the convening

---

<sup>677</sup> See Para. 8, MCM, 1969 (Rev. ed.), at 4-1; Para. 8, MCM, 1951, at 14; Para. 7, MCM, 1949, at 9; Para. 7, MCM, 1928, at 7; Para. 34, MCM, 1917, at 18.

authority intended.<sup>678</sup>

Amendments to the court-martial convening order after a case has been referred to trial are acceptable and valid. They are called amending orders or special orders, and they are usually issued for the purpose of substituting court members or making other changes in the convening order.<sup>679</sup>

Sometimes a convening authority may convene a court-martial orally, or issue an oral amending order. The Court of Military Appeals has held that oral convening orders are valid,<sup>680</sup> but the Court has expressed dissatisfaction with the use of oral orders to cover up mistakes, or make corrections to written court-martial convening orders. In United States v. Carey,<sup>681</sup> the Court of Military Appeals expressed its concern about

---

<sup>678</sup> United States v. Padilla, 1 USCMA 603, 606-07, 5 CMR 31, 34-35 (1952) (two court members who participated in the accused's court-martial were held to have been properly detailed by the convening authority).

<sup>679</sup> See generally W. WINTHROP, MILITARY LAW AND PRECEDENTS 160-61 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 reprint).

<sup>680</sup> United States v. Napier, 20 USCMA 422, 428, 43 CMR 262, 268 (1971) (failure of the record of trial to contain a copy of the court-martial convening order held not error where the trial counsel reported that the charges were properly referred to the court for trial by an oral order of the convening authority); United States v. Petro, 16 CMR 302, 305 (ABR 1954) (verbal order convening a court-martial prior to the convening authority's leaving on TDY held valid).

<sup>681</sup> 23 USCMA 315, 49 CMR 605 (1975).

such practices, and stated that it was in agreement with the following statement which appears in an unpublished opinion from the Navy Court of Military Review:

In the majority of instances wherein a modification to a convening order is required, the fact is known prior to trial, and the written modification should be executed prior thereto. It is apparent to us that too many judge advocates are either indifferent or negligent in this respect and resort to the practice utilized at the bar and all too frequently with the same slipshod, sloppy results. This kind of practice is a reflection upon the entire military legal community and it should be discontinued. In our opinion, the simplest part of any court-martial is a properly-executed convening order. Consequently, there is no excuse for errors in connection therewith.<sup>682</sup>

While oral convening orders, and oral amending orders are valid, the clear preference of the Court of Military Appeals is for convening orders and amending orders to be issued in writing.

In United States v. Perkinson<sup>683</sup> the United States Court of Military Appeals ruled that a court-martial which tried the accused lacked jurisdiction because an oral modification to the special court-martial convening order was not reduced to written form until approximately 11 months after the trial. In Perkinson,

---

<sup>682</sup> Id. at 316 n.3, 49 CMR 606 n.3.

<sup>683</sup> 16 M.J. 400 (C.M.A. 1983).

the accused pleaded guilty and was found guilty by the military judge. Before the court members assembled for sentencing, the trial counsel "announced that an oral amendment to the convening order had been made on March 3, 1981, and that the convening authority's written confirmation of that fact would follow."<sup>684</sup> The oral amendment was necessary, the trial counsel said, because changes had been made in the membership of the court. The written confirmation, however, was not made a part of the record until the issue was raised at the Navy Court of Military Review many months later, and when it was finally received, it was submitted in the form of an affidavit.

The Court of Military Appeals expressed grave concern about the manner in which the confirmation of the court-martial convening order was handled. "We have clearly signaled our disinclination," the Court said, "'to endow with a presumption of regularity' an 'eleventh hour affidavit' to save 'an otherwise sinking record.'"<sup>685</sup> Because of the delay in submitting the written confirmation, Court ruled that the court members were not properly appointed and that the court was

---

<sup>684</sup> Id. at 402.

<sup>685</sup> Id.

without jurisdiction to try the accused.<sup>686</sup>

Judge Cook, while agreeing that the written confirmation was untimely, dissented from the majority opinion on two grounds. First, he argued that dismissal was not the proper remedy for the failure to include a written confirmation order in the record, and, second, he contended that the accused, "who properly pleaded and was found guilty of the offense charged" should not get a "sheer windfall"<sup>687</sup> because of the Government's failure to put a written order in the record of trial.

What is important is to try to avoid making oral modifications to court-martial convening orders. If it is necessary to make an oral amendment, the written confirmation should be added to the record as soon as possible.

##### 5. Withdrawal of Charges

Occasionally, after a charge has been referred to trial, there is a need for the convening authority, not to modify or amend the court-martial convening order, but

---

<sup>686</sup> Id. See United States v. Ware, 5 M.J. 24, 25 (C.M.A. 1978)(Court of Military Appeals refused to consider a written confirmation of an oral amendment filed with the Court 14 months after the trial). But see United States v. Carey, 23 USCMA 315, 317, 49 CMR 605, 607 (1975)(affidavit accepted from a convening authority stating that an amending order which appeared in the record of trial was a written confirmation of an earlier oral modification which was made prior to the trial).

<sup>687</sup> 16 M.J. at 406.

to withdraw the charges from the court-martial to which they have been referred.<sup>688</sup> The Manual recognizes that this need will arise from time to time and provides that "[t]he convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced."<sup>689</sup>

The Manual states that when charges are withdrawn, they should be dismissed, unless the intention of

---

<sup>688</sup> Where a lower level commander, instead of sending the charges to a court-martial, has imposed nonjudicial punishment on an accused for an offense that is not "serious," a higher level commander is precluded, under the provisions of Article 15(f) of the Code, from pursuing further punitive action against the accused for the same offense in the form of a trial by court-martial. United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983). See Art. 15(f), U.C.M.J., 10 U.S.C. § 815(f) (1983). If the offense committed by the accused is "serious," the imposition of nonjudicial punishment under Article 15 of the Code will not bar a higher level commander from referring the charge to a trial by court-martial. 15 M.J. at 193 n.3. See also United States v. Wharton, 33 CMR 729, 731 (AFBR 1962), pet. denied, 14 USCMA 670, 33 CMR 436 (1963) (nonjudicial punishment set aside by superior commander who directed that the accused be tried by general court-martial).

<sup>689</sup> R.C.M. 604(c), MCM, 1984, at II-64.

[I]f a convening authority has referred charges to a court-martial for trial and trial has commenced, [however,] the former jeopardy guarantees of Article 44, UCMJ, 10 U.S.C. § 844, [will] prevent a superior commander from overturning that decision and referring the charges to another court-martial, which might be empowered to adjudge a harsher sentence.

United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983). For a discussion of the problem of double jeopardy, see supra note 648.

the convening authority is to rerefer them to another court or to forward them to a superior competent authority for disposition.<sup>690</sup> If the charges are withdrawn with a view toward dismissing them, they can be withdrawn for any reason and the withdrawal will not be questioned by the appellate authorities.<sup>691</sup>

If the charges are withdrawn with a view toward further prosecution, however, the convening authority's reasons for withdrawing the charges must be included in the record of the earlier proceedings.<sup>692</sup> Not only must

---

<sup>690</sup> Discussion, R.C.M. 604(a), MCM, 1984, at 11-64.

<sup>691</sup> Unfortunately, in cases where charges have been referred to trial by court-martial and the military judge has granted a defense motion to suppress the evidence or granted a defense motion for a finding of not guilty, Navy commanders on ships have withdrawn the charges from the court-martial and then imposed Article 15 punishment on the accuseds using the same evidence that has been suppressed at the trial or found insufficient by the military judge. Because the accuseds are "attached to or embarked in a vessel," they cannot refuse the Article 15's and demand trial by court-martial. This practice has been upheld by the Court of Military Appeals, but has been criticized by the Court as conveying the appearance of evil. See Dobzynski v. Green, 16 M.J. 84, 86 (C.M.A. 1983) (accused's writ of mandamus denied where, after the military judge granted the defense's motion to suppress the government's evidence, the convening authority withdrew the charges from the court-martial and imposed an Article 15 on the accused using the same evidence); Jones v. Commander, 18 M.J. 198, 199 (C.M.A. 1984) (accused's writ of mandamus denied where, after a military judge granted a defense motion for a finding of not guilty, the convening authority withdrew the charges from the court-martial and imposed Article 15 punishment on the accused using the same evidence). See also infra note 1532 and accompanying text.

<sup>692</sup> Discussion, R.C.M. 604(a), MCM, 1984, at 11-64.

the reasons for the withdrawal be included in the record, but the reasons must be considered valid before a second prosecution of the charges will be permitted.

In United States v. Hardy,<sup>693</sup> the United States Court of Military Appeals underscored the importance of stating in the record the reasons for withdrawal. In Hardy, the charges against the accused--use, possession and distribution of LSD--had been referred to a special court-martial by the special court-martial convening authority. A few weeks after the referral, but before the trial was held, "the general court-martial convening authority directed the special court-martial convening authority, his military subordinate, to withdraw the charges from the special court-martial and to refer them to an investigation pursuant to Article 32 of the Uniform Code [of Military Justice]."<sup>694</sup> The general court-martial convening authority also directed that the results of the Article 32 investigation be forwarded to him, the general court-martial convening authority, for review.

The report of the Article 32 investigation was sent to the general court-martial convening authority and he referred the charges a general court-martial for trial. The accused was tried and convicted by a general court-martial and was sentenced to "a dishonorable

---

<sup>693</sup> 4 M.J. 20 (C.M.A. 1977).

<sup>694</sup> Id. at 21.

discharge, confinement at hard labor for 18 months, and forfeiture of all pay and allowances."<sup>695</sup> Unlike the convening authority in Rembert, who had issued a directive reserving the convening of all serious courts-martial to himself, the convening authority in the present case just ordered the special court-martial convening authority to withdraw the charges from the special court-martial to which they had been referred.

On appeal to the United States Court of Military Appeals, the accused argued that the "general court-martial convening authority erred by ordering the special court-martial convening authority to withdraw the charges from the special court-martial where they had been initially referred and by subsequently referring them for trial by general court-martial."<sup>696</sup> In addressing the issue, the Court of Military Appeals noted that two factors had to be examined: the time at which the charges were withdrawn and the reasons given for the withdrawal.<sup>697</sup>

In this case, the Court noted that there was no double jeopardy problem because the charges were withdrawn prior to trial. Having satisfied itself that the withdrawal was timely, the Court examined the reasons

---

<sup>695</sup> Id.

<sup>696</sup> Id.

<sup>697</sup> Id.

why the case was withdrawn. The Court could find no reasons stated in the record of trial, but inferred from the record that the "reason the special court-martial convening authority withdrew the case from the special court was that he was ordered to do so by the general court-martial convening authority--his military superior."<sup>698</sup> This, the Court of Military Appeals held, was not a valid reason for withdrawing the case from the special court-martial and it reversed the accused's conviction. In addition, the Court expressed concern about having to speculate regarding why cases are withdrawn from courts-martial to which they have been referred. For this reason, the Court in Hardy set forth the requirement that henceforth "for all trials beginning on or after the effective date of this decision, an affirmative showing on the record of the reason for withdrawal and rereferral of any specification."<sup>699</sup> This, the Court observed, will protect the accused from his charges being withdrawn from a court in an arbitrary or unfair manner.<sup>700</sup>

---

<sup>698</sup> Id. at 22.

<sup>699</sup> Id. at 25.

<sup>700</sup> Id. See United States v. Scantland, 14 M.J. 531, 533 (ACMR 1982)(convening authority's appointment of new members, after the accused's plea of guilty was held to be improvident, and his "rereferral" of charges held to be a substitution of court members and not a withdrawal of charges); United States v. Delano, 12 M.J. 948, 949 (NMCMR 1982)(unexcused absence of accused is a proper

In United States v. Blaylock,<sup>701</sup> decided six years later, the Court of Military Appeals repudiated its holding in Hardy. In Hardy the Court had held that the "general court-martial lacked jurisdiction to try charges referred to it by the officer exercising general court-martial jurisdiction because those charges had not been properly withdrawn from the special court-martial by its convening authority."<sup>702</sup> On reflection, the Court concluded that intervention by the general court-martial convening authority into the referral of a court-martial to special court-martial by a special court-martial convening authority is not "a 'jurisdictional' defect."<sup>703</sup> In fact, the Court stated that the "Code . . . contains no Article which specifically prohibits a superior commander from directing a convening authority to withdraw charges from a court-martial, so that they may be referred to a different court-martial."<sup>704</sup> In addition, the Court acknowledged the importance of the military command structure and the commanding officer's

---

reason for withdrawal and rereferral of charges against the accused); United States v. Moore, 9 M.J. 527, 528 (ACMR 1980)(commission of additional offenses by the accused sufficient reason to justify withdrawal and referral of charges against accused).

<sup>701</sup> 15 M.J. 190 (C.M.A. 1983).

<sup>702</sup> Id. at 192.

<sup>703</sup> Id. at 193.

<sup>704</sup> Id. at 193-94.

responsibility for controlling his troops and maintaining discipline. For these reasons, the Court concluded that a general court-martial convening authority "may intervene to cause the withdrawal and rereferral of charges which in his view should be tried by a different kind of court-martial."<sup>705</sup>

In Blaylock, the accused had been charged with an unauthorized absence and the special court-martial convening authority had referred the case to a special court-martial. Before trial, however, the accused submitted a request to the general court-martial convening authority for an administrative discharge for the good of the service in lieu of court-martial. The convening authority denied the request for administrative discharge, withdrew the accused's case from the special court-martial, and referred it to a bad conduct discharge special court-martial. On appeal, the accused contested the withdrawal of his case from a special court-martial and its rereferral to a bad conduct discharge special court-martial. For the reasons stated, the Court of Military Appeals upheld the withdrawal and referral of the charges in the accused's case.

The Court, nevertheless, stated that the decision of a general court-martial convening authority to withdraw the charges from one court and rerefer them to

---

<sup>705</sup> Id. at 194.

another court must not be done arbitrarily or unfairly. The Court also emphasized that there must be "a 'proper reason' for withdrawal and rereferral of charges."<sup>706</sup>

In Blaylock, the Court found that the convening authority had acted for proper reasons in rereferring the charges to a bad conduct discharge special court-martial. In addition, the Court observed that the accused "did not object at trial to the withdrawal and rereferral of the charges and offered no evidence that [the general court-martial convening authority] acted 'arbitrarily or unfairly to the accused'."<sup>707</sup> For these reasons, the accused's conviction was upheld.<sup>708</sup>

Most cases concerning the withdrawing of charges from a court-martial arise where the general court-martial convening authority learns after the fact that charges have been referred to a lower level court-martial and are about to be or are being tried. In an effort to have the charges tried by a higher level court, that is, one able to impose a more severe punishment, the conven-

---

<sup>706</sup> Id. at 195.

<sup>707</sup> Id.

<sup>708</sup> Id. See United States v. Charette, 15 M.J. 197, 198-200 (C.M.A. 1983)(accused failed to establish that the convening authority acted arbitrarily in withdrawing the charges against the accused from a regular special court-martial and rereferring the charges to a Bad Conduct Discharge special court-martial after the accused submitted a request for administrative discharge in lieu of court-martial).

ing authority sometimes injects himself into the proceedings with unfortunate consequences.<sup>709</sup>

The rule now, in light of Blaylock, is that charges withdrawn from a special court-martial and rereferred to another court will be upheld so long as the action on the part of the general court-martial convening authority was done for "proper reasons" and is not arbitrary or unfair to the accused.<sup>710</sup>

---

<sup>709</sup> The Manual states that "[i]mproper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional or codal rights, or with the impartiality of a court-martial." Discussion, R.C.M. 604(b), MCM, 1984, at 11-64.

<sup>710</sup> The Manual also states that:

Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal which will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. For example, it is permissible to refer charges which were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement . . . . Charges withdrawn after some evidence on the general issue of guilt is introduced [however] may be re-referred only under the narrow circumstances described in the rule [that is, when "necessitated by urgent and unforeseen military necessity"].

What are "proper reasons" and what is not arbitrary or unfair to the accused, are matters which the Court of Military Appeals and the Courts of Military Review have had to deal with. Clearly the withdrawal of charges from a special court-martial and rereferral of the same charges, along with new charges, to a general court-martial is a "proper reason" for withdrawing the charges from the special court-martial.<sup>711</sup> So too, is the withdrawal of charges by the original convening authority and rereferral of the same charges by a new convening authority where allegations of command influence have been raised by the accused.<sup>712</sup> The withdrawal of charges in order to add a phrase showing the jurisdictional basis of the charges also has been viewed as a "proper reason" for a withdrawal and rereferral of

---

Id. at 11-64 to 11-65.

<sup>711</sup> United States v. Jackson, 1 M.J. 242, 244 (C.M.A. 1976) (withdrawal of assault and disobedience charges from a special court-martial and later rereferral of these charges, with the additional charge of attempted robbery, to a general court-martial held proper). See United States v. Delano, 12 M.J. 948, 949 (NMCMR 1982) (withdrawal of charges from a special court-martial and later referral of charges against the accused to another special court-martial held proper where accused went absent without leave on six occasions after arraignment).

<sup>712</sup> See United States v. Cruz-Maldonado, 20 M.J. 831, 832 (ACMR 1983) (because of allegations of command influence on the part of the convening authority, charges were withdrawn from a general court-martial and re-referred without modification to a new general court-martial by different convening authority).

charges.<sup>713</sup> The withdrawal and referral of charges also is proper where the required number of court members, because of challenges, drops below a quorum.<sup>714</sup>

Where the evidence shows, however, that the charges were withdrawn and referred by the convening authority because "the first court panel was excessively lenient in their sentences",<sup>715</sup> the withdrawal and rereferral have held to be improper.<sup>716</sup> The Court of Military Appeals also has stated that it "would not tolerate withdrawal and rereferral of charges as a stratagem to replace defense counsel,"<sup>717</sup> and that it would be inclined to find an abuse of discretion "if in every instance a request for an administrative discharge

---

<sup>713</sup> United States v. Lewis, 5 M.J. 712, 713 (ACMR 1978), pet. denied, 6 M.J. 294 (C.M.A. 1979)(withdrawal of charge to add jurisdictional language held to be a proper reason for withdrawal).

<sup>714</sup> United States v. Smiley, 17 M.J. 790, 791-92 (AFCMR 1983)(withdrawal and referral of charges to another court-martial, because of a lack of quorum due to challenges for cause and preemptory challenges, held valid).

<sup>715</sup> United States v. Walsh, 22 USCMA 509, 47 CMR 927 (1973).

<sup>716</sup> Id. See generally United States v. Francis, 15 M.J. 424, 427 (C.M.A. 1983) for a discussion of the problems that can arise for the government in withdrawing charges from a court-martial in an absent without leave case after the trial has begun.

<sup>717</sup> United States v. Gnibus, 21 M.J. 1, 8 (C.M.A. 1985)(accused has no right to be represented by a defense counsel who previously had represented him before the accused went absent without leave).

in lieu of court-martial resulted in rereferral of charges to a higher level of court-martial."<sup>718</sup>

In some cases, where the withdrawal of charges and referral is erroneous, the failure of the accused to object to the withdrawal and rereferral may be deemed to be a waiver of the error, or an error that may be tested for prejudice to the accused.<sup>719</sup> The Air Force Court of Military Review also has ruled that the withdrawal of charges from a general court-martial after arraignment of the accused and rereferral of the charges to another general court-martial, without a detailed statement of the reasons for doing so from the convening authority, is not a jurisdictional error, and is not prejudicial to the accused where no objection is made.<sup>720</sup> Where, however, after the Government has presented its

---

<sup>718</sup> United States v. Charette, 15 M.J. 197, 200 (C.M.A. 1983)(accused failed to establish that the convening authority acted arbitrarily in withdrawing the charges against the accused from a regular special court-martial and rereferring the charges to a Bad Conduct Discharge special court-martial after the accused submitted a request for administrative discharge in lieu of court-martial).

<sup>719</sup> United States v. Shrader, 50 CMR 767, 770 (AFCMR 1975)(withdrawal of charges from a court-martial and rereferral of them to a new court-martial after the trial judge granted a defense motion to transfer the trial to another base, held not to be a "proper reason" for withdrawal and rereferral, but the error was held harmless because there was no objection from the accused).

<sup>720</sup> United States v. Shepardson, 17 M.J. 793, 795-96 (AFCMR 1983), pet. denied, 18 M.J. 282 (C.M.A. 1984).

case, the convening authority withdraws the charges and specifications for no apparent reason other than a fear that the specifications might be found defective, and then rerefers the charges to another court-martial, the rereferral will be found to be prejudicial to the accused.<sup>721</sup> The rereferral will be found prejudicial to the accused because former jeopardy will have attached and the second trial will be a nullity.

The withdrawal and rereferral of charges is authorized by the Manual, and, if done for the "proper reasons" is permissible. The failure to act for "proper reasons," however, may result in a finding of jurisdictional error.

What is important to recognize, in conclusion, is that commanders have statutory authority to convene courts-martial. It also is important to understand that there are limitations on the power of commanders to convene courts-martial. Some of the limitations are imposed by statute, like the types of courts-martial different levels of commanders can convene and the prohibition against accusers convening courts-martial. Other limitations are imposed as a matter of regulations, or executive order, or court directive, like the rules concerning devolution of command or the need for express-

---

<sup>721</sup> United States v. Kinard, 15 M.J. 1052, 1053 (NMCMR 1983). See generally supra note 648.

ing proper reasons in the record for withdrawal and rereferral of charges. Still other limitations are aimed at controlling the powers of the convening authority in matters relating to unlawful command influence, like the rule prohibiting a convening authority from being junior in rank to the accuser.

The first element of court-martial jurisdiction is whether a court-martial is properly convened. It is not an element that is litigated often, but it is an important element, for if a court-martial is not properly convened, the consequences can be fatal to the findings and sentence of the court-martial. For this reason, special care should be taken by commanders and those advising and working with commanders to see that courts-martial are properly convened.

## CHAPTER FIVE

### PROPERLY CONSTITUTED COURTS-MARTIAL

The second element of court-martial jurisdiction is whether a court-martial is properly constituted. A court-martial has a limited existence, hears only criminal cases, and is made up of constantly changing personnel. This is in contrast to civilian courts which are presided over by elected or appointed judicial officers, which sit on a regular basis, and which exercise continuing jurisdiction.

A court-martial is created when the convening authority refers the charges and specifications to a court-martial for trial, and its jurisdiction is limited to considering the charges and specifications referred to it. When its work is finished, the court's existence is terminated and those who participated in the trial are discharged.<sup>722</sup>

---

<sup>722</sup> "[A court-martial] is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved." McClaughry v. Deming, 186 U.S. 49, 64 (1902). In theory an order should be issued by the convening authority terminating the existence of the court-martial when the work of the court is complete. As a practical matter, however, this rarely happens. The effect of the failure to issue terminating orders is that

The contrast between military and civilian courts is clearly apparent. Military courts are not permanent courts, but are created to hear a single case and upon rendering a decision in it, are quickly terminated. In contrast, civilian courts are much more stable and once they are created, they are empowered to exercise jurisdiction continuously and to hear an unending line of cases. The difference between the two types of courts is due to Congressional policy and the special needs that are served by both types of courts.<sup>723</sup>

The participants in a court-martial consist of the accused, the defense counsel, the trial counsel, the military judge, and the court members.<sup>724</sup> The convening authority details, or appoints, those who are

---

there are hundreds and thousands of courts-martial which have been convened over the years to hear cases and which have rendered verdicts, but which have never been formally dissolved.

<sup>723</sup> See supra notes 483-85 and accompanying text.

<sup>724</sup> "[R]eporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed" to the court, but they are not usually thought of as parties or participants in the trial. R.C.M. 501(c), MCM, 1984, at II-47. See United States v. Stafford, 15 M.J. 866, 868 (ACMR 1983)(absence of evidence in the record showing that court reporter was sworn held not to be error); United States v. Dionne, 6 M.J. 791, 794 (ACMR 1978) (failure of general court-martial convening authority to detail a court reporter to a general court-martial held not to be jurisdictional error); United States v. Rosado-Marrero, 32 CMR 583, 585-86 (ABR), pet. denied, 13 USCMA 700, 32 CMR 472 (1962)(no evidence in the record that interpreter sworn held not to be error). United States v. Albright, 23 CMR 619, 621-22 (ABR 1957)(failure to swear interpreter held to be harmless error).

to serve as court members. The other participants--the military judge, the trial counsel, and the defense counsel--are detailed pursuant to regulations issued by the Secretary of the service concerned.<sup>725</sup> To comply with the requirements of the Code, the defense counsel, trial counsel, military judge, and court members must be detailed prior to the trial and must be present when the trial starts.<sup>726</sup> If any of the participants are absent or excused, their absence or excusal must be explained on the record.

When the trial begins, "it must appear affirmatively and unequivocally that the court was legally constituted,"<sup>727</sup> that is, that those who are required to be present by statute are indeed present and that they

---

<sup>725</sup> R.C.M. 503(b)1) & (c), MCM, 1984, at 11-53 to 11-54.

<sup>726</sup> United States v. Waruszewski, No. 73 0941 (NCMR Feb. 6, 1973)(unpublished opinion)(military judge and trial counsel not detailed before trial, but after trial, held to be jurisdictional error). But see Wright v. United States, 2 M.J. 9 (C.M.A. 1976). In Wright, the United States Court of Military Appeals held that a "court-martial consists of a military judge and court members," and that counsel, and presumably the accused, are not part of a properly constituted court-martial. Id. at 10. The Code states that all parties to a court-martial must be detailed and present at the start of a trial. The Court of Military Appeals has ruled, however, that the only the court members and the military judge must be present and that the failure of the other participants to be present is not jurisdictional error, but is error that must be tested for prejudice to the accused.

<sup>727</sup> Runkle v. United States, 122 U.S. 543, 556 (1887)(emphasis added).

possess the qualifications necessary to serve as participants in a court-martial. If the court-martial is not properly constituted, it does not have jurisdiction to try the accused.<sup>720</sup>

When the issue of whether a court-martial is properly constituted is raised, the burden is on the government to show that those required to be present are present, and are qualified to serve on the court to which they are detailed. Not all defects in the appointment of personnel to participate in a court-martial are jurisdictional, but some basic procedures must be followed if a court-martial is to be properly constituted.

A. Accused

1. Presence of the Accused Required

The accused is a critical party to a court-martial. The purpose of a trial by court-martial is to determine whether the charges and specifications against

---

<sup>720</sup> McClaughry v. Deming, 186 U.S. 49, 62-64 (1902) (court composed of officers of the Regular Army which tried an officer of the Volunteer Army held improperly constituted where the statute required that members of the Volunteer Army be tried by a court composed of officers from the Volunteer Army); United States v. Febus-Santini, 22 USCMA 226, 49 CMR 145 (1974) (court-martial was improperly constituted where military judge who tried the case had been relieved by an amendment to the original convening order). Where a court is not found to be properly constituted, a nunc pro tunc action, or retroactive corrective action, will most likely not be successful. See Criminal Law Items, THE ARMY LAWYER 28 (Feb. 1975).

the accused are true or false, and if true, whether they can be proved beyond a reasonable doubt. The presence of the accused at a court-martial is therefore important.

Both the Code and the Manual provide that the accused must be present at a court-martial trial. The Code states that the proceedings of a court-martial "shall be conducted in the presence of the accused."<sup>729</sup> The Manual similarly provides that:

The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentence proceedings, and posttrial sessions, if any, except as otherwise provided by this rule.<sup>730</sup>

In addition, "the due process clause of the fifth amendment and the right to confrontation clause of the sixth Amendment"<sup>731</sup> provide that an accused has a right to be present at a trial.

---

<sup>729</sup> Art. 39(a), U.C.M.J., 10 U.S.C. § 839(a) (1983).

<sup>730</sup> R.C.M. 804(a), MCM, 1984, at II-91. See United States v. Dean, 13 M.J. 676, 678 (AFCMR 1982) (challenge of military judge for cause should have been granted where defense witness, deputy staff judge advocate, trial counsel, and military judge met and neither the accused nor his defense counsel were informed or invited to attend the meeting).

<sup>731</sup> App. 21, Analysis, R.C.M. 804(a), MCM, 1984, at A21-40. See also United States v. Davis, 29 CMR 798, 802-03 (ABR 1960) (examination of a child witness by a law officer outside the presence of the defense counsel and the accused held error).

In short, not only does the accused have a constitutional right to be present at a court-martial, but also under the provisions of the Code and the Manual, the accused is required to be present at all proceedings, except when the court members are deliberating and voting on the findings and the sentence.<sup>732</sup>

## 2. Trial of the Accused in Absentia

Even though the accused's presence at a court-martial is required by statute and Executive Order of the President, the accused can waive his constitutional and statutory right to be present.<sup>733</sup> A court-martial, in other words, does not lose jurisdiction to try an accused if, after the trial has started, the accused absents himself from the proceedings. In such cases, the Manual states that the trial can proceed to findings and sentence in the absence of the accused.<sup>734</sup>

---

<sup>732</sup> "Article 39, Uniform Code of Military Justice, 10 USC §839, requires the accused to be present at all proceedings of the court, except during deliberation and voting of members." United States v. Staten, 21 USCMA 493, 494, 45 CMR 267, 268 (1972). The presence of the accused also is required at a rehearing on sentence, at least at the outset. Id. at 495-96, 45 CMR at 269-70.

<sup>733</sup> R.C.M. 804(b), MCM, 1984, at II-91 to II-92.

<sup>734</sup> Id. An accused also can waive his right to be present at a court-martial by voluntarily absenting himself after arraignment, or by engaging in disruptive conduct that can result in his removal from the courtroom. R.C.M. 804(b)(1) & (2), MCM, 1984, at II-92. See United States v. Ellison, 13 M.J. 90, 92 (C.M.A. 1982) (changes in the membership of the court after the absence

In 1953, soon after the Uniform Code of Military Justice was enacted, a soldier argued to the United States Court of Military Appeals in United States v. Houghtaling<sup>735</sup> that he was denied due process of law because he was tried by court-martial in his absence. In Houghtaling, five soldiers had been charged with raping a Korean national and the charges against them were referred to trial by general court-martial as a capital case. The five accuseds were tried together in a joint trial and each was found guilty of the charges and was "sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for 50 years."<sup>736</sup>

During a continuance in the trial, which occurred after arraignment, one of the five accuseds escaped from confinement and subsequently was tried in absentia. On appeal to the Court of Military Appeals, the accused who absented himself from the trial, argued that a defendant in a capital case could not be tried and sentenced in his absence.

The Court noted that the "bulk of civilian authority supports the proposition that one accused of

---

of the accused from trial held not to deny the court jurisdiction to hear the case in the accused's absence).

<sup>735</sup> 2 USCMA 230, 8 CMR 30 (1953).

<sup>736</sup> United States v. Houghtaling, 2 CMR 229, 230 (ABR 1951).

crime may waive his presence at trial, [except] in capital cases."<sup>737</sup> The Court of Military Appeals, however, refused to make an exception for capital cases in the military.<sup>738</sup> So to hold, the Court said, "would be to reward one accused of a capital offense who is ingenious enough to escape from confinement, but to deny the benefit of that reward to his unfortunate brother who has committed a crime only slightly less serious in degree and has also escaped the clutches of the law."<sup>739</sup> For these reasons and others, the Court held that it was not error either to try or to sentence the accused in his absence.<sup>740</sup> In addition, other courts have said that "when the trial judge designates a date for trial, the accused has an obligation to appear in court on that date,"<sup>741</sup> and should not be able to halt the proceedings once they have begun by simply deciding to stay away.<sup>742</sup>

A trial cannot start without the accused being

---

<sup>737</sup> 2 USCMA at 233, 8 CMR at 33.

<sup>738</sup> Id. at 234, 8 CMR at 34.

<sup>739</sup> Id.

<sup>740</sup> Id. at 235, 8 CMR at 35.

<sup>741</sup> United States v. Abilar, 14 M.J. 733, 735 (AFCMR 1982)(order of military judge to appointed military counsel to proceed to trial in the absence of accused and civilian defense counsel held valid).

<sup>742</sup> Id. See also United States v. Houghtaling, 2 USCMA 230, 234, 8 CMR 30, 34 (1953), for a discussion of the rule that an accused cannot stop a trial by his absence.

present and the Manual provides that the accused must be present at least through arraignment. Arraignment in a court-martial occurs early in the proceedings when the trial counsel reads the charges and specifications into the record and the military judge asks the accused how he pleads. The arraignment procedure in the military is basically as follows: The military judge says, "The accused will now be arraigned." The trial counsel then says, "All parties and the military judge have been furnished a copy of the charges and specifications. Does the accused want them read?" The defense counsel responds, by saying either that the accused wants the charges read, or that the accused waives the reading of the charges. If the accused waives the reading of the charges, the military judge will note for the record that the reading of the charges may be omitted. If the accused requests that the charges be read, the trial counsel will read the charges into the record.

The trial counsel then states that the "charges are signed by [the name of the person who signed them], a person subject to the Code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths, and are properly referred to this court-martial for trial by . . . , the convening authority." The military judge then will ask

the accused how he pleads.<sup>743</sup>

If the accused is absent before arraignment, the court-martial must be postponed or continued until the accused returns or is taken into custody. The question of whether an accused is arraigned or not is generally a matter of record and can be determined easily by reference to the record of trial.

### 3. Voluntary and Knowing Absence

Where the accused is present for arraignment and afterwards absences himself from trial, the proceedings can continue in his absence. Before the trial can proceed further, however, the government must prove that the accused's absence from the trial was "voluntary, knowing and without authority." To establish this, the government must show that "the accused [knew] of the scheduled proceedings and intentionally missed them."<sup>744</sup> A showing by the government that an accused simply went absent without leave would not be sufficient to "justify proceeding with a court-martial in the accused's

---

<sup>743</sup> App. 8, Guide for Special and General Courts-Martial, note 21, MCM, 1984, at A8-4; R.C.M. 904, MCM, 1984, at II-107. See United States v. Houghtaling, 2 USCMA 230, 232, 8 CMR 30, 32 (1953) (the entry of the plea of an accused held not to be part of the arraignment).

<sup>744</sup> Discussion, R.C.M. 804(b), MCM, 1984, at II-92. See generally MILITARY JUSTICE: JURISDICTION OF COURTS-MARTIAL 2-10 (Dept. of the Army Pamphlet 27-174, May 1980).

absence."<sup>745</sup> What the government has to prove, in addition to the accused's absence, is that the "accused was aware that the court-martial would be held during the period of the absence."<sup>746</sup> In short, the government must prove that the accused's absence from his trial was voluntary.<sup>747</sup>

In 1979, the Court of Military Appeals in United States v. Johnson,<sup>748</sup> was asked to determine whether the absence of the accused from a court-martial was "voluntary, knowing and without authority."<sup>749</sup> The accused in Johnson had been charged with robbery and absence without leave. He had been arraigned at a general court-martial, and during a continuance in the proceedings granted to enable the government to conduct a new Article 32 investigation, the accused absented himself without authority. The trial resumed without the accused being present, and the accused was convicted of the charges against him and was sentenced to "a bad conduct discharge, forfeiture of \$225 pay per month for a period of 15 months, imprisonment for 15 months and reduction to

---

<sup>745</sup> Discussion, R.C.M. 804(b), MCM, 1984, at II-92.

<sup>746</sup> Id.

<sup>747</sup> Id.

<sup>748</sup> 7 M.J. 396 (C.M.A. 1979).

<sup>749</sup> Id. at 397.

to the lowest enlisted grade."<sup>750</sup>

On appeal the government argued that the accused was notified of the new trial date and that he "knowingly and voluntarily absented himself," and that for this reason "the court-martial was properly vested with jurisdiction to proceed to trial in his absence."<sup>751</sup> The Court agreed noting, in addition, that the accused had absented himself from the trial after he had been arraigned.<sup>752</sup> The Court therefore concluded that "the arraignment . . . was effective and [that the] trial in absentia was proper."<sup>753</sup>

---

<sup>750</sup> Id. at 396-97.

<sup>751</sup> Id. at 397.

<sup>752</sup> Id.

<sup>753</sup> Id. at 598. See United States v. Aldridge, 16 M.J. 1008, 1010 (ACMR 1983)(accused's trial in absentia in Hawaii upheld even though the accused surrendered to military authorities in Washington, D.C. while his trial was proceeding in his absence); United States v. Bystrzycki, 8 M.J. 540, 541 (NCMR 1979)(accused's trial in absentia upheld even though the military judge did not inform the accused that the trial could continue in his absence); United States v. Condon, 3 M.J. 782, 784-85 (ACMR 1977)(accused's trial in absentia upheld and his petition for a Writ of Error Coram Nobis, filed six years after the trial, denied). But see United States v. Cook, 20 USCMA 504, 507-08, 43 CMR 344, 347-48 (1971)(accused's absence from trial held not voluntary because of the accused's mental condition); United States v. Brown, 12 M.J. 728, 730 (NMCMR 1981)(accused's absence from trial found not to be voluntary where there was no evidence that the accused knew his trial would continue after the military judge recommended that the accused be examined by a mental competency board); United States v. Peebles, 3 M.J. 177, 180 (C.M.A. 1977)(because there was no evidence that the accused knew of the scheduled trial date in his case, the trial of the accused in absentia

In Johnson, the Court also noted that the break in the trial proceedings for the holding of a new Article 32 investigation did not "deprive [the accused's general] court-martial of jurisdiction."<sup>754</sup> The Court viewed the continuance for the purpose of holding of the Article 32 proceeding, to be a postponement in the trial until the convening authority could decide whether to order the proceedings to continue or to dismiss the charges against the accused and order a new trial. Since, in this case, the convening authority ordered the trial to proceed after receiving the new pretrial advice, there was no break in the court's jurisdiction over the accused and thus, no need for a new arraignment when the trial resumed.<sup>755</sup>

4. Temporary Absence of the Accused During Trial

The temporary absence of an accused from the trial presents a different problem. As noted, Article 39 of the Code requires that the proceedings of a court-martial "shall be conducted in the presence of the

---

was held to be improper). See also United States v. Chapman, 20 M.J. 717, 718-19 (NMCMR 1985)(military judge can consider the accused's absence from the trial in deciding on an appropriate sentence for the accused).

<sup>754</sup> 7 M.J. at 398 quoting Humphrey v. Smith, 336 U.S. 695, 700 (1949).

<sup>755</sup> Id.

accused."<sup>756</sup> The Analysis to Rule 804, however, states that "[t]he requirement that the accused be present [at the proceedings] is not jurisdictional."<sup>757</sup> In addition, the Analysis states that:

While proceedings in the absence of the accused, without the express or implied consent of the accused will normally require reversal, the harmless error rule may apply in some instances.<sup>758</sup>

The Analysis cites three federal court cases in support of this observation,<sup>759</sup> but no military cases. In two of the cases cited,<sup>760</sup> the accuseds were absent from a conversation between the judge and a jurors. In both cases, the absence of the accuseds was held to be error, but the error was not held to be prejudicial. In the

---

<sup>756</sup> Art. 39(a), U.C.M.J., 10 U.S.C. § 839(a) (1983).

<sup>757</sup> App. 21, Analysis, R.C.M. 804(a), MCM, 1984, at A21-40.

<sup>758</sup> Id. (emphasis added).

<sup>759</sup> Id.

<sup>760</sup> United States v. Walls, 577 F.2d 690, 697-98 (9th Cir.), cert. denied, 439 U.S. 839 (1978) (absence of accused from in chambers conference between judge and juror with defense counsel present held not to involve a critical part of the trial at which the accused was required to be present and was not prejudicial to the accused); United States v. Nelson, 570 F.2d 258, 260-61 (8th Cir. 1978) (absence of accused when trial judge answered a question asked by a juror held not prejudicial error).

third federal case,<sup>761</sup> a three day absence of the accused from a trial was held not to be prejudicial error.

Because both the Manual and the Code specifically require that the accused must be present at all court-martial proceedings, it is doubtful that the Courts of Military Review or the Court of Military Appeals will be quick to find that the absence of the accused from a court-martial is harmless error. It is possible, however, that a situation could arise where the involuntary temporary absence of the accused from a court-martial could be found not to be prejudicial to the accused.

In sum, the accused is the most important participant in a court-martial proceeding, and the Code and the Manual require the accused be present at all stages of the trial. If the accused absents himself from a court-martial after arraignment, the trial may continue to findings and sentence so long as the government proves that the accused's absence was "voluntary, knowing and without authority." If the government is not able to establish that the accused's absence was "voluntary, knowing and without authority," the trial must be

---

<sup>761</sup> United States v. Taylor, 562 F.2d 1345 (2d Cir.), cert. denied, 434 U.S. 853 (1977)(absence of the accused from his trial for three days held not to be prejudicial error). See United States v. Meinster, 481 F. Supp. 1112 (S.D. Fla. 1979)(requests on the part of two accuseds in a joint trial to be absent from part of the trial denied by the trial judge).

continued until the accused is again present.

## B. Defense Counsel

### 1. The Right to Counsel in the Military

Another important participant in a court-martial is the defense counsel. The Sixth Amendment to the Constitution of the United States guarantees an accused in a criminal trial the right to "Assistance of Counsel for his defense."<sup>742</sup> This right applies to an accused in a civilian trial and to the accused in a court-martial as well.<sup>743</sup> The right of a soldier to be represented by a lawyer is now a "fundamental principle of military due process."<sup>744</sup> In recognition of the accused's right to counsel, Article 27 of the Code states that a "defense counsel shall be detailed . . . [and an] assistant and associate defense counsel may be detailed" to represent the accused in "each general and special court-martial."<sup>745</sup> In addition, Article 27(b) states that a

---

<sup>742</sup> U.S. CONST., amend. VI.

<sup>743</sup> United States v. Tempia, 16 USCMA 629, 634, 37 CMR 249, 254 (1967) (Sixth Amendment right to counsel held to apply to military service members).

<sup>744</sup> United States v. Otterbeck, 50 CMR 7, 9 (NCMR 1974) (no right to appointed counsel if the counsel assigned to represent the accused is changed before an attorney-client relationship is established between the counsel and the accused).

<sup>745</sup> Art. 27(a)(1), U.C.M.J., 10 U.S.C. § 827(a)(1) (1983) (emphasis added).

defense counsel who is detailed to represent an accused in a general court-martial--

- (1) must be a judge advocate [officer] who is a graduate of an accredited law school or is a member of the bar of a Federal Court or of the highest court of a State; and
- (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.<sup>766</sup>

Thus, an accused under the Code is entitled to be represented by a qualified lawyer who is certified competent by The Judge Advocate General to practice in courts-martial.

The Manual also provides that in addition to his detailed military defense counsel, the accused may be represented by individual military counsel<sup>767</sup>

---

<sup>766</sup> Art. 27(b)(1) & (2), U.C.M.J., 10 U.S.C. § 827(b)(1) & (2) (1983)(emphasis added).

<sup>767</sup> See United States v. Quinones, 23 USCMA 457, 461, 50 CMR 476, 480 (1975)(convening authority abused his discretion in denying the accused's request for individual military counsel). The denial of a request for individual military counsel must be for a sound reason. United States v. Cutting, 14 USCMA 347, 351-52, 34 CMR 127, 131-32 (1964)(case returned for additional evidence on the question of availability of counsel). And the reasons for the denial also must appear in the record of trial. United States v. Mitchell, 15 USCMA 516, 520, 36 CMR 14, 18 (1965)(importance of a complete record stressed by the Court). See also United States v. Kelly, 16 M.J. 244, 248 (C.M.A. 1983)(convening authority's decision to make accused's individual military counsel the accused's detailed defense counsel, and, in addition, to deny the accused's request for his original detailed

or by a civilian defense counsel of his choice.<sup>768</sup> The Manual further provides that in a general or special court-martial, an assistant defense counsel may be detailed to represent the accused and to assist the military defense counsel or civilian defense counsel.<sup>769</sup> In general, the same legal qualifications and certification requirements apply to individual military counsel and assistant defense counsel as are applicable to the detailed defense counsel.<sup>770</sup> The requirements for civilian counsel are similar to those of military counsel in that civilian counsel must be a "member of the bar of a Federal court or of the bar of the highest court of a State."<sup>771</sup>

Each accused in the military who is charged with committing an offense in violation of the Uniform Code of Military Justice is entitled to be represented by a military lawyer free of charge. The military lawyer appointed to represent the accused may be one assigned by a Chief Defense Counsel or may be a military lawyer

---

military counsel as individual military counsel, held not to be error).

<sup>768</sup> R.C.M. 502(d)(3), MCM, 1984, at 11-49. See Art. 38(b)(2), U.C.M.J., 10 U.S.C. § 838(b)(2) (1983).

<sup>769</sup> R.C.M. 502(d)(2), MCM, 1984, at 11-49.

<sup>770</sup> See United States v. Kraskouskas, 9 USCMA 607, 609-10, 26 CMR 387, 389-90 (1958) (individual military counsel must be a qualified lawyer).

<sup>771</sup> R.C.M. 502(d)(3)(A), MCM, 1984, at 11-49.

specifically requested by the accused. If the accused requests representation by a specific military lawyer, the request will be granted if it is determined, in accordance with regulations, that the lawyer is reasonably available to represent the accused. The aid of an assistant military lawyer is also free. In the military then, an accused is entitled to free military counsel irrespective of whether or not he can afford to hire a lawyer. Under the Code, the accused also can retain a civilian counsel to represent him at no expense to the government.<sup>772</sup>

In 1958, the Court of Military Appeals stated that "in order to promote the best interests of military justice, it is imperative that only qualified lawyers be permitted to practice before a general court-martial,"<sup>773</sup> and the Court accordingly directed "that the practice of permitting nonlawyers to represent persons on trial before general courts-martial be completely discontinued."<sup>774</sup>

---

<sup>772</sup> Art. 38(b), U.C.M.J., 10 U.S.C. § 838(b) (1983).

<sup>773</sup> United States v. Kraskouskas, 9 USCMA 607, 609, 26 CMR 387, 390 (1958)(individual military counsel must be a qualified lawyer).

<sup>774</sup> Id. See United States v. Otterbeck, 50 CMR 7, 9 n.1 (NCOMR 1974)(no attorney-client relationship had been established between the accused and his nonlawyer counsel).

Eighteen years later in Wright v. United States,<sup>775</sup> the Court of Military Appeals again addressed the issue of whether counsel had to possess the qualifications set forth in Article 27 of the Code to participate in a general court-martial. In an extremely important decision in this area, the Court held that "no jurisdictional significance should be attached to [the failure of counsel to possess the necessary qualifications under] Article 27 of the Uniform Code [since] counsel merely augment the adjudicating tribunal and are not an integral part thereof."<sup>776</sup>

In Wright, the convening authority learned after a trial had taken place, that the trial counsel who had prosecuted the accused in a general court-martial did not possess the necessary qualifications required by Article 27(b) of the Code to serve as the trial counsel. The problem was that the trial counsel was not a member of a bar.

On appeal to the Court of Military Appeals, the issue was "whether the failure to comply with Article 27(b) is a matter affecting the jurisdiction of the court-martial or [whether it is] an error to be tested

---

<sup>775</sup> 2 M.J. 9 (C.M.A. 1976).

<sup>776</sup> Id. at 11 (emphasis added). In deciding Wright, the Court made no reference to its prior decision in United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958).

for prejudice under Article 59(a)."<sup>777</sup> The Court held that the failure of counsel to possess the qualifications required by Article 27(b) is not jurisdictional error, but rather an error that is to be tested for prejudice.<sup>778</sup> In reaching this conclusion, the Court observed that "counsel [are not] an integral part of the adjudicating tribunal known as a court-martial,"<sup>779</sup> and hence, are not part of a "properly convened and constituted" court-martial.<sup>780</sup> "[A] court-martial," the Court said, "consists of a military judge and court members, not counsel."<sup>781</sup> In conclusion, the Court ruled that "[d]efects in the appointment of trial counsel, Article 27(a), UCMJ, or in the qualifications of trial counsel, Article 27(b), UCMJ, are matters of procedure to be tested for prejudice."<sup>782</sup> For this reason, the Court held that the accused was not prejudiced by the fact that the trial counsel was not qualified under Article 27(b) and it affirmed the accused's conviction.<sup>783</sup>

---

<sup>777</sup> Id.

<sup>778</sup> Id. at 11.

<sup>779</sup> Id. at 10.

<sup>780</sup> Id.

<sup>781</sup> Id. (emphasis added).

<sup>782</sup> Id. at 11.

<sup>783</sup> Id. Since the Court discusses only defects in the qualification of trial counsel, it may be that defense counsel still will be required to possess the

The decision of the Court of Military Appeals in Wright is particularly significant from the point of view of properly constituted courts-martial because for the first time in 200 years it is clear that counsel are not "an integral part of the . . . court-martial."<sup>784</sup> The decision is significant too because it is no longer as important as it once was to follow the procedures required by the Code and the Manual for detailing counsel to courts-martial. While previously errors in the detail of counsel were jurisdictional, such errors are now to be tested for prejudice to the accused and only if they are found to be prejudicial will a case be reversed.<sup>785</sup>

---

necessary qualifications set forth in Article 27(b). But see United States v. Wilson, 2 M.J. 683 (AFCMR 1976), summarily aff'd, 3 M.J. 186 (C.M.A. 1977).

Though Wright dealt specifically with the matter of an appointed trial counsel who was shown to be unqualified within the meaning of Article 27(b), . . . the decision makes it clear that the same result obtains in the case of errors in the appointment of defense counsel.

2 M.J. at 687. See also infra note 786.

<sup>784</sup> Id. at 10.

<sup>785</sup> United States v. Bartlett, 12 M.J. 880, 881 (AFCMR 1981)(oral appointment of defense counsel by convening authority held not prejudicial error). Under Wright, the failure of the accused to be represented by defense counsel would not be a jurisdictional error, but would be prejudicial to the accused because the accused would be denied his Sixth Amendment right to counsel. United States v. Tempia, 16 USCMA 629, 640, 37 CMR 249, 260 (1967)(right to counsel held applicable to military prosecutions).

In United States v. Wilson,<sup>786</sup> a problem of improperly detailing a defense counsel to represent the accused at trial was held by an Air Force Court of Military Review not to be prejudicial error. In Wilson, the accused was charged with "six specifications of wrongful possession, sale, and use of heroin."<sup>787</sup> He was tried and convicted by a general court-martial and was sentenced to a "dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for three years, and reduction to the grade of airman basic."<sup>788</sup>

On appeal, the accused alleged that "the court-martial lacked jurisdiction [in his case] because [his] defense counsel were not properly detailed."<sup>789</sup> The original court-martial convening order showed Lieutenant Colonel W as the accused's defense counsel and Captain B as the assistant defense counsel. An amending order included in the record of trial revealed that Captain H later was detailed to represent the accused and that Lieutenant Colonel W was relieved.

At trial, however, Lieutenant Colonel W represented the accused, despite the fact that the amending

---

<sup>786</sup> 2 M.J. 683 (AFCMR 1976), summarily aff'd, 3 M.J. 186 (C.M.A. 1977).

<sup>787</sup> 2 M.J. at 684.

<sup>788</sup> Id.

<sup>789</sup> Id. at 686.

order showed he had been relieved. Captain H, on the other hand, "neither appeared nor was mentioned during the trial."<sup>790</sup> In dealing with the accused's contention that the court-martial was not properly constituted, the Air Force Court of Military Review relied on the ruling of the Court of Military Appeals in Wright that counsel are not an integral part of a court-martial and that errors in the detailing of counsel to a court-martial are not jurisdictional.<sup>791</sup>

The Air Force Court of Military Review noted that "no inquiry was made by the military judge to specifically determine whether the accused consented to the absence of Captain H,"<sup>792</sup> but the Court held that the accused waived this irregularity by not raising it.<sup>793</sup> In addition, the Court observed that there was "not the slight-

---

<sup>790</sup> Id. at 687.

<sup>791</sup> Id.

<sup>792</sup> Id.

<sup>793</sup> Id. But see, United States v. Iverson, 5 M.J. 440 (C.M.A. 1978), in which the Court stated that "[a]bsent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level." Id. at 442-43. See also United States v. Snow, 10 M.J. 742, 743 (NCMR 1981)(case remanded to determine whether the accused established an attorney-client relationship with counsel who was absent from trial); United States v. Catt, 23 USCMA 422, 429, 50 CMR 326, 333 (1975)(military judge's improper disqualification and dismissal from the trial of the accused's defense counsel held to be reversible error).

est indication in the record [that] the accused was substantially prejudiced by the procedural defect in the convening orders."<sup>794</sup>

What the Air Force Court of Military Review ruled in Wilson, and what the Court of Military Appeals summarily affirmed on appeal, is that the absence of the detailed defense counsel is not jurisdictional error if there is no evidence in the record to show that the accused was "substantially prejudiced" by the defect. Decisions like Wilson raise serious questions about whether the courts are any longer paying attention to the rule that statutes and rules governing the convening and constituting of courts-martial are to be strictly construed. The absence of a detailed defense counsel seems at odds with the Code requirement that a qualified defense counsel shall be detailed in every court-martial.

In general, the rules and regulations with regard to the participation of counsel in general courts-martial apply to counsel representing accuseds in special courts-martial.<sup>795</sup> Article 27(c)(1) of the Code provides that the accused in a special court-martial "shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed

---

<sup>794</sup> 2 M.J. at 687 (emphasis added).

<sup>795</sup> Art. 27(c), U.C.M.J., 10 U.S.C. § 827(c) (1983). R.C.M. 501(b), MCM, 1984, at II-47.

under [Article 27(b)] unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies."<sup>796</sup> If a qualified and certified defense counsel cannot be obtained for the reasons stated, Article 27(c)(1) provides that a special court-martial "may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained."<sup>797</sup> As a practical matter, this will rarely occur in peacetime, although it is a situation which could arise on a ship in wartime.

The Code also provides that in a special court-martial, the defense counsel shall have qualifications similar to the trial counsel, that is, "if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified."<sup>798</sup> Likewise, "if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the

---

<sup>796</sup> Art. 27(c)(1), U.C.M.J., 10 U.S.C. § 827(c)(1) (1983).

<sup>797</sup> Id.

<sup>798</sup> Art. 27(c)(2), U.C.M.J., 10 U.S.C. § 827(c)(2) (1983).

foregoing."<sup>799</sup>

The rules governing the qualifications and certification of counsel in general courts-martial and special courts-martial, however, do not apply to summary courts-martial because the "accused [in] a summary court-martial does not have the right to counsel."<sup>800</sup>

In short, an accused has the right to be represented in a general or special court-martial by military counsel detailed under Article 27, or by military counsel of the accused's own selection if reasonably available,<sup>801</sup> and by civilian counsel, if provided at no expense to the government. The Manual provides, however, that the accused can be represented by only one military lawyer--either the detailed defense counsel or military counsel of the accused's selection--but not both.<sup>802</sup>

---

<sup>799</sup> Art. 27(c)(3), U.C.M.J., 10 U.S.C. § 827(c)(3) (1983).

<sup>800</sup> R.C.M. 1301(e), MCM, 1984, at II-202. See Middendorf v. Henry, 425 U.S. 25, 48 (1976) (the right to counsel does not extend to accuseds in summary courts-martial because a summary court-martial was held not to be a court); United States v. Alsup, 17 M.J. 166, 169 (C.M.A. 1984) (the armed services may offer the accused the services of a lawyer at a summary court-martial even though there is no constitutional right that counsel be made available to the accused in a summary court-martial).

<sup>801</sup> R.C.M. 506(a), MCM, 1984, at II-57.

<sup>802</sup> Id. See United States v. Tomberlin, 5 M.J. 790, 791-93 (ACMR 1978) (convening authority's excusal of the accused's individual military defense counsel held not error where the accused was represented at trial by a civilian counsel and a detailed military defense counsel).

The Manual further provides that counsel for the accused will be detailed in accordance with regulations issued by the Secretary of the service concerned. Under Army Regulations, for example, a defense counsel will be detailed by the Chief of the U.S. Army Trial Defense Services, or by a person to whom the power to detail defense counsel has been delegated.<sup>803</sup> Prior to August 1, 1984, the convening authority was responsible for detailing defense counsel to a court-martial,<sup>804</sup> but under the 1984 Manual, this is no longer the responsibility or duty of the convening authority.

2. Absence of the Defense Counsel from the Trial

The absence of qualified counsel from a court-martial is not a problem "[a]s long as at least one qualified counsel for each party is present."<sup>805</sup> The Manual warns, however, that:

Ordinarily, no court-martial proceeding should take place if any defense counsel or assistant defense counsel is absent unless the accused expressly consents to the absence. The military judge may, however, proceed in the absence of one or more defense counsel,

---

<sup>803</sup> Para. 8-6, Army Regulation 27-10 (Sept. 1984).

<sup>804</sup> See paras. 6a, 36a & b, and App. 4, MCM, 1969 (Rev.), at 3-3, 8-1 & A4-1; Act of May 5, 1950, ch. 169, art. 27(a), 64 Stat. 117.

<sup>805</sup> R.C.M. 805(c), MCM, 1984, at II-93.

without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired.<sup>806</sup>

The Manual also provides that an "assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel."<sup>807</sup> In light of the Court's holding in Wright, the absence of qualified counsel, where the accused is represented at his court-martial by one counsel, may not be held to be error if the record shows that the accused received adequate representation by unqualified counsel and that the accused was not substantially prejudiced by such representation.

The absence of defense counsel once a trial begins is permissible, but can occur only with the consent of the accused. A military judge, however, can proceed with the trial in the absence of one or more counsel, whether the accused consents or not, if the

---

<sup>806</sup> Discussion, R.C.M. 805(c), MCM, 1984, at II-93. See United States v. Johnson, 12 M.J. 670, 672 (ACMR 1981)(absence of civilian counsel held not error where military counsel were familiar with the case and were prepared to try it). See also United States v. Gnibus, 16 M.J. 844, 846 (NMCMR 1983)(accused held to have no right to the presence at his trial of the defense counsel detailed to represent him where subsequently the accused went absent without leave and in the interim his original detailed defense counsel was reassigned to Italy).

<sup>807</sup> R.C.M. 805(c), MCM, 1984, at II-93.

military judge decides that a continuance in the trial-- usually a further continuance--is not warranted and that the accused will be adequately represented by the counsel present.

### 3. Waiver of Right to Counsel by Accused

Just as an accused can waive his right to be present at a court-martial, the accused can waive his right to be represented by counsel at trial.<sup>808</sup> In such instances, the accused may conduct his own defense if the military judge finds that "the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding."<sup>809</sup>

In United States v. Tanner,<sup>810</sup> the accused

---

<sup>808</sup> Faretta v. California, 422 U.S. 806, 836 (1975)(the right of an accused to represent himself in a criminal trial is a constitutional right). But see United States v. Tomberlin, 5 M.J. 790, 794-96 (ACMR 1978)(military judge did not err in failing to advise the accused of his right to represent himself); United States v. Stoutmire, 5 M.J. 724, 725-26 (ACMR 1978)(military judge is not required to advise an accused at trial that he has the right to represent himself).

<sup>809</sup> R.C.M. 506(d), MCM, 1984, at II-58. See United States v. Howell, 11 USCMA 712, 719, 29 CMR 528, 535 (1960)(accused's waiver of representation by counsel upheld and the accused's failure to object to inadmissible evidence ruled not a ground for reversal). See, United States v. Kraskouskas, 9 USCMA 607, 611, 26 CMR 387, 390 (1958)(an accused may represent himself before a court-martial, but he may not be represented by a layman).

<sup>810</sup> 16 M.J. 930 (NMCMR 1983).

contended that he was denied the right to represent himself at a special court-martial. In Tanner, the accused was charged with "a 137-day unauthorized absence, failure to obey the lawful order of a superior petty officer, two specifications of failure to obey the lawful orders of a superior non-commissioned officer, destruction of government property and assault on a petty officer while in the execution of his office."<sup>911</sup>

At his trial on July 27, 1981, the military judge was informed by Lieutenant L, the accused's military defense counsel, that he had been released by the accused from the responsibility of representing him, and that the accused was requesting the appointment of individual military counsel from another branch of service. The military judge relieved Lieutenant L from further representation in the accused's case, but appointed him to serve as "standby counsel".

At an Article 39(a) session held on August 28, 1981, Lieutenant L stated on behalf of the accused that--

if Petty Officer Tanner does not receive a Coast Guard Lawyer and an Air Force lawyer is not made available as his [individual military counsel], it is Petty Officer Tanner's wishes that he be allowed to represent himself in this court. It is also understood by the defense that the Judge has already ruled that Petty Officer Tanner is not compe-

---

<sup>911</sup> Id. at 931.

tent to represent himself.<sup>912</sup>

At an Article 39(a) session held on October 22, 1981, after it became apparent that individual military counsel from the Coast Guard and the Air Force could not be obtained, the military judge stated: "[W]e will proceed with the trial today with the detailed counsel in this case, who was originally detailed to defend the accused."<sup>913</sup>

The defendant pleaded not guilty and was tried by a court of members. He was convicted of the charges against him and was "sentenced to confinement at hard labor for three months, forfeiture of \$183.00 pay per month for three months, reduction to the lowest enlisted pay grade and a bad-conduct discharge."<sup>914</sup>

On appeal, a Navy-Marine Court of Military Review held that the accused was denied his "sixth amendment right to self-representation."<sup>915</sup> In reversing the accused's conviction, the Court noted that the military judge failed to conduct a proper inquiry into the accused's waiver of his right to be represented by counsel. The Court stated that the military judge should

---

<sup>912</sup> Id. at 933.

<sup>913</sup> Id.

<sup>914</sup> Id. at 931.

<sup>915</sup> Id. at 936.

have inquired, as a minimum, into the following matters:

"To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understanding and wisely made only from a penetrating and comprehensive examination of all the circumstances under which a plea is tendered."<sup>16</sup>

Because the military judge denied the accused's request to represent himself without conducting such an inquiry, the Court concluded that the accused was denied his Sixth Amendment right to represent himself.

In addition, the Court held that "[o]nce an accused has appropriately waived his right to counsel, he has no constitutional or statutory right to standby counsel."<sup>17</sup> The accused, in other words, has a constitutional right to be represented by counsel or to represent himself, but not a right to both.<sup>18</sup>

The matter of appointing a standby counsel to assist the accused during a trial is a discretionary

---

<sup>16</sup> Id. at 935, citing VonMoltke v. Gillies, 332 U.S. 708, 723-24 (1948).

<sup>17</sup> Id. at 935 (emphasis added).

<sup>18</sup> Id.

matter for the military judge.

Normally, standby counsel should not be appointed in the absence of a specific request from an accused. . . . However, in cases which are expected to be long or complicated or in which there are multiple defendants, the military judge should consider the appointment of standby counsel, "even over the objection of the accused."<sup>19</sup>

If standby counsel is appointed in a case where the accused has chosen to represent himself, the military judge may have to explain the role of the standby counsel to the court members.

In conclusion, a defense counsel who is detailed to a court-martial must be present or be properly excused. If the detailed defense counsel is not present for the trial, and his or her absence is not accounted for on the record, the trial may be found to be improperly constituted if the absence of the defense counsel is found to be prejudicial to the accused. Similarly, if a counsel, who has not been detailed to represent the accused, is present at the trial and defends the accused, the court-martial may be found to be improperly constituted if prejudice to the accused can be shown. The temporary absence of defense counsel during a trial, when the accused is represented by two or more counsel, is not error. The accused also can waive his right to be

---

<sup>19</sup> Id. at 935.

represented by counsel and elect to serve as his own defense counsel.

### C. Trial Counsel

#### 1. Role of Trial Counsel

The trial counsel is also a necessary participant in a court-martial. It is the trial counsel's responsibility to make arrangements for the trial and to "prosecute cases on behalf of the United States."<sup>20</sup> The Code provides that a "[t]rial counsel . . . shall be detailed . . . [and that an assistant trial counsel . . . may be detailed for each general and special court-martial."<sup>21</sup> The Code also states that in a general court-martial, a trial counsel--

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal Court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.<sup>22</sup>

In a special court-martial, however, the trial counsel

---

<sup>20</sup> R.C.M. 502(d)(5), MCM, 1984, at II-49.

<sup>21</sup> Art. 27(a)(1), U.C.M.J., 10 U.S.C. § 827(a)(1) (1983).

<sup>22</sup> Art. 27(b)(1) & (2), U.C.M.J., 10 U.S.C. § 827b(1) & (2) (1983).

need not possess these qualifications, but if he does, the defense counsel must be similarly qualified.<sup>§ 23</sup> The Code also prohibits a trial counsel from participating in a court-martial if he previously has acted for the accused in the same case.<sup>§ 24</sup> Under the provisions of the Code and the Manual, the trial counsel also is prohibited from participating in a court-martial if he previously was involved in the case as an accuser, investigating officer, military judge or member of the court.<sup>§ 25</sup>

## 2. Disqualification of Trial Counsel from Participating in a Court-Martial

The Code and the Manual are quite clear as to what type of prior conduct disqualifies a trial counsel from participating in a court-martial. Under the Court of Military Appeal's decision in Wright, however, it is not jurisdictional error for trial counsel to participate in a court-martial where he is the accuser or investigating officer or where he served as a military judge, court member or represented the accused. In each instance, the court will have to find that the prior participation of the trial counsel was prejudicial to the

<sup>§ 23</sup> Art. 27(c)(2), U.C.M.J., 10 U.S.C. § 827(c)(2) (1983).

<sup>§ 24</sup> Art. 27(a)(2), U.C.M.J., 10 U.S.C. § 827(a)(2) (1983).

<sup>§ 25</sup> Id. R.C.M. 502(d)(4), MCM, 1984, at II-49.

accused before the error will be found to be reversible. The participation in a court-martial of a trial counsel who has not been detailed to serve as a trial counsel also is not jurisdictional error, and similarly will have to be tested for prejudice to the accused.

In Wright v. United States,<sup>26</sup> the Court of Military Appeals held that the participation in a general court-martial of a trial counsel who was not a lawyer was not jurisdictional error and was not prejudicial to the accused.<sup>27</sup> In 1984, an Air Force Court of Military Review, cited Wright in deciding the same issue. In United States v. Daigneault,<sup>28</sup> the Air Force Court of Military Review observed that "neither the convening order nor the record of trial reflects that trial counsel was properly qualified to so act."<sup>29</sup> The Court held, however, that the failure of the trial counsel to possess the necessary qualifications required by Article 27(b) of the Code was not jurisdictional error. In reaching its decision, the Court noted that "[d]efects in either the appointment of trial counsel or in the qualifications of counsel are procedural matters to be tested for

---

<sup>26</sup> 2 M.J. 9 (C.M.A. 1976). See supra note 775 and accompanying text.

<sup>27</sup> Id. at 11.

<sup>28</sup> 18 M.J. 503 (AFCMR 1984).

<sup>29</sup> Id. at 505.

prejudice."<sup>30</sup> In Daigneault, the Court found that the "substantial rights" of the accused were not "materially" prejudiced by the defect of the trial counsel not being qualified under Article 27(b) of the Code.<sup>31</sup>

The Military Courts of Review also have ruled that the trial counsel's prior participation in the case as an investigating officer is not prejudicial error, absent objection from the accused.<sup>32</sup> The courts have ruled too that the absence of the detailed trial counsel and detailed assistant trial counsel, in addition, to the participation in a court-martial of a trial counsel who was not detailed to the court by the convening authority, are not prejudicial error.<sup>33</sup>

In sum, while the trial counsel plays an important role in a court-martial, the presence of the detailed trial counsel no longer seems to be an important requirement. Despite the language of Code, which clearly provides that a "trial counsel . . . shall be detailed" for each general and special court-martial, the Court of Military Appeals has indicated in Wright that the failure of the government to comply with the Code provision is

---

<sup>30</sup> Id. at 506.

<sup>31</sup> Id.

<sup>32</sup> United States v. Trakowski, 10 M.J. 792, 794-95 (AFCMR 1981).

<sup>33</sup> United States v. Hicks, 6 M.J. 587, 588 (NCMR 1978).

not jurisdictional error, but is an error to be tested for prejudice to the accused. It is difficult to see how an error in detailing the trial counsel could ever be prejudicial to the accused, especially in the absence of an objection by the defense, unless, of course, the trial counsel previously had been detailed to represent the accused.

It may be that in reviewing military court decisions, the federal courts will construe the language of the Code more strictly, and require closer adherence to the rules on the detail and presence of counsel; such a reading clearly would be more consistent with the view that the statutes concerning the convening of courts-martial are to be strictly construed.

#### D. Military Judge

The military judge is another important participant in a court-martial. While the presence or absence of the trial counsel, defense counsel, and even under some circumstances the accused, is not jurisdictionally important to a properly constituted court-martial, the detail and presence of the military judge is important. In Wright v. United States,<sup>34</sup> the United States Court of Military Appeals stated that a properly constituted court-martial "consists of a military judge and court

---

<sup>34</sup> 2 M.J. 9 (C.M.A. 1976).

members."<sup>35</sup> Thus, the role of the military judge is still important to a properly constituted court-martial.

1. Qualifications of the Military Judge

Article 26 of the Code provides that a "military judge shall be detailed to each general court-martial," and "[s]ubject to [the] regulations of the Secretary concerned . . . may be detailed to any special court-martial."<sup>36</sup> As a practical matter military judges are detailed to sit on every general and special court-martial convened in the armed forces. Each branch of the armed forces has more than an adequate number of judge advocates officers who are certified to act as military judges, and a shortage of qualified military judges should never be a problem.

Article 26 further provides that the "Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed . . . and for the persons who are authorized to detail military judges."<sup>37</sup> This is a new provision which was added to the Code in 1984, and it represents a major change in the way military judges are detailed to serve on courts-mar-

---

<sup>35</sup> Id. at 10.

<sup>36</sup> Art. 26(a), U.C.M.J., 10 U.S.C. § 826(a) (1983)(emphasis added).

<sup>37</sup> Id. (emphasis added).

tial. Prior to 1984, the convening authority was responsible for detailing military judges to serve on courts-martial, but with the 1984 changes, the Secretaries of the various services are responsible for providing regulations for detailing military judges to courts-martial.

In addition, Article 26 prescribes the qualifications of those who serve as military judges:

A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force which such military judge is a member.\*3\*

To serve as a military judge, a commissioned officer must not only possess the qualifications set forth above, but also must personally be selected to serve as a military judge by The Judge Advocate General of the branch of the armed force in which the officer is a member.

Article 26 of the Code further describes the duties that are to be performed by the military judge. As is the case with trial counsel and defense counsel, the Code provides that no military judge may act in a case "if he is the accuser or a witness for the prosecu-

---

\*3\* Art. 26(b), U.C.M.J., 10 U.S.C. § 827(b) (1983).

tion or has acted as investigating officer or a counsel in the same case."<sup>39</sup>

Article 26 also precludes the military judge from consulting with the members of a court-martial outside "the presence of the accused, trial counsel, and defense counsel,"<sup>40</sup> and prohibits the military judge from voting with the members of the court.<sup>41</sup>

## 2. Detailed Military Judge

What effect the new provisions of the Code on the subject of detailing military judges to serve on courts-martial will have on the law of a properly constituted court-martial is not yet clear. The Code states that a "military judge shall be detailed" to each court-martial, but the responsibility for detailing the judges no longer rests with the convening authority. It is now, under regulation, the responsibility of the trial judges themselves. Indeed, the Manual specifically states that if the "authority to detail military judges [has been]

---

<sup>39</sup> Art. 26(d), U.C.M.J., 10 U.S.C. § 826(d) (1983).

<sup>40</sup> Art. 26(e), U.C.M.J., 10 U.S.C. § 826(e) (1983). See United States v. Dean, 13 M.J. 676, 678 (AFCMR 1982) (challenge of military judge for cause should have been granted where defense witness, deputy staff judge advocate, trial counsel, and military judge met and neither the accused nor his defense counsel were informed or invited to attend the meeting).

<sup>41</sup> Art. 26(e), U.C.M.J., 10 U.S.C. § 826(e) (1983).

delegated to a military judge, that judge may detail himself or herself as military judge for a court-martial."<sup>42</sup>

But the Manual also states that at trial the "order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial,"<sup>43</sup> and that the "writing or announcement shall indicate by whom the military judge was detailed."<sup>44</sup>

In the past, when the convening authority personally failed to detail a military judge to sit on a court-martial, the court-martial was held not to be properly constituted and did not have jurisdiction to try

---

<sup>42</sup> R.C.M. 503(b)(1), MCM, 1984, at II-53. Where a military judge recuses himself, the court-martial is without a properly detailed military judge and a new military judge must be detailed by the trial judiciary. See United States v. Renton, 8 USCMA 697, 702, 25 CMR 201, 206 (1958)(law officer who acted in preferring the charges against the accused should have recused himself and another law officer should have been detailed to serve on the court-martial and the failure to do so was jurisdictional error). A military judge also may be replaced during trial by a newly detailed military judge, but after arraignment a military judge can be replaced only for good cause shown on the record, that is, a showing of extraordinary circumstances or military necessity. United States v. Boysen, 11 USCMA 331, 336, 29 CMR 147, 152 (1960)(return of law officer to United States held not sufficient to show good cause for the changing of judges during trial). United States v. Hamlin, 49 CMR 18, 21 (ACMR 1974)(replacement of a military judge by another after arraignment held not to be for good cause).

<sup>43</sup> R.C.M. 503(b)(2), MCM, 1984, at II-53.

<sup>44</sup> Id. at II-53 to II-54.

the accused.<sup>45</sup> A similar holding was made, where a military judge personally detailed by the convening authority did not sit on a court-martial, and another judge, who was not detailed, did sit on the court-martial.<sup>46</sup> And in still another case, the Court of Military Appeals held that a court-martial was improperly constituted where the Court-Martial Convening Order indicated that the military judge who tried the accused, had been relieved from the case, and that the convening authority had appointed another military judge to replace him.<sup>47</sup> These holdings, in conjunction with the strong statement in Wright that a properly constituted court-martial consists of a military judge and court members, would lead one to conclude that a properly detailed military judge would be an indispensable jurisdictional

---

<sup>45</sup> United States v. Singleton, 21 USCMA 432, 434, 45 CMR 206, 208 (1972)(jurisdictional error found where the military judge was detailed to the court 3 days after the trial was held).

<sup>46</sup> United States v. Johnson, 48 CMR 665, 666-67 (ACMR 1974)(jurisdictional error found where military judge was removed prior to trial and the military judge who tried the case was not personally selected by the convening authority).

<sup>47</sup> United States v. Febus-Santini, 23 USCMA 226, 49 CMR 145 (1974)(court-martial held to be improperly constituted, where an amending order relieved the military judge who tried the accused, and appointed a new military judge to try the case).

prerequisite for a properly convened court-martial.<sup>848</sup>

What makes this conclusion questionable is the following statement which appears in the Analysis section to the Manual. The Analysis states that:

As long as a qualified military judge presides over the court-martial, any irregularity in detailing a military judge is not jurisdictional and would result in reversal only if specific prejudice was shown.<sup>849</sup>

A similar statement appears in the Senate Report on the Military Justice Act of 1983.<sup>850</sup> The Senate Report states that the amendment to Article 26 of the Code, on the appointment of military judges, and the amendments to the other articles concerning the detailing of participants to a court-martial, were made in an effort to "reduce the potential for jurisdictional error."<sup>851</sup> "Under these amendments," the Senate Report states, "errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required

---

<sup>848</sup> See United States v. Renton, 8 USCMA 697, 700-02, 25 CMR 201, 204-06 (1958) (law officer who assisted in drafting charges and specifications against the accused should have recused himself and another law officer should have been detailed to serve on the court and the failure to do so was jurisdictional error).

<sup>849</sup> App. 21, Analysis, R.C.M. 503(b), MCM, 1984, at A21-25.

<sup>850</sup> S. REP. No. 53, 98th Cong., 1st Sess. 12 (1983).

<sup>851</sup> Id.

composition of a court-martial will be tested solely for prejudice under Article 59."<sup>52</sup>

The amendments to Article 26 of the Code and to the other articles concerning court-martial personnel were intended to reduce the possibility of jurisdictional error and "to facilitate the administration of courts-martial without affecting the fundamental rights of the accused or the duties of commanders, counsel, court members, and the military judge."<sup>53</sup>

This legislative history reveals a clear intent on the part of Congress to change significantly the law with respect to court-martial personnel and to curtail substantially what long has been an important area of court-martial jurisdiction. Under Article 26, as amended, any military judge whether detailed or not, will be able to sit on any general or special court-martial. The error in the failure to properly detail a military judge to the court-martial will be measured for specific prejudice to the accused, and, in the absent of prejudice--which is unlikely--the presence of an unauthorized judge will be upheld.

The Court of Military Appeals has yet to decide a case under the new provisions of Article 26. In view of the Court's statements in Wright, it will be interesting

---

<sup>52</sup> Id.

<sup>53</sup> Id.

to see, if the Court reads as much into the language of Article 26 as Congress intended, or decides that the plain language of the statute does not support the broad intent expressed by Congress.

### 3. Request for Trial by Military Judge Alone

Prior to 1968, an accused who was tried by court-martial had no right to request trial by military judge alone.<sup>854</sup> In 1968, Congress amended Article 16 of the Code to allow military accuseds the right to be tried by a military judge alone.<sup>855</sup> The intent of Congress in amending Article 16 was to give accuseds in the military, the same right that accuseds in the civilian community had to waive a jury trial and to be tried by a military judge. The changes made by Congress to Article 16 were modeled after the language found in Rule 23(a) of the Federal Rules of Criminal Procedure which provides that "[c]ases required to be tried by [a] jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."<sup>856</sup> In giving accuseds in the military the

---

<sup>854</sup> The Supreme Court of the United States has held that there is no constitutional right to a trial by judge alone. Singer v. United States, 380 U.S. 24, 26 (1965).

<sup>855</sup> Military Justice Act of 1968, Pub. L. No. 90-632, Art. 16, 82 Stat. 1335.

<sup>856</sup> FED. R. CRIM. P. 23(a).

right to waive a jury trial, Congress did away with the need for the government's consent, but it did require the accused to submit "a written request for such a trial after being informed of the identity of the judge."<sup>57</sup>

In 1984, Congress amended Article 16 again, this time to permit an accused to make an oral request on the record for a trial by military judge alone. Article 16 of the Code now provides that in a general court-martial, the court shall consist of--

- (A) a military judge and not less than five members; or
- (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.<sup>58</sup>

The same provisions also apply to special courts.<sup>59</sup>

Before August 1, 1984, the rules with regard

---

<sup>57</sup> United States v. Ward, 3 M.J. 365, 366 (C.M.A. 1977) (denial of accused's request for trial by military judge alone held reasonable).

<sup>58</sup> Art. 16(1)(A) & (B), U.C.M.J., 10 U.S.C. § 816(1)(A) & (B) (1983) (emphasis added). A "court-martial is assembled after the preliminary organization is complete and the trial judge announces that the court is assembled." United States v. Morris, 23 USCMA 319, 322, 49 CMR 653, 656 (1975). See Discussion, R.C.M. 911, MCM, 1984, at 11-120.

<sup>59</sup> Art. 16(2)(B) & (C), U.C.M.J., 10 U.S.C. § 816(2)(B) & (C) (1983).

to requesting trial by military judge alone were strictly construed by the courts and the failure to comply with the exact requirements for requesting trial by military judge alone would result in a finding of jurisdictional error.<sup>\*\*\*</sup> As a result of the recent amendments to Article 16(2)(B) of the Code, requests for trial by military judge alone can now be made orally or submitted in writing. The intent of Congress here was to eliminate errors concerning the form of the request, which "may cause appellate litigation despite the fact that the military judge made a satisfactory inquiry on the record into the accused's decision."<sup>\*\*\*</sup> Under the new Code

---

<sup>\*\*\*</sup> See e.g., United States v. Dean, 20 USCMA 212, 215, 43 CMR 52, 55 (1970)(failure of an accused to submit a request in writing for trial by military judge alone held to be jurisdictional error); United States v. Rountree, 21 USCMA 62, 44 CMR 116 (1971)(failure to submit a new request for trial by military judge alone when a different military judge was substituted for the military judge originally detailed to try the case held to be jurisdictional error). See Baldwin, Requests for Trial by Military Judge Alone under Article 16(1)(B) of the Uniform Code of Military Justice, 72 MIL. L. REV. 153 (1976); Ervin, The Military Justice Act of 1968, 45 MIL. L. REV. 77, 92-93 (1969).

<sup>\*\*\*</sup> S. REP. No. 53, 98th Cong., 1st Sess. 12 (1983).

Nothing in this amendment modifies the defense counsel's responsibility to discuss with the accused the options concerning the composition of the court-martial; nor does it modify the military judge's responsibility to determine that the accused understands the options and that the accused has had an adequate opportunity to consult with counsel about the choice. Likewise,

provisions, this type of error will occur only if there is no evidence in the record that a request was made either in writing or orally for trial by military judge alone.<sup>842</sup>

During the Article 39a session of a court-martial, an accused will be given an opportunity to choose between a trial by court members or a trial by military judge alone. The trial judge will ask the accused if he desires to be tried by court members or military judge. If the accused expresses a desire to be tried by military judge alone, the military judge will explain what a trial by military judge alone will mean, and if he is satisfied that the accused is aware of his rights and is making the choice voluntarily, he can approve the accused's request and will try the case himself.

An accused, however, does not have the right to request trial by military judge alone in a capital case. This rule is stated clearly in Article 18 of the Code.

---

the amendment does not affect the military judge's responsibility to ensure that the accused made a knowing, voluntary request if the accused elects to be tried by judge alone.

Id.

<sup>842</sup> For a discussion of the form of the election and the right to withdraw the request for trial by military judge alone, see R.C.M. 903(b)(2), (c)(2), & (d)(2), MCM, 1984, at II-106 to II-107 and App. 21, Analysis, R.C.M. 903(b), (c), & (d), MCM, 1984, at A21-46 to A21-47.

[A] general court-martial [composed only of a military judge] shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.<sup>863</sup>

The same rule is restated in the Manual.<sup>864</sup>

In United States v. Matthews,<sup>865</sup> the accused in a capital case stated that he "was willing to waive his trial by court members and to proceed with trial by military judge alone."<sup>866</sup> In support of his request, the accused argued that "the provision of the Uniform Code which denies this right in a capital case is unconstitutional."<sup>867</sup> The trial judge denied the request<sup>868</sup> and the Court of Military Appeals affirmed the denial stating first, that "a defendant has no constitutional right to waive trial by jury" and second, that "the unique nature of capital punishment provides adequate justification for the distinction which Congress has made in this regard."<sup>869</sup>

---

<sup>863</sup> Art. 18, U.C.M.J., 10 U.S.C. § 818 (1983)

<sup>864</sup> R.C.M. 201(f)(1)(C), MCM, 1984, at II-10.

<sup>865</sup> 16 M.J. 354 (C.M.A. 1983).

<sup>866</sup> Id. at 361.

<sup>867</sup> Id.

<sup>868</sup> Id.

<sup>869</sup> Id. at 363.

Article 16 of the Code requires that an accused's request for trial by military judge alone be approved by the military judge. The United States Court of Military Appeals has noted in this regard that "[s]uch approval is a necessary prerequisite for a bench trial and [that] Article 16, like Rule 23a, creates no absolute right to trial by judge alone."<sup>70</sup> A request for military judge alone, thus, is not effective upon submission by the accused, but rather upon its approval by the military judge.<sup>71</sup>

The decision as to whether or not to approve a request for trial by military judge alone is discretionary with the military judge.<sup>72</sup> Where the military judge approves the request for trial by military judge alone, the military judge has a duty to review with the accused the significance of the request for trial by military judge alone. This is necessary to ensure that

---

<sup>70</sup> United States v. Ward, 3 M.J. 365, 367 (C.M.A. 1977)(denial of request for trial by military judge alone held reasonable).

<sup>71</sup> United States v. Morris, 23 USCMA 319, 324, 49 CMR 653, 658 (1975)(untimely request for trial by military judge alone can be approved by the military judge, if justified by the circumstances).

<sup>72</sup> United States v. Butler, 14 M.J. 72, 73 (C.M.A. 1982)(a military judge's refusal to approve a request for trial by military judge alone without stating reasons for doing so held to be an abuse of discretion); United States v. Fountain, 2 M.J. 1202, 1223 (NCMR 1976)(military judge's refusal to approve a request for trial by military judge alone held not to be an abuse of discretion).

the accused was aware of who the judge in his case is going to be before he submitted his request, and to make sure that the accused is making his decision freely and without coercion.<sup>873</sup>

Where a military judge, on the other hand, refuses to approve a request for trial by military judge alone, he must state his reasons for doing so on the record. In United States v. Butler<sup>874</sup> the accused, an Air Force Captain, was tried and convicted by a general court-martial for five specifications of willful disobedience of orders and one specification of unauthorized absence, and "was sentenced to dismissal from the service, confinement at hard labor for 6 months, forfeiture of \$1,200.00 pay per month for 6 months and a fine of \$10,000.00."<sup>875</sup>

At his court-martial, the accused submitted a proper request for trial by military judge alone which was "summarily disapproved by the military judge without

---

<sup>873</sup> See App. 8, Guide for General and Special Courts-Martial, Note 20, MCM, 1984, at A8-3 to A8-4 for a discussion of what the military judge is to discuss with the accused concerning the accused's right to trial by military judge alone.

<sup>874</sup> 14 M.J. 72 (C.M.A. 1982)

<sup>875</sup> Id. at n.1. "The convening authority approved only so much of the sentence as provided for dismissal from the service, confinement at hard labor for 6 months, forfeiture of \$1,009.00 pay per month for 6 months and a fine of \$10,000.00." Id.

explanation."<sup>876</sup> The accused then "moved for reconsideration of this denial [and his motion] was, likewise, denied."<sup>877</sup> On appeal to the United States Court of Military Appeals, the accused argued that "the military judge erred in denying, without reasons, [the accused's] request for trial by military judge alone."<sup>878</sup>

In addressing the issue, the Court of Military Appeals noted that a military judge's discretion in approving or disapproving requests for trial by military judge alone "is not peremptorily absolute," but rather "is subject to review for abuse."<sup>879</sup> In this case, the Court stated that the absence of reasons in the record explaining the trial judge's exercise of discretion made it impossible for the Court to review the issue raised by the accused and, for this reason, the Court was required to set aside the accused's conviction and sentence.

In discussing the need for setting forth in the record the reasons for denying such requests, the Court noted that a judge's "discretionary power to deny cannot be reviewed by appellate courts unless his reasons can be reviewed," and, in addition, the Court noted that "military judges cannot be allowed to abuse their

---

<sup>876</sup> 14 M.J. at 72.

<sup>877</sup> Id.

<sup>878</sup> Id. at 72-73.

<sup>879</sup> Id. at 73.

discretion by summarily denying such requests for no reviewable reasons."<sup>880</sup> For these reasons, the Court ruled that "a military judge is required as a matter of judicial responsibility to make the basis of his denial a matter of record."<sup>881</sup>

If a military judge determines "that, because of the particular issues raised in a case or because of his own involvement in a related case, the findings and sentence should be left to the court members,"<sup>882</sup> he should put such reasons in the record. Where the reasons for denial have been included in the record, the appellate courts can adequately review the military judge's exercise of discretion. As a general rule, where the military judge's reasons are a matter of record, the appellate courts have given military judges the benefit of the doubt in reviewing their discretionary rulings.<sup>883</sup>

---

<sup>880</sup> Id.

<sup>881</sup> Id.

<sup>882</sup> Id. at 74 (J. Everett concurring).

<sup>883</sup> See e.g., United States v. Ward, 3 M.J. 365, 367 (C.M.A. 1977)(denial of the accused's request for trial by military judge alone held not to be an abuse of discretion); United States v. Schaffner, 16 M.J. 903, 905 (ACMR 1983)(military judge had sound reasons for denying the accused's request for trial by military judge alone); United States v. Fountain, 2 M.J. 1202, 1223 (NCMR 1976)(military judge's denial of the accused's request for trial by military judge alone based on reasonable considerations); United States v. Stewart, 2 M.J. 423, 427 (ACMR 1975)(military judge's premature denial of request for trial by military judge alone held not to be an abuse of discretion); United States v. Scaife, 48 CMR

In addition, the appellate courts have stated that "the military trial judge's discretionary determination[s] should not be overturned in the absence of a clear showing of prejudicial error."<sup>884</sup> In short, "[c]ompeiling an accused to undergo a trial with members, against his will, is not contrary to an accused's right to a fair trial or to due process."<sup>885</sup>

In conclusion, it is clear that the jurisdictional requirements for detailing military judges to serve on courts-martial and for requesting trial by military judge alone have been relaxed considerably by the Congress. Under the new rules a court-martial may be held to be properly constituted as long as a qualified military judge is presiding. In addition, an informal request for trial before a military judge alone will be sufficient for an accused to be tried by a military judge alone. The fact that the military judge has not been

---

<sup>884</sup> United States v. Winn, 46 CMR 871, 872 (AFCMR), pet. denied, 22 USCMA 625, 46 CMR 1324 (C.M.A.), pet. for reconsideration denied, 22 USCMA 626, 45 CMR 1324 (C.M.A. 1973)(military judge did not abuse his discretion in denying a late request for trial by military judge alone).

<sup>885</sup> United States v. Dupree, 45 CMR 456, 461 (AFCMR), pet. denied, 21 USCMA 640, 45 CMR 928 (1972) (accused's request for trial by military judge was an effective waiver of a trial by court members).

properly detailed in accordance with the provisions of the Code may no longer be jurisdictional error. This new approach to detailing military judges and requesting trial by military judge alone is markedly different from the long history of precedent and policy applied by the courts in the past in this area. How the appellate courts will treat these new changes for detailing military judges remains to be seen.

#### E. Court Members

The last important group of participants in a court-martial are the court members.<sup>\*\*\*</sup> These are commissioned officers, and noncommissioned officers if the accused has requested trial by a court composed of at least one-third enlisted personnel, who serve as jurors on a court-martial. As noted, an accused in a general or special court-martial has the right to be tried by a court composed of members--5 or more in general court-martial and 3 or more in a special court-martial--or to be tried by a military judge alone. In 1983, 45% of the general courts-martial tried in the armed forces of the United States were tried before court members and 55%

---

<sup>\*\*\*</sup> See generally Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 5-10 (1953); Van Sant, Trial by Jury of Military Peers, 15 A.F. JAG L. REV. 185, 186-88 (Summer 1974).

were tried before military judge alone.<sup>887</sup> In the same year, 18% of the special courts-martial were tried before court members and 82% were tried by military judge alone.<sup>888</sup>

The duties of the court members in a court-martial are similar to those of jurors in a civilian trial. The court members hear the evidence and decide whether the accused is guilty beyond a reasonable doubt of the offenses charged, or is innocent of the charges in light of the evidence presented. In the event of a finding of guilty, the court members must impose an appropriate sentence. In performing their duties, the court members must be impartial, unbiased and objective, and they must not let any fixed idea or outside influence interfere with their responsibility to be fair and just. In addition, they must be careful not to let command influence affect their deliberations or decision-making.<sup>889</sup>

---

<sup>887</sup> ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 1982 - SEPTEMBER 30, 1983, 18 M.J. CXV, CXLII, CLII, CLXII, CLXX.

<sup>888</sup> Id.

<sup>889</sup> Art. 37, U.C.M.J., 10 U.S.C. § 837 (1983). See Curry v. Secretary of Army, 595 F.2d 873, 879-80, rehearing denied, 595 F.2d 873 (D.C. Cir. 1979).

## 1. Selection of Court Members

Under Article 25 of the Code, the convening authority is responsible for selecting members who will serve on courts-martial. Article 25(d)(2) provides that "the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament."<sup>90</sup> To prevent the selection by the convening authority of court members who might later be challenged for cause at trial, the Code states that "[n]o member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or counsel in the same case."<sup>91</sup> The Manual also lists other persons who may be subject to challenge and should not be selected by the convening authority to serve as court members, namely, "any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused,

---

<sup>90</sup> Art. 25(d)(2), U.C.M.J., 10 U.S.C. § 825(d)(2) (1983). See Schwender, One Potato, Two Potato . . . : A Method to Select Court Members, THE AMRY LAWYER 12, 13 (May 1984) [hereinafter cited as A Method to Select Court Members].

<sup>91</sup> Art. 25(d)(2), U.C.M.J., 10 U.S.C. § 825(d)(2) (1983).

unless this is unavoidable; an enlisted member from the same unit as the accused; [and] any person who is in arrest or confinement."<sup>892</sup>

As in the case of properly convened courts-martial, a presumption of regularity is applied to the convening authority's selection and detailing of court members.<sup>893</sup> Unless the accused challenges the method by which the court members were selected by the convening authority, or can present evidence of some irregularity in the selection process, a presumption of regularity will be applied to the actions of the convening authority in the selection of court members to sit on an accused's court-martial.

Aside from these guidelines, the convening authority has wide discretion in selecting those whom he believes are the best qualified to serve on the court-martial.<sup>894</sup> As in the case of properly convened courts-

---

<sup>892</sup> Discussion, R.C.M. 503(a)(1), MCM, 1984, at 11-53. In addition, the convening authority may have a personal list of criteria for use in the selection process. See A Method to Select Court Members, supra note 890 at 13.

<sup>893</sup> See generally United States v. Saunders, 6 M.J. 731, 734-35 (ACMR 1978)(en banc)(absent a showing to the contrary, the convening authority is presumed to have properly detailed the military judge and the defense counsel to the accused's court-martial).

<sup>894</sup>

The commanding officer is well situated to determine whether the various needs of the service will be best served by the selection and participation of particular individuals in

martial, a presumption of regularity is applied to the actions of the convening authority in selecting and detailing members to sit on a court-martial.<sup>895</sup> Unless the accused objects to the manner in which the convening authority has selected the court members to participate in the trial, the appellate courts will apply a presumption of regularity to the convening authority's actions

---

a court-martial proceeding. . . .

[In addition, the] . . . selection of court members by the commanding officer is the most expeditious way to convene a military jury.

Curry v. Secretary of the Army, 595 F.2d 873, 878, rehearing denied, 595 F.2d 873 (D.C. Cir. 1979)(multiple roles assigned to the convening authority by the UCMJ held constitutional).

We decline to read Article 25 of the Code as requiring that officers selected for service on a general court-martial be of a particular rank or represent a cross-section of the officer-community. Indeed, it must be read as requiring that about which appellant complains--i.e., a discriminatory selection process to be exercised by a convening authority in detailing members of his command for court-martial membership. Each convening authority must use the "best-qualified" test by considering, in potential appointees to courts-martial, those qualities prescribed by Congress.

United States v. Brandy, 40 CMR 674, 677 (ABR), pet. denied, 18 USCMA 640, 40 CMR 327 (1969)(convening authority's process for selecting court members did not result in the automatic exclusion of lower ranking officers).

<sup>895</sup> See generally United States v. Saunders, 6 M.J. 731, 734-35 (ACMR 1978)(absent a showing to the contrary, the convening authority is presumed to have properly detailed the defense counsel and the military judge).

and will uphold the selection process.

2. Request for Trial by Enlisted Members

If the accused requests to be tried by enlisted personnel, the convening authority must select a panel of court members that is composed of at least a third enlisted members. Article 25(c)(1) of the Code gives the accused the right to request to be tried by a court consisting of enlisted members.<sup>996</sup> When a written request is received from the accused, the convening authority will select enlisted personnel to serve on the court using the same criteria used to select officer personnel.

A written request for enlisted personnel to be included in the membership of a court-martial signed by the accused is a jurisdictional prerequisite and the

---

<sup>996</sup> Art. 25(c)(1), U.C.M.J., 10 U.S.C. § 825(c)(1) (1983). See R.C.M. 503(a)(2), MCM, 1984, at 11-53. A request for enlisted members may be presented to the convening authority any time before the conclusion of the Article 39a session or the assembly of the court. United States v. Dauphine, 46 CMR 862, 864 (ACMR 1972) (reference of case to trial before enlisted personnel, based on the oral request of defense counsel for trial before enlisted personnel, was error, but this did not mean that the Article 39a session at which the accused plead guilty lacked jurisdiction). See Schiesser, Trial by Peers--Enlisted Members on Courts-Martial, 15 CATHOLIC. L. REV. 171, 177-187 (1966). For an historical discussion of the right to request enlisted personnel to sit as court members, see SWORDS AND SCALES, supra note 15, at 40-41.

absence of such a request is jurisdictional error.<sup>897</sup>

With regard to written request, Article 25(c)(1) provides in part:

Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial. . . , but he shall serve as a member of a court only if . . . the accused personally has requested in writing that enlisted members serve on it.<sup>898</sup>

In United States v. White,<sup>899</sup> the Court of Military Appeals reviewed the legislative history of this section of the Code and concluded that "Congress intended that the accused's personal written request [is] an indispensable prerequisite to an enlisted man's membership on a particular court."<sup>900</sup> In United States

---

<sup>897</sup> R.C.M. 903(b)(1), MCM, 1984, at 11-106. United States v. Brandt, 20 M.J. 74, 77 (C.M.A. 1985)(court-martial lacked jurisdiction where defense counsel signed the request for enlisted members rather than the accused); United States v. White, 21 USCMA 583, 589, 45 CMR 357, 363 (1972)(oral request for enlisted personnel held to be jurisdictional error).

<sup>898</sup> Art. 25(c)(1), U.C.M.J., 10 U.S.C. § 825(c)(1) (1983).

<sup>899</sup> 21 USCMA 583, 45 CMR 357 (1972).

<sup>900</sup> Id. at 588, 45 CMR at 362. But see United States v. Shoemaker, 17 M.J. 858, 861 (NMCMR 1984) (unsigned request for enlisted personnel held not defective where the intent of the accused is clearly evident in the record); United States v. Baker, 21 M.J. 618, 620-21 (ACMR 1985)(absence of written request for enlisted personnel from the record of trial held not to be jurisdictional error where the record clearly

v. Brandt,<sup>901</sup> the Court reaffirmed its conclusion in this regard. Thus, a written request for enlisted members must be submitted if a court consisting of enlisted members tries the accused's case. If no request for enlisted members is conveyed either in writing and signed by the accused, the court-martial is not properly constituted and lacks jurisdiction.<sup>902</sup>

3. Need for Personal Selection of Court Members by the Convening Authority

The responsibility for selecting court members traditionally has been a duty which only the convening authority could exercise. It is a duty associated with command and is personal to the convening authority and cannot be delegated.<sup>903</sup> This does not mean that the

---

established that a written request was submitted to the trial judge).

<sup>901</sup> 20 M.J. 74, 77 (C.M.A. 1985)(court-martial lacked jurisdiction where defense counsel signed the request for enlisted personnel rather than the accused).

<sup>902</sup> An accused may withdraw a request for trial by enlisted members before the conclusion of the Article 39a session or before the assembly of the court. United States v. Stipe, 23 USCMA 11, 13, 48 CMR 267, 269 (1974)(refusal by the military judge to allow an enlisted accused to withdraw his request for enlisted members before assembly of the court held reversible error).

<sup>903</sup> United States v. Ryan, 5 M.J. 97, 101 (C.M.A. 1978)(failure of the convening authority to have selected personally the court members which served on the accused's trial held to be jurisdictional error); United States v. Bunting, 4 USCMA 84, 87, 15 CMR 84, 87 (1954) (command responsibilities were not delegated to the next in command, but devolved).

convening authority cannot receive assistance from staff members in the selection of the court members,<sup>904</sup> but it does mean that the convening authority must personally select the members to serve on the court. In the event of a change of command, the new convening authority can adopt all prior referrals and rereferrals of the previous convening authority. So long as the new convening authority is aware of the court members selected by the previous convening authority and the cases referred to those court members, the courts will find that the court members were personally selected and that the courts-martial on which they served were properly constituted.<sup>905</sup>

The assumption in all cases is that the convening authority acted properly in fulfilling his assigned duties and responsibilities under the Code. Thus, there is no need for an "affirmative showing on the record . . . that the convening authority personally designated

---

<sup>904</sup> United States v. Kemp, 22 USCMA 152, 155, 46 CMR 152, 155 (1973)(not error for a convening authority to rely on assistance of subordinate personnel so long as the convening authority personally appointed the court members).

<sup>905</sup> United States v. Wood, 47 CMR 957, 960 (ACMR 1973)(new convening authority's affidavit, indicating that he was adopting the selection of court members previously selected by the previous convening authority, was sufficient to show that the court-martial was properly constituted).

the . . . members."<sup>906</sup> The rule here is that once the "jurisdictional averments are set forth on the record, the [accused] must come forward with some showing that the court-martial lacks jurisdiction."<sup>907</sup>

#### 4. Excusal of Court Members

Court members selected by the convening authority are required to be present and participate in the court-martial to which they have been detailed, unless excused in accordance with the provisions of the Manual and the Code. The Manual provides that before trial, the convening authority or the convening authority's delegate or representative ("the staff judge advocate or legal officer or other principal assistant to the convening authority") may excuse a court member from participating in a trial without the need of an explanation.<sup>908</sup> The convening authority's delegate, however, cannot excuse any more than a third of the court members detailed by the convening authority to the court-martial.<sup>909</sup>

When excusals are made by the convening author-

---

<sup>906</sup> United States v. Shearer, 6 M.J. 737, 739 (AMCR 1978) (no need to reverse where it appears on the record that the convening authority acted properly in constituting the court-martial).

<sup>907</sup> Id.

<sup>908</sup> R.C.M. 505(c)(1)(B)(i), MCM, 1984, at II-56.

<sup>909</sup> R.C.M. 505(c)(1)(B)(ii), MCM, 1984, at II-56.

ity's representative, the reasons for such excusals should be communicated to the convening authority<sup>910</sup> and to the defense counsel.<sup>911</sup> While the absence or excusal of members detailed to sit on a court-martial is not jurisdictional error, absence or excusal of 40% or 50% of the detailed members has been held to be prejudicial to the accused and grounds for reversal.<sup>912</sup>

After assembly of the court, the restrictions on the excusal of court members are more severe. Under the Code, assembly of the Court is significant because it is after the assembly that evidence on the merits of the case is presented. Article 29(a) of the Code states that:

No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused

---

<sup>910</sup> United States v. Cross, 50 CMR 501, 503 (ACMR 1975)(excusal of court members by the military judge held to be error but not jurisdictional error and not prejudicial to the accused).

<sup>911</sup> United States v. Royal, 17 M.J. 669, 671 (ACMR 1983)(reversal of the accused's conviction required where convening authority substituted an entirely new panel of court members before trial without notifying the defense counsel or the accused).

<sup>912</sup> United States v. Colon, 6 M.J. 73, 74-75 (C.M.A. 1978)(proceeding to trial with 40% of the court members detailed held to be prejudicial error requiring reversal). United States v. Allen, 5 USCMA 626, 638, 18 CMR 250, 262 (1955)(excusal by staff judge advocate of 50% of the court members detailed by the convening authority held to be improper and reversible error).

as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.<sup>913</sup>

In a court-martial, assembly occurs after the Article 39a session, that is, after all of the parties to the trial have been accounted for, after the accused has been arraigned, after the defense motions have been raised and ruled on by the military judge, and after the accused's plea has been entered.

After assembly, court members can only be excused for good cause. In United States v. Garcia,<sup>914</sup> after an 11 day recess, the court reconvened and one of the court members was absent. The defense counsel objected to the absence of the court member and the trial counsel explained that the convening authority had excused the court member so that the member could "supervise live firing" as part of a field exercise. The defense counsel argued that that was not "good cause" under Article 29(a) of the Code, but the trial judge disagreed.

On appeal to the Air Force Court of Military Review, the accused argued that "the military judge erred by refusing to allow the Government to set out on the

---

<sup>913</sup> Art. 29(a), U.C.M.J., 10 U.S.C. § 829(a) (1983).

<sup>914</sup> 15 M.J. 864 (AFCMR 1983).

record support for the convening authority's conclusion that good cause existed for the excusal of one of the court members after assembly."<sup>915</sup> The Court noted that the 1969 Manual defined "good cause by way of example as 'emergency leave or military exigencies, as distinguished from the normal conditions of military life.'"<sup>916</sup> The Court concluded that the bare assertion that the court member "was the chief of a firing battery then participating in a tactical evaluation which would involve live firing does not necessarily describe a military exigency."<sup>917</sup> In the absence of any other explanation in the record as to the convening authority's reasons for excusing the court member after assembly, the court presumed prejudice and reversed the accused's conviction.<sup>918</sup>

While the failure of the convening authority personally to select the court members is clearly jurisdictional error, the unexplained or improper absence of a court member from a trial after assembly has

---

<sup>915</sup> Id.

<sup>916</sup> Id. at 865.

<sup>917</sup> Id.

<sup>918</sup> Id. at 866. United States v. Grow, 3 USCMA 77, 83, 11 CMR 77, 83 (1953)(reasons for excusing members after assembly must be set forth in the record of trial).

been held to be error, but not jurisdictional error.<sup>919</sup>

Where the number of court members are less than the number required by the Code, jurisdictional error clearly occurs. In United States v Schmidt,<sup>920</sup> a special court-martial consisting of two court members convicted an accused of a one-week absence without leave and sentenced him to a bad conduct discharge, confinement at hard labor for 2 months, and to forfeit \$27 per month for 2 months. On appeal, the accused's conviction was reversed by a Navy Board of Review, which found that the court-martial which tried the accused did not have jurisdiction to try him because only two of the five members appointed to serve on the court were present when the case was tried.<sup>921</sup>

Where the number of court members drops below a quorum, 5 members in a general court-martial and 3 members in a special court-martial, the convening authority is required to appoint new court members,<sup>922</sup>

---

<sup>919</sup> United States v. Calley, 46 CMR 1131, 1163 (ACMR), aff'd, 22 USCMA 534, 48 CMR 19 (1973), rev'd sub nom., Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom., Calley v. Hoffman, 425 U.S. 911 (1976).

<sup>920</sup> 1 CMR 498 (NBR 1951).

<sup>921</sup> Two court members were absent and one was challenged for cause. Id. at 498-99.

<sup>922</sup> R.C.M. 505(c)2)(B), MCM, 1984, at II-56. See also Art. 29(b) & (c), U.C.M.J., 10 U.S.C. § 829 (b) & (c) (1983).

and the failure to do so will result in jurisdictional error. Where it appears that a court member is absent after assembly, but not because of physical disability, a challenge, or excusal for good cause by the convening authority, the error will be tested for prejudice to the accused.<sup>923</sup> In the absence of an objection from the accused, the reviewing courts will assume the accused was aware of the court member's absence and had no problem with it. In the "absen[ce of] a specific objection by the defense counsel," in other words, a court will be reluctant to find prejudice to the accused.<sup>924</sup>

An objection by the defense counsel to the court member's absence is "sufficient to raise and preserve the issue,"<sup>925</sup> and where a court detects, "even the least motive of improper manipulation of court members by the government, then dismissal would be appropriate, regardless of whether there was an objection."<sup>926</sup>

---

<sup>923</sup> United States v. Cross, 50 CMR 501, 503 (ACMR 1975).

<sup>924</sup> Id.

<sup>925</sup> Id.

<sup>926</sup> Id. Whether there is an objection or not, the duty of the military judge in the case of an absent court member is clear:

It is urged that where the defense counsel inquires as to a member's status prior to assembly, a military judge should at least recognize a duty to ascertain the true facts

## 5. Presence of a Nondetailed Court Member

Where it appears that one or more court members who sat on the court which tried an accused were not appointed by the convening authority to serve as members on the court, jurisdictional error will result. In United States v. Harnish,<sup>927</sup> the Court of Military Appeals held that two court members, who were not selected by the convening authority and who participated in the accused's case, were "interlopers."<sup>928</sup> For this reason, the Court found that the "[court-martial] was improperly constituted"<sup>929</sup> and did not have jurisdiction to try the accused's case. In Harnish, the charges had been referred to a special court-martial and then

---

concerning the absence and to inquire of the defense counsel if he objects to the absence of the member. In any event, whether there is an objection or not, if a court member is absent without the consent of the convening authority prior to assembly the military judge should fully comply with mandates of the military's procedural law by ascertaining the decision of the convening authority concerning the status of an absent member prior to further trial proceedings.

Id.

<sup>927</sup> 12 USCMA 443, 31 CMR 29 (1961).

<sup>928</sup> Id. at 444, 31 CMR at 33.

<sup>929</sup> Id. at 443, 31 CMR at 29. See United States v. Caldwell, 16 M.J. 575, 577 (ACMR 1983) (participation in a court-martial as a member by an officer who was not appointed by the convening authority held jurisdictional error).

withdrawn and rereferred to another special court-martial. Two of the court members from the first court-martial showed up for the second court-martial and participated in the trial of the accused. Their participation in the second trial was not proper because they were not listed on the orders for the second trial and, thus, the court-martial was held to be improperly constituted.

In conclusion, the rules with regard to court members are fairly clear. The convening authority must personally select the court members and the failure to do so is jurisdictional error. Once selected, the court members may be excused from participating in the trial. After assembly, such absences must be for good cause, but an error in this regard is not jurisdictional. If the number of court members present is less than the number required for a quorum, jurisdictional error will occur. Jurisdictional error also will occur if someone who was not selected by the convening authority participates in the court-martial.

The second major element of court-martial jurisdictional is that the court-martial is properly constituted. This means that certain participants in the trial must be present when the trial takes place--the accused, the defense counsel, the trial counsel, the military judge, and the court members. In light of the

recent changes to the Code and the new provisions of the Manual, the identity of the trial counsel and defense counsel and the military judge appear to be insignificant. Any qualified judge, any qualified defense counsel, and qualified or unqualified trial counsel can now appear at a court-martial whether detailed or not. The error, if any, in their not being properly detailed is not jurisdictional, and in the absence of a showing of prejudice to the accused, their participation in the trial will be considered harmless. Even the accused can be absent from the trial so long as it is shown that the absence was voluntary and knowing and without authority.

While the rules governing the presence of participants in a court-martial have been relaxed considerably in recent years, the rule with regard to the appointment and presence of court members are still rather strict. The convening authority must personally select the court members, their absence or excusal after assembly must be explained for the record, a quorum must be present for the trial, a written request for enlisted personnel is required, and the presence of unappointed court members is prejudicial.

## CHAPTER SIX

### JURISDICTION OVER THE PERSON

The third element of court-martial jurisdiction is jurisdiction over the person. Once it is established that a court-martial is properly convened and properly constituted, it is necessary to determine whether the court-martial has jurisdiction over the person. What is important to determine is whether the person charged with a court-martial offense is someone who can be prosecuted under the Uniform Code of Military Justice.

In the civilian community, jurisdiction over the person is usually presumed,<sup>930</sup> but in the military, jurisdiction over the person must be established. In a court-martial, for example, the government has to prove in each case that the accused is someone who can be tried by a court-martial. If the government cannot prove, by a

---

930

With rare exceptions any person who commits any criminal offense within the geographical boundaries of a county or other judicial district of a state, or of a federal court district, is subject to the jurisdiction of the court of that district regardless of nationality, nature of employment or other status.

Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 21 (1953).

preponderance of the evidence, that an accused is subject to court-martial jurisdiction, the charges against the accused will be dismissed for lack of jurisdiction. For this reason, civilians as a rule cannot be tried by court-martial.<sup>931</sup> And for this same reason too, a soldier cannot be tried "by court-martial for criminal offenses committed . . . before he acquired military status, even though the offense is one prohibited by military law."<sup>932</sup> This is because a soldier has to be subject to the Uniform Code of Military Justice, not only at the time of the trial, but also at the time that the offense was committed. In short, a soldier who commits an offense in violation of the Code cannot be court-martialed for that offense until it is established that he is a person who is subject to the Code.

The reason that jurisdiction over the person has

---

<sup>931</sup> "It is firmly established that a court-martial proceeding which lacks jurisdiction over the accused is a nullity and that defect may not be waived." United States v. Morris, 18 M.J. 531, 532 (AFCMR 1984)(reservist held subject to court-martial jurisdiction for offenses committed while serving on active duty).

<sup>932</sup> Id. at 23-24.

In [United States v. Logan, 31 BR 363 (1944)] the accused who first entered the service in 1942 was tried for a bigamous marriage celebrated in 1934. It was held [that] the continued illicit cohabitation did not make the bigamy a continuing offense and that the court-martial was without jurisdiction.

Id. at 24 n.112.

to be affirmatively established before a person can be tried by court-martial, is because of the unique nature of military service. When one enters the military, one gives up certain "civil rights" and agrees to undertake certain "obligations" which ordinary citizens are not required to give up or assume.<sup>933</sup> One of the "civil rights" a person gives up is the Sixth Amendment right to indictment by a grand jury. Another is the right to trial by jury of one's peers. There is also a curtailment of one's First Amendment right to freedom of speech and a significant restriction under the Privileges and Immunities Clause of one's right to freedom of travel. In the military, a service member may be called upon to perform duties which are neither pleasant nor desirable, but which nevertheless must be performed, and cannot be ignored or shirked.<sup>934</sup> In sum, military life

---

<sup>933</sup> G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 46 (New York: John Wiley & Sons, Inc., 2d ed., 1915).

<sup>934</sup>

Fundamental to an effective armed force is the obligation of obedience to lawful orders. The obligation to obey a lawful order cannot be, and is not, as a matter of law, terminated on the mere occurrence of a condition or circumstance that might justify separation from the service. On the contrary, the obligation to obey [lawful orders] continues until the individual is actually discharged in accordance with the provisions of law.

United States v. Noyd, 18 USCMA 483, 491, 40 CMR 195, 203 (1969)(officer's change of conscience with regard to the Vietnam War held not to change his military status or his

is considerably more constraining than civilian life-- constitutionally and otherwise--and it is thought that no person should be subjected to such conditions without a showing that the person entered into the relationship voluntarily and with full knowledge that a change in status would occur. It is for this reason too that the rules governing the exercise of jurisdiction by military courts are strictly construed.

Article 2 of the Code<sup>935</sup> defines the types of persons who have military status and are subject to court-martial jurisdiction.

These include active duty personnel (Article 2(a)(1)); cadets, aviation cadets, and midshipmen (Article 2(a)(2)); certain retired personnel (Article 2(a)(4) and (5)); members of Reserve components not on active duty under some circumstances (Article 2(a)(3)); persons in the custody of the armed forces serving a sentence imposed by court-martial (Article 2(a)(7)); and, under some circumstances, specified categories of civilians (Article 2(a)(8), (9), (10), (11), and (12) . . .). In addition, certain persons whose status as members of the armed forces or as persons otherwise subject to the code apparently has ended may, nevertheless,

---

duty to obey orders). See Westmoreland, Military Justice--A Commander's Viewpoint, 10 AM. CRIM. L. REV. 5 (1971); Eckhardt, Command Criminal Responsibility: A Plea for a Workable Standard, 97 MIL. L. REV. 1 (Summer 1982).

<sup>935</sup> Art. 2(a), U.C.M.J., 10 U.S.C. § 802(a) (1983).

be amenable to trial by court-martial.<sup>936</sup>

As a general rule, court-martial jurisdiction is exercised most frequently over active duty personnel, cadets from the military academies,<sup>937</sup> reservists, and those serving military sentences to confinement. By far

---

<sup>936</sup> Discussion, R.C.M. 202(a), MCM, 1984, at 11-11. In all there are 12 types of persons who are subject to court-martial jurisdiction.

Dangerously oversimplified, those persons subject to military law are: all on active federal armed forces service regardless of component or assigned duty; cadets and midshipmen; reserves on voluntary inactive duty training under an order expressly so stating; retired regular personnel entitled to receive pay; retired reserve personnel receiving armed forces hospitalization; Fleet Reserve and Fleet Marine Corps Reserve personnel; prisoners sentenced by courts-martial and in armed forces custody; prisoners of war in armed forces custody; Coast and Geodetic Survey, Public Health Service and other organization personnel when assigned to and serving with the armed forces; without the continental limits of the United States, Alaska, Puerto Rico, Canal Zone and the Hawaiian and Virgin Islands all persons serving with, employed by, or accompanying the armed forces, or within an area under the control of the Secretary of a Department; and, in time of war, all persons serving with or accompanying an armed force in the field.

Wurfel, Court-Martial Jurisdiction under the Uniform Code, 32 N.C.L. REV. 1, 23 (1953).

<sup>937</sup> "Today, except at the Merchant Marine Academy, cadets belong to a unique military class and are members of the Regular Armed Force denoted in the name of their academy." M. ROSE, A PRAYER FOR RELIEF: THE CONSTITUTIONAL INFIRMITIES OF THE MILITARY ACADEMIES' CONDUCT, HONOR AND ETHICS SYSTEMS 5-6 (New York: The New York University School of Law, 1973). See Art. 2(a)(2), U.C.M.J., 10 U.S.C. § 802(a)(2) (1983).

the largest group of persons subject to the Code are those who are "[m]embers of a regular component of the armed forces."<sup>938</sup>

The critical question, for the purpose of court-martial jurisdiction, is when does one acquire military status; when, in other words, does one stop enjoying the liberties associated with being a civilian and start assuming the rigors and responsibilities of a soldier serving in the armed forces. For enlisted personnel the rule is that one's status changes when one voluntarily enlists or is inducted into military service. With induction or enlistment, the change occurs when one takes an oath.<sup>939</sup> An officer's status changes when the officer receives an appointment in the armed forces and is ordered to active duty.

The process of appointment, which changes the individual's "status" and which may be accomplished either by the President or the Secretary concerned, consists of three elements: (1) Making of the appointment by proper authority; (2) Tender of the appointment to the individual; and (3) Acceptance of the appointment by the individual.<sup>940</sup>

---

<sup>938</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C. § 802(a)(1) (1983).

<sup>939</sup> D. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 111 (Charlottesville, Virginia; The Michie Company, 1982) [hereinafter cited as *MILITARY PRACTICE AND PROCEDURE*].

<sup>940</sup> *Id.* at 121.

Article 2(a)(1) of the Code states that officers acquire military status at the time they are ordered to report to active duty.<sup>941</sup>

Once military status is acquired, it continues until it is terminated. Many year ago Winthrop noted that the--

term of time during which an officer or soldier continues within the jurisdiction of a court-martial is the term between the time of his entering the military service by acceptance of appointment or commission, or by enlistment or muster in, and the time of his leaving it by resignation, dismissal, discharge, or death.<sup>942</sup>

Military status is not a condition that can be terminated unilaterally by a soldier on the grounds of breach of contract or a change of heart.<sup>943</sup> The status is some-

---

<sup>941</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C § 802(a)(1) (1983).

<sup>942</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 85-86 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 reprint). See generally Meador, Judicial Determinations of Military Status, 72 YALE L.J. 1292-95 (1963).

<sup>943</sup>

[T]he general rule is that military persons--officers and enlisted men--are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become civil persons, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of

thing more than simply a contract and once it is acquired, like marriage, it remains in effect until it is lawfully terminated.<sup>944</sup>

For enlisted personnel and officers serving on active duty, military status is terminated when they receive "a discharge certificate or its equivalent" pursuant to competent orders.<sup>945</sup> For those transferring to the reserves, orders directing the transfer "are the equivalent of a discharge certificate for purposes of jurisdiction."<sup>946</sup>

Most of the problems arising in the area of jurisdiction over the person are concerned with: (1) when military status begins; (2) whether it continues after a break in service; and (3) when it ends. In dealing with these and other issues involving jurisdiction over the person, it is important to remember that it is the government's responsibility in each case to establish that the person being tried by court-martial is subject

---

the civil community.

W. WINTHROP, MILITARY LAW AND PRECEDENTS 89 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 reprint).

<sup>944</sup> In re Grimley, 137 U.S. 147, 151-52 (1890).  
See Schlueter, The Enlistment Contract: A Uniform Approach, 77 MIL. L. REV. 1, 39-40 (1977).

<sup>945</sup> Discussion (2), R.C.M. 202(a), MCM, 1984, at II-11.

<sup>946</sup> Id.

to court-martial jurisdiction.<sup>947</sup>

A. When Jurisdiction Attaches

The rules concerning when court-martial jurisdiction attaches to persons serving in the armed forces are fairly simple. Article 2(b) of the Code provides that enlistees are subject to jurisdiction "effective upon the

---

<sup>947</sup> R.C.M. 905(c)(2)(B), MCM, 1984, at 11-109.

At trial the government's burden of establishing the court's jurisdiction over the accused is an interlocutory matter; the military judge must upon a defense motion to dismiss for lack of personal jurisdiction, apply the preponderance of the evidence standard. Should the military judge rule that the accused is subject to court-martial jurisdiction, the defense may still raise the issue of status before the fact-finders. They must find beyond a reasonable doubt that the accused possesses military status where that status is an underlying element of the charged offense.

MILITARY PRACTICE AND PROCEDURE, supra note 939, at 132-33. The government may satisfy its burden of proving that a court-martial has jurisdiction over the person by offering a stipulation of fact. See generally United States v. Garcia, 5 USCMA 88, 95-97, 17 CMR 88, 95-97 (1954) (accused's consent to stipulation of fact held sufficient to subject the accused to court-martial jurisdiction). The statements of trial counsel and defense counsel, or an "offer of proof" by the defense counsel, may not be sufficient to establish that the court-martial has jurisdiction over the accused. See United States v. Barbeau, 9 M.J. 569, 571-72 (AFCMR), pet. denied, 9 M.J. 277 (C.M.A. 1980) (in deciding whether the accused was subject to court-martial jurisdiction, the Air Force Court of Military Review refused to consider defense counsel's "offer of proof" or defense counsel's statement).

taking of [an] oath of enlistment."<sup>948</sup> and that inductees are subject to court-martial jurisdiction "from the time of their actual induction into the armed forces."<sup>949</sup> The Code also provides that officers are subject to the Code from the time they are "lawfully . . . ordered . . . to duty in . . . the armed forces."<sup>950</sup> While the rules concerning military status are fairly simple and straightforward, and have remained basically unchanged since the Code was enacted in 1950, the interpretation and application of them has not been so simple. What has developed are a series of "qualifications and exceptions" which make the rules in this area less simple and more complicated to apply.

#### 1. Enlistees

For over a decade now, since July 1, 1973,<sup>951</sup> the military has operated with an "all-volunteer" force. Since then the primary means for entering into the armed forces has been through the enlistment process. With regard to enlistment, the starting point

---

<sup>948</sup> Art. 2(b), U.C.M.J., 10 U.S.C. § 802(b) (1983).

<sup>949</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C. § 802(a)(1) (1983).

<sup>950</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C. § 802(a)(1) (1983).

<sup>951</sup> 50 U.S.C. § 467(c) (1981). See infra note 1033 and accompanying text.

remains the same: an enlistment in the armed forces is effective at the time of the taking of the oath and it is at this point that one becomes a soldier and is subject to court-martial jurisdiction.<sup>952</sup> But there is more to a valid enlistment than merely taking an oath; some other criteria must be satisfied. To be valid, the enlistment must be voluntary and the individual enlisting must be competent to do so.

A voluntary enlistment is one where the individual decides to enlist freely and without the threat of coercion or force. The individual's decision to enlist, in other words, has to be "the product of an essentially free and unconstrained choice."<sup>953</sup> The issue of whether an enlistment is voluntary or not is usually not raised until after a soldier has been charged with the commission of an offense, and often it is not easy to resolve.

In United States v. Catlow,<sup>954</sup> the Court of Military Appeals held that the enlistment was not voluntary where an accused was given a choice by a civilian trial judge "between 'five years indefinite in

---

<sup>952</sup> See generally Schlueter, The Enlistment Contract: A Uniform Approach, 77 MIL. L. REV. 1 (1977); Casella, Armed Forces Enlistment: The Use and Abuse of Contract, 39 U.CHI. L. REV. 783 (1972).

<sup>953</sup> Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (consent search of car in which the accused was riding held valid).

<sup>954</sup> 23 USCMA 142, 48 CMR 758 (1974).

jail' or to enlist for 3 years in the Army."<sup>955</sup> In United States v. Lightfoot,<sup>956</sup> however, the Court of Military Appeals refused "to extend [the concept of involuntary enlistment] to embrace the situation in which a criminal defendant, on the advice of counsel, instigates the proposal of military service as an alternative choice to confinement."<sup>957</sup> Nor does the concept of involuntary enlistment extend to a situation where the accused's "civilian lawyer, after consultation with [the accused] and his mother, initiated the alternative of military service to avoid further prosecution on the civilian charge."<sup>958</sup> The line between a voluntary and an involuntary enlistment is a fine one, but the distinguishing factor in these cases is the presence of "intimidation or improper influence"<sup>959</sup> on the part of

---

<sup>955</sup> Id. at 143, 48 CMR at 759.

<sup>956</sup> 4 M.J. 262 (C.M.A. 1978).

<sup>957</sup> Id. at 263.

<sup>958</sup> United States v. Wagner, 5 M.J. 461, 465 (C.M.A. 1978)(enlistment held valid where accused's lawyer proposed service in the Army as an alternative to further prosecution on civilian felony charges for possession of a concealed weapon). See United States v. Bachand, 16 M.J. 896, 897 (ACMR 1983)(the enlistment option proposed by the accused's lawyer did not make the enlistment void); United States v. Boone, 10 M.J. 715, 718-21 (ACMR 1981), aff'd, 15 M.J. 159 (C.M.A. 1983)(enlistment by accused at invitation of recruiter after accused had been arrested by civilian authorities for possession of marijuana and amphetamines held valid).

<sup>959</sup> 5 M.J. at 465.

someone not associated with the accused, that is, someone other than a parent, friend or a lawyer. A voluntary enlistment is a necessary element to a valid enlistment, and if someone not associated with the accused, like a trial judge or policeman, intimidates or improperly influences the accused, the enlistment will not be voluntary.

In addition to showing that the enlistment is voluntary, it also must be established that an individual enlisting in the armed forces is competent to do so. Section 504 of Title 10 states:

No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force.<sup>940</sup>

But, this section also provides that "the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies."<sup>941</sup>

In addition, Section 505 of Title 10 of the United States Code, states that no one can enlist who is "less than seventeen years of age, nor more than

---

<sup>940</sup> 10 U.S.C. § 504 (1983). See Joyce v. Guenther, 351 A.2d 331, 333 (Pa. Commw. Ct. 1976) (National Guardsman enlistee's claim 7 months after the fact that he was intoxicated when he enlisted in the National Guard held insufficient to show that the enlistment was not voluntary).

<sup>941</sup> 10 U.S.C. § 504 (1983).

thirty-five years of age,"<sup>962</sup> and that "no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."<sup>963</sup> Section 3253(c) of Title 10 of the United States Code further provides that "[i]n time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Naturalization Act."<sup>964</sup>

The various branches of the armed forces also

---

<sup>962</sup> 10 U.S.C. § 505 (1983).

<sup>963</sup> Id.

Persons age 17 (but not yet 18) may not enlist without parental consent. A parent or guardian may, within 90 days of its inception, terminate the enlistment of a 17-year-old who enlisted without parental consent, if the person has not yet reached the age of 18, 10 U.S.C. § 1170 . . . Absent effective action by a parent or guardian to terminate such an enlistment, court-martial jurisdiction exists over the person. An application by a parent for release does not deprive a court-martial of jurisdiction to try a person for offenses committed before action is completed on such an application.

Discussion (2)(A)(i), R.C.M. 202(a), MCM, 1984, at II-12. See United States v. Garback, 50 CMR 673, 674 (ACMR 1975)(17-year-old accused's agreement to extend his enlistment held valid absent an objection within 90 days from his parents).

<sup>964</sup> 10 U.S.C. § 3253(c) (1983).

have issued regulations providing other qualifications for competency to enlist.<sup>965</sup> Army Regulations, for example, prohibit a person from enlisting in the United States Army if either juvenile or criminal charges are pending against him at the time of enlistment.<sup>966</sup>

In short, to be valid, an enlistment must be voluntary and the person enlisting must be competent to do so. In theory, at least, if either of these two elements are missing, the enlistment is invalid and a court-martial will not have jurisdiction over the person.

If a person is incapable of enlisting because of being too young, intoxicated or insane, jurisdiction will not attach. Article 2(c) of the Code provides, however, that all of the other statutory and regulatory requirements and qualifications for enlistment can be

---

<sup>965</sup> See e.g., AR 601-210, Regular Army Enlistment Program (1975).

<sup>966</sup>

Persons who, as an alternative to further prosecution, indictment, trial, or incarceration in connection with the charges, or to further proceedings relating to adjudication as a youthful offender or juvenile delinquent, are granted a release from the charges at any stage of the court proceedings on the condition that they will apply for or be accepted for enlistment in the Regular Army [are not competent to enlist in the United States Army].

Para. 4-11, Army Regulation, 601-210, Personnel Procurement Regular Army Enlistment Program, Table 2-6 (Change 8, June 24, 1975).

waived if a person who is serving in the military has--

- (1) submitted voluntarily to military authority;
- (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority [that is, not insane, intoxicated, or under the age of 17];
- (3) received military pay or allowances; and
- (4) performed military duties.<sup>967</sup>

Thus, under Article 2(c), a person can be subject to court-martial jurisdiction, even though he did not possess the necessary qualifications required for enlistment by statute or regulations.

This is exactly what Congress intended when it amended Article 2 of the Uniform Code of Military Justice in 1979. Congress believed that--

[n]o military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result. That policy makes a mockery

---

<sup>967</sup> Art. 2(c), U.C.M.J., 10 U.S.C. § 802(c) (1983). See Discussion (2)(A)(i), R.C.M. 202(a), MCM, 1984, at 11-12. Article 2(c) is part of the 1979 Amendment to the UCMJ which was designed to eliminate many of the factors which resulted in the courts finding a lack of jurisdiction over persons. See Schlueter, Personal Jurisdiction under Article 2, UCMJ: Whither Russo, Catlow, and Brown?, THE ARMY LAWYER 3 (Dec. 1979).

of the military justice system in the eyes of those who serve in the military services.<sup>968</sup>

Under the change, a person who does not voluntarily enlist or who does not initially meet the minimum qualifications for enlistment, can nevertheless acquire military status and become subject to court-martial jurisdiction by meeting the four requirements set forth in Article 2(c).<sup>969</sup>

The principle codified in Article 2(c) is the theory of constructive enlistment.<sup>970</sup> A constructive enlistment is an enlistment that is imposed or created by law. It is "a legal fiction" and it is based on the idea that while at the time of enlistment there may not have been a meeting of the minds between the government and the service member due to some defect or misunderstanding, the occurrence of events subsequent to the enlist-

---

<sup>968</sup> S. REP. NO. 197, 96th Cong., 1st Sess. 121, 122 (1979). The codification of the theory of constructive enlistment in the Code was first suggested by Professor David A. Schlueter in 1977. See Schlueter, The Enlistment Contract: A Uniform Approach, 77 MIL. L. REV. 1, 56-63 (1977); United States v. Quintal, 10 M.J. 532, 535 (ACMR 1980) (accused found subject to court-martial jurisdiction despite claims of recruiter misconduct).

<sup>969</sup> An individual who intentionally conceals facts which would disqualify him from enlisting in the armed forces can be prosecuted for fraudulent enlistment under Article 83 of the Code. See Art. 83(1), U.C.M.J., 10 U.S.C. § 883(1) (1983).

<sup>970</sup> See generally Schlueter, Constructive Enlistments: Alive and Well, THE ARMY LAWYER 6 (Nov. 1977).

ment are such as to permit a court to imply that the parties intended for an enlistment to occur.<sup>971</sup> It is the reliance on the part of the government and the individual on the individual's changed status which gives rise to the constructive enlistment. What the courts do is give effect to the mutual intent of the parties, notwithstanding defects in the enlistment process. What the constructive enlistment does, in other words, is to confer "court-martial jurisdiction over a defendant who would otherwise not be subject to such jurisdiction because of a defective enlistment that was either void or voidable."<sup>972</sup>

What is critical to finding a constructive enlistment is the intent of the party who is challenging the enlistment. The intent of the party to become a service member can be inferred from a number of factors: "(1) receipt of pay and benefits, (2) voluntary submission to military authority, (3) acceptance of service by the military, and (4) actual performance of military duties."<sup>973</sup> If these factors can be established, and it

---

<sup>971</sup> United States v. King, 11 USCMA 19, 25, 28 CMR 243, 249 (1959) (civilian masquerading as a soldier held not subject to court-martial jurisdiction).

<sup>972</sup> Parker, Parties and Offense in the Military Justice System: Court-Martial Jurisdiction, 52 IND. L.J. 167, 169 (1976).

<sup>973</sup> MILITARY PRACTICE AND PROCEDURE, supra note 939, at 117.

can be shown that the accused acquiesced to being a member of the armed forces subsequent to his enlistment, the courts will infer that the accused intended to become a member of the armed forces and that his subsequent conduct gave rise to a constructive enlistment.

Before Article 2 of the Code was amended in 1979, the military courts had refused to allow the Government to rely on constructive enlistment to establish jurisdiction where the Government had been a party to a fraudulent enlistment. The leading case on this point was United States v. Russo.<sup>974</sup> In Russo, the accused, a private who was "suffering from dyslexia, a mental disorder which severely impairs an individual's ability to read," was enlisted in the United States Army by an Army recruiter.<sup>975</sup> The accused in Russo had approached the recruiter and expressed a desire to enlist. "[A]fter advising the recruiter that he could not read," the accused's uncontroverted testimony at trial was that "the recruiter [then] provided him with 'a list of numbers and letters to put on the [Armed Forces Qualifications] test' to assure his eligibility for enlistment."<sup>976</sup>

The Court of Military Appeals found that the

---

<sup>974</sup> 1 M.J. 134 (C.M.A. 1975).

<sup>975</sup> Id. at 135.

<sup>976</sup> Id.

recruiter's conduct violated Army Regulations designed to assure that new recruits met minimum mental qualifications. The Court also found that the recruiter's misconduct was detrimental to the nation's fighting force and a disservice to the accused. In addition, the Court stated that "fraudulent enlistments are not in the public interest."<sup>977</sup>

For these reasons, the Court ruled that "where recruiter misconduct amounts to a violation of the fraudulent enlistment statute, as was the situation here, the resulting enlistment is void and contrary to public policy."<sup>978</sup> The Court added that "'fairness prevents the Government from . . . relying upon a constructive enlistment as a jurisdictional base' where Government agents acted improperly in securing an individual's enlistment."<sup>979</sup> The reasoning in Russo was that it is unfair to permit the Government to participate in a fraudulent enlistment, which is contrary to public policy, and then later to permit the Government to argue that a constructive enlistment occurred when the enlistment goes bad.

The 1979 amendment to Article 2 of the Code was intended to overrule the Court of Military Appeal's

---

<sup>977</sup> Id. at 137.

<sup>978</sup> Id.

<sup>979</sup> Id.

decision in Russo and in other cases "which held that improper Government participation in the enlistment process estops the Government from asserting constructive enlistment."<sup>980</sup> The Amendment also was designed to overrule those decisions of the Court which held "that an uncured regulatory enlistment disqualification, not amounting to a lack of capacity or voluntariness, prevented application of the doctrine of constructive enlistment."<sup>981</sup> The purpose of the amendment, in other words, was to make "those persons whose intent it is to perform as members of the active armed forces and who [meet] the four statutory requirements,"<sup>982</sup> subject to the jurisdiction of courts-martial whether they meet the statutory and regulatory requirements or not.

As noted, the amendment does not apply to 16-year-olds,<sup>983</sup> to those who are intoxicated, or to those who are insane. Nor does it apply to reservists

---

<sup>980</sup> S. REP. NO. 197, 96th Cong., 1st Sess. 121, 122 (1979).

<sup>981</sup> Id.

<sup>982</sup> Id.

<sup>983</sup> Id. See United States v. Brown, 23 USCMA 162, 165, 48 CMR 778, 781 (1974) (court-martial had no jurisdiction over a 17-year-old soldier who enlisted at the age of 16 as a result of improper recruiting practices and whose company commander failed to act after learning that the accused was only 16 years old); United States v. Graham, 22 USCMA 75, 77, 46 CMR 75, 77 (1972) (court-martial had no jurisdiction over 17-year-old soldier who enlisted at age 16 and who consistently requested release from active military service).

performing inactive duty or to civilians.<sup>984</sup> It does apply, however, to those who fail to meet a regulatory or statutory requirement that would be a bar to an enlistment if the Government is able to establish the four requirements set forth in Article 2(c).

In United States v. Quintal,<sup>985</sup> the accused, a Private E-1, was charged with "larceny, housebreaking, disrespect toward an officer, and offering violence against and assaulting an officer, in violation of Articles 121, 130, 89, and 90" of the Code.<sup>986</sup> The accused was tried and convicted by general court-martial and "was sentenced to a bad-conduct discharge, confinement at hard labor for two years, and forfeiture of all pay and allowances."<sup>987</sup>

At his trial the accused argued that the charges against him should be dismissed because the court-martial lacked jurisdiction over his person. The accused contended that "he was ineligible to enlist and [that] his recruiter participated in a deception with respect

---

<sup>984</sup> S. REP. NO. 197, 96th Cong., 1st Sess. 121, 122 (1979).

<sup>985</sup> 10 M.J. 532 (ACMR 1980).

<sup>986</sup> Id. at 533.

<sup>987</sup> Id.

to his lack of eligibility"<sup>988</sup> by inducing the accused to sign a document stating that the accused had received a GED (Government Educational Development), the equivalent of a high school diploma. The accused also contended that the recruiter had improperly signed a document indicating that he, the recruiter, had called the accused's school and verified the fact that the accused had received a GED.<sup>989</sup>

The recruiter testified that the accused had stated that he had passed his GED exams. The recruiter also testified that "he dialed the number given to him by the [accused], that the person who answered stated that she was the school official named by the [accused], and that she stated that the [accused] had passed the GED tests that morning."<sup>990</sup> The trial judge considered the evidence and denied the accused's motion to dismiss the charges on the grounds of lack of jurisdiction.

On appeal to the Army Court of Military Review, the accused contended that the recruiter's testimony lacked credibility and that, in any event, the charges should be dismissed due to recruiter misconduct, because the recruiter falsely certified that he had verified the fact that the accused had obtained his GED. The Court

---

<sup>988</sup> Id.

<sup>989</sup> Id. at 533-34.

<sup>990</sup> Id. at 534.

noted that Congress amended Article 2 of the Code with the intent to overrule the Court of Military Appeal's decision in Russo. In applying the law, as set forth in the Amendment to Article 2(c) of the Code, the Court held that the accused "is, and was at the time of his trial, subject to the Uniform Code of Military Justice, and that the court-martial that tried and convicted him had jurisdiction over him regardless of the claimed misconduct of his recruiter."<sup>991</sup>

What is clear now as a result of the Amendment to Article 2 of the Code and the Court's interpretation of the Amendment,<sup>992</sup> is that allegations of recruiter misconduct or failure to comply with enlistment regulations will not result in a finding of lack of jurisdiction over the person where the government can show a constructive enlistment.

Sometimes, the issue with regard to the exercise of jurisdiction over the person does not concern the individual's immediate enlistment, but rather involves allegations made later by a service member that the military has breached a promise made to him in an enlistment contract. In such cases, the individual usually has enlisted with a guarantee that he would

---

<sup>991</sup> Id. at 535.

<sup>992</sup> See e.g., United States v. Bachand, 16 M.J. 896, 897-98 (ACMR 1983) (Article 2(c) applied and accused was held to have constructively enlisted).

receive special schooling, a particular assignment, or the job of his choice. When the schooling is not available, or the assignment cannot be made, or the job is nonexistent or some other expectation is not fulfilled, the individual may allege that his enlistment contract was breached, and that for this reason he is no longer in the military or subject to court-martial jurisdiction.

As a rule, the claim of breach of contract, like the claim of recruiter misconduct, usually is made after the service member has been charged with the commission of a military offense. In United States v. Imler<sup>993</sup>, for example, the accused "enlisted in the regular component of the United States Navy on 11 December 1980 for a period of four years."<sup>994</sup> One of the guarantees made to the accused upon enlisting was that he would be able to attend a Naval flight school in Pensacola, Florida. While in attendance at the school, the accused was disqualified for medical reasons from performing flight duties and, thus, was no longer eligible to attend the school or participate in the Navy aviation programs. Upon learning of his disqualification, the accused requested immediate release from the Navy. His request was denied, and he was reassigned for duty to the USS

---

<sup>993</sup> 17 M.J. 1021 (NMCMR 1984).

<sup>994</sup> Id. at 1023.

FORRESTAL. When the accused "reported to the FORRESTAL . . . he told several petty officers and a chief that the Navy had breached his enlistment contract."<sup>995</sup> No action was taken on the accused's complaints, and "[o]n 16 November 1981 [the accused] began the first of three unauthorized absences which resulted in [a] general court-martial."<sup>996</sup>

The accused was tried and convicted for three absent without leaves and was sentenced "to forfeiture of \$100.00 pay per month for six months and a letter of reprimand."<sup>997</sup> The convening authority approved the findings of the court-martial and that part of the sentence requiring forfeiture of pay, but disapproved the part of the sentence calling for a letter of reprimand.<sup>998</sup> The accused's case was reviewed by The Judge Advocate General of the Navy<sup>999</sup> who referred it to the Navy Marine Court of Military Review<sup>1000</sup> for consideration of the issue concerning the exercise of jurisdiction over the accused.

---

<sup>995</sup> Id. at 1024.

<sup>996</sup> Id.

<sup>997</sup> Id. at 1022.

<sup>998</sup> Id.

<sup>999</sup> Art. 69, U.C.M.J., 10 U.S.C. § 869 (1983).

<sup>1000</sup> Id. See Art. 66, U.C.M.J., 10 U.S.C. § 866 (1983).

In the Navy Marine Court of Military Review, the accused argued that "a material breach of an unexpired enlistment contract accompanied by a demand for discharge and passage of time operate to divest [the military of] jurisdiction [over the accused]." <sup>1001</sup> The Court disagreed. It concluded that the accused had enlisted in the United States Navy for four years, and that he had taken an oath of enlistment. By so doing, the Court found that the accused had "assumed the status of a member of a regular component of the armed forces within the meaning of Article 2, UCMJ" and in the absence of a "discharge or other release by proper authority," remained "a person subject to the Code and amenable to trial by court-martial." <sup>1002</sup>

The Court noted that the accused's "demands for discharge, whether or not meritorious, cannot operate to divest the court-martial jurisdiction conferred under Article 2 of the Code." <sup>1003</sup> The proper way for handling the accused's complaint, the Court suggested, was not by relieving the accused from active duty, but by allowing him to use the "comprehensive administrative grievance procedure available to him." <sup>1004</sup> In this

---

<sup>1001</sup> 17 M.J. at 1025.

<sup>1002</sup> Id.

<sup>1003</sup> Id.

<sup>1004</sup> Id.

regard, the Court noted that the--

Options available to resolve wrongs or enforce rights include a written request for administrative action (Article 1108, U.S. Navy Regulations), a request made with his commanding officer (Article 1107, U.S. Navy Regulations), a request for redress of a wrong committed by a superior (Article 1106, U.S. Navy Regulations), a complaint of wrong against his commanding officer (Article 138, UCMJ, 10 U.S.C. § 938), and a petition to the Board for Correction of Naval Records (10 U.S.C. § 1552).<sup>1005</sup>

The Court also stated that "a service member may sue in the federal district courts to enforce rights under an enlistment agreement where he is dissatisfied with the resolution of an enlistment agreement dispute made by a military department."<sup>1006</sup>

In the present case, the accused's complaints should have been handled administratively. Even if meritorious, however, the accused's complaints were not sufficient to divest the military of jurisdiction over the accused.<sup>1007</sup> The policy supporting this decision is

---

<sup>1005</sup> Id. at 1025.

<sup>1006</sup> Id.

<sup>1007</sup> United States v. Jarrell, 12 M.J. 917, 920 (NMCMR 1982) (breach of promise not to assign the accused, a Marine PFC, to the infantry, armor, or artillery did not preclude the military from trying the accused for absence without leave); United States v. Davis, 8 M.J. 575, 577 (ACMR 1979) (the accused, a captain in the medical corps, was subject to court-martial jurisdiction for absence without leave and other offenses, even though the Army allegedly breached its contract with him concerning pay

the great importance that the military attaches to the change of status which occurs when one enlists in the armed forces. The military's overriding concern is its need to be able to assign its members and transfer them in accordance with needs and requirements of the service. If agreements and understandings can be honored in the process of accomplishing the mission, they will be, but if changing circumstances and conditions make it impossible to comply with the agreements and promises made, they will be ignored because of the greater need for accomplishing the military mission at hand. This is the only way the military can function efficiently and effectively without getting bogged down in personnel assignment problems. If a wrong has occurred and the accused has been harmed, he can always seek administrative relief. What is clear, however, is that the breach of an agreement will not result in a finding that the accused is no longer subject to military jurisdiction.

With respect to enlistments, it is important to determine whether the initial enlistment was voluntary and whether the individual was competent to enlist. If it appears that the enlistment was invalid for any

---

and promotions). But see United States v. Hurd, 8 M.J. 555, 556 (NCMR 1979) (enlistment contract of the accused which was altered by a military recruiter without the knowledge of the accused held sufficient to render the enlistment of the accused involuntary and void).

reason, it is necessary then to decide whether a constructive enlistment has occurred.<sup>1008</sup> If later, a breach of an enlistment contract is alleged, it is important that the matter be handled administratively. The allegation of a breach of one's enlistment contract, however, is not sufficient to divest a court-martial of jurisdiction over the accused.

## 2. Inductees

With regard to induction, the starting point, as with the enlistment, is with the taking of the oath of induction. The leading Supreme Court case on when the "actual induction" takes place is Billings v. Truesdell.<sup>1009</sup> In Truesdell the accused, a draftee, was notified and received orders for induction, was transported to Fort Leavenworth, was fed in the mess, was given a physical exam and a mental examination, and was told to report to the induction office. Once there, the accused "told the officers in charge that he refused to serve in the Army and that he wanted to turn himself over to the civilian authorities."<sup>1010</sup> The officers told the

---

<sup>1008</sup> An initial enlistment can be involuntary or in violation of the minimum age requirements and still be valid under a constructive enlistment. See S. REP NO. 197, 96th Cong., 1st Sess. 121, 123 (1979).

<sup>1009</sup> 321 U.S. 542 (1944).

<sup>1010</sup> Id. at 544.

accused "that he was already under the jurisdiction of the military."<sup>1011</sup> They placed him "under guard to prevent him from leaving,"<sup>1012</sup> but permitted him to call a civilian attorney for the purpose of filing a writ of habeas corpus. An officer at the reception center read the accused "the oath of induction which [the accused] refused to take."<sup>1013</sup> The accused was told that his refusal to take the oath made no difference, and that he was "'in the army now'."<sup>1014</sup> The accused was ordered to submit to fingerprinting, which he refused to do, and he was charged with willful disobedience of an order and confined.

The accused filed a petition for a writ of habeas corpus in the Federal District Court for the District of Kansas alleging that he was "not a member of the armed forces of the United States, [that he was] not subject to military jurisdiction, and that he should be brought before the civil courts for any alleged unlawful act committed by him."<sup>1015</sup> The district court refused to issue the accused a writ of habeas corpus and the

---

<sup>1011</sup> Id.

<sup>1012</sup> Id. at 544-45.

<sup>1013</sup> Id. at 545.

<sup>1014</sup> Id.

<sup>1015</sup> Ex parte Billings, 46 F. Supp. 663, 664 (D. Kan. 1942).

Tenth Circuit Court of Appeals affirmed.<sup>1016</sup> The Tenth Circuit held that the "[i]nduction was completed when the oath was read to [the accused] and he was told that he was inducted into the Army."<sup>1017</sup> For this reason, the circuit court concluded "that the military authorities had jurisdiction over [the accused]."<sup>1018</sup>

On review the Supreme Court of the United States ruled that the accused was not subject to military jurisdiction because he was never "actually inducted" into the Army.<sup>1019</sup> The Court stated that a draftee "becomes 'actually inducted' . . . when in obedience to the order of his [draft] board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."<sup>1020</sup> Because the accused had not taken the oath, he did not complete all of the necessary steps for induction and consequently, was not "actually inducted" into the Army. In short, the Supreme Court held that while the accused could be prosecuted by the civilian authorities for failure to comply with the

---

<sup>1016</sup> Billings v. Truedell, 135 F.2d 505, 507 (10th Cir. 1943).

<sup>1017</sup> Id.

<sup>1018</sup> Id.

<sup>1019</sup> Billings v. Truesdell, 321 U.S. 542, 559 (1944).

<sup>1020</sup> Id.

provisions of the Selective Training and Service Act of 1940,<sup>1021</sup> he could not be prosecuted by the military authorities for willful disobedience of a direct order since he never became a soldier.<sup>1022</sup>

In United States v. Hall,<sup>1023</sup> a similar case, the Court of Military Appeals came to the same conclusion. In Hall, the accused was tried and convicted of willful disobedience of a lawful order and was sentenced to a "dishonorable discharge, forfeiture of \$56.00 per month for twenty-four months, and confinement at hard labor for two years."<sup>1024</sup>

On appeal the accused argued that the military did not have jurisdiction to try him. Like Billings, almost 25 years earlier, Hall was never actually inducted into military service. When he indicated at the Induction Center that he refused to be inducted, he was removed from the swearing-in room and no further effort was made to induct him. In addition, the accused continually protested being retained on active duty. The Court of Military Appeals held that under the circumstances, the "accused should have been brought to

---

<sup>1021</sup> See id. at 556-57. See also Selective Training and Service Act of 1940, Pub. L. No. 783, § 11, 54 Stat. 894-95.

<sup>1022</sup> 321 U.S. at 558.

<sup>1023</sup> 17 USCMA 88, 37 CMR 352 (1967).

<sup>1024</sup> Id. at 89, 37 CMR at 353.

the attention of the civil authorities for his actions" because he was "a civilian not inducted into the armed forces and not a person subject to the Uniform Code of Military Justice."<sup>1025</sup>

In other cases, however, where an accused has failed to take the oath, to step forward, or to achieve a passing score on the Armed Forces Qualification Test, the military courts have held that the accused nevertheless is subject to military jurisdiction.<sup>1026</sup> The reason for the different results in these cases is based on the subsequent conduct of the accused. Acceptance by the accused of the exercise of military control over him in effect may cure any error in the induction process. In

---

<sup>1025</sup> Id. at 92-93, 37 CMR at 356-57. See United States v. Ornelas, 2 USCMA 96, 101, 6 CMR 96, 101 (1952)(issue of whether the accused, who reported for a physical examination at the reception center, but who later went home to Mexico and never participated in an induction ceremony, was subject to military court jurisdiction, presented a factual question which should have been submitted to the court members for decision).

<sup>1026</sup> Brown v. Resor, 407 F.2d 281, 285 (5th Cir. 1969), cert. denied sub nom., Gilliam v. Resor, 399 U.S. 933 (1970)(accused held properly inducted and subject to court-martial jurisdiction even though he failed to take the oath); United States v. Martin, 9 USCMA 568, 573, 26 CMR 348, 353 (1958)(accused held subject to court-martial jurisdiction even though he failed to achieve a passing score on the Armed Forces Qualification Test); United States v. Rodriguez, 2 USCMA 101, 104-05, 6 CMR 101, 104-05 (1952)(accused, who took no oath of allegiance and was not advised of his rights as an alien, held subject to court-martial jurisdiction); United States v. Harmash, 48 CMR 809, 810-11 (ACMR 1974)(accused held to be properly inducted into the Army even though he never took the oath of allegiance).

this regard, the Court of Military Appeals notes that:

The teaching of these cases . . . is that, in order to have military jurisdiction attach, there must be some sort of compliance with the induction ceremony required under the [Selective Service] Act and regulations. A failure to comply with the formalities of this entry into service or other irregularities therein may well be cured by the accused's subsequent conduct and tacit submission to military authority. . . . But where an accused refuses to submit to induction; in fact does not participate in any ceremony at all; and continually thereafter protests the attempt nonetheless to subject him to military service, no jurisdiction over him can be held to have attached.<sup>1027</sup>

The failure to participate in the induction ceremony and continually protesting one's status are what is required at a minimum to hold onto one's civilian status. What is critical is the accused's "subsequent conduct."<sup>1028</sup> If it shows an "acceptance of military status," the court will find "a waiver of any irregularity involved."<sup>1029</sup>

A waiver also may occur where one fails to assert a defect or exemption at the time of induction, but instead raises it at a later time. In United States v. McNeill,<sup>1030</sup> the accused was entitled to an exemption

---

<sup>1027</sup> United States v. Hall, 17 USCMA 88, 91, 37 CMR 352, 355 (1967).

<sup>1028</sup> Id. at 92, 37 CMR at 356.

<sup>1029</sup> Id.

<sup>1030</sup> 2 USCMA 383, 9 CMR 13 (1953).

from induction in 1950 because he had prior service in World War II--two years of service on active duty, and three years of service as an enlisted reservist. But the accused failed to raise the fact of his prior military service when he was inducted. He did, however, make his prior service known a year later when he was court-martialed for desertion. In denying the accused his exemption, the Court of Military Appeals stated that:

[The] accused failed to furnish the requested information, he failed to show any reason for an exemption, he reported for duty, he was housed, fed, clothed and possibly paid for six weeks and then, when selected for possible overseas duty, he went absent. To allow an exemption to be exercised in that manner and at that late date would allow an inductee to enter upon his duties as a soldier and then abandon the service according to his own whims without fear of punishment.<sup>1031</sup>

What is clear is that defects in the induction process and the failure to raise exemptions can be waived if an accused's subsequent conduct demonstrates an acceptance of military status. Not all defects, however, can be waived; the inability to read and write English, for

---

<sup>1031</sup> Id. at 387, 9 CMR at 17. See United States v. Scheunemann, 14 USCMA 479, 485, 34 CMR 259, 265 (1964)(alien held subject to court-martial jurisdiction where exemption was not raised until 21 months after induction); United States v. Hazeldine, 4 CMR 429, 431 (NBR 1952)(Navy court-martial had jurisdiction to try the accused for absence without leave, even though the accused alleged that he had served in the Army Air Corps and had been discharged with an undesirable discharge).

example, is a defect that cannot be waived.<sup>1032</sup>

On July 1, 1973, the induction of young men into the armed forces of the United States by means of the draft was discontinued.<sup>1033</sup> Registration was ended by President Gerald R. Ford on March 29, 1975,<sup>1034</sup> but was reactivated by President Jimmy Carter on July 2, 1980 after the Soviet invasion of Afghanistan.<sup>1035</sup> Registration has been in effect since July 21, 1980. In light of these developments, there has been no litigation in recent years on the subject of exercising jurisdiction over inductees, although there has been litigation on the issue of the constitutionality of registration.<sup>1036</sup>

### 3. Reservists

In addition to active duty personnel, the

---

<sup>1032</sup> United States v. Burden, 1 M.J. 89 (C.M.A. 1975)(accused's inability to read and write the English language held to be a nonwaivable bar to induction). See Para. 4-12, Army Regulation 601-270, Personnel Procurement, Armed Forces Examining and Induction Stations (March 18, 1969).

<sup>1033</sup> 50 U.S.C. App. § 467(c) (1983).

<sup>1034</sup> Presidential Proclamation No. 4360, March 29, 1975), 40 Fed. Reg. 14567 (1975), reprinted in note following 50 U.S.C. § 453 at 15 (1983).

<sup>1035</sup> Presidential Proclamation No. 4771, July 2, 1980, 45 Fed. Reg. 45247 (1980), reprinted in note following 50 U.S.C. § 453 at 16-17 (1983). See 16 Weekly Comp. of Pres. Doc. 198 (1980)(States of the Union Address, January 23, 1980).

<sup>1036</sup> See Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (constitutionality of draft registration upheld).

other large group of individuals who are subject to court-martial jurisdiction are reservists.<sup>1037</sup> Article 2(a)(1) of the Code provides that reservists, as "persons lawfully called or ordered . . . to duty . . . for training in . . . the armed forces," are subject to court-martial jurisdiction.<sup>1038</sup> The Manual explains that a "member of a reserve component may be called or ordered to active duty for a variety of reasons, including

---

<sup>1037</sup> 10 U.S.C. § 270 (1983)(reservists generally are required to attend 48 drill sessions per year and serve on active duty for at least 14 days each year). Bishop, Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners, 112 U. PA. L. REV. 317, 357-68 (1964).

The reservist is a hybrid existing somewhere on the vague spectrum between active-duty soldier and civilian. While at drills or on active duty for training, the reservist is a member of the Armed Forces; he sometimes wears a uniform; he has a rank or rate; he must obey orders of his superiors; and he is subject to call-up in times of emergency. Nevertheless, most reservists operate as full-fledged civilians 28 days of each month, taking on the military trappings only on weekends. Their civilian occupation determine where and how they live.

Hardy & Mills, Constitutional Law: Military Jurisdiction over Inactive Reservists, 27 JAG J. 129, 131 (1972). See generally Baldwin & McMenis, Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates, THE ARMY LAWYER 5 (Feb. 1981).

<sup>1038</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C. § 802(a)(1) (1983). Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 33 (1953). See United States v. Caputo, 18 M.J. 259, 263 (1984)(reservist, who was charged with committing offenses in violation of the Code after finishing two weeks of annual training, held not subject to court-martial jurisdiction).

training, service in time of war or national emergency, or as a result of failure to participate satisfactorily in unit activities."<sup>1039</sup> A reservist, who is serving on active duty as a result of being lawfully called or ordered to duty<sup>1040</sup> and who commits an offense, is subject to court-martial jurisdiction.<sup>1041</sup>

Most of the questions concerning the exercise

---

<sup>1039</sup> Discussion (2)(A)(4)(iii), R.C.M. 202(a), MCM, 1984, at 11-12. See H. MOYER, JR., JUSTICE AND THE MILITARY 61 (Washington, D.C.: Public Law Education Institute, 1972). See Zillman, Federal Court Challenge to Reservists Involuntary Activation: Mellinger v. Laird, 339 F Supp 434 (ED PA 1972), 2 THE ARMY LAWYER 6 (Oct. 1972).

<sup>1040</sup>

"Active duty" means full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

10 U.S.C. § 101(22) (1983).

<sup>1041</sup> See United States v. Morris, 18 M.J. 531, 532 (AFCMR 1984)(reservist on 365 days active duty tour held subject to court-martial jurisdiction for an offense committed during his tour of active duty). National Guard personnel serving on six months "active duty for training" with their consent and with the consent of the Governor of the State are subject to court-martial jurisdiction. In re Taylor, 160 F. Supp. 932, 937 (W.D. Mo. 1958)(North Carolina national guardsmen were subject to court-martial jurisdiction during 6 months of active duty for training in the Army); United States v. Carroll, 26 CMR 598, 600 (ABR 1958)(Washington and California National Guardsmen were subject to court-martial jurisdiction during 6 months active duty for training). See Berg, Jurisdiction Over Air National Guard Members Called to Short Tours of Active Duty, 3 U.S.A.F. JAG BULL. 19 (Jul. 1961).

of jurisdiction over reservists, however, do not involve offenses committed on active duty, but involve offenses committed during periods of inactive duty for training, that is, during 4-hour evening drills held once a week or during weekend drills held once a month. Article 2(a)(3) provides that reservists are subject to the jurisdiction of the Code--

while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to [the Code].<sup>1042</sup>

Reservists, attending a once a week evening drill or a once a month weekend drill, are subject to court-martial jurisdiction when they are performing their drills pursuant to written orders, when their orders state that they will be subject to the Code during such periods of training, and when such orders have been accepted

---

<sup>1042</sup> Art. 2(a)(3), U.C.M.J., 10 U.S.C. § 802(a)(3) (1983)(emphasis added).

[O]f the twelve jurisdictional provisions in UCMJ Article 2 (10 USC § 802), Article 2[(a)](3) is the only one which makes UCMJ jurisdiction dependent upon voluntary submission. This seems to indicate that Congress may have desired a truly voluntary acceptance.

Wallace v. Chafee, 451 F.2d 1374, 1377 (9th Cir. 1971). For a discussion upholding the constitutionality of Article 2(a)(3) see United States v. Caputo, 18 M.J. 259, 265-66 (C.M.A. 1984). See also id. at 269-73 for a discussion of a portion of the legislative history on Article 2(a)(3).

voluntarily by the reservists performing the drills.<sup>1043</sup>

All of the services agree that a reservist serving on active duty is subject to court-martial jurisdiction. They do not agree, however, on whether reservists participating in evening or weekend drills should be subject to court-martial jurisdiction.

The Army and the Air Force, as a matter of policy, exercise court-martial jurisdiction under Article 2(a)(3) only in situations where the reservist is using expensive or dangerous equipment. The Navy, Coast Guard, and Marines may apply Article 2(a)(3) in all situations involving reserve training.<sup>1044</sup>

The policy followed by the Army and the Air Force tracks more closely with what Congress intended the scope of

---

<sup>1043</sup> See Wallace v. Chafee, 451 F.2d 1374, 1375 (9th Cir. 1971) (reservist attending drill session subject to court-martial jurisdiction for disobeying an order to get a haircut); Partington, Court-Martial Jurisdiction Over the Weekend Reservist: Wallace v. Chafee, 7 U. SAN FRAN. L. REV. 57 (1972); Comment, The Week-end Warrior and the Uniform Code of Military Justice: Does the Military Have Jurisdiction Over Week-end Reservists?, 7 CAL. W. L. REV. 238 (1970); Hardy & Mills, Constitutional Law: Military Jurisdiction over Inactive Reservists, 27 JAG J. 129 (1972); Recent Cases, Armed Services--Military Jurisdiction--Reservists: Wallace v. Chafee, 23 CASE W. RES. L. REV. 668 (1972).

<sup>1044</sup> MILITARY PRACTICE AND PROCEDURE, supra note 939, at 122. See United States v. Schuering, 16 USCMA 324, 326, 36 CMR 480, 482 (1966); United States v. Abernathy, 48 CMR 205, 206 (CGCMR 1974). See also H. MOYER, JR., JUSTICE AND THE MILITARY 73-74 (Washington, D.C.: Public Law Education Institute, 1972).

jurisdiction over reservists to be.<sup>1045</sup> The policy followed by the Navy, Marines and Coast Guard, on the other hand, is far boarder than Congress intended, but is consistent with the policy these services have followed for years.<sup>1046</sup>

As a result, reservists are usually only tried by the Navy, Marines and Coast Guard.<sup>1047</sup> When reservists

---

<sup>1045</sup> See United States v. Caputo, 18 M.J. 259, 269-73 (C.M.A. 1984) for part of the legislative history concerning the scope of jurisdiction to be exercised under Article 2(a)(3) of the Code.

Congressional committee reports, speeches, and hearing testimony by the military all indicated that jurisdiction under article 2[a](3) was to be exercised only when a reservist was using dangerous or expensive equipment. Congress and the military agreed the threat of court-martial was necessary to maintain discipline when a reservist was at sea, on flight duty, or drilling with weapons. The authorities indicated, however, that when a reservist dozed at a classroom session or bungled routine administrative chores, military necessity did not require jurisdiction.

Hardy & Mills, Constitutional Law: Military Jurisdiction over Inactive Reservists, 27 JAG J. 129, 133 (1972). See H. MOYER, JR., JUSTICE AND THE MILITARY 73-74 (Washington, D.C.: Public Law Education Institute, 1972).

<sup>1046</sup> Id.

<sup>1047</sup>

Disciplinary statistics provided by the Services for the years 1979 through 1983 indicate a great variance regarding both the acceptance and use of UCMJ authority. The Navy and Marine Corps have used UCMJ authority for courts-martial or nonjudicial punishments in several thousand cases. The Air Force has used it in less than 50 cases. The Army has always refused to recognize UCMJ application in weekend drill scenarios. The National Guard

are tried by court-martial for committing offenses under the UCMJ, the provisions of Article 2(a)(3) of the Code are usually strictly construed.

In United States v. Abernathy,<sup>1048</sup> an accused, a reservist who was performing duty during a weekend drill, was charged with "being drunk on board a Coast Guard vessel and [with] willfully damaging military property."<sup>1049</sup> He was tried and convicted by special court-martial on a Thursday, a nondrill day, and was sentenced to a fine of \$500.00, reduction to the lowest enlisted

---

relies on a disparate system of state laws. Specifically, the Navy court-martialed 122 reservists on inactive duty training status and 696 reservists on active duty and imposed a total of 3,085 nonjudicial punishments. The Marine Corps court-martialed 143 reservists on inactive duty status and six reservists on active duty and imposed a total of 3,136 nonjudicial punishments during this period. The Air Force court-martialed one reservist on inactive duty training status and imposed a total of 45 nonjudicial punishments.

. . . . The Army indicates that it relies on administrative action and civil courts to resolve disciplinary problems in the Army Reserve.

The National Guard administers discipline solely on the state level under each state's military code. Guardsmen are subject to UCMJ jurisdiction only when called to Federal duty. No central system for reporting disciplinary actions exists for the National Guard.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (RESERVE AFFAIRS), END OF YEAR REPORT 1984 at 12-13.

<sup>1048</sup> 48 CMR 205 (CGCMR 1974).

<sup>1049</sup> Id.

grade, and a bad conduct discharge.<sup>1050</sup>

At his trial and on appeal, the accused argued that "he never accepted a set of orders specifying that he was subejct [sic] to the Code."<sup>1051</sup> The accused's orders were dated 29 October 1968 and provided that:

Upon voluntary acceptance of these orders, you are subject to the Uniform Code of Military Justice while performing inactive duty training in compliance herewith.<sup>1052</sup>

But Abernathy contended that "he never received the orders of 29 October 1968."<sup>1053</sup>

The issue for the Coast Guard Court of Military Review was a factual one. If Abernathy never signed for or accepted orders stating that he was subject to the Code, then he could not be tried by court-martial for the offense with which he was charged. If, on the other hand, the evidence showed that he accepted the orders, then the court-martial had jurisdiction to try him.

On reviewing the record, the court found no evidence showing that the accused ever "voluntarily accepted" orders specifically stating that he would be

---

<sup>1050</sup> Id.

<sup>1051</sup> Id. at 206.

<sup>1052</sup> Id. See United States v. Caputo, 18 M.J. 259, 260 (C.M.A. 1984).

<sup>1053</sup> Id.

subject to the Code during his weekend drills.<sup>1054</sup>  
Because of this, the court held that the accused "was not, on the date of the offenses alleged, a person subject to the Uniform Code of Military Justice."<sup>1055</sup>

Had the reserve unit collected from the accused "the original orders directing him to report, with his signature upon the second endorsement showing that he had accepted the orders," the court noted, "there would be no question of jurisdiction in this case."<sup>1056</sup> For reservists in the Navy, Marines, and Coast Guard, then, the voluntary acceptance or receipt of orders specifying that they are subject to the Code during evening or weekend drills is critical if court-martial jurisdiction is to be exercised over them.

In addition to showing that an order has been "voluntarily accepted," it is important that the reservist be charged and tried under proper procedures. It is clear that a reservist who commits an offense during an evening or weekend drill can be tried for that offense during the same drill period, although this rarely happens.<sup>1057</sup> While it is possible, it is not likely because

---

<sup>1054</sup> Id. at 207.

<sup>1055</sup> Id. at 208.

<sup>1056</sup> Id. at 207.

<sup>1057</sup> United States v. Schuering, 16 USCMA 324, 326, 36 CMR 480, 482 (1966).

it takes time to prepare charges and arrange for a trial. It is also clear that a reservist who commits an offense during an evening or weekend drill cannot be tried for that offense by a court-martial convened on a nondrill day.<sup>1058</sup> It is clear too, in light of a recent decision of the Court of Military Appeals, that a reservist, who commits an offense while on two weeks active duty or during an evening or weekend drill session, cannot be tried for that offense later at another regularly scheduled drill.<sup>1059</sup>

The only way a reservist can be tried by court-martial for an offense committed during an evening or weekend drill, other than being tried during the same drill period, is for those in authority to take some action with a view toward trial of the accused prior to the termination of the drill.<sup>1060</sup> "[C]ommencement of action with a view to trial--as by apprehension, arrest, confinement, or filing of charges'" during the drill period--will preserve jurisdiction over the reservist

---

<sup>1058</sup> Id. at 328-30, 36 CMR 484-86.

<sup>1059</sup> United States v. Caputo, 18 CMR 259, 267 (C.M.A. 1984) (reservist's status as a person subject to the UCMJ terminates upon completion of his two-week tour of active duty).

<sup>1060</sup> Commanders have other options available for handling disciplinary problems, in addition to resorting to court-martial. See Baldwin & McMenis, Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates, ARMY LAWYER 10 (Mar. 1984).

even though his status may change on leaving the meeting.<sup>1061</sup> In such a case, jurisdiction will exist "to try the accused beyond the date of his scheduled release because of the prior action taken against him."<sup>1062</sup>

The importance of initiating action with a view toward trial after an offense occurs is demonstrated in the Court of Military Appeal's recent decision in United States v. Caputo.<sup>1063</sup> In Caputo, the accused, a reservist was performing two weeks of active duty with the Naval Supply Center at Pearl Harbor when he was arrested on February 13, 1983 by plainclothes police for drinking in public near the Kuhio Beach Center. On searching the accused, the police found a black film canister containing LSD. The accused was held in civilian custody for two days and then released to his unit. Three days later, on February 18, 1983, Caputo and his unit returned to New York and the accused was released from his unit, having finished his two weeks of

---

<sup>1061</sup> 16 USCMA at 330, 36 CMR at 486, citing para. 11d, MCM, 1951, at 16. See United States v. Caputo, 18 M.J. 259, 263 (C.M.A. 1984) (reservist's status as a person subject to the UCMJ terminates upon completion of his two-week tour of active duty).

<sup>1062</sup> 16 USCMA at 331, 36 CMR at 487. See generally Finan & Vorbach, Military Jurisdiction--Active Restraint Required To Attach Jurisdiction Over Reservist for Court-Martial on Non-Drill Day--United States v. Schuering, 16 U.S.C.M.A. 324, 36 C.M.R. 480 (1966), 35 GEO. WASH. L. REV. 611 (1967).

<sup>1063</sup> 18 M.J. 259 (C.M.A. 1984).

annual active duty training.

On the day Caputo was arrested in Hawaii, the commanding officer of his unit in Hawaii and the commanding officer of his parent unit at the Naval Reserve Center in Staten Island, New York, were aware of his arrest. On March 2 & 3, 1983, a charge sheet was prepared and sworn to charging Caputo with unlawful possession of drugs and absence without leave. On March 12, 1983, Caputo reported to his reserve unit for a regularly scheduled weekend drill and at that time "he was advised of the charges against him, given Article 31 and 'Tempia' warnings, and ordered into pretrial confinement."<sup>1064</sup>

On May 27, 1983, Caputo's trial by special court-martial began. When the military judge ruled that the accused was subject to court-martial jurisdiction for the offenses committed in Hawaii, the accused filed a petition for extraordinary relief with the Court of Military Appeals challenging the finding that he was subject to court-martial jurisdiction.

In a lengthy opinion, the Court of Military Appeals concluded that the accused was not subject to court-martial jurisdiction for the offenses he was charged with committing while on active duty. In its opinion, the Court of Military Appeals stated that

---

<sup>1064</sup> Id. at 261.

Caputo's status as a soldier subject to the Code was terminated when he was released from his two weeks of active duty on February 18, 1983. While the accused became subject to court-martial jurisdiction again on March 12, 1983, the Court found that "the hiatus that occurred in [the accused's] status of being subject to the Code precludes trial by court-martial."<sup>1065</sup> Finding no exception to this rule that would apply to the accused's case, and dismissing as dicta Judge Quinn's observation 18 years earlier in Schuering that an accused can be tried during a later drill for an offense committed during an earlier drill,<sup>1066</sup> the Court ruled that Caputo could not be tried by court-martial for the offenses he was charged with committing in Hawaii.<sup>1067</sup>

Reservists can be tried by court-martial for offenses committed while on active duty and for offenses committed during evening or weekend drills. To try a reservist for an offense committed during an evening drill or weekend drill, it is important to show that the orders to perform the drill were "voluntarily accepted" and specified that the reservist was subject to the Uniform Code of Military Justice. In addition, it is important for the commander of the reserve unit to take

---

<sup>1065</sup> Id. at 266 (emphasis added).

<sup>1066</sup> Id. at 267.

<sup>1067</sup> Id. at 268.

some action with a view toward trial immediately upon learning of the offense if jurisdiction to try the reservist is to be preserved.<sup>1068</sup>

4. Fleet Reserve

Article 2(a)(6) of the Code provides that a member of the Fleet Reserve and the Fleet Marine Corps Reserve are subject to court-martial jurisdiction. Article 2(a)(6) states that:

(a) The following persons are subject to [the Code]:

. . .

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.<sup>1069</sup>

---

1068

If you have a Reserve officer . . . on active duty, he is like a regular officer for all disciplinary purposes--if you have him on inactive duty, and he commits something which would be a civil offense, such as larceny of Government property, you can deal with him much more expeditiously and easily in the appropriate civil tribunal. On the other hand, if he commits a military offense, or shows he is a pretty worthless fellow and had better get out of the Reserve, then I think you do better to board him, revoke his commission after having appeared before a board, instead of starting the somewhat cumbersome [court-martial] machinery going.

Testimony of Frederick Bernays Wiener, Hearings on H.R. 2498 Before a Subcom. of the House Armed Services Comm., 81st Cong., 1st Sess., Book I, 799-800 (1949).

<sup>1069</sup> Art. 2(a)(6), U.C.M.J., 10 U.S.C. § 802(a)(6) (1983).

Section 6630(a) of Title 10 of the United States Code states that the "Fleet Reserve and the Fleet Marine Corps Reserve are comprised of members of the naval service transferred thereto under (1) Title II of the Naval Reserve Act of 1938 . . . ; or (2) [transferred thereto under the provisions of subsection (b) of Section 6630]."<sup>1070</sup> Subsection (b) of Section 6630 states that:

An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.<sup>1071</sup>

Under these provisions, enlisted personnel from the Navy or Marine Corps with over 20 years of active or reserve service are eligible to transfer to civilian service in the Fleet Reserve or Fleet Marine Corps Reserve.

As members of the Fleet Reserve or the Fleet Marine Corps Reserve, such personnel may--

- (a) . . . be ordered by competent authority to active duty without

---

<sup>1070</sup> 10 U.S.C. § 6330(a) (1983).

<sup>1071</sup> 10 U.S.C. § 6330(b) (1983).

[their] consent--

- (1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;
  - (2) in time of national emergency declared by the President; or
  - (3) when otherwise authorized by law.
- (b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period.<sup>1072</sup>

Members of the Fleet Reserve and Fleet Marine Corps Reserve receive retainer pay for participating in the Fleet Reserve program. The amount of the retainer pay a member is entitled to receive is dependent on the level of base pay he was receiving at the time of transfer into the Fleet Reserve and dependent too on the number of years that the individual served on active duty in the armed forces.<sup>1073</sup>

---

<sup>1072</sup> 10 U.S.C. § 6485 (1983)(emphasis added).

<sup>1073</sup> Section 6330(c) of Title 10 of the United States Code provides that:

- (c)(1) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled, when not on active duty, to retainer pay--

- (A) . . . at the rate of 2 1/2 percent of the basic pay that he received at

Members of the Fleet Reserve and Fleet Marine Corps Reserve have been subject to the Uniform Code of Military Justice since 1950, when the Fleet Reserve units were created. Until recently, however, no members of the Fleet Reserve ever have been prosecuted for violations of the Uniform Code of Military Justice.

In 1985, a member of the Fleet Reserve was tried under the provisions of Article 2(a) for violations of the Uniform Code of Military Justice. In United States v. Overton,<sup>1074</sup> the accused had served in the Marine Corps for 22 years before transferring to the Fleet Marine Corps Reserve in 1976, and, while serving as a member of the Fleet Reserve, was a civilian employed by the United States Government at Subic Bay Naval Station, Republic of the Philippines. At Subic Bay, he was charged with the theft of items from the Navy Exchange and their sale on the black market. He was tried and convicted by general court-martial of "three violations of Article 81, . . . conspiring with two others to steal property of the Navy Exchange at [the] Naval

---

the time of transfer . . .

. . .

multiplied by the number of years of active service in the armed forces.

10 U.S.C. § 6330(c) (1983).

<sup>1074</sup> 20 M.J. 998 (NMCMR 1985).

Station, Subic Bay, Republic of the Philippines, and four violations of Article 121, . . . larceny of property from that Navy Exchange."<sup>1075</sup> The sentence he received was "dishonorable discharge from the U.S. Marine Corps Fleet Reserve and total forfeitures of all retainer pay."<sup>1076</sup>

The accused appealed his conviction to the Navy Marine Court of Military Review. In his petition he alleged that the court-martial which convicted him did not have jurisdiction to try him. In particular, he argued that "a member of the Fleet Marine Corps Reserve cannot constitutionally be included in 'land and naval forces,'" and "that Article 2(a)(6) is an unwarranted extension of court-martial jurisdiction."<sup>1077</sup>

The Court of Military Review held that the accused was properly tried by court-martial. In support of its decision, the Court noted that, unlike other civilians and discharged service personnel, the accused--

has never left the Naval Service but instead has merely been "transferred" (in the exact words of the statute) from one component to another--not retired, not discharged, not separated--and continues to receive "retainer" pay in return for his membership in the Fleet Marine Reserve."<sup>1078</sup>

---

<sup>1075</sup> Id.

<sup>1076</sup> Id.

<sup>1077</sup> Id. at 1000.

<sup>1078</sup> Id.

For this reason, the Court found that "contrary to the [accused's] claims, we see a direct and substantial connection between him and the Marine Corps which continues to make him part of the 'land and naval forces'."<sup>1079</sup> In addition, the Court found that "Article 2(a)(6), UCMJ, is a constitutionally permissible extension of court-martial jurisdiction."<sup>1080</sup>

Members of the Fleet Reserve and Fleet Marine Corps Reserve serving the United States Government in a civilian capacity, thus are clearly subject to court-martial jurisdiction for offenses committed in violation of the Uniform Code of Military Justice.

##### 5. Civilians

In addition to persons serving on active duty, reservists, and members of the fleet reserve, certain types of civilians, who have no connection with the military, can be tried by court-martial for violations of the Uniform Code of Military Justice. Article 2 identifies four types of civilians who are subject to the Code:

1. Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and

---

<sup>1079</sup> Id. at 1001.

<sup>1080</sup> Id.

serving with the armed forces;<sup>1081</sup>

2. In time of war, persons serving with or accompanying an armed force in the field;<sup>1082</sup>
3. Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands;<sup>1083</sup>
4. Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.<sup>1084</sup>

As a practical matter, only a few cases involving the exercise of court-martial jurisdiction over civilians have been tried in the last 25 years. Those that have been tried have involved civilian dependents of military

---

<sup>1081</sup> Art. 2(a)(8), U.C.M.J., 10 U.S.C. § 802(a)(8) (1983). See Discussion (3), R.M.C. 202(a), MCM, 1984, at II-13; 42 U.S.C. § 217 (1983); 33 U.S.C. § 855 (1983).

<sup>1082</sup> Art. 2(a)(10), U.C.M.J., 10 U.S.C. § 802(a)(10) (1983).

<sup>1083</sup> Art. 2(a)(11), U.C.M.J., 10 U.S.C. § 802(a)(11) (1983).

<sup>1084</sup> Art. 2(a)(12), U.C.M.J., 10 U.S.C. § 802(a)(12) (1983).

service personnel, civilian employees of the armed forces, and some discharged service members. On appeal, all of these cases have been reversed on appeal on the grounds that the exercise of court-martial jurisdiction over civilians is unconstitutional.<sup>1085</sup>

As the years pass, and peacetime continues, the cases involving the exercise of court-martial jurisdiction over civilians during peacetime become less significant. This is so because the military in 1986 has little or no interest in trying civilians in time of peace for violations of the Uniform Code of Military Justice.

In the event of war, the exercise of court-martial jurisdiction over civilians assigned to, serving with, or accompanying the armed forces overseas, will again become an important issue, and at such time, the constitutionality of the provisions providing for the exercise of court-martial jurisdiction over civilians, no doubt, will be attacked anew by those who believe that the exercise of such power by the military is unconstitutional.

Article 2(a)(11) of the Code states that civil-

---

<sup>1085</sup> See generally, Everett & Hourcle, Crime Without Punishment--Ex-Servicemen, Civilian Employees and Dependents, 13 A.F. JAG L. REV. 184 (1971); Giovagnoni, Jurisdiction: Minus a Uniform, 14 A.F. JAG L. REV. 190 (1973); Underhill, Jurisdiction of Military Tribunals in the United States over Civilians, 12 CALIF. L. REV. 75 (1924).

ians "serving with, employed by, or accompanying the armed forces outside of the United States" are subject to the Uniform Code of Military Justice. This provision is applicable in peacetime as well as in wartime and its constitutionality was challenged soon after the new Code was enacted. In short order, the Supreme Court of the United States held that this provision could not be used in peacetime to court-martial civilian dependents of military personnel who committed capital and noncapital offenses overseas.<sup>1086</sup> In addition, the Court held that Article 2(a)(11) could not be used in peacetime to court-martial civilian employees of the armed forces for the commission of capital and noncapital crimes overseas.<sup>1087</sup> Thus, while Article 2(11) is written broadly, its reach and effect during peacetime has been limited significantly by the Supreme Court's decisions. Some time ago, Winthrop wrote that "a statute cannot be framed by which a civilian can lawfully be made amenable

---

<sup>1086</sup> Reid v. Covert, 354 U.S. 1, 5 (1957)(wife of an Air Force sergeant held not subject to court-martial jurisdiction for the murder of her husband in England); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 249 (1960)(wife of soldier stationed in Germany could not be tried by court-martial for a noncapital offense committed overseas).

<sup>1087</sup> Grisham v. Hagen, 361 U.S. 278, 280 (1960) (Department of the Army civilian employee could not be tried by court-martial for premeditated murder committed while employed in France); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 284 (1960)(civilian employee could not be tried by court-martial for a non-capital offenses committed overseas).

to . . . military jurisdiction in time of peace,"<sup>1088</sup> and this series of decisions have proved him correct.

Article 2(10) of the Code provides that "[i]n time of war, persons serving with or accompanying an armed force in the field"<sup>1089</sup> are subject to the Uniform Code of Military Justice. While the Supreme Court has addressed the constitutionality of the exercise of court-martial jurisdiction over civilians in peacetime, it has not ruled on the question of whether civilians can be tried by court-martial in wartime.

In Reid v. Covert,<sup>1090</sup> Justice Black noted that:

There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during time of war. To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield.<sup>1091</sup>

Justice Black also stated in a footnote that "[w]e

---

<sup>1088</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 107 (Washington, D.C.: Government Printing Office, 2d ed., 1896, 1920 Reprint)(emphasis deleted).

<sup>1089</sup> Art. 2(a)(10), U.C.M.J., 10 U.S.C. § 802(a)(10) (1983).

<sup>1090</sup> 354 U.S. 1 (1957).

<sup>1091</sup> Id. at 33.

believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field'.<sup>1092</sup> If the "we believe" is representative of the thinking of a majority of the Court, and it must be assumed that it is, then it may be that the exercise of jurisdiction over civilians "in the field" would be held to be constitutional by the Court.

Since the nation has not technically been "at war" during the period that the Code has been in existence, the occasion for the military to exercise jurisdiction over civilians accompanying the armed forces in time of war has not arisen. That is not to say that the Government has not tried to exercise jurisdiction over civilians under the provisions of Article 2(10); it has, but it has not been successful in its attempt.

In United States v. Averette,<sup>1093</sup> the accused was "a civilian employee of an Army contractor in the Republic in Vietnam."<sup>1094</sup> He was "the supervisor of a motor pool housing vehicles and equipment utilized in the post utilities operations [and he] performed his duties in the Saigon area within a United States Army

---

<sup>1092</sup> Id. at 33 n.61.

<sup>1093</sup> 40 CMR 891 (ACMR 1969), rev'd, 19 USCMA 363, 41 CMR 363 (1970).

<sup>1094</sup> 19 USCMA at 363, 41 CMR at 363.

compound guarded by United States Army soldiers."<sup>1095</sup>  
The accused behaved irresponsibly and was charged with  
"conspiracy to commit larceny and attempted larceny of  
36,000 United States Government-owned batteries."<sup>1096</sup> He  
was tried and convicted by a general court-martial at  
Long Binh, Vietnam, and was sentenced "to be confined at  
hard labor for one year and to pay a fine of \$2,000.00,  
with provision for additional confinement not to exceed  
one year until said fine is paid."<sup>1097</sup>

The accused's court-martial conviction was  
affirmed by the Army Court of Military Review which held  
that Averette was a person accompanying the armed forces  
under Article 2(10) of the Code, and thus was subject to  
court-martial jurisdiction.<sup>1098</sup> On appeal, the Court of  
Military Appeals ruled "that the words 'in time of war'"  
found in Article 2(10) of the Code mean "a war formally  
declared by Congress."<sup>1099</sup> Since Congress had not  
formally declared war in Vietnam, the Court concluded  
that the accused was not technically a civilian serving  
with or accompanying the armed forces in the field in

---

<sup>1095</sup> United States v. Averette, 40 CMR 891, 892 (ACMR 1969).

<sup>1096</sup> Id.

<sup>1097</sup> Id. at 891.

<sup>1098</sup> Id. at 893.

<sup>1099</sup> 19 USCMA at 365, 41 CMR at 365.

time of war, and therefore could not be tried by court-martial for the offenses with which he was charged.<sup>1100</sup>

The holding that civilians who are serving with or accompanying the armed forces in time of war are subject to court-martial jurisdiction only during wars "formally declared by Congress"<sup>1101</sup> will limit considerably the number of civilians who will ever be tried by court-martial during wartime. This is because Congress rarely has ever formally declared war.

In fact, all but five of the conflicts to which the United States has committed its

---

<sup>1100</sup> Id. at 366, 41 CMR at 366. See also Zamora v. Woodson, 19 USCMA 403, 404, 42 CMR 5, 6 (1970) (civilian employee of an Army contractor, charged with 56 specifications of violating a general regulation dealing with the purchase of money orders in Vietnam, held not to be a person serving with or accompanying the armed forces in the field and thus not subject to court-martial jurisdiction); Latney v. Ignatius, 416 F.2d 821, 823 (D.C. Cir. 1969) (civilian seaman serving on civilian tanker just off the coast in Vietnam held not serving with or accompanying the armed forces in the field and thus not subject to court-martial jurisdiction); Robb v. United States, 456 F.2d 768, 772 (Ct. Cl. 1972) (Navy held to be without jurisdiction to try civilian employee of the Navy by court-martial for violating lawful general orders); Note, Military Law--"In Time of War", Under the Uniform Code of Military Justice: An Elusive Standard, 67 MICH. L. REV. 841 (1969). But see United States v. Dienst, 16 M.J. 727, 728 (AFCMR 1983) (accused's conviction for desertion and absence without leave which occurred during his service in Vietnam upheld because the offenses were committed "in time of war" during which the statute of limitations for such offenses was tolled); United States v. Anderson, 17 USCMA 588, 590, 38 CMR 386, 388 (1968) (Vietnam War held to be "a time of war" under Art. 43 of the Code for the purposes of tolling the statute of limitations on an absence without leave).

<sup>1101</sup> 19 USCMA at 365, 41 CMR at 365.

armed forces since 1789--and the armed services have been used to back up American policy about 150 times--have been carried on without benefit of a declaration of war, although usually not without the more or less explicit authority of Congress.<sup>1102</sup>

In light of this, it is up to the courts to decide when civilians serving with or accompanying the armed forces in time of war can be tried by court-martial for offenses committed "in the field." The present standard announced by the Court of Military Appeals is very restrictive, but in the absence of much litigation in this area, it doubtful that much harm will result.<sup>1103</sup>

In the exercise of court-martial jurisdiction over civilians in peacetime, the Supreme Court of the United States has made clear that civilians are not subject to trial by court-martial for offenses committed overseas. The rationale supporting this decision is that civilians are entitled to constitutional guarantees not afforded in military trials, and that the denial of such protections to civilians in military trials is unconstitutional. The only way an offense committed by a civilian overseas can be dealt with under the present law

---

<sup>1102</sup> J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 179 (New York: Charterhouse, Inc., 1974).

<sup>1103</sup> "The courts, sensibly enough, have decided which of them amounted to 'war' in the light of the realities and the purpose of the statutes before them." Id.

is to let the host nation try the civilian under local law, where there may be no constitutional protections whatsoever. The other option is to let the offense go unpunished. In time of undeclared war, when the host country is involved in hostilities, the prospect of the civilian being tried by the local authorities is less likely and the possibility of no trial at all is great.<sup>1104</sup>

#### B. Continuing Jurisdiction

As a general rule, an officer, an enlisted member, or an inductee usually serves in the armed forces for a term of years. Those who are career officers and career enlisted personnel serve until retirement, but the great majority of the 2.1 million service men and women in the armed forces serve for only a limited period of time. When one's period of commissioned service, term of enlistment, or obligated service is up, an officer or enlisted member is usually discharged; but this does not always happen, and when it doesn't, problems of continuing jurisdiction arise.

---

<sup>1104</sup> Many of the problems in this area will be eliminated if and when provisions of the federal criminal code are given extraterritorial application. See Horbaly & Mullin, Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas, 71 MIL. L. REV. 1, 3-48 (1977).

## 1. After Expiration of Term of Service

The first group of individuals who may be subject to continuing jurisdiction are those whose term of service has expired and who, for some reason, have not been discharged from active duty. Article 2(a)(1) of the Code states that "those awaiting discharge after expiration of their terms of enlistment" remain subject to court-martial jurisdiction.<sup>1105</sup> The Manual similarly states that the "[c]ompletion of an enlistment or term of service does not itself terminate court-martial jurisdiction."<sup>1106</sup> An enlistment or term of service can be extended or readjusted for a number of reasons<sup>1107</sup>

---

<sup>1105</sup> Art. 2(a)(1), U.C.M.J., 10 U.S.C. § 802(a)(1) (1983).

<sup>1106</sup> Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12.

<sup>1107</sup> Army Regulation 635-200 § III (15 Oct. 1985) (Enlisted Personnel: Separations) lists some of the reasons why a service member could be held beyond his discharge date. These include making up "bad" or "lost" time due to desertion, absence without leave, confinement, drug abuse, or injury due to one's misconduct; investigation with a view toward trial by court-martial; travel en route to the United States; medical or dental care required, or sickness being treated in a hospital; or retention for the purpose of prosecution by a foreign jurisdiction.

One's amenability to military law and court-martial jurisdiction does not necessarily cease with the mere expiration of the period of enlistment. Certain formalities of discharge are distinctly contemplated--and, while a military person is awaiting their accomplishment, he remains fully subject to the terms of the Uniform Code of Military Justice, as

and during such time the service member remains subject to court-martial jurisdiction.<sup>1108</sup> In such cases, court-martial jurisdiction will continue "past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."<sup>1109</sup>

## 2. Held with a View toward Trial

The second group of individuals subject to continuing jurisdiction are those who are being held with a view to trial by court-martial. The Manual provides

---

specifically provided in its Article 2(1).

United States v. Klunk, 3 USCMA 92, 94, 11 CMR 92, 94 (1953)(Navy accused's length of military service extended beyond his ETS date by the length of his absence without leave). See United States v. Shenefield, 40 CMR 393, 394 (ABR 1968), rev'd on other grounds, 18 USCMA 453, 40 CMR 165 (1969)(accused subject to continuing jurisdiction for larceny offense committed after his term of service had expired); United States v. Hout, 19 USCMA 299, 302, 41 CMR 299, 302 (1970)(Air Force Sergeant subject to court-martial jurisdiction for offense committed while on administrative hold after his ETS date); United States v. Huchins, 4 M.J. 190, 192 (C.M.A. 1978)(action with a view toward trial taken before the accused's term of service expired).

<sup>1108</sup> Id.

<sup>1109</sup> Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12. United States v. Fitzpatrick, 14 M.J. 394, 398 (C.M.A. 1983)(Government acted expeditiously to prosecute the accused after he objected to being held beyond the expiration of his term of service); United States v. Douse, 12 M.J. 473, 479 (C.M.A. 1982)(Government acted expeditiously to try accused after expiration of the accused's term of service).

that "if action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders."<sup>1110</sup> Action with a view toward trial may consist of apprehension, arrest, restriction, confinement, or filing of charges.

Some form of affirmative action on the part of the government is necessary in order to hold an accused for trial beyond his term of service. In United States v. Wheeley,<sup>1111</sup> the Court of Military Appeals ruled that the apprehension and restriction of the accused "prior to the expiration of his term of enlistment"<sup>1112</sup> was sufficient action on the part of the government to warrant holding the accused beyond his enlistment.<sup>1113</sup>

In United States v. Kalt,<sup>1114</sup> however, an Army

---

<sup>1110</sup> Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12.

<sup>1111</sup> 6 M.J. 220 (C.M.A. 1979).

<sup>1112</sup> Id. at 222.

<sup>1113</sup> See United States v. Self, 13 M.J. 132, 138 (C.M.A. 1982) (informing the accused of the offense of which he was suspected, reading him his rights, and interrogating him, held to be sufficient evidence of action with a view toward trial to exercise court-martial jurisdiction over a national guardsman after expiration of his term of service).

<sup>1114</sup> 50 CMR 95 (ACMR 1975).

Court of Military Review held that a "flagging" action in and of itself was not sufficient action with a view toward trial to uphold the exercise of court-martial jurisdiction over the accused 56 days after his term of enlistment expired. In Kalt, the accused was suspected of committing larceny while stationed in Korea. Even though the accused was a suspect in the investigation, he was permitted to leave Korea, and return to the United States on July 25, 1973. His term of enlistment expired on August 23, 1973 and he reported to the Oakland Personnel Center for release from active duty. At the Oakland Personnel Center, the accused was informed that his records had been flagged by military authorities in Korea. He later was returned to Korea, placed in pretrial confinement, and on January 7, 1974, was tried and convicted by general court-martial for larceny.

On appeal the accused argued that he was not subject to court-martial jurisdiction. An Army Court of Military Review agreed finding that military authorities had not taken sufficient action with a view toward trial to continue court-martial jurisdiction over the accused.<sup>1115</sup>

The only actions taken prior to the expiration of his enlistment that in any way related to the offenses charged was an electronic message to the Personnel

---

<sup>1115</sup> Id. at 97.

Center in Oakland, California requesting that [the accused] be flagged and a follow-up message to the same institution on 9 August 1973. The record reveals no newly discovered evidence nor change of circumstances after his departure that would have prompted action that reasonably could and should have been taken two to three months earlier while [the accused] was a member of the command; if in fact the military entertained "a view to trial."<sup>1116</sup>

Even assuming that the electronic messages "flagging" the accused's personnel records "constituted the type of action with a view toward trial that would preserve jurisdiction,"<sup>1117</sup> the Court nevertheless found that the court-martial lacked jurisdiction over the accused because the Government failed to follow appropriate Army Regulations. Paragraph 2-4 of Army Regulation 635-200 provides that, if charges have not been preferred against an accused, the accused "shall not be retained more than 30 days beyond the expiration of his term of service without the personal approval of the general court-martial convening authority."<sup>1118</sup> Because the charges against the accused were not preferred until 56 days after the expiration of the accused's term of service, and because no personal approval was obtained from the convening authority for retaining the accused beyond the

---

<sup>1116</sup> Id.

<sup>1117</sup> Id.

<sup>1118</sup> Id.

30 days, the Court ruled that the accused could not be tried by court-martial.<sup>1119</sup>

The Manual clearly provides that action with a view toward trial begun before the expiration of one's term of service will preserve jurisdiction over the accused until a court-martial can be held. The action with a view toward trial, however, must be sufficient enough to show that jurisdiction has been preserved.

### 3. Self-Executing Orders

The third group of individuals who are subject to continuing court-martial jurisdiction are those with self-executing orders. These individuals are usually reservists or national guardsmen who are serving on active duty for a period of two weeks, a month, or six months. The self-executing orders state that the individual will serve on active duty for a specific period of time and when that time expires, the individual is automatically released from active duty. A self-executing order will state that:

"Upon satisfactory completion of the period of ACDUTRA [active duty training] indicated, unless sooner relieved or extended by proper authority, individual will return to the place where he entered on ACDUTRA and stand relieved there-

---

<sup>1119</sup> Id. at 98.

from."<sup>1120</sup>

Self-executing "orders are 'self-executing' in the sense that they need no further action on the part of the government (such as the issuance of a discharge certificate) to effect the release of the service member from active federal service."<sup>1121</sup>

An individual with self-executing orders, who commits an offense while serving on active duty, is subject to court-martial jurisdiction and can be tried by court-martial for the offense. In addition, if action with view toward trial is taken against the individual with self-executing orders before his date of separation, court-martial jurisdiction will be preserved over him<sup>1122</sup> and he can be held and tried by court-martial after the expiration date of his service.<sup>1123</sup> An individual also is subject to court-martial jurisdiction if his term of

---

<sup>1120</sup> United States v. Hamm, 36 CMR 656, 658 (ABR), pet. denied, 16 USCMA 655, 36 CMR 541 (1966).

<sup>1121</sup> United States v. Barbeau, 9 M.J. 569, 573 (AFCMR), pet. denied, 9 M.J. 277 (C.M.A. 1980).

<sup>1122</sup> Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12. See United States v. Hamm, 36 CMR 656, 659-60 (ABR), pet. denied, 16 USCMA 655, 36 CMR 541 (1966)(apprehension of national guardsman who had self-executing orders during his active duty was sufficient to preserve court-martial jurisdiction over him).

<sup>1123</sup> United States v. Self, 13 M.J. 132, 138 (C.M.A. 1982)(flagging action and being told that he was a subject of investigation was sufficient to preserve court-martial jurisdiction over the accused).

service is extended prior to its expiration date by proper authority, where "the exigencies of the service require or with the consent of the officer concerned or for investigation and trial by court-martial."<sup>1124</sup>

Unlike regular active duty personnel, a person with self-executing orders, who is held beyond his term of service because of court-martial charges, cannot be tried by court-martial for any new offenses committed after his initial period of service.<sup>1125</sup> Similarly, if a person with self-executing orders who is not being held on court-martial charges commits an offense after the completion of his term of service, he likewise is not subject to court-martial jurisdiction.<sup>1126</sup>

Questions concerning the exercise of court-martial jurisdiction over reservists and national

---

<sup>1124</sup> United States v. Mansbarger, 20 CMR 449, 452 (ABR 1955) (reserve officer with self-executing orders held subject to court-martial jurisdiction after expiration of his tour of active duty, because his period of service had been extended by competent authority for proper reasons).

<sup>1125</sup> Id. at 452-56.

<sup>1126</sup> See United States v. Peel, 4 M.J. 28, 29 (C.M.A. 1977) (no court-martial jurisdiction over a national guardsman who was returned to active duty without amending orders after his tour of duty was completed); United States v. Hamm, 36 CMR 656, 658 & 660 (ABR), pet. denied, 16 USCMA 655, 36 CMR 541 (1966) (national guardsman's offenses committed prior to completion of active duty tour held triable by court-martial, but offenses committed after completion of tour of active duty held not subject to court-martial jurisdiction).

guard personnel do not arise often. When they do arise, the same general rules which apply to active duty personnel apply to reservists and national guardsmen, that is, the government must prove the five elements of court-martial jurisdiction. In addition, the rules concerning the effect of a change of status from a soldier and civilian also apply to these individuals.

### C. When Jurisdiction Terminates

The general rule is that court-martial jurisdiction over officers and enlisted personnel serving on active duty terminates when they are discharged from military service. When an officer accepts an appointment, or an enlisted person enlists or is inducted into the armed forces, a change of status occurs; a civilian, in short, becomes a soldier. When a soldier's term of service ends and a valid discharge certificate is issued, another change of status occurs; the soldier reverts back to being a civilian.

As noted earlier, a civilian who commits a military offense in peacetime cannot be tried by court-martial because civilians are not subject to court-martial jurisdiction under the Code. The offense may be tried in a civilian court if it is a violation of civilian law, but it cannot be tried by the military authorities. As a general rule, the same principle

applies to military personnel who commit offenses while serving on active duty, and are discharged before they can be tried by military authorities for the offense. The effect of the discharge is to change their status from that of a soldier to that of a civilian, and once they are civilians, they cannot be tried by court-martial.

The general rule is that "the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction."<sup>1127</sup> A

---

<sup>1127</sup> Discussion (2)(B), R.C.M. 202(a), MCM, 1984, at 11-12. See United States v. Brown, 12 USCMA 693, 695, 31 CMR 279, 281 (1962)(court-martial jurisdiction over the accused ended with the delivery of orders discharging him from the Navy); United States v. Scott, 11 USCMA 646, 648, 29 CMR 462, 464 (1960)(delivery of valid discharge certificate to accused held to terminate court-martial jurisdiction over the accused); United States v. Christian, 22 CMR 780, 786 (AFBR 1956)(discharge issued to the accused on 18 March was effective on 18 March, and accused, who picked up his discharge on 19 March, was no longer subject to court-martial jurisdiction); United States v. Banner, 22 CMR 510, 519 (ABR 1956)(issuance of an undesirable discharge certificate to the accused, who mistakenly was thought to be in civilian confinement, held to have terminated court-martial jurisdiction over the accused); United States v. Santiago, 1 CMR 365, 370 (ABR 1951)(notice to an accused, who was confined as a result of a civilian conviction, that he had been issued an undesirable discharge certificate in accordance with Army Regulations, was sufficient to terminate court-martial jurisdiction over him). See United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)(the accused, who out-processed in the afternoon and received his discharge certificate and who had his discharge revoked at 2200 hours on the same day under Army Regulations, which provided that a discharge is not effective until 2400 hours on the day of discharge, was held to have been discharged from the Army and was not subject to court-martial jurisdiction for the offense of wrongful possession of military identification card). See also United

consequence of attaining civilian status, in other words, is that the individual is no longer subject to court-martial jurisdiction for offenses committed on active duty. There are at least six exceptions, however, to the general rule that court-martial jurisdiction over a person terminates upon discharge from military service. Some of the exceptions are specifically provided for in the Code, while the others have been developed by the courts.

In theory, the rule that the issuance of a discharge certificate terminates military status is clear. The application of the rule is more complicated because of the exceptions to the rule that have been developed.<sup>1128</sup>

---

States v. Barbeau, 9 M.J. 569, 573 (AFCMR), pet. denied, 9 M.J. 277 (C.M.A. 1980)(time of discharge stated in Air Force Regulations held controlling). See generally 10 U.S.C. § 1168(a)(1983).

<sup>1128</sup> See e.g., Zeigler, The Termination of Jurisdiction Over the Person and the Offense, 10 MIL. L. REV. 139, 147 (1960)[hereinafter cited as The Termination of Jurisdiction]. The exact time that the discharge becomes effective sometimes is prescribed by service regulation. These regulations, however, may no longer have any legal significance in view of the Court of Military Appeals' recent decision in United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985), holding that the delivery of the discharge certificate to an accused terminates court-martial jurisdiction over him. In essence, the Court of Military Appeals ruled that the termination of a soldier's military status is controlled by the delivery of the discharge certificate, and not by the time set forth in a service regulation.

1. Article 3(a) Exception

Article 3 of the Code is a source for at least three of the exceptions to the general rule that a discharge terminates military jurisdiction. The first exception is the serious offense exception found in Article 3(a); this the most controversial exception to the general rule and it is the one that has been litigated most often. The exception is stated as follows:

[N]o person charged with having committed, while in a status in which he was subject to [the Code], an offense against [the Code], punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.<sup>1129</sup>

Article 3(a) basically provides that under certain circumstances, a soldier who has been discharged from military service can be tried by court-martial for a serious offense committed during an earlier term of service. Three conditions must be present, however, before this can happen: First, the offense has to be one punishable under the Code by confinement at hard labor

---

<sup>1129</sup> Art. 3(a), U.C.M.J., 10 U.S.C. § 803(a)(1983) (emphasis added). Article 3(a) has a long and interesting history which is recounted in detail in The Termination of Jurisdiction, supra note 1128 at 170-76.

for 5 years or more.<sup>1130</sup> Second, the offense cannot be one which can "be tried in the courts of the United States or of a State, Territory, or the District of Columbia."<sup>1131</sup> And third, the soldier, "at the time of the court-martial [must be] subject to the code, by reentry into the armed forces or otherwise."<sup>1132</sup> Stating the rule in a slightly different way, the Discussion to Rule 202(a) of the Manual notes that "a person who reenlists following a discharge may not be tried for offenses committed during the earlier term of service unless the offense was punishable by confinement for 5 years or more and could not be tried in the courts of the United States or of a State, a Territory, or the District of Columbia."<sup>1133</sup> What is important here is that the soldier be on active duty at the time of the trial, that the offense be a serious one, and that the offense be one which cannot be tried in the civilian courts. If these three conditions exist, the soldier can be tried by court-martial, even though he previously has been discharged from military service.

---

<sup>1130</sup> Discussion (2)(B)(iii)(a)(1), R.C.M. 202(a), MCM, 1984, at II-12.

<sup>1131</sup> Discussion (2)(B)(iii)(a)(2), R.C.M. 202(a), MCM, 1984, at II-12.

<sup>1132</sup> Discussion (2)(B)(iii)(a)(3), R.C.M. 202(a), MCM, 1984, at II-12.

<sup>1133</sup> Discussion (2)(B)(ii), R.C.M. 202(a), MCM, 1984, at II-12 (emphasis added).

In United States v. Gallagher<sup>1134</sup> the Court of Military Appeals upheld a conviction of a military accused under the provisions of Article 3(a). In Gallagher the accused was a prisoner of war during the Korean War, who after he was freed in 1953, was placed on leave and later discharged from military service. The accused immediately reenlisted and in 1955 was charged with committing crimes while he was a prisoner of war during his prior period of service. He was charged specifically with "two offenses of unpremeditated murder, . . . three offenses of mistreatment of fellow-prisoners of war, . . . one offense of collaboration with the enemy, . . . and one offense of misconduct as a prisoner of war."<sup>1135</sup> He was tried and convicted by general court-martial and was "sentenced to dishonorable discharge, total forfeitures, and life imprisonment."<sup>1136</sup>

On appeal an Army Board of Review reversed the accused's conviction on the ground that the court-martial lacked jurisdiction over the offenses.<sup>1137</sup> The Judge Advocate General of the Army certified the issue of jurisdiction over the offenses committed by the accused

---

<sup>1134</sup> 7 USCMA 506, 22 CMR 296 (1957).

<sup>1135</sup> Id. at 507, 22 CMR at 297.

<sup>1136</sup> Id.

<sup>1137</sup> United States v. Gallagher, 21 CMR 435, 451 (ABR 1956).

to the Court of Military Appeals.

The Court of Military Appeals reversed the decision of the Board of Review and held that "Article 3(a) is constitutional when applied so as to preserve jurisdiction over discharged servicemen who have re-enlisted."<sup>1138</sup> Congress, the Court concluded fully "intended to preserve jurisdiction over men like Gallagher."<sup>1139</sup> In addition, the Court concluded that the exercise of jurisdiction by the military over soldiers like Gallagher was not precluded by the Supreme Court's decision in United States ex rel. Toth v. Quarles.<sup>1140</sup>

In Toth, the Supreme Court of the United States had ruled that civilians, who previously had served in the military, could not be tried by court-martial for offenses committed during their prior military service. An earlier version of Article 3(a) of the Code had provided that civilians could be tried by court-martial for offenses committed during their military service:

Subject to the provisions of article 43  
[statute of limitations] any person  
charged with having committed, while

---

<sup>1138</sup> 7 USCMA at 513, 22 CMR at 303.

<sup>1139</sup> Id. at 510, 22 CMR at 300.

<sup>1140</sup> Id. See United States v. ex rel. Toth v. Quarles, 350 U.S. 11( 1955)(a civilian, who had served in the Air Force and had been discharged, could not be tried by court-martial for the murder of a Korean national committed during the civilian's prior active duty).

in a status in which he was subject to [the] code, an offense against [the] code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.<sup>1141</sup>

The Supreme Court held that this version of Article 3(a), so far as it applied to civilians, was unconstitutional.<sup>1142</sup>

It is clear that a civilian, who has severed all connections with the military, cannot later be tried by court-martial for offenses committed during his prior service. It also is clear that a soldier, who has been discharged from military service and who reenlists, can be tried under certain circumstances for offenses committed during prior service.

What is not so clear is whether a civilian, who has been relieved from active duty and has been transferred to the reserves, is subject to court-martial jurisdiction under Article 3(a) for offenses committed while on active duty. In United States v. Wheeler<sup>1143</sup> the accused, an Airman Third Class, had completed his

---

<sup>1141</sup> Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107, 109-10.

<sup>1142</sup> 350 U.S. at 23.

<sup>1143</sup> 10 USCMA 646, 28 CMR 212 (1959).

tour of active duty in the Air Force and had been transferred to the Air Force Reserve . . . for completion of his military service obligation under the Universal Military Training Act.<sup>1144</sup> Soon after leaving active duty, the accused was apprehended for the murder of a German national committed while he was on active duty and stationed in Germany. The accused was returned to military control and once subject to military authority submitted a written request for recall to active duty.<sup>1145</sup> He subsequently pleaded guilty in a general court-martial and was sentenced to a "dishonorable discharge, total forfeitures, and confinement at hard labor for the term of his natural life."<sup>1146</sup> His sentence was reduced by the convening authority under the terms of a pretrial agreement to a "dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years."<sup>1147</sup>

Judge Latimer, writing the principal opinion for the Court, held that "Article 3(a) of the Code . . . is not unconstitutional as applied to this accused,

---

<sup>1144</sup> Id. The Termination of Jurisdiction, supra note 1128 at 173. See generally Murray, Court-Martial Jurisdiction Over Reservists, A.F. JAG L. REV. 10 (Jul.-Aug. 1968).

<sup>1145</sup> 10 USCMA at 651, 28 CMR at 217.

<sup>1146</sup> Id. at 649, 28 CMR at 215.

<sup>1147</sup> Id.

and, therefore, the court-martial had jurisdiction to try and convict him for the crime alleged."<sup>1148</sup> Judge Latimer noted that since the accused had not completely severed his relationship with the military, he remained subject to court-martial jurisdiction.<sup>1149</sup> Chief Judge Quinn and Judge Ferguson concurred in the result, but did not join Judge Latimer's opinion or his Article 3(a) analysis; for them the accused's request for recall to active duty was sufficient to establish jurisdiction over the accused.

In United States v. Brown<sup>1150</sup> the accused, was charged with conspiracy and other offenses in connection with competitive servicewide examinations. He pleaded guilty to the charges in a general court-martial, and was sentenced to a "bad-conduct discharge, reduction, forfeiture of all pay and allowances, and confinement at

---

<sup>1148</sup> Id. at 657, 28 CMR at 223.

<sup>1149</sup>

There can be no doubt then that [the] accused, as a person released from active duty and transferred to the reserve, remained a member of the armed forces.

Id. at 654, 28 CMR at 220. But see Wickham v. Hall, 12 M.J. 145, 149 (C.M.A. 1981) (Judge Cook stated that a reserve obligation after a tour of active duty may not make one constitutionally amenable to trial by court-martial).

<sup>1150</sup> 12 USCMA 693, 31 CMR 279 (1962).

hard labor for one year."<sup>1151</sup>

On appeal the Court of Military Appeals held that the accused was not subject to court-martial jurisdiction because at the time he was charged with the offenses, his active duty in the United States Navy had been terminated. The Court found that "the accused completed every formality attendant upon his relief from active duty, received the orders directing his separation, and departed from his ship, en route to his home in Ohio."<sup>1152</sup> In addition, the Court found that "orders were validly issued terminating [the] accused's active duty in the Regular Navy and transferring him to inactive duty in the Naval Reserve, effective 'this date'."<sup>1153</sup> The fact that orders were issued to the accused terminating his active duty in the Navy was significant, and the fact that he had a two year obligation of inactive duty in the Naval Reserve was not significant.

The important difference between the Court's decision in Wheeler and Brown is the issuance of orders terminating the accused's active duty status in Brown and the absence of any such terminating orders or discharge certificate in Wheeler. In fact, in Wheeler, Judge

---

<sup>1151</sup> Id. The convening authority reduced the confinement to 6 months and approved the rest of the sentence. Id.

<sup>1152</sup> Id. at 694, 31 CMR at 280.

<sup>1153</sup> Id. at 693, 31 CMR at 279.

Latimer noted specifically that the accused "was not discharged from [active duty] and did not receive a discharge certificate."<sup>1154</sup> The history of the exercise of court-martial jurisdiction under Article 3(a) is long and colorful and has been reviewed extensively by many commentators.<sup>1155</sup> The important point to remember with respect to Article 3(a) is that while it may no longer apply to civilians, it does apply under certain circumstances to military service personnel.

## 2. Fraudulent Discharge Exception

The second exception to the general rule that a discharge ends military status is the fraudulent discharge exception found in Article 3(b) of the Code. Article 3(b) provides in part that:

Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is . . . subject to trial by court-martial on that charge and is after apprehension subject to [the Code] while in the custody of the armed forces for that

---

<sup>1154</sup> United States v. Wheeler, 10 USCMA 646, 653, 28 CMR 212, 219 (1959).

<sup>1155</sup> See e.g., The Termination of Jurisdiction, supra note 1128, at 170-76; Note, What Remains of Courts-Martial Jurisdiction over Civilians?--The Toth and Kinsella Cases, 51 NW. U.L. REV. 474 (1956); MILITARY JUSTICE: JURISDICTION OF COURTS-MARTIAL 4-22 TO 4-24 (DA PAM 27-174, May 1980).

trial.<sup>1156</sup>

This subsection to Article 3 also provides that a soldier who obtains a fraudulent discharge is subject to court-martial jurisdiction for all offenses committed prior to the fraudulent discharge. In short, soldiers who obtain fraudulent discharges are subject to court-martial jurisdiction under Article 3(b) of the Code for offenses committed before they were discharged. From 1950 to 1981, there was little if any litigation on fraudulent discharges,<sup>1157</sup> and no challenges to the constitutionality of the exercise of court-martial jurisdiction under Article 3(b).

---

<sup>1156</sup> Art. 3(b), U.C.M.J., 10 U.S.C. § 803(b) (1983).

The legislative history of Article 3(b) reveals that Congress was reacting to cases arising after World War II in which servicemen had fraudulently procured discharges. The former servicemen then used their fraudulently obtained discharges to block military court action. See Hearings on the Uniform Code of Military Justice before a House Subcommittee of the Committee on Armed Services, 81st Cong., 1st Sess. 885 (March 18, 1949) (Comments of Felix Larkin, Assistant General Counsel, Office of The Secretary of Defense). Recognizing the seriousness of the problem, Congress gave military tribunals the authority to deal with an offense that would strike at the very heart of the individual's military commitment.

Wickham v. Hall, 706 F.2d 713, 716, rehearing en banc denied, 712 F.2d 1416 (5th Cir. 1983). See The Termination of Jurisdiction, supra note 1128 at 184-85.

<sup>1157</sup> Wickham v. Hall, 12 M.J. 145, 154 (C.M.A. 1981) (Chief Judge Everett dissenting).

But in 1981, a Private First Class in the United States Army challenged the constitutionality of Article 3(b). In Wickham v. Hall,<sup>1158</sup> the accused, a female, obtained a fraudulent discharge from the Army claiming she was pregnant when she was not. She had submitted to military authorities a urine sample from a friend who was pregnant and based on an analysis of the sample, the accused was "released from active duty and transferred to the Individual Ready Reserve to complete her military service obligation."<sup>1159</sup>

Military authorities later learned that the accused may have obtained her discharge fraudulently. When this was verified, the accused was charged with obtaining a fraudulent discharge in violation of Article 83(2) of the Code.<sup>1160</sup> The accused then filed a petition for extraordinary relief with the United States Court of Military Appeals requesting that she not be tried by special court-martial for fraudulently procuring "her separation from the Army."<sup>1161</sup>

In the Court of Military Appeals, the accused argued that when she received her discharge, she became a

---

<sup>1158</sup> 12 M.J. 145 (C.M.A. 1981).

<sup>1159</sup> Id. at 146.

<sup>1160</sup> Art. 83(2), U.C.M.J., 10 U.S.C. § 883(2) (1983).

<sup>1161</sup> 12 M.J. at 146.

civilian, and that as a result she was no longer subject to military jurisdiction or trial for violations of the Uniform Code of Military Justice. In conclusion, she argued that "Article 3(b) is unconstitutional, because like Toth, [she] was 'discharged' and became a 'civilian' who could not be tried by court-martial."<sup>1162</sup>

The Court denied the accused's petition for extraordinary relief, but could not agree on the reasons why. In his opinion, Judge Cook concluded that "Congress properly exercised its constitutional power to govern the armed forces"<sup>1163</sup> when it enacted Article 3(b) dealing with fraudulent discharges. For this reason, he concluded that the accused was "subject to court-martial jurisdiction under Article 3(b)."<sup>1164</sup> Judge Fletcher concurred in the result only and Chief Judge Everett dissented. Because there was no opinion for the court on the question presented, the issue has not been settled completely and may arise again.<sup>1165</sup>

---

<sup>1162</sup> Id. at 148.

<sup>1163</sup> Id. at 152.

<sup>1164</sup> Id. at 151.

<sup>1165</sup> See Wickham v. Hall, 706 F.2d 713, rehearing en banc denied, 712 F.2d 1416 (5th Cir. 1983) (military court had power under the Constitution to decide whether the accused's discharge was obtained fraudulently and the issue did not have to be decided by a civilian court).

### 3. Deserter Exception

The third exception to the general rule that a discharge terminates military status is the deserter exception found in Article 3(c). Article 3(c) states that:

No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of [the Code] by virtue of a separation from any later period of service.<sup>1166</sup>

This section of Article 3 provides for the exercise of court-martial jurisdiction over soldiers who have deserted, and who come back on active duty, either in the same branch or in a different branch, and receive a valid discharge for their second period of military service.

In United States v. Huff,<sup>1167</sup> for example, the accused, a seaman apprentice in the Coast Guard, was tried by general court-martial for desertion and intent to desert. He was convicted of the offenses and was "sentenced to a bad conduct discharge and confinement at hard labor for six months."<sup>1168</sup>

In January 1954, the accused had completed a

---

<sup>1166</sup> Art. 3(c), U.C.M.J., 10 U.S.C. § 803(c) (1983).

<sup>1167</sup> 19 CMR 603 (CGBR 1955), rev'd on other grounds, 7 USCMA 247, 22 CMR 37 (1956).

<sup>1168</sup> 19 CMR at 605.

three year tour of duty and was honorably discharged. Eight months later, in August 1954, he joined the Coast Guard and was assigned to perform duty at the Coast Guard Base in Portsmouth, Virginia. On December 4, 1954, the accused received a weekend pass and travelled to his home in Louisville, Kentucky. He was scheduled to report back to Portsmouth on December 6, 1954, but he did not return. Instead, on the next day, December 7, 1954, he met with a recruiter in Louisville and enlisted in the United States Army. In filling out his application for enlistment in the Army, the accused noted that he previously had served in the Army and that he had received an honorable discharge. The accused, however, failed to mention that he presently was serving on active duty in the Coast Guard; this, even though, the enlistment contract contained a declaration in it which clearly stated "that I am not now a member of any of the armed forces."<sup>1169</sup>

After enlisting, the accused was sent to Fort Knox, Kentucky. Five days later he disclosed to Army officials at Fort Knox that he was absent without leave from the Coast Guard. On February 14, 1955, the Army released the accused with an undesirable discharge and returned him to the Coast Guard<sup>1170</sup> where he was tried for desertion and intent to desert.

---

<sup>1169</sup> Id. at 605.

<sup>1170</sup> Id. at 606.

In appealing his court-martial conviction on these charges, the accused argued to the Coast Guard Court of Military Review that the court-martial which tried him did not have jurisdiction over the desertion offenses. The court-martial did not have jurisdiction, he maintained, because the undesirable discharge he received from the Army terminated his status as a member of the military.<sup>1171</sup>

The Court disagreed noting that Article 3(c) of the Code provided "a sufficient answer to [the accused's] contention."<sup>1172</sup> The provisions of Article 3(c), the Court stated, provide that "[a]ny person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of [the] Code by virtue of a separation from any subsequent period of service."<sup>1173</sup> In addition, the Court concluded that the accused "could not by his act of enlisting in the Army nullify or avoid his pre-existing obligation to the Coast Guard."<sup>1174</sup> For these reasons, the Court ruled that the court-martial had jurisdiction to try the accused for the offenses of desertion and intent to desert.

The purpose of Article 3(c) is to preserve

---

<sup>1171</sup> Id. at 609.

<sup>1172</sup> Id.

<sup>1173</sup> Id.

<sup>1174</sup> Id.

jurisdiction over a desertion committed during a prior service. The fact that a soldier later receives a discharge from another branch of the armed forces and becomes a civilian, does not protect him from being tried by court-martial for a desertion committed during a previous period of service in another branch of the armed forces.<sup>1173</sup>

#### 4. Prisoners in Military Custody Exception

The fourth exception to the general rule that a discharge terminates military status is the prisoner in military custody exception which is found in Article 2(a)(7) of the Code.<sup>1174</sup> Article 2(a)(7) provides that "[p]ersons in custody of the armed forces serving a

---

<sup>1173</sup> But see Ex parte Drainer, 65 F. Supp. 410 (N.D. Calif. 1946), aff'd sub nom, Gould v. Drainer, 158 F.2d 981 (9th Cir. 1947) (per curiam) (accused, who deserted from the Marine Corps, and later served in the Navy from which he received an Honorable Medical Discharge, held not subject to court-martial jurisdiction for the prior desertion offense because the Marine Corps was part of the Naval service). See Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 28-29, 31-32 (1953); The Termination of Jurisdiction, supra note 1128 at 185-87.

<sup>1174</sup> Art. 2(a)(7), U.C.M.J., 10 U.S.C. § 802(a)(7) (1983). See Bishop, Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists and Discharged Prisoners, 112 U. PA. L. REV. 317, 368-76 (1964) [hereinafter cited as Military-Civilian Hybrids]; Zajicek, General Court-Martial Authority: Air Force Prisoners in United States Disciplinary Barracks, 10 A.F. JAG L. REV. 24 (May-June 1968).

sentence imposed by a court-martial"<sup>1177</sup> are subject to court-martial jurisdiction. The Discussion to Rule 202(a) of the Manual states that a "prisoner who has received a discharge and who remains in the custody of an armed force may be tried for an offense committed while a member of the armed forces and before the execution of the discharge as well as for offenses committed after it."<sup>1178</sup>

In United States v. Ragan<sup>1179</sup> the accused was a sentenced prisoner at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. "For most of eighteen years, the accused [had] been in a military or civilian prison."<sup>1180</sup> The offenses with which the accused was charged in the present case--"assault on a fellow prisoner in the United States Disciplinary Barracks, in violation of Article 128, and two specifications of misconduct, in violation of Article 134"<sup>1181</sup>-- occurred shortly after the accused was transferred to the United States Disciplinary Barracks from the Federal Prison at Alcatraz. The accused was tried and convicted

---

<sup>1177</sup> Id.

<sup>1178</sup> Discussion (2)(B)(iii)(c), R.C.M. 202(a), MCM, 1984, at II-13.

<sup>1179</sup> 14 USCMA 119, 33 CMR 331 (1963).

<sup>1180</sup> Id. at 120, 33 CMR at 332.

<sup>1181</sup> Id.

by general court-martial and "sentenced to confinement at hard labor for five years."<sup>1182</sup>

An Army Court of Military Review affirmed his conviction.<sup>1183</sup> The accused appealed the decision to the Court of Military Appeals contending that he was "not subject to the Code because long before the commission of the instant offenses and the trial, he received a dishonorable discharge."<sup>1184</sup> The accused received the dishonorable discharge as part of the sentence from his original court-martial that he still was serving confinement on.

In denying the accused's claim of lack of jurisdiction, the Court of Military Appeals noted that Article 2(a)(7) of the Code specifically provides for the exercise of court-martial jurisdiction "over persons 'in custody of the armed forces serving a sentence by a court-martial'."<sup>1185</sup> In addition, the Court noted that the exercise of such jurisdiction is within the "power of Congress to make rules and regulations for the government of the armed forces."<sup>1186</sup>

---

<sup>1182</sup> Id.

<sup>1183</sup> United States v. Ragan, 32 CMR 913 (AFBR 1962).

<sup>1184</sup> 14 USCMA at 120, 33 CMR at 332.

<sup>1185</sup> Id. at 121, 33 CMR at 333.

<sup>1186</sup> Id.

The accused also argued that even if he was subject to court-martial jurisdiction as a prisoner serving a court-martial sentence, "such jurisdiction was lost when he was transferred to a Federal penitentiary under the supervision of the Department of Justice."<sup>1187</sup> The Court noted that Article 2(a)(7) provides for the exercise of court-martial jurisdiction over a person "'in the custody of the armed forces'."<sup>1188</sup> It also observed that the offenses with which the accused were charged were committed while the accused was in the custody of the armed forces and that the accused was in the custody of the armed forces when he was tried by court-martial for the offenses.<sup>1189</sup> For these reasons, the Court concluded "that the period of confinement served by the accused in a Federal civilian penitentiary as a military prisoner did not preclude the exercise of military jurisdiction over him upon his return to military custody."<sup>1190</sup>

In Ragan and other cases<sup>1191</sup> the exercise of

---

<sup>1187</sup> Id.

<sup>1188</sup> Id. at 122, 33 CMR at 334.

<sup>1189</sup> Id.

<sup>1190</sup> Id.

<sup>1191</sup> See Peelbes v. Froehike, 22 USCMA 226, 229, 46 CMR 266, 269 (1973) (Army had jurisdiction to retry accused for offenses which were reversed on appeal, even though the accused had received a dishonorable discharge in a subsequent trial for other offenses and was now a

court-martial jurisdiction over sentenced prisoners has been upheld as constitutional. The fact that a prisoner committing an offense previously has been awarded a punitive discharge in no way lessens his amenability to trial by court-martial for offenses committed while serving as a sentenced prisoner in the custody of the armed forces. In short, sentenced prisoners in military confinement facilities remain subject to the Code even though they may have received punitive discharges.

#### 5. Uninterrupted Status Exception

The fifth exception to the general rule that receipt of a discharge terminates military status is the uninterrupted status exception. In the uninterrupted status cases, the service member receives a discharge when the term of his service expires, and then he immediately reenlists without a break in service. While in theory, the individual receives a discharge at the end, or before the end of his enlistment, no real

---

civilian); United States v. Nelson, 14 USCMA 93, 95, 33 CMR 305, 307 (1963)(prisoner who had received a punitive discharge nevertheless held subject to trial by court-martial on charges of offering violence to the stockade commander); United States v. Holston, 41 CMR 589, 591 (ACMR 1969)(prisoner in United States Disciplinary Barracks held subject to court-martial jurisdiction for offenses committed while in confinement). See generally J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 65-66 (New York: Charterhouse, Inc., 1974); The Termination of Jurisdiction, supra note 1128, at 176-81; Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1 (1953).

change in his military status occurs because the soldier passes from one enlistment to another without pause.

In United States v. Clardy,<sup>1192</sup> the Court of Military Appeals held that the receipt of a discharge under such circumstances does not preclude the trial of a service member for an offense committed during the previous term of service. The accused in Clardy, a Specialist Four, was charged with "five specifications of larceny, five specifications of forgery, two specifications of making and delivering a worthless check, and three specifications of making and uttering a worthless check."<sup>1193</sup> He pleaded guilty in a general court-martial before a military judge alone and was sentenced to a "bad conduct discharge, 2 years' confinement, total forfeitures, and reduction to the grade of E-1."<sup>1194</sup>

On appeal an Army Court of Military Review

set aside the findings of guilty on the two specifications of making and delivering a worthless check, because it concluded these offenses had been committed shortly before [the accused] had been discharged from a prior enlistment for the purpose of immediate reenlistment and were not in the category of offenses as to which military jurisdiction was

---

<sup>1192</sup> 13 M.J. 308 (C.M.A. 1982).

<sup>1193</sup> Id.

<sup>1194</sup> Id. "The convening authority suspended execution of that portion of the confinement in excess of 8 months but otherwise approved the findings and sentence." Id.

preserved by Article 3(a).<sup>1195</sup>

The Judge Advocate General of the Army certified to the United States Court of Military Appeals, the question of whether the accused could be tried for the offenses committed during his prior enlistment.

The Court of Military Appeals held that "court-martial jurisdiction will exist to try a member of the service for an offense occurring during his prior enlistment when he was discharged solely for the purpose of reenlistment and his military status remained uninterrupted."<sup>1196</sup> In reaching its decision, the Court observed that this holding was more in keeping with Congressional intent and proper interpretation of provisions of the Code.

In deciding the case this way, the Court announced that it was overruling its previous decision in United States v. Ginyard<sup>1197</sup> which held that the receipt of a discharge at the end of an enlistment, issued solely for the purpose of a reenlistment, would "operat[e] as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by

---

<sup>1195</sup> Id. at 308-09.

<sup>1196</sup> Id. at 309 (emphasis and print style changed).

<sup>1197</sup> 16 USCMA 512, 37 CMR 132 (1967).

Article 3(a) of the Code.<sup>1198</sup> In ruling that the award of a discharge in connection with an immediate reenlistment does not terminate the exercise of court-martial jurisdiction for offenses committed during a prior enlistment, the Court ended a situation which allowed career soldiers to escape punishment for minor offenses committed during prior years of service.

#### 6. Retired Personnel Exception

The sixth exception to the general rule that receipt of a discharge terminates military status is the retired personnel exception.<sup>1199</sup> Article 2 of the Code provides that there are two types of retirees who remain subject to court-martial jurisdiction after discharge from active duty:

- [1] Retired members of a regular component of the armed forces who are entitled to pay[;]<sup>1200</sup> [and]
- [2] Retired members of a reserve

---

<sup>1198</sup> 13 M.J. at 314 (emphasis deleted) quoting from United States v. Ginyard, 16 USCMA 512, 516, 37 CMR 132, 136 (1967). See Woodruff, The Rule in Ginyard's Case-- Congressional Intent or Judicial Field Expedient?, 21 A.F. JAG L. REV. 285 (1979).

<sup>1199</sup> Military-Civilian Hybrids, supra note 1176 at 331-57; Blair, Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power, 50 GEO. L.J. 79 (1961)[hereinafter cited as Court-Martial Jurisdiction Over Retired Regulars].

<sup>1200</sup> Art. 2(a)(4), U.C.M.J., 10 U.S.C. § 802(a)(4) (1983).

component who are receiving hospitalization from an armed force.<sup>1201</sup>

Retired members are considered to be part of the armed forces of the United States, even though retired, and as such are subject to court-martial jurisdiction for offenses committed in violation of the Code.

Retired regulars have been subject to court-martial jurisdiction since August 3, 1861 when the first federal legislation governing retirees was "passed and signed into law by President Lincoln."<sup>1202</sup> This legislation provided for the--

mandatory retirement of officers physically unable to perform the duties of their rank, and further, that an officer could, upon application and approval, be retired after completion of forty years' service. Retirement was either "whole" or "partial"; those "wholly" retired were to receive a single stipulated sum of money and were, so to speak, paid off, while the group "partially" retired were to receive continuing monetary payments over the remainder of their lives, entitled to wear the uniform of their rank, subject to recall to active duty, and subject to the Rules and Articles of War and to trial by court-

---

<sup>1201</sup> Art. 2(a)(5), U.C.M.J., 10 U.S.C. § 802(a)(5) (1983). There are no reported cases dealing with this section of the Code.

<sup>1202</sup> Court-Martial Jurisdiction Over Retired Regulars, supra note 1199 at 80. See Act of August 3, 1861, ch. 42, §§ 18-25, 12 Stat. 290-91.

martial for breach thereof.<sup>1203</sup>

In 1916, an effort was made on the part of Congress to eliminate the exercise of jurisdiction over retirees and this provision was omitted from the proposed Articles of War.

President Woodrow Wilson "took the omission so seriously that he vetoed the entire [Army Appropriation Bill for FY 1917 which included amendments to the Articles of War of 1916] with the result that Congress restored the missing jurisdiction."<sup>1204</sup> President Wilson stated in his veto message in part that:

The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit of cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a

---

<sup>1203</sup> Court-Martial Jurisdiction Over Retired Regulars, supra note 1199, at 80 (emphasis added).

<sup>1204</sup> Military-Civilian Hybrids, supra note 1176, at 333.

common discipline.<sup>1205</sup>

Even though retired members continue to be subject to court-martial jurisdiction under Article 2(a)(4) of the Code, and despite the fact that there are approximately 1.5 million retired regulars presently mixed among the civilian population, few ever have been tried for violations of military law, and none in the last quarter of a century.

In the early 1930's the Army tried a retired Major by general court-martial for conduct unbecoming an officer by being drunk and disorderly in a San Francisco hotel.<sup>1206</sup> He was convicted and sentenced "to be dismissed from the service."<sup>1207</sup> On review, however, "President Hoover disapproved the entire proceedings, including the sentence."<sup>1208</sup>

In the early 1960's the Navy tried two retired officers by court-martial, Rear Admiral Hooper (Ret.) and Lieutenant Commander Chambers (Ret.). Both officers were charged in separate incidents with engaging in sodomy

---

<sup>1205</sup> 53 Cong. Rec. 12845 (1916). President Wilson's complete veto message is reprinted in United States v. Hooper, 9 USCMA 637, 643-45, 26 CMR 417, 423-25 (1958).

<sup>1206</sup> United States v. Kearney, 3 JAGD Board of Review 63 (1931).

<sup>1207</sup> Military-Civilian Hybrids, supra note 1176, at 338.

<sup>1208</sup> Id. at 339.

with enlisted personnel; Chambers' offenses occurring before he left active duty, and Hooper's occurring after he left active duty.

Admiral Hooper was tried and convicted by a general court-martial and "was sentenced to dismissal and total forfeitures."<sup>1209</sup> On appeal, the Court of Military Appeals affirmed the exercise of court-martial jurisdiction over him under Article 2(a)(4) of the Code.<sup>1210</sup>

Chambers was arrested and placed in pretrial confinement on January 3, 1961. Soon thereafter he filed a petition for a writ of habeas corpus and a petition for a writ of prohibition in the Federal District Court for the Northern District of California challenging the constitutionality of the exercise of court-martial jurisdiction over him under Article 2(4) of the Code. The Court denied the accused's petitions and concluded

---

<sup>1209</sup> United States v. Hooper, 9 USCMA 637, 639, 26 CMR 417, 419 (1958). "On January 7, 1961, [his] conviction and sentence were approved and ordered executed by the President of the United States, and payment of [his] retired pay was discontinued as of that date." Hooper v. United States, 326 F.2d 982, 984 (Ct. Cl. 1964), cert. denied, 377 U.S. 977 (1964). See also Hooper v. Hartman, 163 F. Supp. 437, 442 (S.D. Calif. 1958), aff'd, 274 F.2d 429 (9th Cir. 1959)(per curiam)(Article 2(a)(4) of the UCMJ held constitutional and the court held that the accused had to exhaust his military remedies and was not entitled to an extraordinary writ to enjoin court-martial proceedings).

<sup>1210</sup> United States v. Hooper, 9 USCMA 637, 639, 26 CMR 417, 425 (1958)(decision of the Navy Board of Review was reversed because the post trial review was improper and the case was sent back to the Judge Advocate of the Navy for a new convening authority to review it).

that the Navy could "proceed with the court-martial [of the accused]."<sup>1211</sup> Since there is no further reported court decisions on Chambers, it is most likely that his problems with the Navy were resolved administratively.<sup>1212</sup>

In addition to retired regulars, those who are on the Temporary Disability Retired List also are subject to jurisdiction under Article 2 of the Code. In United States v. Bowie,<sup>1213</sup> a retired Air Force Staff Sergeant, who was on the Temporary Disability Retired List, was tried by general court-martial for writing four bad checks. The accused in Bowie had been "relieved from active duty in August 1961, and placed on the Temporary Disability Retired List" after undergoing "abdominal operations which affected his physical capacity."<sup>1214</sup> In this status, the accused "was, among other things entitled to pay and was required to submit periodically to a physical examination for reassessment of his condition."<sup>1215</sup>

After his retirement from the Air Force, the

---

<sup>1211</sup> Chambers v. Russell, 192 F. Supp. 425, 428 (N.D. Calif. 1961).

<sup>1212</sup> Military-Civilian Hybrids, supra note 1176, at 345.

<sup>1213</sup> 14 USCMA 631, 34 CMR 411 (1964).

<sup>1214</sup> Id.

<sup>1215</sup> Id.

accused "obtained employment at the American Ernest Harmon Air Force Base" and "became a member of the Base Noncommissioned Officers' Open Mess."<sup>1216</sup> As a member of the Noncommissioned Officers' Club, the accused cashed four bad checks at the NCO Club (two for \$500.00, one for \$150.00 and one for \$50.00) on banks in the United States and Canada in which he had no accounts. As a result, the accused was tried and convicted by general court-martial "of making and uttering four worthless checks with intent to defraud, in violation of Article 123a" of the Code, and was sentenced to a "bad-conduct discharge and confinement at hard labor for one year."<sup>1217</sup>

At trial and later on appeal to the Air Force Board of Review, the accused argued that he "was not a person subject to the Uniform Code of Military Justice."<sup>1218</sup> In reviewing the issue, the Board of Review noted that Article 2(a)(4) of the Code clearly provides that "[r]etired personnel of a regular component of the armed forces . . . entitled to receive pay" are subject to the Code.<sup>1219</sup> In light of this the Board of Review

---

<sup>1216</sup> Id.

<sup>1217</sup> United States v. Bowie, 34 CMR 808, 810 (AFBR 1964).

<sup>1218</sup> Id.

<sup>1219</sup> Id.

concluded that it had to decide "whether [the] accused, being on the Temporary Disability Retired List of the Air Force, [was] a person subject to the Code by virtue of this statute."<sup>1220</sup>

On reviewing the record of trial, the Board of Review found that the "accused was a member of the Regular Air Force at the time he was placed on the Temporary Disability Retired List and that, at the time of the offenses, he was receiving retired pay from the Air Force under the provisions of 10 United States Code 1202."<sup>1221</sup> In addition, the Board of Review found, among other things: that the accused continued to be subject to the "'jurisdiction' of the Secretary of the Air Force;" that "if his disability continue[d] and he [met] various other requirements, he [would be] permanently retired either prior to or upon the expiration of five years after the date he was placed on the temporary list;" that "if, during the five-year period, he [was] found to be physically qualified, he has a statutory right to return to active duty in his regular grade;" and that "although he [was] released from active military service, he [was] not discharged" from active duty.<sup>1222</sup> In short, the Board concluded that "the status of the accused here is

---

<sup>1220</sup> Id. at 811.

<sup>1221</sup> Id.

<sup>1222</sup> Id.

no different from that of the retired naval officer accused in United States v. Hooper"<sup>1223</sup> and that the accused was "a person subject to the Uniform Code of Military Justice."<sup>1224</sup>

On appeal to the United States Court of Military Appeals, the accused argued that "a retiree for physical disability should be considered differently from those retired for length of service or other causes, because it cannot reasonably be expected that he will be recalled to active duty, even in time of national need."<sup>1225</sup> The Court responded that while this might prove to be the case for the accused, it might not necessarily be so for others on the Disabled Retired List. In addition, the Court noted that "the Uniform Code does not distinguish between retirees, on the basis of the reason for retirement."<sup>1226</sup> Instead, it noted that the Code provides that "all retirees receiving pay are subject to its provisions."<sup>1227</sup> For this reason, the Court of Military

---

<sup>1223</sup> Id. (emphasis added). The Board of Review also concluded that the trial of the accused by court-martial did not violate Air Force policy and was not prohibited by the provisions of the North Atlantic Treaty Organization, Status of Forces Agreement between Canada and the United States. Id. at 812-14.

<sup>1224</sup> Id. at 812.

<sup>1225</sup> United States v. Bowie, 14 USCMA 631, 632, 34 CMR 411, 412 (1964).

<sup>1226</sup> Id.

<sup>1227</sup> Id.

Appeals affirmed the decision of the Air Force Board of Review and ruled that the accused was properly tried by court-martial for his offenses in violation of the Uniform Code of Military Justice.

While the duties and obligations of retired personnel are significantly different from those of career officers serving on active duty, they are not so different that they place the retired regular beyond the reach of court-martial jurisdiction. A discharge from active duty after 20 or 30 years, or for physical disability, or for any other reason, in other words, does not end the retired regular's status as a person subject to the Code.

In conclusion, jurisdiction over the person is an important element of court-martial jurisdiction. While it is true that each of the five elements of court-martial jurisdiction are important, the element of jurisdiction over the person has attracted the most attention and has been the subject of the greatest amount of litigation. It is also the element of jurisdiction that the Supreme Court of the United States has examined most closely. To the credit of the Supreme Court, when it has been asked to review the exercise of court-martial jurisdiction over the person, it has done so with a critical eye, keeping in mind the importance of civilian control of the military and the need to restrict the

exercise of court-martial jurisdiction to "the least possible power adequate to the end proposed."<sup>1228</sup>

---

<sup>1228</sup> United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955).

## CHAPTER SEVEN

### JURISDICTION OVER THE OFFENSE

The fourth element of court-martial jurisdiction is jurisdiction over the offense. Like jurisdiction over the person, jurisdiction over the offense has been the subject of much litigation. When the issue is raised, the burden is on the government, as it is with the other elements of jurisdiction,<sup>1229</sup> to prove that the court-martial has jurisdiction to try the offense charged.<sup>1230</sup>

---

<sup>1229</sup> See supra note 494 and accompanying text.

<sup>1230</sup> See MILITARY PRACTICE AND PROCEDURE, supra note 939, at 132, 141-42, 173. "The question of whether the court has subject matter jurisdiction is an interlocutory question to be decided by the military judge; it is not submitted to the fact-finders." Id. at 142. United States v. Rollins, 7 M.J. 125 (C.M.A. 1979)(military judge correctly found that evidence was sufficient to show that offense occurred on a military reservation). See also Cooper, Turning Over a New Alef: A Modest Proposal, THE ARMY LAWYER 8 (Mar. 1982); United States v. Alef, 3 M.J. 414, 416 (C.M.A. 1977)(off-post drug sale by accused held not service connected; government required to show on charge sheet jurisdictional basis for trial of accused and offense); United States v. George, 14 M.J. 990, 992-93 (NMC MR 1982)(alleging drug offense is sufficient to establish jurisdiction over accused and offense); United States v. Trottier, 9 M.J. 337, 350 (C.M.A. 1980)(virtually all drug related offenses held to be service connected); Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 48-52 (1953).

## A. Offenses Triable by Court-Martial

The types of offenses that can be tried by a court-martial are found in the punitive and general articles of the Uniform Code of Military Justice.

### 1. Punitive Articles

The punitive articles of the Code are set forth in Articles 77 to 132 of the Code. These articles deal with general common law crimes, like murder, rape and robbery, and with offenses that are purely military in nature, like absence without leave, missing movement, and disrespect toward a superior commissioned officer.<sup>1231</sup>

### 2. General Articles

The second category of offenses are those found in the two general articles of the Code; Article 133, Conduct Unbecoming an Officer and a Gentleman, and Article 134, the General Article. Article 133 makes any conduct which compromises the character or standards of an officer an offense punishable under the Code,<sup>1232</sup> and

---

<sup>1231</sup> For a brief discussion of the drafting of the punitive articles in 1949, see United States v. Acevedo-Velez, 17 M.J. 1, 6-7 (C.M.A. 1983).

<sup>1232</sup> Art. 133, U.C.M.J., 10 U.S.C. § 933 (1983). MILITARY PRACTICE AND PROCEDURE, supra note 939, at 50-51. See generally para. 59, MCM, 1984, at IV-108 to IV-109; Nelson, Conduct Expected of an Officer and a

Article 134 "makes punishable all of those acts which are not specifically proscribed in the other punitive articles of the U.C.M.J."<sup>1233</sup> The Code thus spells out in detail the types of offenses that can be tried by court-martial. The Manual also provides information on the offenses chargeable under the Code and a detailed discussion of the general articles, Article 133 and Article 134.<sup>1234</sup>

### 3. Concurrent Jurisdiction

While many of the offenses listed in the Code are crimes under federal and state laws, and the law of foreign nations, some are unique to the military. The Manual provides that "[c]ourts-martial have exclusive

---

Gentleman: Ambiguity, 12 A.F. JAG L. REV. 124 (1970); Wiener, Are the General Military Articles Unconstitutionally Vague?, 54 A.B.A.J. 357 (1968); Ackroyd, The General Articles, 133 and 134 of the Uniform Code of Military Justice, 35 ST. JOHN'S L. REV. 264 (1961).

<sup>1233</sup> MILITARY PRACTICE AND PROCEDURE, supra note 939, at 52. See generally para. 60, MCM, 1984, at IV-109 to IV-147. "[T]he language [of Article 134] covers more than seventy rather diverse offenses." Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 HASTINGS L.J. 259 (1971); Peltzer, The Military Crime of Prejudicial Conduct: An Appraisal of United States v. Messenger, 22 GEO. WASH. L. REV. 76 (1953); Everett, Article 134, Uniform Code of Military Justice--A Study in Vagueness, 37 N.C.L. REV. 142 (1959); Nichols, The Devil's Article, 22 MIL. L. REV. 111 (1963); Cutts, Article 134: Vague or Valid?, 15 A.F. JAG L. REV. 129 (1974).

<sup>1234</sup> See generally paras. 59-113, MCM, 1984, at IV-108 to IV-147.

jurisdiction [over] purely military offenses."<sup>1235</sup> Offenses which violate "the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic," or by both.<sup>1236</sup> Where an offense can be tried in a court-martial and in a civilian court (federal, state or foreign), the decision as to which court will prosecute the accused first is a matter to be decided by the jurisdictions involved and is not a matter about which the accused has anything to say.<sup>1237</sup> As a practical matter, the logistics of "who goes first" are resolved through "consultation or prior agreement between appropriate military officials . . . and appropriate

---

<sup>1235</sup> R.C.M. 201(d)(1), MCM, 1984, at 11-8.

<sup>1236</sup> R.C.M. 201(d)(2), MCM, 1984, at 11-8. A further prosecution of a defendant by court-martial after a federal or state conviction for the same offense is subject to the provisions set forth in the Manual and in the regulations of the Secretary concerned. R.C.M. 907(b)(2)(C), for example, provides that an accused may not be tried by court-martial if he has been convicted of the same offense in a federal court. Id. at 11-114. See MILITARY PRACTICE AND PROCEDURE, supra note 939, at 142-43; Duke and Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 VAND. L. REV. 435, 453-55 (1960).

<sup>1237</sup> R.C.M. 201(d)(3), MCM, 1984, at 11-8. See United States v. Mauck, 17 M.J. 1033, 1034-36 (ACMR), pet. for grant of review vacated and denied, 19 M.J. 106 (1984)(accused tried by court-martial and accomplice tried by civilian authorities for offenses committed 15 feet outside the boundary line of Redstone Arsenal).

civilian authorities."<sup>1230</sup> The Manual does provide, however, that "efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the code to the extent possible under applic-

---

<sup>1230</sup> Discussion, R.C.M. 201(d)(3), MCM, 1984, at II-8. See e.g., App. 3, Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes over Which the Two Departments Have Concurrent Jurisdiction (19 July 1955), MCM, 1984, at A3-1 to A3-2.

Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless it expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. See, for example, NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No 2846.

Discussion, R.C.M. 201(d), MCM, 1984, at II-8. See also Army Regulation 27-10, Chap. 7 (Sept. 1984); MILITARY PRACTICE AND PROCEDURE, supra note 939, at 143-45.

Though more than 80 percent of primary jurisdiction is waived back to American military authorities by foreign governments, in 1969 American servicemen were tried for approximately 46,000 offenses in foreign courts; 75 percent of these were traffic cases and slightly more than 100 servicemen were serving sentences in host nation prisons. Army Times, January 20, 1971, at c, col. 1. Foreign courts convict United States servicemen in more than 98 percent of the cases they try, but only 1.3 percent of those convicted are sentenced to jail. Id.

Hunt, Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice, 63 J. CRIM. LAW, CRIMINOLOGY & POL. SCI. 23, 26 n.32 (1972). See ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS, supra note 271, at CXXXVI.

able agreements."<sup>1239</sup> The Analysis to the Manual is even more specific; it notes that Rule 203 of the Manual dealing with jurisdiction over the offense "is intended to provide for the maximum possible court-martial jurisdiction over offenses."<sup>1240</sup>

## B. An Appropriate Standard

### 1. Military Status Standard

Prior to 1969, an individual serving in the armed forces could be charged with committing a military offense anywhere, and so long as the individual had "military status," both at the time of the offense and at the time of trial, the offense could be tried by court-martial.<sup>1241</sup> The rule, according to the Supreme Court of the United States, was that "military 'status' [was] a necessary and sufficient condition for the exercise of

---

<sup>1239</sup> Discussion, R.C.M. 201(d), MCM, 1984, at 11-8. The policy of the Air Force is not to try an accused for an offense for which he has been tried in a State Court. See AIR FORCE MANUAL 111-2, MILITARY JUSTICE GUIDE, para. 2-5 (July 2, 1973). See also United States v. Taylor, 16 M.J. 882, 884 (AFCMR 1983) (Air Force could try an accused by court-martial where the State of Montana agreed to defer prosecution of the accused for one year).

<sup>1240</sup> App. 21, Analysis, R.C.M. 203, MCM, 1984 at A21-10.

<sup>1241</sup> Bishop, Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners, 112 U. PA. L. REV. 317, 329-30 (1964).

court-martial jurisdiction."<sup>1242</sup> This, the Supreme Court observed, is because "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."<sup>1243</sup> What was important, in other words, in exercising court-martial jurisdiction prior to 1969 was whether a person was "regarded as falling within the term 'land and naval Forces.'"<sup>1244</sup> If the person was a member of the armed forces, the military was permitted to deal with the service member as it saw fit and federal and state courts generally did not interfere. "This 'hands off' attitude," Chief Justice Earl Warren noted in 1962, "has strong historical support."<sup>1245</sup> In addition, he stated that:

[T]here is . . . no necessity to [explain the matter completely] since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel.<sup>1246</sup>

---

<sup>1242</sup> O'Callahan v. Parker, 395 U.S. 258, 275 (1969) (Harlan, J. dissenting).

<sup>1243</sup> Kinsella v. ex rel. Singleton, 361 U.S. 234, 243 (1960).

<sup>1244</sup> Id. at 241.

<sup>1245</sup> Warren, The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181, 187 (1962).

<sup>1246</sup> Id. See Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 254 (1863) (Supreme Court of the United States held that it had no power to review directly a petition for certiorari from the accused's conviction by court-martial); Dynes v. Hoover, 61 U.S. (20 How.) 65, 83-84

The reason for allowing the military to try its own personnel for crimes committed off post is a belief that the failure to allow such prosecutions would be detrimental to good order and discipline in the military. At the time of the Revolutionary War, George Washington made a similar observation:

All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.<sup>1247</sup>

The theory supporting the exercise of jurisdiction by the military is that the Government has a legitimate interest "in keeping its own house in order" and in taking care of its own.<sup>1248</sup> It is thought too that if the military has the power to deal with its people, it can "deter[re] members of the armed forces from engaging in criminal misconduct on or off the base, and rehabilitat[e]

---

(1857)(Supreme Court of the United States refused to take action on the accused's conviction by court-martial for desertion).

<sup>1247</sup> 14 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES: 1745-1799 140-41 (Westport, Connecticut: Greenwood Press, Publishers, John C. Fitzpatrick ed., 1970 Reprint).

<sup>1248</sup> O'Callahan v. Parker, 395 U.S. 258, 282 (1969)(Harlan, J. dissenting).

offenders to return them to useful military service."<sup>1249</sup> Also, as a practical matter, a soldier is more useful to the military in the military custody than in civilian custody.<sup>1250</sup> In addition, it is widely believed that civilian courts are not adequately equipped to deal with matters involving military authority or the requirements of military discipline.<sup>1251</sup> Consistent with these views, the military for almost 200 years exercised jurisdiction over those with "military status" who committed offenses in violation of military law.

## 2. Service Connection Standard

Under the "military status" standard, a soldier who committed a serious offense off post could be tried by court-martial for the crime. In 1969, the Supreme Court of the United States decided O'Callahan v. Parker<sup>1252</sup> and did away with the "military status" standard.<sup>1253</sup> Under O'Callahan, a soldier who committed

---

<sup>1249</sup> Id.

<sup>1250</sup> Id.

<sup>1251</sup> Warren, The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181, 187 (1962).

<sup>1252</sup> 395 U.S. 258 (1969).

<sup>1253</sup> See Griswold, Appellate Advocacy, THE ARMY LAWYER 11, 13 (Oct. 1973); Everett, O'Callahan v. Parker -- Milestone or Millstone in Military Justice?, 1969 DUKE L.J. 853; Nelson & Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 MINN. L. REV. 1 (1969); Rice,

a serious offense in a civilian community of the United States or its territories during peacetime, could not be tried by court-martial for the offense, unless the Government could establish that the crime was related to the military in some way. After O'Callahan the "military status" of the accused, thus, was no longer a sufficient basis for the exercise of court-martial jurisdiction over an accused. What replaced it was the "service connection" standard.

In O'Callahan, the accused, a sergeant in the United States Army assigned to Fort Shafter, Hawaii, "was charged [in 1956] with attempted rape, housebreaking, and assault with intent to rape."<sup>1254</sup> The offenses were committed in a penthouse apartment at the Reef Hotel on Waikiki Beach in Honolulu while the accused was on an evening pass. The victim of the offenses was a 14-year-old girl. The accused was tried and convicted of the crimes by a general court-martial and was sentenced to 10 years confinement at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. An Army Board of Review affirmed the conviction<sup>1255</sup> and the Court

---

O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman, 51 MIL. L. REV. 41 (1971).

<sup>1254</sup> O'Callahan v. Parker, 395 U.S. 258, 260 (1969).

<sup>1255</sup> United States v. O'Callahan, CM 393590 (ABR 1956)(unpublished opinion).

of Military Appeals denied his petition for review.<sup>1256</sup>

In 1966, while confined at the United States Penitentiary in Lewisburg, Pennsylvania, the accused petitioned the Federal District Court for the Middle District of Pennsylvania for a Writ of Habeas Corpus contending that the court-martial did not have jurisdiction to try him "for nonmilitary offenses committed off-post while on an evening pass."<sup>1257</sup> The District Court denied the petition<sup>1258</sup> and the Third Circuit Court of Appeals affirmed.<sup>1259</sup>

In 1968, twelve years after his conviction by general court-martial, the accused filed a petition for a writ of certiorari with the Supreme Court of the United States and the Court granted certiorari on the following question:

Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave,

---

<sup>1256</sup> United States v. O'Callahan, 7 USCMA 800, \_\_\_\_\_ CMR \_\_\_\_\_ (1957), pet. coram nobis denied, 16 USCMA 568, 37 CMR 188 (1967).

<sup>1257</sup> 395 U.S. at 261.

<sup>1258</sup> United States ex rel. O'Callahan v. Parker, 256 F. Supp. 679, 682 (M.D. Pa. 1966).

<sup>1259</sup> United States ex rel. O'Callahan v. Parker, 390 F.2d 360, 364 (3rd Cir. 1968).

thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?<sup>1260</sup>

The Supreme Court in a 6 to 3 decision held that the military did not have jurisdiction to try O'Callahan by court-martial because his offenses were not service connected.<sup>1261</sup> In reaching its conclusion, the Court in an opinion written by Justice Douglas,<sup>1262</sup> noted that the victim was a civilian and that the offenses occurred while the accused was off duty and off post. The Court also concluded that the crimes were not related in any way to the military and that they were committed within the territorial limits of the nation in time of peace. For these and other reasons, the Court reversed O'Callahan's court-martial conviction.<sup>1263</sup>

A few years later in Relford v. Commandant,<sup>1264</sup> the Supreme Court of the United States was asked to decide another question concerning the exercise of

---

<sup>1260</sup> O'Callahan v. Parker, 393 U.S. 822 (1968).

<sup>1261</sup> 395 U.S. at 274.

<sup>1262</sup> Chief Justice Warren, and Justices Black, Brennan, Fortas and Marshall joined Justice Douglas's opinion. Justices Harlan, Stewart, and White dissented.

<sup>1263</sup> Id.

<sup>1264</sup> 401 U.S. 355 (1971). See Zillman, Relford v. Commandant, U.S. (24 February 1971): On-Post Offenses and Military Jurisdiction, 52 MIL. L. REV. 169 (1971).

court-martial jurisdiction over the offense. In Relford, the accused had been charged in 1961, with two separate instances of kidnapping and rape--one incident occurring at Fort Dix, New Jersey, and the other at the adjacent McQuire Air Force Base, New Jersey. The accused was tried and convicted by a general court-martial of the offenses and was sentenced to "forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and death."<sup>1265</sup>

An Army Court of Military Review affirmed the accused's conviction,<sup>1266</sup> but reduced the sentence to confinement "at hard labor for 30 years, total forfeitures, and a dishonorable discharge."<sup>1267</sup> The accused appealed to the Court of Military Appeals and his petition for review was denied.<sup>1268</sup>

In 1967, while confined at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, the accused filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas alleging inadequate representation at his court-martial. The District Court denied his petition and the

---

<sup>1265</sup> Id. at 361.

<sup>1266</sup> United States v. Relford, CM 407213 (ABR 1963)(unpublished opinion), pet. denied, 14 USCMA 687, \_\_\_ CMR \_\_\_ (1963).

<sup>1267</sup> 401 U.S. at 361.

<sup>1268</sup> 14 USCMA 678, \_\_\_ CMR \_\_\_ (1963).

Tenth Circuit Court of Appeals affirmed the District Court's decision.<sup>1269</sup>

In his appeal to the Supreme Court of the United States, the accused raised a jurisdictional argument contending in part "that O'Callahan's requirement that the crime be 'service connected' before a court-martial may sit demands that the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action."<sup>1270</sup> The Court, in a unanimous opinion written by Justice Blackmun, rejected the accused's argument and held "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial."<sup>1271</sup>

The significance of the Relford decision is, not so much its holding, but its identification of factors to be considered in deciding when an offense is service connected. The factors, drawn from the O'Callahan opinion, are listed as follows:

---

<sup>1269</sup> Relford v. Commandant, 409 F.2d 824, 825 (10th Cir. 1969), aff'd, 401 U.S. 355 (1971).

<sup>1270</sup> 401 U.S. at 363.

<sup>1271</sup> Id. at 369.

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied area of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. And the offense's being among those traditionally prosecuted in civilian courts.<sup>1272</sup>

In addition to these factors, the Court noted some other considerations that were important to review in deciding

---

<sup>1272</sup> Id. at 365.

questions of service connection. These include:

[T]he responsibility of a commander to maintain discipline within the command; the 'distinct possibility' that civilian courts would have less than complete interest, concern, and capacity for all cases that vindicate the military's disciplinary authority within its own community; and that court-martial jurisdiction is not restricted to purely military offenses.<sup>1273</sup>

These factors are important because they provide a framework for deciding when offenses are service connected. The "test," the Manual warns, "is not simply a numerical tally of the presence or absence of these or other factors,"<sup>1274</sup> but a balancing test. The balancing test referred to in the Manual is the one Justice Powell described in Schlesinger v. Councilman.<sup>1275</sup> In Councilman, Justice Powell stated that the decision of whether an offense is service connected ultimately--

turns in major part on gauging the impact of [the] offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest

---

<sup>1273</sup> MILITARY PRACTICE AND PROCEDURE, supra note 939, at 135. See Relford v. Commandant, 401 U.S. 355, 367-69 (1971). See also Discussion (c), R.C.M. 203, MCM, 1984, at II-14.

<sup>1274</sup> Discussion (c)(1), R.C.M. 203, MCM, 1984, at II-14.

<sup>1275</sup> 420 U.S. 738, 760 (1975).

can be vindicated adequately in civilian courts.<sup>1276</sup>

The Court in Councilman, however, did not reach the issue of service connection because the case involved the issuance of a preliminary injunction and the Court held that the accused had to exhaust his military remedies before the federal courts could review the claim that his drug offenses were not service connected.<sup>1277</sup>

C. Development of the Service Connection Standard

Since announcement of the Court's decisions in O'Callahan and Relford,<sup>1278</sup> numerous cases have been decided by the Court of Military Appeals and the Military Courts of Review on the issue of jurisdiction over the offense and on the application of the "service connection" standard. After the Relford decision, the Court of Military Appeals and the Courts of Military Review began to pay more attention to the facts in cases in which issues of jurisdiction over the offense were raised.

---

<sup>1276</sup> Id.

<sup>1277</sup> Id. at 761. See Bartley, Military Law in the 1970's: The Effects of Schlesinger v. Councilman, 17 A.F.L. REV. 65, 66 (Winter 1975).

<sup>1278</sup> In 1973, the Supreme Court of the United States ruled in Gosa v. Mayden, 413 U.S. 665, 685 (1973), that O'Callahan would not be given retroactive effect, and that therefore, court-martial convictions for nonservice committed offenses committed before O'Callahan would continue to be valid.

Instead of simply applying general rules to resolve the jurisdictional issues presented, the courts started to examine the facts in each case in light of the factors identified in Relford.

The change in the Court of Military Appeals' approach to dealing with cases raising service connection issues was noted in United States v. Moore.<sup>1279</sup>

What Relford makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.<sup>1280</sup>

As a result, trial judges and appellate judges now must apply a "case-by-case" and "offense-by-offense" approach to deciding issues of service connection.<sup>1281</sup>

---

<sup>1279</sup> 1 M.J. 448, 450 (C.M.A. 1976)(larceny and conspiracy to collect life insurance proceeds held service connected and triable by court-martial).

<sup>1280</sup> Id.

<sup>1281</sup> See e.g., United States v. Hedlund, 2 M.J. 11, 13-15 (C.M.A. 1976)(no court-martial jurisdiction over robbery and kidnapping offenses, but the court-martial did have jurisdiction to try the accused for conspiracy); United States v. Sims, 2 M.J. 109, 111-12 (C.M.A. 1977) (off post forgery of a money order held not service connected). See also United States v. Lockwood, 15 M.J. 1, 3-6 (C.M.A. 1983)(larceny of fellow serviceman's wallet and use of identification in it to obtain a loan from an off post business establishment held service connected); United States v. Kyles, 20 M.J. 571, 573-74 (NMCMR 1985)(offense of bigamy held service connected).

Because so many cases have been decided since the standard of service connection was announced in O'Callahan, definite patterns in the decision of cases are evident. Over time, in other words, the courts have decided like cases similarly. Thus, even though the courts are applying a "case-by-case" approach in this area, certain types of offenses are always being held to be service connected and others are not. For purposes of discussion, the offenses raising the service connection issue can be divided into twelve categories: military crimes; crimes against military personnel; crimes against military property; crimes committed on post; crimes committed off post; crimes committed at or near post; crimes committed off post and on post; crimes involving the misuse of military status; crimes committed in uniform; crimes involving drug offenses; petty offenses; and offenses committed overseas.

#### 1. Military Crimes

In some cases, the evidence of service connection is very clear and this is particularly so with regard to military crimes. "Military offenses, such as unauthorized absence, disrespect offenses, and disobedience of superiors," the Manual concludes, "are always service-

connected."<sup>1282</sup> Indeed, the Analysis to the Manual states that "[i]t has never been seriously contended that purely military offenses are not service-connected per se."<sup>1283</sup> One of the 12 factors identified in Relford, to be considered in deciding if an offense is service connected is whether the offense is "among those traditionally prosecuted in civilian courts."<sup>1284</sup> Since purely military offenses never are prosecuted in the civilian courts, but traditionally are prosecuted in military courts, the existence of service connection with regard to military offenses never really presented a question.

## 2. Crimes Against Military Personnel

After O'Callahan, the general rule was that crimes committed against other service members were service connected and subject to court-martial jurisdiction.<sup>1285</sup> This was so whether the offense was committed on post or off post, and whether the accused knew that

---

<sup>1282</sup> Discussion (c)(2), R.C.M. 203, MCM, 1984, at II-14.

<sup>1283</sup> App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-10.

<sup>1284</sup> 420 U.S. at 365.

<sup>1285</sup> See O'Callahan v. Parker, 395 U.S. 258, 270 n.14 (1969), where Justice Douglas notes that "assaults on and thefts from other soldiers" are "peculiarly military crimes." Id.

his victim was a service member or not.

In United States v. Rego,<sup>1286</sup> the Court of Military Appeals upheld the conviction of the accused for larceny and housebreaking off post where the house broken into and the items stolen belonged to an airman who was an acquaintance of the accused.<sup>1287</sup> Similarly in United States v. Camacho,<sup>1288</sup> the Court of Military Appeals held that a break-in of a house in the civilian community was service connected where the owner of the house was a Marine officer, but the accused did not know the officer or know that the house belonged to the officer.<sup>1289</sup> However, the other three break-ins of homes owned by civilians off-post were held not to be service connected.<sup>1290</sup>

The Court of Military Appeals also ruled that service connection does not extend to offenses where the victim is a retired military officer employed on

---

<sup>1286</sup> 19 USCMA 9, 41 CMR 9 (1969).

<sup>1287</sup> Id.

<sup>1288</sup> 19 USCMA 11, 41 CMR 11 (1969). See United States v. Cook, 19 USCMA 13, 14, 41 CMR 13, 14 (1969) (car stolen from another serviceman in the civilian community held service connected); Silvero v. Chief of Naval Air Basic Training, 428 F.2d 1009, 1013 (5th Cir. 1970) (sodomy committed by Navy Lieutenant on Navy enlisted personnel off post held service connected).

<sup>1289</sup> 19 USCMA at 12, 41 CMR at 12.

<sup>1290</sup> Id.

base,<sup>1291</sup> the dependent child of a service member,<sup>1292</sup> or a civilian.<sup>1293</sup> In short, crimes committed off post against other service members were service connected, but offenses against retired military officers, dependents of military service personnel, and civilians were not service connected.

After the Supreme Court's decision in Relford, however, the Court of Military Appeals began to retreat somewhat, and, in at least four cases held, after reviewing the Relford factors, that the mere status of the victim itself was not sufficient to establish a service connection.<sup>1294</sup> More recently the Court of

---

<sup>1291</sup> United States v. Armes, 19 USCMA 15, 16, 41 CMR 15, 16 (1969)(larceny of automobile off post belonging to a retired Army officer held not service connected).

<sup>1292</sup> United States v. McGonigal, 19 USCMA 94, 95, 41 CMR 94, 95 (1969)(sodomy and indecent liberties taken with dependent daughter of a service member off post held not service connected); United States v. Shockley, 18 USCMA 610, 611, 40 CMR 322, 323 (1969)(sodomy with stepdaughter committed on post held service connected, but sodomy offense committed off post with stepdaughter held not service connected). But see United States v. Solorio, 21 M.J. 512, 522 (CGCMR 1985), aff'd, 21 M.J. 251, 254-55 (C.M.A. 1986)(off post offenses committed against dependents of active duty Coast Guard personnel living off post held service connected).

<sup>1293</sup> United States v. Armstrong, 19 USCMA 5, 6, 41 CMR 5, 6 (1969)(unpremeditated murder and felony murder of civilian gas station manager off post held not service connected).

<sup>1294</sup> See United States v. Conn, 6 M.J. 351, 353 (C.M.A. 1979)(off post use of marihuana by officer with enlisted personnel in New York City held not service connected); United States v. Wilson, 2 M.J. 24, 25 (C.M.A. 1976)(off post robbery of fellow serviceman

Military Appeals has turned back to its earlier decisions and has stated that "the conduct of servicemembers which takes place outside a military enclave is service connected and subject to trial by court-martial if it has a significant effect within that enclave."<sup>1295</sup> Arguably, any offense committed against another service member off post could have a significant effect "on the morale, reputation and integrity of the installation,"<sup>1296</sup> and

---

dressed in civilian clothes and not known to accused held not service connected); United States v. Hedlund, 2 M.J. 11, 15 (C.M.A. 1976)(off post robbery and kidnapping of AWOL Marine dressed in civilian clothes held not service connected, but conspiracy formulated on post to commit robbery held service connected); United States v. Tucker, 1 M.J. 463, 465 (C.M.A. 1976)(unlawful concealment of stolen property off post held not service connected). See also United States v. Scott, 15 M.J. 589, 590 (ACMR 1983)(while the military status of the accused and the military status of the victim is not enough in itself to establish service connection, the military status of both plus the fact that the charged offenses arose out of activities which occurred on post is sufficient to show service connection).

<sup>1295</sup> United States v. Lockwood, 15 M.J. 1, 6 (C.M.A. 1983)(emphasis added)(larceny of fellow serviceman's wallet and use of identification cards in it to obtain loan from an off post business establishment held service connected); United States v. Shorte, 18 M.J. 518, 520 (AFCMR 1984), summarily aff'd, 20 M.J. 414 (C.M.A. 1985) (felonious assault committed four and one half miles off post by one service member against another service member held service connected). See United States v. Trottier, 9 M.J. 337, 350 (C.M.A. 1980)(almost every drug offense will be held to be service connected because of the impact on military society).

<sup>1296</sup> United States v. Shorte, 18 M.J. 518, 520 (AFCMR 1984), summarily aff'd, 20 M.J. 414 (C.M.A. 1985) (felonious assault committed by one serviceman against another serviceman off post held service connected). But see United States v. Rappaport, 19 M.J. 708, 711-12 (AFCMR 1984)(sodimical relationship between accused and

thus would be service connected.

In a sense, much of the Court's analysis in this area may be unnecessary. In O'Callahan, Justice Douglas cited Winthrop's observation that:

[Crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person[.] inasmuch as they directly affect military relations and prejudice military discipline, may properly be--as they frequently have been--the subject of charges under [Article 134 of the Code].<sup>1297</sup>

In this regard, Winthrop also observed that "where such crimes are committed upon or against civilians, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are in general to be . . . treated as civil rather than military offenses."<sup>1298</sup> In discounting the cases listed by the Government in its brief as examples of the exercise of court-martial jurisdiction over civilians, Justice Douglas noted that "[i]n almost every case summarized, it

---

woman Air Force officer who was not his wife, which occurred off post and which had no connection with the accused's military status, held not service connected).

<sup>1297</sup> O'Callahan v. Parker, 395 U.S. 258, 274 n.19 (1969)(emphasis added) citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 724 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 reprint).

<sup>1298</sup> Id.

appears that some special military interest existed."<sup>1299</sup> "Many," he notes, "are peculiarly military crimes--desertions, assaults on and thefts from other soldiers, and stealing government property."<sup>1300</sup>

Obviously, Justice Douglas agreed with Winthrop's conclusions. For the courts, in light of this history, to engage in a careful weighing of Relford factors where a service member is the victim of an offense committed by another service member on post or off post is not necessary and may be an example of the Court's engaging in overanalysis. If Justice Douglas, an exserviceman and certainly no fan of the military justice system in 1969, thought crimes involving other service members were service connected, that should be enough for a finding of service connection in this area.

### 3. Crimes Against Military Property

The general rule is that offenses committed against military property, like crimes committed against military victims, are service connected. In O'Callahan, Justice Douglas stated in a footnote that "stealing government property" is a "peculiarly military crim[e]"

---

<sup>1299</sup> O'Callahan v. Parker, 395 U.S. 258, 270 n.14 (1969).

<sup>1300</sup> Id.

because of the "special military interest" involved.<sup>1301</sup>

In United States v. Regan,<sup>1302</sup> a Navy Court of Military Review held that the accused's possession "in his off-base apartment [of] two (2) pieces of C-4 high explosive, two (2) nonelectric blasting caps and one (1) black fuse cord, property of the United States Government"<sup>1303</sup> was a service connected offense in violation of the Code. In emphasizing the military's special interest in the wrongful possession of these items the Court noted:

The C-4 high explosives, blasting caps and black fuse cord are properties within the military's distinctive province of weaponry, in which military interests are virtually exclusive of those of the civilian community. A Government pen, typewriter, wrench may be put to legitimate or illegitimate uses by anyone at any place. No common legitimate use exists, however, for C-4 high explosives outside a military area.<sup>1304</sup>

For this reason, the Court affirmed the accused's conviction of the wrongful possession of Government property in violation of a lawful general regulation and affirmed his sentence as approved by the convening

---

<sup>1301</sup> Id. at 270 n.14.

<sup>1302</sup> 7 M.J. 600 (NCMR 1979).

<sup>1303</sup> Id. at 601.

<sup>1304</sup> Id. at 602.

authority.<sup>1305</sup>

One judge dissented, however, concluding after an examination of the offense that in light of the Relford factors, "there has been an abject failure on the part of the Government to establish service connection or subject matter jurisdiction in this case."<sup>1306</sup>

An offense involving military property belonging to the United States is the sort of crime that one might logically think would be service connected. At least common sense would lead one to think so, but a careful application of the Relford factors to the offense of wrongful possession of "high explosives" kept in one's off post living quarters caused at least one judge on the Navy Court of Military Review to conclude that the wrongful possession of such Government property was not a service connected offense.

#### 4. Crimes Committed On Post

The Court of Military Appeals in United States v. Lockwood,<sup>1307</sup> states that "[o]ffenses committed on post have an especially obvious adverse effect on military personnel and operations; and usually the occurrence of a crime on post suffices to establish

---

<sup>1305</sup> Id.

<sup>1306</sup> Id. at 604 (Root, J. dissenting).

<sup>1307</sup> 15 M.J. 1 (C.M.A. 1983).

service connection."<sup>1308</sup> The Discussion to Rule 203 of the Manual states the principle more strongly. It notes that "[v]irtually all offenses which occur on a military base, post, or other installation are service connected" and that likewise all "offenses aboard a military vessel or aircraft are service-connected."<sup>1309</sup> The Analysis similarly states that "[d]ecisions uniformly have held that offenses committed on a military installation are service connected."<sup>1310</sup>

At least four Relford factors support the decision that offenses committed on post are service connected.<sup>1311</sup> Relford indicates that an offense may not be service connected if it is committed (1) "away from the base"; (2) "at a place not under military control"; (3) there is no "threat to a military post"; and (4) there is no "violation of military property."<sup>1312</sup> Obviously, an offense committed on post is committed at a place under military control, and is both a threat to a military post and a violation of military property.

---

<sup>1308</sup> Id. at 5.

<sup>1309</sup> Discussion (c)(3), R.C.M. 203, MCM, 1984, at 11-14. See United States v. Rogers, 7 M.J. 274, 276 (C.M.A. 1979)(rape which occurred on the Fort Lewis reservation held service connected).

<sup>1310</sup> App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-10.

<sup>1311</sup> See Relford factors 2, 3, 10 and 11. Id.

<sup>1312</sup> 401 U.S. at 365.

Conversely, an offense that is committed away from the post at a place not under military control and that is neither a treat to a military installation nor a violation of military property, is not service connected and cannot be tried by court-martial.<sup>1313</sup>

In United States v. Garries,<sup>1314</sup> the accused, an Airman First Class assigned to the United States Air Force Academy, was convicted by general court-martial of the premeditated murder of his wife. The case was referred to trial as a capital case by the convening authority, but the accused was sentenced to life imprisonment. On appeal to the Air Force Court of Military Review, the accused contended that the court-martial lacked jurisdiction over the offense because it had not been shown that the victim had been killed at the Air Force Academy.

The Air Force Court of Military Review noted that the military judge ruled that the offense was committed on post and was service connected. The Court of Military

---

<sup>1313</sup> Compare United States v. Henderson, 18 USCMA 601, 602, 40 CMR 313, 314 (1969) (carnel knowledge with a 16-year-old girl off post held not service connected) with United States v. Smith, 18 USCMA 609, 610, 40 CMR 321, 322 (1969) (carnel knowledge with a 16-year-old girl on post held service connected). See United States v. Crapo, 18 USCMA 594, 595-96, 40 CMR 306, 307-08 (1969) (off post attempted robbery held not service connected, but a second robbery commenced on post and accomplished off post held service connected).

<sup>1314</sup> 19 M.J. 845 (AFCMR 1985).

Review also found that the military judge's "findings [were] more than supported by the evidence of record."<sup>1315</sup> In addition, the Court ruled that the military judge specifically had instructed the court members "that one of the elements they had to find beyond a reasonable doubt was that the victim was killed at the Air Force Academy."<sup>1316</sup> From the record, it was clear that the court members found that the victim was killed on the grounds of the Air Force Academy. For these reasons, the Court of Military Review ruled that the accused's offense was service connected and properly tried by court-martial.

In short, cases committed on post generally are held to be service connected. On the other hand, offenses committed off post generally are not held to be service connected unless it can be shown that the offense has an effect on the morale and integrity and reputation of a military installation and those serving there.

##### 5. Crimes Committed Off Post

In United States v. Rappaport,<sup>1317</sup> the Air Force Court of Military Review held that an offense committed off post was not service connected and was not subject to

---

<sup>1315</sup> Id. at 851.

<sup>1316</sup> Id.

<sup>1317</sup> 19 M.J. 708 (AFCMR 1984).

court-martial jurisdiction. In Rappaport, an Air Force Major was charged with numerous offenses, one of which involved committing sodomy off post with a female Air Force officer who was not his wife. Since the "acts occurred off base and [since] the relationship was private, consensual, and had no connection with the accused's duties,"<sup>1318</sup> the Court held that the "offense was not service-connected and [that] the court-martial therefore lacked jurisdiction to try it."<sup>1319</sup>

In United States v. Williamson,<sup>1320</sup> however, an Army Court of Military Review held that a sexual offense involving a young girl committed off post was service connected and subject to trial by court-martial. In Williamson, the accused, a Captain, was charged with "conduct unbecoming an officer in violation of Article 133, . . . and committing lewd and lascivious acts upon a female under the age of sixteen in violation of Article 134."<sup>1321</sup> He was tried and convicted by general court-martial and "sentenced to dismissal from the service, confinement at hard labor for thirty months, and forfeiture of \$1000.00 pay per month for thirty months."<sup>1322</sup>

---

<sup>1318</sup> Id. at 711.

<sup>1319</sup> Id. at 711-12.

<sup>1320</sup> 19 M.J. 617 (ACMR 1984).

<sup>1321</sup> Id. at 618.

<sup>1322</sup> Id.

The indecent acts, with which the accused was charged, involved a 12-year-old baby sitter who was the daughter of a noncommissioned officer who worked for the accused. At the accused's trial, the victim of the offenses testified that the acts took place "on three occasions at the [accused's] residence located in Manhattan, Kansas, about seven miles from Fort Riley."<sup>1323</sup> The victim's father also testified that "on three occasions the [accused] transported [the victim] from her home on Fort Riley to [the accused's] home off post."<sup>1324</sup>

At his trial the accused argued, that the offenses charged occurred off post and were not subject to court-martial jurisdiction. The trial judge ruled that the offenses were service connected and the Army Court of Military Review agreed, finding that there was sufficient evidence "to establish that the offenses were service-connected"<sup>1325</sup> under the standard set forth in United States v. Lockwood.<sup>1326</sup> In short, the Court found

---

<sup>1323</sup> Id.

<sup>1324</sup> Id.

<sup>1325</sup> Id. at 618.

<sup>1326</sup> 15 M.J. 1 (C.M.A. 1983). See United States v. Solorio, 21 M.J. 512, 522 (CGCMR 1985), aff'd, 21 M.J. 251, 254-56 (C.M.A. 1986)(accused's off post offenses committed against the young daughters of Coast Guard personnel who lived off post held service connected).

that the offenses with which the accused was charged had an adverse effect on the morale, integrity and reputation of the post.

In Williamson, the accused's offenses were held to be service connected, but in Rappaport, the accused's offenses were held not to be service connected. The difference in the results in the two cases is attributable to the nature of the offenses committed. What is critical in determining whether an off post offense is service connected, is what, if any, impact the offense may have on the "integrity, morale and reputation" of the military installation. A single incident of off post sodomy with an officer of the opposite sex was found not to have much impact on the installation, whereas the indecent acts with the daughter of a member of the accused's unit was deemed to have a significant impact.

#### 6. Crimes Committed At or Near Post

Offenses committed "at or near" or just outside the geographical boundaries of a military installation also are generally held to be service connected and triable by court-martial. The Supreme Court of the United States in Relford stated that "when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or property there, that offense

may be tried by a court-martial."<sup>1327</sup> The Court also cited with approval Winthrop's observation that crimes committed against officers, soldiers, and camp followers should be tried by court-martial, but that other types of offenses--those, for example, "committed upon or against civilians . . . not at or near a military camp or post . . . [--should be] treated as civil rather than military offenses" and that such offenses should be tried in civilian courts.<sup>1328</sup>

The Discussion to the Manual similarly suggests that "an offense . . . committed near a military installation . . . may support a finding of service-connection . . . when it injures relationships between the military and civilian communities and makes it more difficult for servicemembers to receive local support."<sup>1329</sup>

In United States v. Mauck,<sup>1330</sup> an offense committed approximately 15 feet outside the geographical boundary of Redstone Arsenal, Alabama, was held to be service connected and subject to court-martial jurisdic-

---

<sup>1327</sup> Relford v. Commandant, 401 U.S. 355, 369 (1969) (emphasis added).

<sup>1328</sup> Id. at 368 citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 725 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 Reprint)(emphasis added).

<sup>1329</sup> Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14.

<sup>1330</sup> 17 M.J. 1033 (ACMR), pet. for grant of review vacated and denied, 19 M.J. 106 (C.M.A. 1984).

tion. In Mauck, the accused was tried and convicted by a general court-martial of "larceny, maiming, forcible sodomy and attempted murder [in violation] of Articles 121, 124, 125, and 80" of the Code, and he was sentenced to "a dishonorable discharge, confinement at hard labor for fifteen years, and total forfeitures."<sup>1331</sup>

On appeal, the accused argued that "the court-martial lacked jurisdiction over the subject matter of the charged offenses since they occurred off-post."<sup>1332</sup> The evidence at trial showed that the victim of the offense was a young woman who was the daughter of a retired military man and who lived with her parents just outside the boundary of Redstone Arsenal. On the evening of January 22, 1982, she met two soldiers--the accused and a friend of the accused's. The three of them spent the evening at the enlisted man's club on post, and then they went to a bar off post in Huntsville, Alabama.

After midnight, the accused got into an argument with the victim. The accused was upset that a friend of the victim's, his blind date, had not shown up as expected during the evening. On taking the victim home, the accused and the other soldier stopped the car on an abandoned road just outside Redstone Arsenal and there "sodomized and brutally and violently" beat the vic-

---

<sup>1331</sup> Id. at 1034.

<sup>1332</sup> Id.

tim.<sup>1333</sup>

Though they left the victim in the freezing rain "naked, beaten, maimed, and bloody," she survived.<sup>1334</sup> Eleven days later, the accused and his accomplice were arrested by the Huntsville Police. The two soldiers were indicted by a Madison County grand jury on charges of assault and sodomy. The accomplice was tried first "in the circuit court of Madison County and found guilty of assault in the second degree and sexual abuse in the second degree" and "was sentenced to serve fifteen years at hard labor in the Alabama penitentiary."<sup>1335</sup>

The case against the accused was not crossed by the civilian authorities and the accused later was charged by military authorities with various offenses under the Uniform Code of Military Justice. After reviewing the facts in the case and considering the issue of jurisdiction raised by the accused, the Army Court of Military Review held that the offenses with which the accused was charged "were committed 'at the geographical boundary' of a military post and were violative of the security of persons therein, and that the . . . conduct [of the accused] had a significant effect upon that

---

<sup>1333</sup> Id.

<sup>1334</sup> Id.

<sup>1335</sup> Id. at 1034-35.

enclave."<sup>1336</sup> In addition, the Court noted that the victim was treated at the Redstone Arsenal medical facility and that dependents of retired military personnel are authorized to receive "medical care at military treatment facilities."<sup>1337</sup> With respect to the fact, that the civilian authorities prosecuted the accused's accomplice and not the accused, the Court stated that "[w]e presume [the State of Alabama] had good and sufficient reason to prosecute [the accomplice] but not the [accused], just as we presume the convening authority in this case had good and sufficient reason to prosecute [the accused] but not [the accomplice]."<sup>1338</sup> For these reasons, the accused's conviction by court-martial was upheld.

The conclusion that offenses committed at or near the boundaries of a military installation are service connected is based on a statement in Relford

---

<sup>1336</sup> Id. at 1036.

<sup>1337</sup> Id.

<sup>1338</sup> Id. See also United States v. Daye, 17 M.J. 555, 556-57 (ACMR 1983)(attempted larceny which was planned and began on post, and which was committed off post within three-tenths of a mile of the boundary of Fort Carson, Colorado, held service connected); United States v. Williams, 17 M.J. 207, 216 (C.M.A. 1984)(kidnapping of a soldier at or near the geographical boundary of Fort Hood, Texas, held service connected); United States v. Brauchler, 15 M.J. 755, 757 (AFCMR 1983)(offense of indecent contact which took place 5 feet outside the boundary of Castle Air Force Base, California, held service connected).

which stressed--

[t]he impact and adverse effect that a crime committed . . . [may have (1)] upon morale, discipline, reputation and integrity of the base itself, [(2)] upon its personnel and [(3)] upon the military operation and the military mission.<sup>1339</sup>

The result is that the great majority of offenses committed on post, or "at or near" post, are held to be service connected.

#### 7. Crimes Committed On Post and Off Post

Preparation on post to commit an offense off post, however, may not be enough to show service connection.<sup>1340</sup> Nor is the "introduction onto a military installation of the fruits or instruments of a crime completed off base . . . necessarily . . . sufficient to

---

<sup>1339</sup> 401 U.S. at 367.

<sup>1340</sup> See United States v. McCollum, 6 M.J. 224, 225 (C.M.A. 1979)(off post drug sale planned on post not service connected, where the accused was charged with wrongful possession of marihuana and was not charged with conspiracy to possess and sell marihuana); United States v. Williams, 4 M.J. 336, 337 (C.M.A. 1978)(off post sale of fake drugs planned on post held not service connected). But see United States v. Hardin, 7 M.J. 399, 400 (C.M.A. 1979)(off post sale and exchange of drugs held to be service connected); United States v. Carpo, 18 USCMA 594, 595, 40 CMR 306, 308 (1969)(robbery begun on military installation and ended in the civilian community held service connected); United States v. Daye, 17 M.J. 555, 556-57 (ACMR 1983)(attempted larceny which was planned and began on post, and which occurred within three-tenths of a mile off the post, held service connected).

prove service-connection over an off-base offense."<sup>1341</sup> Where, however, an offense occurs as a result of activities on post and is completed off post, the offense is service connected and triable by court-martial.

In United States v. Scott,<sup>1342</sup> for example, an off post murder committed by the accused was held to be service connected because it had "its basis in the on-post conduct of the participants."<sup>1343</sup> In Scott, the accused was charged with killing a First Sergeant and was tried by a general court-martial consisting of officers and enlisted personnel. The accused was convicted of premeditated murder and was sentenced "to a dishonorable discharge, confinement at hard labor for life, total forfeitures, and reduction to the grade of Private E-1."<sup>1344</sup>

On appeal to the Army Court of Military Review, the accused argued that the military did not have

---

<sup>1341</sup> Discussion (c)(3), R.C.M. 203, MCM, 1984, at 11-14. See United States v. Snyder, 20 USCMA 102, 103, 42 CMR 294, 295 (1970)(evidence discovered on post not sufficient to establish service connection over off post manslaughter); United States v. Riehle, 18 USCMA 603, 604, 40 CMR 315, 316 (1969)(car stolen from civilian used car lot found on post not sufficient to establish service connection). But see United States v. Esobar, 7 M.J. 197, 199 (C.M.A. 1979)(off post larceny of a jacket belonging to another service member held service connected where the jacket later was brought on post).

<sup>1342</sup> 15 M.J. 589, 591 (ACMR 1983).

<sup>1343</sup> Id. at 591.

<sup>1344</sup> Id. at 590.

jurisdiction to try him because the murder was committed off post.<sup>1345</sup> The Court of Military Review held, however, that even though "the offense was consummated off-post," it still was service connected because it arose out of the association between the accused and the victim that had a basis on post. The Court noted that the accused's "avowed purpose for the slaying was to retaliate against the [First Sergeant] for his part in counseling a female acquaintance of the [accused] for her excessive indebtedness and lateness and ordering her to move back into the barracks."<sup>1346</sup> The Court noted that the accused's intent was "to frustrate the legitimate exercise of [the First Sergeant's] authority" and that this motivation "provided an adequate basis for the exercise of court-martial jurisdiction" over the accused.<sup>1347</sup>

In addition, the Court observed that both the accused and the victim were service members and that traditionally, "a crime of violence committed by a member of the military upon a military person" is triable by court-martial whether the crime is committed off post or on post.<sup>1348</sup> Such offenses are held to be subject to

---

<sup>1345</sup> Id.

<sup>1346</sup> Id. at 590.

<sup>1347</sup> Id.

<sup>1348</sup> Id. at 590-91.

court-martial jurisdiction because the "offense 'directly affect[s] military relations and prejudices military discipline.'" <sup>1349</sup>

In Scott it was the combination of the status of the accused and the victim, and the fact that the offense had "its basis in the on-post conduct of the participants" <sup>1350</sup> which established the service connection and enabled the military to exercise court-martial jurisdiction over the offense.

The factor in Relford that is relevant to Scott and to cases like it, is the factor that states that an offense may not be service connected if there is an "absence of any threat to a military post." <sup>1351</sup> In Scott, the accused's attack on the First Sergeant was considered to be a threat to the command structure and military discipline. In at least one other case, the Court of Military Appeals held that the "threat posed to military personnel, and hence the military community itself, by the transfer of a substantial quantity of marihuana to a fellow soldier who was a known drug dealer" was a factor weighing heavily in favor of exercising court-martial jurisdiction over the ac-

---

<sup>1349</sup> Id. at 591 quoting O'Callahan v. Parker, 395 U.S. 258, 274 n.19 (1969).

<sup>1350</sup> Id. at 591.

<sup>1351</sup> Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14, citing Relford factor 10.

cused.<sup>1352</sup>

In United States v. Lockwood,<sup>1353</sup> the Court of Military Appeals also noted that "an act or omission that occurs outside the boundaries of a military enclave often may have significant impact on the security and combat readiness of those within."<sup>1354</sup> As an example, the Court noted that the "use of drugs off-post may lessen a servicemember's ability to handle complicated military equipment or perform important military duties on post."<sup>1355</sup>

In light of Lockwood, many offenses which are not committed on post will be found to be service connected if some impact on the military can be found. In short, the on post or off post distinction is no longer as helpful in resolving questions of service connection where an offense involves only conduct committed off post.

---

<sup>1352</sup> United States v. McCarthy, 2 M.J. 26, 29 (C.M.A.1976)(wrongful transfer of 3 pounds of marihuana just outside the gate of a military installation held service connected). See also United States v. Safford, 19 USCMA 33, 34, 41 CMR 33, 34 (1969)(conspiracy to commit espionage held service connected); United States v. Harris, 18 USCMA 596, 597, 40 CMR 308, 309 (1969) (espionage and conspiracy involving military documents held service connected).

<sup>1353</sup> 15 M.J. 1 (C.M.A. 1983).

<sup>1354</sup> Id. at 5.

<sup>1355</sup> Id.

8. Crimes Involving the Use of Military Status

As a general rule, the use of one's military status to aid in the commission of an off post offense is an important factor in determining whether the offense is service connected and triable by court-martial. The Manual states that this is because of:

[t]he impact and adverse effect that a crime committed . . . [can have] upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.<sup>1356</sup>

In addition, the Discussion to R.C.M. 203 of the Manual notes that "[i]f the accused's status, either as a servicemember generally, or as the occupant of a specific position, is of central importance to the criminal activity, as where it is crucial in enabling the accused to commit the crime, service connection will normally exist."<sup>1357</sup> What is critical, in deciding whether service connection exists in a particular instance, is the extent to which the accused's military status played a role in the commission of the offense.

---

<sup>1356</sup> Relford v. Commandant, 401 U.S. 355, 367 (1971).

<sup>1357</sup> Discussion (c)(5), R.C.M. 203, MCM, 1984, at II-14.

In United States v. Moore,<sup>1358</sup> the Court of Military Appeals found that the accused's off post offenses were service connected because "the accused's status, and [his] status alone, enabled [him] to devise and implement his criminal scheme."<sup>1359</sup> In Moore, the accused was found guilty of "attempted larceny and conspiracy to steal \$20,000, larceny of the death gratuity in the amount of \$2,266.20, as well as breach of restraint and desertion."<sup>1360</sup> He was tried and convicted by military judge alone in a general court-martial and was sentenced "to a dishonorable discharge, confinement at hard labor for three years, total forfeitures, and reduction to airman basic."<sup>1361</sup>

The accused in Moore, conspired with his wife and a fellow airman "to collect \$20,000 under the accidental death provisions of the Serviceman's Group Life Insurance program by falsely reporting the drowning" of the accused.<sup>1362</sup> After the fictitious drowning was reported to military authorities, the accused's wife received a death gratuity check for \$2,266.20 and later

---

<sup>1358</sup> 1 M.J. 448 (C.M.A. 1976).

<sup>1359</sup> Id. at 451.

<sup>1360</sup> Id. at 449.

<sup>1361</sup> United States v. Moore, 50 CMR 432-33 (AFCMR 1975), aff'd, 1 M.J. 448 (C.M.A. 1976).

<sup>1362</sup> 1 M.J. at 449.

she filled out the necessary forms to receive Serviceman's Group Life Insurance benefits.

On appeal to the United States Court of Military Appeals, the accused argued that the court-martial lacked jurisdiction to try him because the conspiracy was conceived and put into effect off post and was not service connected.<sup>1363</sup> The Court found that the accused's military status was what enabled him "to devise and implement his criminal scheme."<sup>1364</sup> In addition, the Court found that the purpose of his plan was not only to avoid military service, but also to collect benefits "available only to deceased servicemen."<sup>1365</sup> For these and other reasons, the Court concluded "that the military society's interests far outweighed those of the civilian community . . . and [that] the offenses were triable by court-martial."<sup>1366</sup>

---

<sup>1363</sup> Id.

<sup>1364</sup> Id. at 451.

<sup>1365</sup> Id.

<sup>1366</sup> Id. See United States v. Peak, 19 USCMA 19, 20-21, 41 CMR 19, 20-21 (1969)(wrongful appropriation of an automobile from a used car lot held service connected because the accused used his military status to take the car for a test drive); United States v. Morisseau, 19 USCMA 17, 18, 41 CMR 17, 18 (1969)(accused's conviction for check forgery upheld where he represented that he was a serviceman going on leave and in the rush to go forgot his military identification). But see United States v. Williams, 18 USCMA 605, 606, 40 CMR 317, 318 (1969)(bad checks written on post held to be service connected, but bad checks written off post held not to be service connected where there was no evidence that

What is important is not the soldier's military status itself, "but the positive misuse of the status [by the soldier] to secure privileges or recognition not accorded others."<sup>1367</sup> It is this type of conduct which "causes the armed forces to have a substantial interest in punishing the abuse lest innocent members suffer."<sup>1368</sup>

In the past military status, without more, has generally not been enough to establish service connection. In United States v. Hopkins,<sup>1369</sup> for example, the Court of Military Appeals held that the use of a false identification card by an accused to withdraw more than \$10,000 from his girl friend's bank accounts at 3 separate off post banks was not sufficient to make the offenses service connected.<sup>1370</sup> Likewise, in United States v. Sims,<sup>1371</sup> the Court of Military Appeals held that the accused's use of military identification off post to forge a stolen money order was not a service

---

civilian owner of a grocery store located off post relied on the accused's military status in cashing the accused's checks).

<sup>1367</sup> United States v. Fryman, 19 USMCA 71, 73, 41 CMR 71, 73 (1969)(Marine private wearing the uniform of a Marine Corps First Lieutenant ran up a bill at a hotel which he failed to pay held subject to court-martial jurisdiction because he abused military status).

<sup>1368</sup> Id.

<sup>1369</sup> 4 M.J. 260 (C.M.A. 1978).

<sup>1370</sup> Id. at 261.

<sup>1371</sup> 2 M.J. 109 (C.M.A. 1977).

connected offense.<sup>1372</sup>

More recently, however, the Court of Military Appeals in a similar case ruled the other way. In United States v. Lockwood,<sup>1373</sup> the Court held that "[e]ven though [the accused's] forgery and theft [offenses] occurred off-base, they nonetheless had an adverse effect on the general reputation of Sheppard Air Force Base and those assigned there" and thus were service connected.<sup>1374</sup> What the Court is doing now, and which it had not done previously, is to attach great weight to "the impact [the] offenses [have] upon persons assigned [to a base] and [to] the morale, reputation, and integrity of the base itself."<sup>1375</sup>

As in the case of offenses against military personnel and property, it may be hard to find cases

---

<sup>1372</sup> Id. at 112. "The mere display of [the accused's] military identification card did not flout military authority and did not confer court-martial jurisdiction" over the offenses. Id. at 112 n.11. See United States v. Vick, 4 M.J. 235, 236 (C.M.A. 1978) (off post forgery of another serviceman's signature on a pawn shop signature card held not service connected even though the accused was in uniform at the time and used a stolen Red Cross identification card as identification to sign the victim's name); United States v. Uhlman, 1 M.J. 419, 420 (C.M.A. 1976) (forgery offense committed off post involving a check stolen from another serviceman held not service connected). These cases, however, all predate the Court of Military Appeals decision in Lockwood.

<sup>1373</sup> 15 M.J. 1 (C.M.A. 1983).

<sup>1374</sup> Id. at 10.

<sup>1375</sup> Id.

where the misuse of military status will have no impact on the "morale, reputation, and integrity" of a military installation.<sup>1376</sup> As a result of the Court's decision in Lockwood, many more "abuse of military status" cases will likely be subject to court-martial jurisdiction.

#### 9. Crimes Committed While in Uniform

Like the abuse of military status, the use of a military uniform to aid in the commission of an offense may be an important fact in showing that an offense is service connected.<sup>1377</sup> The Manual notes that the "fact that the accused is an officer or military policeman or was in uniform when the offense was committed does not necessarily establish service-connection, although such circumstances may tend to support a finding of service-connection in conjunction with other facts."<sup>1378</sup>

In United States v. Armes,<sup>1379</sup> the accused was charged with the larceny of two automobiles in the civilian community, one belonging to a civilian and

---

<sup>1376</sup> Id.

<sup>1377</sup> United States v. Fryman, 19 USCMA 71, 72, 41 CMR 71, 72 (1969) (Marine private wearing the uniform of a Marine Corps First Lieutenant ran up a bill at a hotel which he failed to pay held subject to court-martial jurisdiction for abuse of military status).

<sup>1378</sup> Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14 to II-15.

<sup>1379</sup> 19 USCMA 15, 41 CMR 15 (1969).

the other belonging to a retired Army Major. In reversing the accused's court-martial conviction for these two offenses, the Court of Military Appeals held that there was no evidence in the record "that these offenses had any military significance other than the status of the accused as a member of the armed forces."<sup>1380</sup> In addition, the Court noted that--

the wearing of the fatigue uniform at the time of arrest and the commission of these offenses while absent without leave or to facilitate an escape from confinement, does not, under these circumstances, confer jurisdiction on the court-martial.<sup>1381</sup>

In dissent, Judge Quinn attached considerable weight to the fact that the accused committed his offenses while in military uniform. This, Judge Quinn said, "tends to discredit the armed forces."<sup>1382</sup>

It may be, in light of the Court of Military Appeal's recent interest in the impact of offenses on the military community, that the wearing of the military uniform while committing an off post offense may have more significance than it has in the past. This is especially so, if the military is discredited in the eyes of the public because of the association of the uniform

---

<sup>1380</sup> Id. at 16, 41 CMR at 16.

<sup>1381</sup> Id.

<sup>1382</sup> Id. at 17.

with the offense.

10. Drug Offenses

In 1980, the Court of Military Appeals observed in United States v. Trottier,<sup>1383</sup> that "the gravity and immediacy of the threat to military personnel and installations posed by the drug traffic and by drug abuse convince us that very few drug involvements of a service person will not be 'service connected.'<sup>1384</sup> In light of this and in recognition of the Court's responsibility to respond "to changing conditions that affect the military society," the Court came to the "conclusion that almost every involvement of service personnel with the commerce in drugs is 'service connected.'<sup>1385</sup>

The Discussion to Rule 203 of the Manual closely follows the language of the Court's opinion in Trottier. The Manual states that "[almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution, is service-connected, regardless of location."<sup>1386</sup> The general rule now is that the use, possession and sale of dangerous drugs by

---

<sup>1383</sup> 9 M.J. 337 (C.M.A. 1980).

<sup>1384</sup> Id. at 351 (emphasis added).

<sup>1385</sup> Id. at 350.

<sup>1386</sup> Discussion (c)(4), R.C.M. 203, MCM, 1984, at II-14.

military personnel is a service connected offense which is subject to court-martial jurisdiction.

The Court of Military Appeals states that there may be some exceptions to the general rule, and cites two situations where the use of drugs might not have an adverse impact on the military, and hence, would not be service connected.

[I]t would not appear that use of marihuana by a serviceperson on a lengthy period of leave away from the military community would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under O'Callahan. Similarly, the interest of the military in the sale of a small amount of a controlled substance by a military person to a civilian for the latter's personal use seems attenuated.<sup>1387</sup>

---

<sup>1387</sup> 9 M.J. at 350 n.28 citing United States v. Morley, 20 USCMA 179, 180, 43 CMR 19, 20 (1970)(sale of LSD and marihuana to a civilian in the civilian community held not service connected). See also Murray v. Haldeman, 16 M.J. 74, 80 (C.M.A. 1983)(trace of drug found in urine of accused after extended leave held sufficient to establish service connection in trial for drug offense).

We are convinced that, even when a service-member uses a psychoactive drug in private while he is on extended leave far away from any military installation, that use is service-connected, if he later enters a military installation while subject to any physiological or psychological effects of the drug. Such use falls outside the scope of the exception mentioned in the Trottier footnote.

Id.

While the Court of Military Appeals thought that these might not be service connected, the lower courts have not been so understanding.<sup>1388</sup> In short, any involvement of military personnel with drugs will be viewed as having an adverse impact on the military and will be held to be service connected.<sup>1389</sup>

D. Exceptions to the Service Connection Requirement

In deciding O'Callahan, the Supreme Court ruled that a crime committed by service members in the civilian community could not be tried by court-martial, unless it could be shown that the offense was service connected.<sup>1390</sup> The theory was that an offense committed by a soldier off post that was not service connected could be prosecuted in the civilian courts. This, the Court, reasoned, was more in keeping with the Constitu-

---

<sup>1388</sup> See United States v. Lange, 11 M.J. 884, 886 (AFCMR), pet. denied, 12 M.J. 318 (C.M.A. 1981)(off post use of marihuana during six-day leave in a National Park held sufficient to establish service connection for court-martial for drug offense); United States v. Brace, 11 M.J. 794, 795 (AFCMR), pet. denied, 12 M.J. 109 (C.M.A. 1981)(off post use of marihuana during six-day leave 275 miles from post held sufficient to establish service connection in court-martial for drug offense).

<sup>1389</sup> See Schutz, Trotter and the War Against Drugs: An Update, THE ARMY LAWYER 20 (Feb. 1983).

<sup>1390</sup> See supra notes 1247-58 and accompanying text.

tion because military personnel tried in the civilian courts would get certain constitutional protections not available in the military courts, namely, the right to indictment by a grand jury and the right to a trial by a jury of one's peers. These two guarantees, the Court observed, were a critical part of the judicial process and certainly should be made available to military service members where offenses were in no way service connected.

Two exceptions to the service connection requirement, however, quickly became apparent. The first was the overseas exception and the second was the petty offense exception.

#### 1. Overseas Exception

The overseas exception to the service connection standard provides that soldiers who commit offenses in the civilian community while assigned overseas can be tried by court-martial for those offenses whether the offenses are service connected or not. The reason for this exception is alluded to in the Discussion to Rule 203 in the Manual which states that:

Offenses which are committed outside the territorial limits of the United States and its possessions, and which are not subject to trial in the civilian courts of the United States, need not be service-connected to be tried by court-

martial.<sup>1391</sup>

The point is that if there are no federal or state courts available to try soldiers for offenses committed in the civilian community overseas, then a soldier is not deprived of any constitutional rights in being tried by a court-martial for the offenses.<sup>1392</sup>

In United States v. Keaton,<sup>1393</sup> the accused was charged with assault with intent to commit murder of another soldier stationed in the Philippines. The accused was tried and convicted of the offense by general court-martial at Clark Air Force Base in the Philippines and he was "sentenced to a dishonorable discharge, confinement at hard labor for eight years, forfeiture of \$75.00 per month for ninety-six months, and reduction."<sup>1394</sup>

On appeal the accused argued that O'Callahan should apply to offenses committed overseas. The Court, however, ruled "that the constitutional limitation on court-martial jurisdiction laid down in O'Callahan

---

<sup>1391</sup> Discussion (d)(1), R.C.M. 203, MCM, 1984, at 11-15 (emphasis added). See generally Note, Military Law--Military Jurisdiction over Crimes Committed by Military Personnel Outside the United States: The Effect of O'Callahan v. Parker, 68 MICH. L. REV. 1016 (1970).

<sup>1392</sup> See App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-11.

<sup>1393</sup> 19 USCMA 64, 41 CMR 64 (1969).

<sup>1394</sup> Id. at 65, 41 CMR at 65.

v. Parker . . . is inapplicable to courts-martial held outside the territorial limits of the United States."<sup>1395</sup> In reaching its decision the Court concluded that the Supreme Court did not intend for O'Callahan to apply overseas and that the trial "by court-martial of all offenses under the Code committed abroad, including those which could be tried by Article III courts if committed in this country, is a valid exercise of constitutional authority."<sup>1396</sup>

In United States v. Newvine<sup>1397</sup> the Court of Military Appeals was asked to decide if an offense committed by an accused during an evening in Mexico was triable by court-martial. The accused was charged with unpremeditated murder of a female in Mexico as a result

---

<sup>1395</sup> Id. at 68, 41 CMR at 68 (emphasis added). See United States v. Stevenson, 19 USCMA 69, 70, 41 CMR 69, 70 (trial of accused by court-martial for unpremeditated murder of a Canadian committed in the civilian community in Germany upheld); United States v. Easter, 19 USCMA 68, 69, 41 CMR 68, 69 (1969)(nonservice connected offenses committed by accused in the civilian community in Germany held subject to trial by court-martial); United States v. Weinstein, 19 USCMA 29, 30, 41 CMR 29, 30 (1969)(marijuana offense committed in Germany held service connected and subject to trial by court-martial); United States v. Goldman, 18 USCMA 389, 395, 40 CMR 101, 107 (1969) (dissenting opinion of Ferguson, J.)(conviction of the accused in Vietnam for desertion and two specifications of possession of counterfeit military payment certificates upheld); Hemphill v. Moseley, 443 F.2d 322, 324 (10th Cir. 1971)(assault with intent to commit rape off post in Germany held subject to court-martial jurisdiction).

<sup>1396</sup> Id. at 67, 41 CMR at 67.

<sup>1397</sup> 23 USCMA 208, 48 CMR 960 (1974).

of "a dispute over the terms of an arrangement he had made with her when they had met at a nightclub."<sup>1398</sup> The accused was stationed at Laughlin Air Force Base in Texas, near the Mexican border, and, while off duty, had gone to Ciudad Acuna, Mexico "for an evening's entertainment."<sup>1399</sup> The accused was tried by general court-martial with members and was convicted and sentenced "to a dishonorable discharge, 15 years confinement at hard labor, total forfeitures, and reduction to airman basic."<sup>1400</sup>

In deciding this case, the Court of Military Appeals established that the place of the offense and not the place of trial determines whether the service connection standard applies. If the accused had committed his offense in a civilian community in Texas, the offense would not be service connected and could not be tried by court-martial. But since the offense was committed in a foreign country, the service connection standard was not applicable and the offense was properly tried by court-martial.<sup>1401</sup> What is important in

---

<sup>1398</sup> Id.

<sup>1399</sup> Id.

<sup>1400</sup> United States v. Newvine, 48 CMR 188, 189 (AFCMR), aff'd, 23 USCMA 208, 48 CMR 960 (1974).

<sup>1401</sup> Id. at 210, 48 CMR at 962. See United States v. Bowers, 47 CMR 516, 517 (ACMR 1973)(bad check offenses committed in Pennsylvania while the accused was on leave from Germany could not be tried by

applying the overseas exception is the place where the offense occurred and not the place where the trial is held.

The Discussion to the Manual notes that "the overseas exception does not apply to all offenses committed abroad, [since] some criminal statutes of the United States [do] apply to its citizens abroad."<sup>1402</sup> In cases where a criminal statute does apply overseas, the Manual states that the "offense must be service-connected . . . because the offense may also be tried in a civilian court of the United States."<sup>1403</sup> Where a federal criminal statute has application outside the territorial boundaries of the United States, the offense must be shown to be service connected before it can be tried by court-martial.

In United States v. Gladue,<sup>1404</sup> the accused, a sergeant in the Air Force, was charged in part with "conspiracy to introduce heroin into a military aircraft

---

<sup>1402</sup> Discussion (d)(1), R.C.M. 203, 1984, at II-15.

<sup>1403</sup> Id. See Horbaly & Mullin, Extraterritorial Jurisdiction And Its Effect On The Administration of Military Criminal Justice Overseas, 71 MIL. L. REV. 1, 57-77 (1976).

<sup>1404</sup> 4 M.J. 1 (C.M.A. 1977).

for the purpose of transfer to the United States."<sup>1405</sup> On appeal, the government conceded that "the overseas exception is not present in this case since the essence of the conspiracy was to import heroin into the United States--an offense which is clearly cognizable in the United States civil courts."<sup>1406</sup> In order to establish that the court-martial had jurisdiction to try the offense, the government had to prove that the conspiracy was in some way service connected. If the government could not show service connection, the court-martial would not have jurisdiction over the conspiracy and the offense would have to be tried in the federal courts by the civilian authorities. In this case, the Court found that the government was able to establish a service connection. The Court noted that "both the misuse and abuse of the [accused's] military duties and the misuse of a military aircraft to effectuate the criminal acts conferred service connection"<sup>1407</sup> and this made the offense triable by court-martial.

In United States v. Black,<sup>1408</sup> the Court of Military Appeals was asked to decide "whether a conspiratorial agreement alleged to have been reached in [Viet-

---

<sup>1405</sup> Id. at 2.

<sup>1406</sup> Id. at 5.

<sup>1407</sup> Id. at 6.

<sup>1408</sup> 1 M.J. 340 (C.M.A. 1976).

nam] is itself sufficient to vest a court-martial with jurisdiction."<sup>1409</sup> In Black, the accused, a Specialist Five, was charged with wrongful possession of marihuana and conspiracy to transfer heroin. He was tried and convicted in a bad conduct discharge special court-martial before a military judge alone at Fort Knox, Kentucky, and was sentenced to a "Bad conduct discharge, confinement at hard labor for five months, forfeiture of \$200.00 pay per month for five months, and reduction to the grade of Private (E-1)."<sup>1410</sup>

What the accused had done, upon returning home from Vietnam, was to write to a fellow serviceman in Vietnam asking him to cash a money order and give the money and a letter to a Vietnam national. The serviceman in Vietnam notified the Army CID (Criminal Investigation Division) and the accused subsequently was arrested at Fort Knox.

At the Army Court of Military Review, the accused argued that there was "no service connection in the conspiracy offense [with which he was charged] and thus under the principle announced in O'Callahan v. Parker, . . . the court-martial had no jurisdiction to try [him]

---

<sup>1409</sup> Id. at 342.

<sup>1410</sup> United States v. Black, 49 CMR 805, 806 (ACMR 1975), rev'd, 1 M.J. 340 (C.M.A. 1976).

for that crime."<sup>1411</sup> The Court disagreed. After reviewing the facts surrounding the conspiracy offense, the court found that the offense was service connected for the following reasons:

The agreement [to enter the conspiracy] was entered into overseas in a combat zone; the overt act, the writing and sending of the letters of instructions and the money, occurred on a military installation in the United States; the Army Postal Service was used to transmit the money order and the instructions; the money order was converted to Military Payment Certificates and thence to piasters in a combat zone overseas; the money and instructions were delivered to the co-conspirator in the same combat zone overseas; and the scheme required the use of an innocent serviceman as an unwitting conduit for the illegal drug traffic.<sup>1412</sup>

These factors, the Court concluded, were more than sufficient to give the military courts jurisdiction over the offense.<sup>1413</sup>

On appeal to the Court of Military Appeals, the government argued that the "completion of a substantial portion of this crime overseas was sufficient to subject the [accused] to military jurisdiction,"<sup>1414</sup> and trial by court-martial. The accused, on the other hand,

---

<sup>1411</sup> Id. (emphasis added).

<sup>1412</sup> Id. at 807.

<sup>1413</sup> Id.

<sup>1414</sup> 1 M.J. at 342.

argued that "the foreign country or 'overseas exception' was not triggered here, since the conspiracy offense in issue was not complete until execution of the overt act in Kentucky, from whence the letter . . . was sent."<sup>1415</sup>

The Court of Military Appeals, in a decision reversing the Army Court of Military Review, held that the "overseas exception" did not apply to the offense for which the accused was found guilty, in part, because the offense was not completed in Vietnam and, in part, because the importation of controlled substances is a violation of federal law which was to be tried in the federal courts.<sup>1416</sup> Having held that the overseas exception did not apply, the Court looked to see if the offense was service connected. After reviewing the Relford factors, the Court concluded that the conspiracy offense in this case was not service connected.<sup>1417</sup>

In discussing the overseas exception the Court noted that:

The purpose of O'Callahan is to insure indictment and trial by jury, and the rationale of the overseas exception to that standard's application is that those benefits are not available in foreign courts, anyway, so trial by court-martial is as close as is possible to affording all the rights and privi-

---

<sup>1415</sup> Id.

<sup>1416</sup> Id. at 343.

<sup>1417</sup> Id. at 345.

leges to an accused in Anglo-American jurisprudence.<sup>1418</sup>

The Court noted, however, that the overseas exception "must be narrowly read and strictly applied."<sup>1419</sup>

In sum, under the overseas exception an accused can be tried by court-martial for an offense that is not service connected, if the offense is committed overseas and is not an offense that can be tried by the civilian courts of the United States. If the civilian courts of the United States can try the offense, the military must establish that the offense is service connected before it can be tried by court-martial.

## 2. Petty Offenses

The second exception to the service connection standard is the petty offense exception. The Manual notes that a petty offense is an offense where "the maximum confinement which may be adjudged is 6 months or less and no punitive discharge is authorized."<sup>1420</sup> The Manual also notes that "[p]etty offenses may be tried by

---

<sup>1418</sup> Id. at 344.

<sup>1419</sup> Id. at 342. See United States v. King, 6 M.J. 553, 557 (ACMR 1978), pet. denied, 6 M.J. 290 (C.M.A. 1979) (presenting false claims for per diem and dependent travel allowances in Korea held triable by court-martial).

<sup>1420</sup> Discussion (d)(2), R.C.M. 203, MCM, 1984, at 11-15.

court-martial whether or not they are service-connected."<sup>1421</sup> The rationale for the petty offense exception is similar to that for the overseas exception, in that since "there is no constitutional right to indictment by grand jury or trial by jury for petty offenses . . . , the service-connection requirement does not apply to [such offenses]."<sup>1422</sup>

The leading case on the petty offense exception is United States v. Sharkey.<sup>1423</sup> In Sharkey the accused, a marine, was charged with numerous offenses, one of which was being "drunk and disorderly in uniform in a public place" off post.<sup>1424</sup> The Court noted that the offense occurred in the Old City Club in San Juan, Puerto Rico, and that it was a petty offense, "one punishable by confinement at hard labor of six months and forfeiture of two-thirds pay per month for a like period."<sup>1425</sup> The Court noted too that "[i]t has long been held that an accused is not constitutionally entitled to indictment or trial by jury for petty offenses"<sup>1426</sup> and that for this

---

<sup>1421</sup> Id.

<sup>1422</sup> App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-11.

<sup>1423</sup> 19 USCMA 26, 41 CMR 26 (1969).

<sup>1424</sup> Id. at 27, 41 CMR at 27 (1969).

<sup>1425</sup> Id. at 27, 41 CMR at 27.

<sup>1426</sup> Id. at 27-28, 41 CMR at 27-28.

reason, "the court-martial . . . clearly had jurisdiction to try [the accused]."<sup>1427</sup>

The Analysis to Rule 203 in the Manual notes that the Court in Sharkey "relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty."<sup>1428</sup> The Analysis suggests, however, that the better approach is to look to the maximum sentence that can be imposed by a special court-martial or a summary court-martial and use that limit on the maximum punishment to determine what is a petty offense.<sup>1429</sup> This is an interesting observation that no doubt will be raised in future cases and addressed by the appellate courts. The potential effect of adopting such an approach would be to make all cases tried by summary and special court-martial subject to the petty offense exception.

In conclusion, jurisdiction over the offense, like jurisdiction over the person, has been the subject of frequent litigation in recent years. Since 1969 and 1972, in particular, the law of jurisdiction over the offense has changed dramatically as courts made the change over from the "military status" standard to the

---

<sup>1427</sup> Id. at 28, 41 CMR at 28.

<sup>1428</sup> App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-11.

<sup>1429</sup> Id.

"service connection" standard. The identification of the Relford factors and the use by the courts of an ad hoc approach to deciding questions concerning jurisdiction over the offense have resulted in a host of individualized decisions. Because of the great number of cases decided in the area of jurisdiction over the offense, some repetition in the results have occurred as like cases are treated similarly. What has developed as a result are some general categories of offenses and some general rules for dealing with them.

The announcement of the service connection standard 17 years ago imposed a major limitation on the exercise of court-martial jurisdiction. In recent years, however, the tendency of the Courts of Military Review and the Court of Military Appeals has been gradually to expand the scope of court-martial jurisdiction. Offenses, which a few years ago were held not to be service connected, are now held to be service connected and triable by court-martial. The recent expression by the Court of Military Appeals of the view that offenses committed in the civilian community will be found to be service connected if they affect the morale, reputation and integrity of the armed forces, no doubt, will result in a further expansion of the types of offenses that will be found to be service connected and subject to court-martial jurisdiction.

## CHAPTER EIGHT

### SENTENCING

The fifth and last element of court-martial jurisdiction is whether the sentence of a court-martial is within the maximum limits authorized by the Code and the Manual. Unlike the civilian criminal courts where the judge imposes a sentence on each count, the sentence in a court-martial is a "gross sentence" or a cumulative sentence. Winthrop almost 100 years ago observed that in a court-martial "there [is] but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences."<sup>1430</sup>

When a case is tried before court members, it is the members who impose the single sentence; and in a trial before a military judge alone, it is the military

---

<sup>1430</sup> W. WINTHROP, MILITARY LAW AND PRECEDENTS 404 (Washington, D.C.: U.S. Government Printing Office, 2d ed., 1896, 1920 Reprint).

judge who imposes the sentence.<sup>1431</sup>

The provisions of the Code and the Manual govern the types of sentences that can be imposed by a court-martial.<sup>1432</sup> Both the Code and the Manual prescribe specific rules with regard to the maximum punishments that can be imposed by summary, special and general courts-martial and for the various offenses set forth in the punitive articles. The Code and the Manual also set forth rules governing the maximum punishments which can be imposed in rehearings and retrials.<sup>1433</sup>

Any sentence adjudged by a court-martial which is within the maximum punishment authorized by the Code and the Manual is valid and enforceable.<sup>1434</sup> Any part of the sentence, however, which exceeds that which is authorized is void and unenforceable. The application of

---

<sup>1431</sup> "The only form of sentence used in military law is a single sentence imposed in gross to cover all offenses of which the accused has been convicted." Note, Habeas Corpus Review of Military "Gross Sentence" Usage, 65 YALE L.J. 413 (1956).

<sup>1432</sup> See generally Douglass, The Judicialization of Military Courts, 22 HASTINGS L.J. 213, 227-32 (1971); Curtis, Sentences of Courts-Martial, JAG J. 3 (Jan. 1953); Hunt, Sentencing in the Military, 10 AM. CRIM. L. REV. 107, 117-18 (1971).

<sup>1433</sup> Art. 63, U.C.M.J., 10 U.S.C. § 863 (1983); R.C.M. 810(d), MCM, 1984, at II-99. See Cassidy, Rehearing Procedure, 21 JAG J. 54, 55 (Sept., Oct., Nov., 1966).

<sup>1434</sup> See generally Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 62 (1953).

this principle to a court-martial case was challenged in McKinney v. Finletter.<sup>1435</sup> In McKinney the accused filed a writ of habeas corpus in the Tenth Circuit Court of Appeals attacking "the validity of the sentence of [his] court-martial in its entirety on the ground that it was in excess of that authorized by law."<sup>1436</sup> The accused had been charged with rape under Article 92 of the Articles of War and had been tried and convicted by a general court-martial and sentenced "to confinement at hard labor for the term of his natural life."<sup>1437</sup>

In his appeal to the Tenth Circuit, the accused argued that "Article of War 92 fixes the punishment for murder or rape at death or imprisonment for life,"<sup>1438</sup> and that because "the sentence which the court-martial imposed upon [him] included a provision that he be confined for life at hard labor, it exceeded the punishment authorized by law."<sup>1439</sup> For this reason, the accused contended that "the entire sentence was and is void."<sup>1440</sup>

In addressing the accused's contention, the Tenth

---

<sup>1435</sup> 205 F.2d 761 (10th Cir. 1953).

<sup>1436</sup> Id. at 762.

<sup>1437</sup> Id.

<sup>1438</sup> Id. at 763.

<sup>1439</sup> Id. (emphasis added).

<sup>1440</sup> Id.

Circuit Court of Appeals noted that the general rule is:

[W]here a court has jurisdiction of the accused and of the offense charged, the imposition of a sentence in excess of that which the law permits does not render the authorized portion of the sentence void if the excess is separable from the residue and may be reached without disturbing the portion which is legal.<sup>1441</sup>

In applying this rule to the accused's case, the Court concluded that the portion of the accused's sentence confining him to imprisonment at hard labor "was in excess of that authorized by law"<sup>1442</sup> and thus void. But the Court upheld the remainder of the accused's sentence to life imprisonment because, the Court concluded, this part of the accused's sentence was within the court-martial's jurisdiction.

Where a sentence is more severe than that which is authorized by the Code or the Manual, the reviewing court, can either approve that part of the sentence which the trial court had authority to impose, as was done in

---

<sup>1441</sup> Id. See United States v. Pridgeon, 153 U.S. 48, 62 (1894)(sentence in excess of what the law permits is void; that which is within the legal limit is valid).

<sup>1442</sup> 205 F.2d at 763. See De Coster v. Madigan, 223 F.2d 906, 911 (7th Cir. 1955)(sentence held nonseverable and excessive and the accused was released where a court-martial sentence was imposed for two offenses and one of the offenses was reversed on appeal), companion case rev'd, Jackson v. Taylor, 353 U.S. 569 (1957)(power of Army Board of Review to reassess the accused's sentence under Article 66 of the Code upheld).

McKinney, or it can return the case to the trial court for a rehearing on sentencing. To determine if a court-martial sentence is within the limits authorized by the Code and the Manual, and hence valid, one has to know what types of punishment can be imposed by a court-martial.

A. The Code

1. Maximum Punishments for Offenses

The offenses that can be tried by court-martial are listed in the Punitive and General Articles of the Code, that is, Articles 77-134. For the majority of the offenses listed in the Punitive Articles, the Code states that the offense "shall be punished as a court-martial may direct."<sup>1443</sup> Under the language of the Code, a

---

<sup>1443</sup> See generally Arts. 77-133, U.C.M.J., 10 U.S.C. §§ 877-933 (1983).

The only deviation from this language is found in general Art. 134 . . . where the wording is: "shall be taken cognizance of by a general or special or summary . . . court-martial, according to the nature and degree of the offense, and [shall be] punished at the discretion of [that] court." This occurs because of the express reference to the inferior military courts. As phrased, it excludes from the power of a general court the death sentence only.

Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 60 n.356 (1953). See also United States v. Phipps, 12 USCMA 14, 15-16, 30 CMR 14, 15-16 (1960)(court-martial can only adjudge a bad conduct discharge or a dishonorable discharge and cannot adjudge

court-martial can impose any sentence it deems appropriate for an offense for which an accused has been found guilty. Only one offense in the Punitive Articles provides for a mandatory sentence: that is Article 106 which states that the death sentence is mandatory for a conviction of spying in wartime.<sup>1444</sup> The Code also provides that a sentence of "death or imprisonment for life" must be imposed for a violation of Article 118, where one kills another with "a premeditated design to kill,"<sup>1445</sup> or where one "is engaged in the perpetration

---

an undesirable discharge, a general discharge, or an honorable discharge); United States v. Jones, 3 M.J. 348, 352 (C.M.A. 1977)(general court-martial cannot adjudge an undesirable discharge and once it announces punishment of an undesirable discharge, the court members cannot increase the sentence to a bad conduct discharge); United States v. Miller, 17 M.J. 817, 819 (ACMR 1984)(court-martial may not adjudge correctional custody as punishment).

1444

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place of institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

Art. 106, U.C.M.J., 10 U.S.C. § 906 (1983).

<sup>1445</sup> Art. 118(1), U.C.M.J., 10 U.S.C. § 918(1) (1983). See Jurek v. Texas, 428 U.S. 262, 265 n.1, 276 (1976)(sentence of mandatory life imprisonment or death for conviction of murder with malice aforethought upheld as constitutional).

or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson."<sup>1446</sup> The death penalty may be imposed for a conviction of Article 120 (rape), Article 106a (espionage), Article 94 (mutiny and sedition), and Article 110a (willfully and wrongfully hazarding a vessel). Ten other articles provide that "death or such other punishment as a court-martial may direct" shall be imposed for offenses committed during wartime.<sup>1447</sup> For the remainder of the offenses listed in the Punitive and General Articles, the Code imposes no limit on the types of punishment that can be imposed by a court-martial; in theory, at least, punishment "up to life imprisonment [could] be imposed for any offense" under the Code.<sup>1448</sup> So far as offenses are concerned, the Code provisions are broadly written and grant

---

<sup>1446</sup> Art. 118(4), U.C.M.J., 10 U.S.C. § 918(4) (1983).

<sup>1447</sup> The death penalty may be imposed in wartime for Article 85 (desertion), Article 90 (assaulting or willfully disobeying a superior commissioned officer), Article 99 (misbehaving before the enemy), Article 100 (subordinate compelling a commander to surrender), Article 101 (improper use of a countersign), Article 102 (forcing a safeguard), Article 104 (aiding the enemy), Article 106a (espionage during wartime) and Article 113 (misbehavior of a sentinel). "The Army executed over 100 men in World War II. The Navy has not executed a man since 1842, the year in which Midshipman Philip Spence and two others were hanged for conspiring to mutiny." Keefe & Moskin, Codified Military Injustice, 49 CORNELL L.Q. 151, 152 n.6 (1949).

<sup>1448</sup> Wurfel, Court-Martial Jurisdiction Under the Uniform Code, 32 N.C.L. REV. 1, 60 (1953).

courts-martial wide discretion in fixing an appropriate sentence for those convicted of committing offenses in violation of the Code. This because--

Congress traditionally has vested in the military . . . very broad discretion so that it might adequately cope with the widely differing conditions and considerations involved, depending on whether an offense was committed in peace or in war, at home or abroad, in garrison, in the field or in combat.<sup>1449</sup>

In short, the Code imposes few limitations on the types of punishments which can be imposed by a court-martial.

Even though the Code provisions are broad, they are not so broad as to permit the imposition of cruel and unusual punishments. Article 55 of the Code, in fact, prohibits the imposition of cruel and unusual punishments, specifically stating that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial."<sup>1450</sup> The limitations prescribed by the Code on the types of punishments that can be imposed for certain kinds of offenses and its prohibitions against the imposition of cruel and unusual punishment is one way in which jurisdiction limits on sentencing are established.

---

<sup>1449</sup> Id.

<sup>1450</sup> Art. 55, U.C.M.J., 10 U.S.C. § 855 (1983).

## 2. Types of Courts

The limitations on the maximum punishments that summary, special and general courts-martial can impose is another way the Code places jurisdictional limits on sentencing. The Code imposes only two limitations on the maximum punishment that can be adjudged by general courts-martial. The first is that the death penalty can only be imposed by a court-martial consisting of members,<sup>1451</sup> and cannot be imposed by a military judge. The other limitation is implied in that the death penalty cannot be imposed by court members, unless the case has to be referred to trial by the convening authority as a capital case. If the convening authority has referred a case to trial as noncapital, the court members cannot impose the death penalty.<sup>1452</sup>

The limitations prescribed by the Code for the maximum punishments that can be imposed by special courts-martial and summary courts-martial are much more restrictive. Article 19 of the Code provides that a special court-martial may--

[A]djudge any punishment not forbidden by

---

<sup>1451</sup> Art. 18, U.C.M.J., 10 U.S.C. § 818 (1983).

<sup>1452</sup> See generally R.C.M. 1004, MCM, 1984, at II-149 to II-152. See also App. 21, Analysis, R.C.M. 1004, MCM, 1984, at A21-63.

[the Code] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months.<sup>1453</sup>

Stated another way, the maximum sentence a special court-martial can impose is six months confinement at hard labor, hard labor without confinement for three months, forfeiture of two-third's pay per month for up to six months, and reduction to the lowest enlisted grade. As a practical matter, the imposition of hard labor without confinement is rarely used.

Under certain circumstances too, a special court-martial can adjudge a bad conduct discharge. The Code provides that in order for a special court-martial to impose a bad conduct discharge, a complete record of the proceedings and testimony must be made, counsel qualified under Article 27(b) must be detailed to represent the accused, and a military judge must be detailed to the court.<sup>1454</sup> In addition, the charges must be referred to a special court-martial empowered to adjudge a bad conduct discharge; in the Army, it is usually the general court-martial convening authority who has the power to refer a case to a bad conduct discharge

---

<sup>1453</sup> Art. 19, U.C.M.J., 10 U.S.C. § 819 (1983).  
See R.C.M. 201(f)(2)(B), MCM, 1984, at II-10.

<sup>1454</sup> Art. 19, U.C.M.J., 10 U.S.C. § 819 (1983).

special court-martial.<sup>1455</sup>

Article 20 of the Code provides that a summary court-martial can try only enlisted personnel and may--

[A] judge any punishment not forbidden by [the Code] except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.<sup>1456</sup>

The maximum sentence a summary court-martial can impose, therefore, is confinement at hard labor for one month, hard labor without confinement for 45 days, restriction to a specified area for two months, forfeiture of two-thirds pay per month for one month, and reduction to the lowest enlisted grade. The punishment to hard labor without confinement for 45 days, however, is not fre-

---

<sup>1455</sup> See supra note 308 and accompanying text.

<sup>1456</sup> Art. 20, U.C.M.J., 10 U.S.C. § 820 (1983). "[C]ommissioned officers, warrant officers, cadets, aviation cadets, and midshipmen" cannot be tried by summary court-martial. R.C.M. 1301(c), MCM, 1984, at II-201. See R.C.M. 1301(a) & (d)(1), MCM, 1984, at II-201.

If the accused is attached to or embarked in a vessel, the maximum penalty is confinement for 3 days on bread and water or diminished rations, confinement for 24 days (30 days if no confinement on bread and water or diminished rations is adjudged), forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade.

Discussion, R.C.M. 1301(d)(1), MCM, 1984, at II-201.

quently imposed. With respect to "enlisted members above the fourth enlisted pay grade," the Manual provides that "summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade."<sup>1457</sup>

### 3. Special Sentencing Provisions

In addition to the limitations on the maximum punishment that can be imposed for particular types of offenses and the limitations on the types of maximum punishments that the three kinds of courts-martial can impose, the Code also provides for limitations on the maximum punishments that can be imposed in special situations. Article 63, for example, prescribes rules restricting the severity of the sentence that can be imposed on a rehearing.<sup>1458</sup> Article 63 states:

[u]pon a rehearing . . . no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory.<sup>1459</sup>

---

<sup>1457</sup> R.C.M. 1301(d)(2), MCM, 1984, at II-201 to II-203.

<sup>1458</sup> Art. 63, U.C.M.J., 10 U.S.C. § 863 (1983).

<sup>1459</sup> Id. See R.C.M. 810(d)(1), MCM, 1984, at II-99. The rules with regard to the severity of the sentence that can be imposed on a rehearing also apply to new trials or other trials involving the same charges.

Article 63 also states that if there was a pretrial agreement in the first case and on the rehearing the accused decides to change his plea, the sentence imposed on the rehearing shall not be "in excess of that lawfully adjudged at the first court-martial."<sup>1460</sup>

B. Manual Provisions on Sentencing

In addition to the limitations the Code prescribes (1) for the maximum punishments that can be imposed for offenses, (2) for the three types of courts-martial, and (3) for rehearings, new trials, and other trials, the Code provides that the President of the United States can impose limitations with regard to the maximum punishments for specific offenses.

1. Maximum Punishment Chart

Article 56 of the Code provides that the "punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."<sup>1461</sup> Pursuant to this authority the President has prescribed a maximum punishment for each of the offenses listed in the Punitive Articles and listed

---

<sup>1460</sup> Art. 63, U.C.M.J., 10 U.S.C. § 863 (1983).  
See R.C.M. 810(d)(2), MCM, 1984, at II-99.

<sup>1461</sup> Art. 56, U.C.M.J., 10 U.S.C. § 856 (1983).

under the General Articles, Article 133 and Article 134.<sup>1442</sup> These punishments are set out in the "Maximum Punishment Chart" found in Appendix 12 of the Manual.<sup>1443</sup> The Manual states that a court-martial has wide discretion in the type of sentence which can be imposed for violations of the Code. And it notes that: "except when a mandatory minimum sentence is prescribed by the code [that is, death or life imprisonment], a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."<sup>1444</sup>

Rule 1003 of the Manual lists the specific kinds of punishments that a court-martial can impose.<sup>1445</sup> These include: reprimand, forfeiture of pay and allowances, fine, loss of numbers, lineal position, or seniority (applicable only in the Navy, Marine Corps and Coast Guard), reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, confinement on bread and water or diminished rations, punitive separation (dismissal, dishonorable discharge or bad conduct discharge), death and punishment

---

<sup>1442</sup> See Paras. 59-113, MCM, 1984, at IV-108 to IV-147.

<sup>1443</sup> App. 12, Maximum Punishment Chart, MCM, 1984, at A12-1 to A12-8.

<sup>1444</sup> R.C.M. 1002, MCM, 1984, at II-144.

<sup>1445</sup> R.C.M. 1003, MCM, 1984, at II-144 to II-147.

under the law of war, that is, "any punishment not prohibited by the law of war."<sup>1466</sup>

## 2. Other Limitations on Punishments

The Manual also provides some limitations on the types of punishment that can be imposed by court-martial. Rule 1003(c)(1)(A), for example, provides that "[t]he maximum limits for the authorized punishments of confinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of [the] Manual,"<sup>1467</sup> and that these are maximum punishments that can be imposed for each separate offense. Rule 1003(c)(1)(A)(i) also makes clear that a bad conduct discharge may be imposed whenever a dishonorable discharge is authorized.<sup>1468</sup>

The Manual further provides that in addition to, or in lieu of the penalties listed in Part IV of the Manual and the Maximum Punishment Chart--that is, "confinement, forfeitures, and punitive discharge (if authorized), and death (if authorized),"<sup>1469</sup>--a court-martial may impose a reprimand, fine, loss of number,

---

<sup>1466</sup> R.C.M. 1003(b)(11), MCM, 1984, at II-147.

<sup>1467</sup> R.C.M. 1003(c)(1)(A)(i), MCM, 1984, at II-147.

<sup>1468</sup> Id.

<sup>1469</sup> R.C.M. 1003(c)(1)(A)(ii), MCM, 1984, at II-147.

lineal position or seniority (in the Navy, Marine Corps, and Coast Guard), reduction in pay grade, restriction to specified limits, and hard labor without confinement.<sup>1470</sup>

In United States v. DeAngelis,<sup>1471</sup> the accused received a fine, in addition to confinement, as part of his sentence. On appeal the accused argued that the fine was in excess of the maximum permissible punishment that could be imposed for the offense for which he was convicted and thus was void. In DeAngelis, the accused was a Captain in the Army who was assigned as a Disbursing Agent in Rome. He was charged with converting \$79,837.67 of United States money to his own use to finance bets at Italian race tracks, and he was tried by general court-martial at Wiesbaden, Germany and Rome. He was convicted of a violation of Article of War 96 (embezzlement), and was sentenced to "dismissal, total forfeitures, confinement at hard labor for seven years and a fine of \$10,000, or further confinement until the fine is paid, but not exceeding two more years."<sup>1472</sup>

On appeal, the Army Board of Review construed the offense to be one of larceny rather than embezzlement and reduced the sentence to a "dismissal from the service, forfeiture of all pay and allowances . . . ,

---

<sup>1470</sup> Id.

<sup>1471</sup> 3 USCMA 298, 12 CMR 54 (1953).

<sup>1472</sup> Id. at 300, 12 CMR at 56 (emphasis added).

confinement at hard labor for five years, and a fine to be paid by [the] accused to the United States of \$10,000 with further confinement at hard labor until said fine is so paid, but for not more than two years in addition to the five years so adjudged."<sup>1473</sup>

On appeal to the Court of Military Appeals, the accused contended that the confinement imposed by the Board of Review on the charge of larceny "exhausted the punitive jurisdiction of the court-martial and [that] the additional sentence 'to pay the United States a fine of ten thousand dollars and to be further confined at hard labor until said fine is so paid, but not more than two years' is void."<sup>1474</sup> The Court of Military Appeals denied the accused's contention and upheld the sentence imposing the fine as proper. In reaching its decision, the Court of Military Appeals noted first that the Board of Review correctly viewed the offense as one of larceny rather than embezzlement and that the Board appropriately reassessed the accused's sentence downward.<sup>1475</sup>

Second, the Court noted that a fine is a permissible punishment on an officer; that it can be imposed as an additional punishment where there is evidence of

---

<sup>1473</sup> United States v. DeAngelis, 4 CMR 654, 727 (ABR 1952), aff'd, 3 USCMA 298, 12 CMR 54 (1953)(emphasis added).

<sup>1474</sup> 3 USCMA at 305, 12 CMR at 61.

<sup>1475</sup> Id.

unjust enrichment; and that it was properly imposed in the accused's case.<sup>1476</sup> In addition, the Court stated that:

The provision that the accused be further confined until the fine is paid, after imposition of the maximum period of confinement, was a proper exercise of the court-martial's punitive authority, and is legal.<sup>1477</sup>

The Court reasoned that "the provision for further confinement was not made as punishment for the offense, but merely as a means of coercing the collection of the fine imposed."<sup>1478</sup> With respect to imprisonment for nonpayment of the fine, the accused controlled his own release; in effect, the Court notes, "he carries the keys of his prison in his own pocket."<sup>1479</sup>

The Manual authorizes the imposition of addi-

---

<sup>1476</sup> Id.

<sup>1477</sup> Id. at 62.

<sup>1478</sup> Id.

<sup>1479</sup> Id. See United States v. Vinyard, 3 M.J. 551, 552 (ACMR), pet. denied, 3 M.J. 207 (C.M.A. 1977) (sergeant fined \$5,000 for stealing \$5,000 worth of postal money orders with provision that he be confined for two years in lieu of payment of the fine upheld as constitutional and valid); United States v. Justice, 2 M.J. 344, 348 (AFCMR 1976), aff'd on reconsideration, 2 M.J. 623 (AFCMR), aff'd, 3 M.J. 451 (C.M.A. 1977) (staff sergeant fined for taking bribes upheld as proper); United States v. Kehrl, 44 CMR 582, 585 (AFCMR 1971), pet. denied, 21 USCMA 621, 44 CMR 940 (1972) (fine of \$15,000 with one year of additional confinement in lieu of payment of the fine for wrongful transfer of marijuana held proper).

tional confinement in lieu of the payment of a fine or until the fine is paid, but notes that the "total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial"<sup>1400</sup> The Manual also provides that "[a]ny court-martial may adjudge a fine instead of forfeitures"<sup>1401</sup> and that a general court-martial may adjudge a fine in addition to forfeiture.<sup>1402</sup> In addition, the Manual provides that a fine

---

<sup>1400</sup> R.C.M. 1003(b)(3), MCM, 1984, at II-145.

<sup>1401</sup> Id. The Court of Military Appeals has explained the difference between a fine and a forfeiture as follows:

[O]ne against whom a fine has been adjudged owes to the Government the amount of money specified in the sentence whether he receives any compensation or not. In order to satisfy this debt, the Government may bring suit in the same manner as it would to collect any other debt due and owing the United States. A forfeiture, however, deprives one of his right to receive an amount of money to which he otherwise would be entitled. A sentence which includes a forfeiture thereby relieves the Government to the extent provided in the sentence of its obligation to pay the amount due and forfeited and an accused has no legal right to the amount forfeited.

United States v. Cuen, 9 USCMA 332, 336, 26 CMR 112, 116 (1958)(change by the Army Board of Review of a portion of the accused's sentence from a fine to a forfeiture held not to be an illegal commutation of the accused's sentence). The Court of Military Appeals has stated too that "a fine is a more severe form of punishment than one in which a forfeiture [is] adjudged." Id. at 337, 26 CMR at 119.

<sup>1402</sup> R.C.M. 1003(b)(3), MCM, 1984, at II-145. See United States v. Williams, 18 M.J. 186, 189 (C.M.A. 1984)(a fine of \$10,000 may not be imposed in addition to forfeitures in a general court-martial guilty plea case

cannot be imposed in a special court-martial "in excess of the total amount of forfeitures which may be adjudged."<sup>1483</sup>

If an offense is not listed in Part IV of the Manual and is not listed in the Maximum Punishment Chart, the Manual provides that the maximum punishment for the offense will be that of an offense closely related to it, or the offense of which it is a lesser included offense.<sup>1484</sup> If the unlisted offense is related to two or more offenses, the maximum punishment of the least severe offense will be the one applied to the unlisted offense.<sup>1485</sup>

Where an offense is not listed in Part IV of the Manual or in the Maximum Punishment Chart and is not closely related to any of the offenses included therein, the offense "is punishable as authorized by the United States Code, or as authorized by the custom of the

---

where the accused is not aware that a fine could be imposed on him).

<sup>1483</sup> R.C.M. 1003(b)(3), MCM, 1984, at II-145. See United States v. Sears, 18 M.J. 190, 191 (C.M.A. 1984) (a special court-martial has authority under the Code to impose a fine); United States v. Brown, 1 M.J. 465, 467 (C.M.A. 1976) (\$1,200 fine held not to be in excess of the total amount of forfeitures that could be adjudged).

<sup>1484</sup> R.C.M. 1003(c)(1)(B)(i), MCM, 1984, at II-147.

<sup>1485</sup> Id.

service."<sup>1486</sup> If the punishment authorized by the United States Code provides for confinement for a period of time, that period of time will be the maximum period of confinement a court-martial may impose.<sup>1487</sup>

If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.<sup>1488</sup>

As a practical matter, it is rare that a military offense that is tried by court-martial will not be listed in the Maximum Punishment Chart.

Sometimes an accused is charged with committing two or more offenses. In such a case, the maximum sentence that can be imposed by a court-martial for the offenses is the total maximum punishment listed for each of the separate offenses. If the offenses charged are similar, the maximum punishment that can be imposed is still the sum total of the maximum punishment listed for each offense. Where the offenses are multiplicitous, that is, requiring proof of the same elements, the maximum

---

<sup>1486</sup> R.C.M. 1003(c)(1)(B)(ii), MCM, 1984, at II-147.

<sup>1487</sup> Id.

<sup>1488</sup> Id.

sentence that can be imposed is "the maximum authorized punishment for the offense carrying the greatest maximum punishment."<sup>1489</sup> The Discussion to Rule 1003 of the Manual notes that the theory here "is that an accused may not be punished twice for what is, in effect, one offense."<sup>1490</sup>

The Manual also prescribes limitations on the nature of the punishment that can be imposed due to the rank of the accused. The Manual states, for example, that a commissioned officer, warrant officer, cadet, midshipman, or air cadet, can be sentenced only to confinement,<sup>1491</sup> or separated from the service with a

---

<sup>1489</sup> R.C.M. 1003(c)(1)(C), MCM, 1984, at II-147.

<sup>1490</sup> Discussion, R.C.M. 1003(c)(1)(C), MCM, 1984, at II-148. The offenses may be multiplicitous for findings as well as sentencing. See United States v. Rodriguez, 18 M.J. 363, 369 (C.M.A. 1984)(offenses of conduct prejudicial to good order and discipline and conduct unbecoming an officer held multiplicitous for findings because the offenses alleging conduct prejudicial to good order and discipline were lesser included offenses of conduct unbecoming an officer); United States v. Stegall, 6 M.J. 176, 177-78 (C.M.A. 1979)(offenses of assault and battery and striking a noncommissioned officer while in the execution of his office held to be multiplicitous for findings because assault and battery is included in the greater offense of striking a noncommissioned officer); United States v. Posnick, 8 USCMA 201, 204, 24 CMR 11, 14 (1957)(unauthorized absence and missing movement while absent without leave held multiplicitous for sentencing purposes because the the lesser included offense (AWOL) was not an offense "separate" from the greater offense of missing movement). See also McAtamney, Multiplicity: A Functional Analysis, 106 MIL. L. REV. 115, 116-35 (Fall 1984).

<sup>1491</sup> R.C.M. 1003(c)(2)(A)(ii), MCM, 1984, at II-148.

dismissal<sup>1492</sup> by a general court-martial, and that such personnel "may not be reduced in grade by any court-martial,"<sup>1493</sup> or "sentenced to hard labor without confinement."<sup>1494</sup>

Last, the Manual provides that the maximum sentence that may be imposed by a court-martial can be limited by instructions from the convening authority at the time the charges are referred to trial. An offense, which can be punished as a capital offense (felony murder or rape, for example,) can be referred to trial by the convening authority as noncapital; in such a case, the maximum punishment a court-martial could impose would be imprisonment for life.<sup>1495</sup>

In referring a case to trial, the convening authority also can issue special instructions limiting the maximum sentence that can be imposed. In convening a special court-martial, for example, a general court-martial convening authority can issue an instruction directing that the authorized maximum punishment in the

---

<sup>1492</sup> R.C.M. 1003(c)(2)(A)(iv), MCM, 1984, at II-148.

<sup>1493</sup> R.C.M. 1003(c)(2)(A)(i), MCM, 1984, at II-148.

<sup>1494</sup> R.C.M. 1003(c)(2)(A)(iii), MCM, 1984, at II-148.

<sup>1495</sup> Discussion, R.C.M. 601(e)(1), MCM, 1984, at II-62.

case cannot include a bad conduct discharge.<sup>1496</sup> This means that a special court-martial could impose a sentence less severe than a bad conduct discharge, but could not impose a bad conduct discharge.

Under certain circumstances, a conviction for a combination of offenses may result in the award of a punitive discharge, even though, none of the offenses, when considered individually, is serious enough to warrant imposition of a punitive discharge.<sup>1497</sup> The Manual provides that a punitive discharge can be imposed where an accused receives three or more court-martial convictions for minor offenses within a year's time.

If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next

---

<sup>1496</sup> Id. Article 19 of the Code provides in part that:

A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of [the Code] (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial.

Art. 19, U.C.M.J., 10 U.S.C. § 819 (1983).

<sup>1497</sup> See United States v. Lalla, 17 M.J. 622, 625-26 (NMCMR 1983)(failure of military judge to advise the accused that he could receive a bad conduct discharge as additional punishment under the Manual because of his prior convictions by court-martial held error, but not prejudicial error).

preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year.<sup>1498</sup>

The prior convictions, however, must be final and any periods of absence without leave are to be excluded in computing the 1 year period.<sup>1499</sup>

If an accused receives two or more court-martial convictions for minor offenses within a 3 year period, the Manual provides that a punitive discharge can be awarded.

If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months.<sup>1500</sup>

Here too, the prior convictions must be final and any

---

<sup>1498</sup> R.C.M. 1003(d)(1), MCM, 1984, at II-148.

<sup>1499</sup> Id. at II-148 to II-149.

<sup>1500</sup> R.C.M. 1003(d)(2), MCM, 1984, at II-149.

periods of unauthorized absence are excluded in computing the three-year period.

If an accused receives two or more court-martial convictions for minor offenses, and the total authorized confinement for the two offenses is 6 months or more, the Manual states that a punitive discharge also can be imposed.

If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.<sup>1501</sup>

Convictions by summary courts-martial may not be used to increase the punishment in any of these situations,<sup>1502</sup> and the other general rules on limitation on punishments still apply; a special court-martial, for example, cannot impose more confinement than it is authorized to impose by statute.

These are the general rules found in the Code and the Manual concerning the maximum sentence which can be imposed for offenses committed under the Code.

Sentences which exceed the maximum sentence authorized

---

<sup>1501</sup> R.C.M. 1003(d)(3), MCM, 1984, at II-149.

<sup>1502</sup> Discussion, R.C.M. 1003(d)(3), MCM, 1984, at II-149.

can be reduced after the trial by the convening authority on review, or reassessed by the appellate authorities on appeal, but in no instance, except where a sentence is mandatory, can the sentence adjudged by a court-martial be increased over that which has been announced at trial.<sup>1503</sup> In conclusion, to be sound jurisdictionally, the court-martial sentence must be within the maximum limits prescribed by the Code and the Manual.

---

1503

[A] sentence cannot be reconsidered with a view toward increasing its severity if such sentence has been "announced," unless a mandatory sentence is involved.

United States v. Justice, 3 M.J. 451, 452 (C.M.A. 1977).  
See Art. 60(e)(2)(C), U.C.M.J., 10 U.S.C. § 860(e)(2)(C) (1983).

## CHAPTER NINE

### EXTRAORDINARY RELIEF

A soldier, who is charged with a military offense and who believes an issue of court-martial jurisdiction exists in his case, can raise the issue in three ways. First, the accused can present the issue in an Article 39(a) session at a court-martial in the form of a motion to dismiss the charges and specifications for lack of jurisdiction.<sup>1504</sup> Second, if the military judge rules against the accused and the accused is convicted of the crime with which he is charged, the issue of lack of jurisdiction can be raised again by the accused either in an Article 69 appeal,<sup>1505</sup> or in an appeal to the Court of Military Review<sup>1506</sup> or on appeal to the Court of Military Appeals.<sup>1507</sup> It is at the trial level or on appeal that most jurisdiction issues usually are decided.

The third way in which an accused can raise a

---

<sup>1504</sup> Art. 39(a), U.C.M.J., 10 U.S.C. § 839(a) (1983).

<sup>1505</sup> Art. 69(b), U.C.M.J., 10 U.S.C. § 869(b) (1983).

<sup>1506</sup> Art. 66, U.C.M.J., 10 U.S.C. § 866 (1983).

<sup>1507</sup> Art. 67, U.C.M.J., 10 U.S.C. § 867 (1983).

jurisdictional issue is by filing a petition for extraordinary relief in the Courts of Military Review,<sup>1508</sup> in the Court of Military Appeals,<sup>1509</sup> or in a federal district court,<sup>1510</sup> in a federal circuit court of appeals,<sup>1511</sup> or in the Supreme Court of the United States.<sup>1512</sup> The accused can file a petition for extraordinary relief (1) before a court-martial begins, or (2) after a motion to dismiss the charges for lack of jurisdiction has been denied by a military judge at an Article 39(a) session.

A. Extraordinary Writs in Military Courts

The Courts of Military Review and the Court of Military Appeals have power under the All Writs Act to issue extraordinary writs.<sup>1513</sup> The All Writs Act

---

<sup>1508</sup> See Courts of Military Review Rules of Practice, Rule 21, 10 M.J. LXXXVII-LXXXVIII (1980).

<sup>1509</sup> See United States Court of Military Appeals Rules of Practice and Procedure, 4 M.J. CXII-CXIII (1977).

<sup>1510</sup> See 28 U.S.C. §§ 1651, 2241, 2242, 2255 (1983).

<sup>1511</sup> FED. R. APP. P. 21-24.

<sup>1512</sup> SUP. CT. R. 41 & 43 (June 30, 1980).

<sup>1513</sup> An extraordinary writ can be filed in the form of a Writ of Habeas Corpus, a Writ of Prohibition, a Writ of Mandamus, a Writ of Coram Nobis, or a Writ of Certiorari. MILITARY PRACTICE AND PROCEDURE, supra note 939, at 363 n.1; Rankin, The All Writs Act and the Military Justice System, 53 MIL. L. REV. 103, 105-10 (1971).

provides that:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.<sup>1514</sup>

In effect, the All Writs Act gives the Court of Military Appeals and the Courts of Military Review the "power to grant relief on an extraordinary basis, when the circumstances so require."<sup>1515</sup> In this regard, the Supreme Court of the United States has observed that when a soldier raises a substantial question about the right of the military to try him, it is not necessary for the soldier to exhaust his military remedies.<sup>1516</sup>

---

<sup>1514</sup> 28 U.S.C. § 1651(a) (1983).

<sup>1515</sup> Gale v. United States, 17 USCMA 40, 43, 37 CMR 304, 307 (1967) (Court of Military Appeals holds it has the power to grant petitions for extraordinary relief in appropriate cases). See United States v. Morgan, 346 U.S. 502, 506-12 (1954) (Supreme Court discusses the potential use of the All Writs Act in criminal cases); United States v. Ferguson, 5 USCMA 68, 86-87, 17 CMR 68, 86-87 (1954) (Judge Brosman discusses use of the All Writs Act by military courts).

<sup>1516</sup> Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969) (accused did not raise a substantial question concerning the right of the military to try him); United States v. Caputo, 18 M.J. 259, 263 (C.M.A. 1984) (accused is entitled to an authoritative answer as to whether he could be tried by court-martial); Wickham v. Hall, 12 M.J. 145, 146 (C.M.A. 1981) (Court of Military Appeals considers before trial the accused's petition for extraordinary relief on whether the accused was subject to court-martial jurisdiction). See also Murray v. Haldeman, 16 M.J. 74, 76-77, 80 (C.M.A. 1983) (petition for extraordinary relief on issue of compulsory urinary-

1. Court of Military Appeals

In McPhail v. United States,<sup>1517</sup> the Court of Military Appeals made clear that it, like the federal civilian courts, has the "authority to issue an appropriate writ in 'aid' of [its] jurisdiction" and that its authority is "not limited to the appellate jurisdiction defined in Article 67."<sup>1518</sup> The Court of Military

---

<sup>1517</sup> 1 M.J. 457 (C.M.A. 1976).

<sup>1518</sup> Id. at 462. Article 67(b), U.C.M.J., 10 U.S.C. § 867(b) (1983), provides in part that:

- (b) The Court of Military Appeals shall review the record in--
- (1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;
  - (2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
  - (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted review.

The Court of Military Appeals has not always viewed its authority to issue extraordinary writs as being this broad. See United States v. Snyder, 18 USCMA 480, 483, 40 CMR 192, 195 (1969) (appellate jurisdiction of Court of Military Appeals held limited to appellate jurisdiction set forth in Article 67(b)); Wacker, The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under

Appeals, in other words, has ruled, that as a court created by Congress under Article I, it has the power to act on extraordinary writs and to grant appropriate relief when circumstances warrant such action.<sup>1519</sup>

In 1969, the Court of Military Appeals was asked by the accused in Fleiner v. Koch<sup>1520</sup> to rule on a petition for a Writ of Prohibition. The accused in Fleiner was charged with committing indecent assault and an indecent act on a citizen in the civilian community in

---

the All Writs Act from the United States Court of Military Appeals, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 33, 92 (1975).

1519

We conclude, therefore, that, in an appropriate case, this Court clearly possesses the power to grant relief to an accused prior to the completion of court-martial proceedings against him. To hold otherwise would mean that, in every instance and despite the appearance of prejudicial and oppressive measures, he would have to pursue the lengthy trial of appellate review--perhaps even serving a long term of confinement--before securing ultimate relief. We cannot believe Congress, in revolutionizing military justice and creating for the first time in the armed services a supreme civilian court in the image of the normal Federal judicial system, intended it not to exercise power to grant relief on an extraordinary basis, when the circumstances so require.

Gale v. United States, 17 USCMA 40, 43, 37 CMR 304, 307 (1967)(petition for extraordinary relief denied on the grounds that the facts in the case did not present a need for extraordinary relief); United States v. Frischholz, 16 USCMA 150, 153, 36 CMR 306, 309 (1966)(petition for coram nobis denied where the accused asked the Court for reconsideration of an issue previously raised).

<sup>1520</sup> 19 USCMA 630, \_\_\_ CMR \_\_\_ (1969).

San Diego, California. In ruling on the writ, the Court noted that "[n]one of the circumstances indicate that either of the alleged acts is service-connected so as to allow trial thereof by court-martial within the constitutional limitation on court-martial jurisdiction delineated by the United States Supreme Court in *O'Callahan v. Parker*."<sup>1521</sup> For this reason, the Court granted the accused's petition for Writ of Prohibition and prohibited the convening authority, a Rear Admiral who was the Commandant of the Naval District of Washington, "from ordering or otherwise requiring the Petitioner to stand trial before a court-martial for the alleged acts set" out in the charge sheets.<sup>1522</sup>

In *Fleiner*, the accused filed the Writ of Prohibition before his court-martial commenced, and by doing so, avoided the need of having to go through a court-martial to have the issue of jurisdiction resolved. In *McPhail v. United States*,<sup>1523</sup> the accused filed a petition for extraordinary relief after he was convicted by court-martial.

In *McPhail*, the accused was found guilty by a special court-martial for offenses involving misconduct "in connection with an application for a loan from a

---

<sup>1521</sup> Id.

<sup>1522</sup> Id.

<sup>1523</sup> 1 M.J. 457 (C.M.A. 1976).

credit union located in the civilian community and under circumstances which did not establish a military connection with the transaction."<sup>1524</sup> The sentence imposed by the military judge in a trial by military judge alone was "restriction to the limits of Charleston Air Force Base for 1 month, and to perform hard labor without confinement for 3 months."<sup>1525</sup>

The accused's case was reviewed under Article 69 by The Judge Advocate General of the Air Force. Upon completion of review by The Judge Advocate General, the accused filed a petition for extraordinary relief in the United States Court of Military Appeals.<sup>1526</sup> In reviewing the accused's petition, the Court found that the court-martial did not have jurisdiction over the offense because the offenses with which McPhail was charged were not service connected.<sup>1527</sup> For this reason, the Court granted McPhail's request for relief and ordered The

---

<sup>1524</sup> Id. at 458.

<sup>1525</sup> Id. at 459.

<sup>1526</sup> The accused filed a petition "for writ of certiorari or coram nobis." Id. at 457. The Court of Military Appeals noted that under a writ of coram nobis "a court can remedy an earlier disposition of a case that is flawed because the court misperceived or improperly assessed a material fact." Id. at 459. In this case, the Court concluded that there was no basis for coram nobis relief because the Court's first review of the accused's case and its "disposition of it was not predicated upon an error of fact." Id.

<sup>1527</sup> Id. at 463.

Judge Advocate General of the Air Force to "vacate the accused's conviction and provide . . . that the accused be restored to all rights, privileges and property affected by the execution of the sentence imposed by the court-martial."<sup>1528</sup>

Commenting on the timeliness of McPhail's filing his petition for extraordinary relief, the Court noted that "[h]ad the accused petitioned this Court before he was sentenced, he would not now be burdened with a conviction for offenses which concededly were not triable by court-martial."<sup>1529</sup> The point is that if there is a jurisdictional error in a case, an accused should not hesitate to petition the Courts of Military Review or the Court of Military Appeals for relief. If, before trial, or after the issue has been decided at an Article 39(a) Session, a Court of Military Review or the Court of Military Appeals decides that it is "abundantly clear that any verdict of guilty returned by the court-martial [will] be overturned," the Court will take whatever action is "necessary to prevent a waste of time and energy of the military tribunals involved throughout the trial and appellate stages."<sup>1530</sup> If, however, the

---

<sup>1528</sup> Id.

<sup>1529</sup> Id. at 459.

<sup>1530</sup> United States v. Caputo, 18 M.J. 259, 268 (C.M.A. 1984) (petition for extraordinary relief granted where it was found that the court-martial had no juris-

court decides that the accused is simply using the All Writs Act as a means to appeal an interlocutory decision of a court-martial or the military judge, the court will deny the petition for extraordinary relief.<sup>1531</sup>

Not every petition for extraordinary relief alleging a jurisdictional issue will be acted on favorably by the Court of Military Appeals. In Dobzynski v. Green,<sup>1532</sup> for example, the accused was charged with possession of marihuana on board the USS RICHMOND K. TURNER. His case was referred to a special court-martial and during the Article 39(a) session of the court-martial, the defense counsel made a motion to suppress the evidence of marihuana on the grounds that it was obtained

---

diction to try a reservist who committed offenses on active duty for training and who was released from active duty before he was charged with the offenses); Chenoweth v. Van Arsdall, 22 USCMA 183, 188, 46 CMR 183, 188 (1973)(writ of prohibition denied because no facts were presented showing the need for extraordinary relief). Zamora v. Woodson, 19 USCMA 403, 404, 42 CMR 5, 6 (1970)(petition for extraordinary relief granted where court-martial had no jurisdiction to try a civilian accompanying the armed forces in Vietnam for offenses committed in Vietnam). See also Del Prado v. United States, 23 USCMA 132, 48 CMR 748 (1974)(writ of coram nobis granted four years after completion of appellate review where accused was tried by military judge alone without a written request for trial by military judge alone).

<sup>1531</sup> See Medina v. Resor, 20 USCMA 403, 405-06, 43 CMR 243, 245-46 (1971)(petition for writ of prohibition, to enjoin convening authority from referring charges to a court-martial, denied on grounds that the accused presented no need for extraordinary relief).

<sup>1532</sup> 16 M.J. 84 (C.M.A. 1983).

as a result of an illegal search and seizure. The military judge agreed and granted the defense's motion to suppress the evidence. Upon learning of the judge's decision, "the convening authority withdrew the charges from the properly convened special court-martial"<sup>1533</sup> and within two months referred the marihuana charges to a Captain's Mast for imposition of nonjudicial punishment. At the Captain's Mast, the accused was found guilty of possession of the same marihuana, which the military judge had suppressed at the trial as illegally seized evidence, and the accused was given "nonjudicial punishment of 45 days' restriction, 45 days' extra duty, and forfeiture of \$250 pay per month for 2 months."<sup>1534</sup>

The accused petitioned the Court of Military Appeals for a writ of mandamus alleging that his due process rights were violated when the military judge allowed "withdrawal [by the convening authority] of charges after arraignment and suppression of evidence prior to presentation of evidence on the merits."<sup>1535</sup> The Court stated that the Manual permits a convening authority to withdraw charges referred to trial for "good cause" and that a finding of insufficient evidence was "good cause" for withdrawal of the charges. For this

---

<sup>1533</sup> Id. at 85.

<sup>1534</sup> Id.

<sup>1535</sup> Id.

reason, the Court concluded that "the convening authority acted in accordance with the law and within his discretion in withdrawing the charges from the special court-martial."<sup>1534</sup> In short, the Court denied the accused's petition for relief because it found "that the charges were properly withdrawn from the special court-martial and that Article 15 punishment was properly imposed."<sup>1537</sup>

In Dobzynski's case there was no jurisdictional error and no due process error and, hence, the Court was powerless to grant the accused the relief he requested. The Court, however, strongly condemned this sort of procedure and noted "that the disposition of the offenses in this case lends itself, at the very least, to the impression of injustice--a perception to be avoided in a fundamentally fair justice system."<sup>1538</sup>

In another case, Jones v. Commandant,<sup>1539</sup> an

---

<sup>1534</sup> Id. at 86.

<sup>1537</sup> Id. Chief Judge Everett in dissent argued that the imposition of Article 15 punishment was illegal and that the writ of mandamus should have been granted. Id. at 92.

<sup>1538</sup> Id. at 85. See Robertson v. Wetherill, 21 USCMA 77, 78, 44 CMR 131, 132 (1971) (petition for extraordinary relief seeking to prohibit convening authority from withdrawing charges from special court-martial for rereferral to general court-martial denied); Petty v. Moriarty, 20 USCMA 438, 442, 43 CMR 278, 282 (1971) (writ of prohibition granted prohibiting a convening authority from withdrawing charges from special court-martial where military judge had granted the accused a continuance to obtain witnesses).

<sup>1539</sup> 18 M.J. 198 (C.M.A. 1984).

accused's petition for extraordinary relief similarly was denied by the Court of Military Appeals. In Jones, the accused, who was attached to a vessel, was tried by "general court-martial on various drug-related charges including conspiracy and dereliction of duty."<sup>1540</sup> During his trial, the military judge granted the accused's motion to suppress certain evidence. In addition, the convening authority withdrew "the dereliction charge on the grounds" that it failed to state an offense.<sup>1541</sup> After the Government rested its case, the accused made a motion for a finding of not guilty which the military judge granted.

Later, the accused was given an Article 15 for the same charges on which he had been acquitted.<sup>1542</sup> Because the accused was assigned to a ship, he was precluded from refusing the Article 15 and demanding trial by court-martial. The Article 15 punishment was imposed on the accused and the accused appealed it. His appeal was denied, and the Navy then discharged him administratively with a less than honorable discharge.

In his petition to the Court of Military Appeals, the accused requested that the convening authority be ordered to grant the accused's appeal from Article 15

---

<sup>1540</sup> Id. at 199.

<sup>1541</sup> Id.

<sup>1542</sup> Id.

punishment, and that the Navy be directed to annul the accused's administrative discharge and to reinstate the accused in the Navy.<sup>1543</sup>

The Court of Military Appeals noted that the "allegation of conspiracy [in the Article 15] amounted to essentially the same crime alleged in the general court-martial with the mere substitution in the second instance of a previously unnamed co-conspirator."<sup>1544</sup> Nevertheless, the Court held "that the wrong perpetrated here does not rise to the level of a legal error demanding the exercise of our extraordinary relief powers."<sup>1545</sup>

Judge Cook in his concurring opinion agreed that the Court of Military Appeals did not have jurisdiction to review the accused's petition for a writ of mandamus. In his view, the Court's power to grant petitions for extraordinary relief was limited to matters involving courts-martial and did not apply matters concerning nonjudicial punishment. For this reason, he voted to dismiss accused's petition.

In dissent, Chief Judge Everett argued that the accused had been acquitted in his court-martial of the charges for which he was being punished under Article 15 and that he was "protected by the Uniform Code and the

---

<sup>1543</sup> Id.

<sup>1544</sup> Id.

<sup>1545</sup> Id.

United States Constitution from being tried again for the [same] offenses."<sup>1546</sup> Chief Judge Everett argued that the Court of Military Appeals is empowered by the Congress to grant extraordinary relief [especially in cases like this where] Article 15 is used in a manner that clearly violates a servicemember's statutory and constitutional rights."<sup>1547</sup>

The point is that a petition for extraordinary relief must be one on which the courts have authority to act and must present a valid jurisdictional question. The accused has to show, in other words, (1) that the case can be reviewed by a Court of Military Review under the provisions of Article 66(b) of the Code and by the Court of Military Appeals under the provisions of Article 67 of the Code, or (2) that the case can be reviewed by a Court of Military Review or the Court of Military Appeals in "aid" of its jurisdiction. In addition, the accused has to allege in his petition that the court-martial, which is about try him or which has tried him, was not properly convened or properly constituted, did not have jurisdiction over the offense or his person, or imposed or is about to impose a sentence in excess of that which is permitted by the Code or the Manual.

---

<sup>1546</sup> Id. at 200.

<sup>1547</sup> Id. at 201.

## 2. Courts of Military Review

In addition to holding that it has the power under the All Writs Act to grant petitions for extraordinary relief, the Court of Military Appeals also has held that "a Court of Military Review is empowered to provide extraordinary relief."<sup>1548</sup> The power to grant extraordinary relief, however, has not been extended to military judges, although at least two judges on the Court of Military Appeals apparently think a military judge has such power once charges have been referred to trial.<sup>1549</sup>

---

<sup>1548</sup> Dettinger v. United States, 7 M.J. 216, 219 (C.M.A. 1979)(no grounds shown for granting government's petition for extraordinary relief). See also Jameson v. Strom, 17 M.J. 808, 809 (ACMR 1984)(petition for extraordinary relief denied because the facts alleged by the accused in his petition were found not to be as alleged); Talbert v. Lurker, 17 M.J. 692, 693 (ACMR 1983)(accused's petition for a writ of mandamus denied because the court could not find extraordinary circumstances warranting the issuance of the writ); DeChamplain v. McLucas, 22 USCMA 462, 463, 47 CMR 552, 553 (1973) (denial by the military judge of the accused's motion at trial did not present grounds for extraordinary relief). For a discussion of the limitations on the power of the Courts of Military Review to grant petitions for extraordinary relief see Barnett v. Persons, 4 M.J. 934 (ACMR 1978)(Army Court of Military Review held without jurisdiction to hear accused's petition for extraordinary relief). See also Stayton v. Westbrook, 18 M.J. 520, 522 (AFCMR 1984)(accused not entitled to extraordinary relief because his case was not one with the potential to come before the Court of Military Review on appellate review).

<sup>1549</sup>

In Zamora v. Woodson, 19 USCMA 403, 42 CMR 5 (1970), this Court reserved decision on two questions as to the power of the military judge. The first was whether the judge could

## B. Extraordinary Writs in the Federal Courts

A soldier, who is charged with a military offense and who believes an issue of court-martial jurisdiction exists in his case, also has the right to file a petition for extraordinary relief in a federal civilian court, but only under limited circumstances.<sup>1550</sup> In the past, Article III courts have considered writs from service members only after the military decisions are final and after an accused has exhausted his military remedies. The exhaustion of military remedies requirement promotes efficiency by preventing premature review of military issues by the federal courts. It also permits the military to develop a complete factual record in a case and to exercise its expertise and discretion in dealing

---

act in regard to pretrial confinement prior to the referral of a case to trial; the second was whether he could independently exercise authority under the All Writs Act, 28 USC § 1651(a), as a court created by Congress. Apparently, the majority would answer both questions in the affirmative. Affirmative answers are, in my opinion, contrary to the Uniform Code.

Porter v. Rocharadson, 50 CMR 910, 912-13 (1975) (Cook dissenting).

<sup>1550</sup> The issue of the jurisdiction of a court-martial is by no means the only issue which can be raised in a federal court on a petition for extraordinary relief. For a discussion of the various ways in which the writ of habeas corpus can be used by military service personnel, see Bruinooge, Mobilization for a European War: The Impact of Habeas Corpus, 22 A.F.L. REV. 205, 221-69 (1980-81).

with matters that are purely military in nature.<sup>1551</sup>

The hesitancy of federal judges to interfere in the ongoing powers of military justice is due in part to a recognition on the part of the federal civilian courts that the military justice system is separate and complete, and that the military courts are competent to handle the matters within their system.<sup>1552</sup>

---

<sup>1551</sup> See McKart v. United States, 395 U.S. 185, 194 (1969)(accused was found to be exempt from military service as sole surviving son, even though his mother died, and respondent's attempt to reclassify him and induct him into the armed services held to be improper); Parisi v. Davidson, 405 U.S. 34, 37 (1972)(ongoing court-martial prosecution against the accused is not a reason for a federal district court to delay acting on the accused's claim that the military improperly denied his application for discharge for conscientious objector status).

<sup>1552</sup> Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).

Notwithstanding the existence of the power [of the federal courts to issue writs of habeas corpus], the decisions of the Federal courts disclose a marked reluctance on the part of civilian judges to interfere, save in compelling circumstances, with the determinations of military tribunals. Two basic principles underlie this judicial attitude. First, courts-martial together with their appellate agencies form a special type of judicial system which is part of the Executive branch and which is constitutionally independent of the Federal courts. Second, in the present Uniform Code of Military Justice, as in the former Articles of War and Articles for Government of the Navy, Congress has established strong safeguards for the rights of persons accused of offenses against military law.

De Coster v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955), companion case rev'd, Jackson v. Taylor, 353 U.S. 569, 572 n.2 (1957)(in reviewing the accused's sentence to 20

1. Military Justice System is Separate and Complete

The judges in the federal system are aware that for almost two centuries, the military courts have operated under their own rules and procedures. In acknowledging the uniqueness of military law, Chief Justice Vinson observed in Burns v. Wilson<sup>1553</sup> that:

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

---

years confinement at hard labor for rape and premeditated murder, the Board of Review properly sustained the sentence, even though it reversed the accused's conviction of premeditated murder).

With respect to review of court-martial decisions, American law has followed the English concept that military courts provide an autonomous system of jurisprudence which, due to the exigencies of military life and the necessity for discipline, should not be interfered with by the civil authorities.

Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 VA. L. REV. 483, 486 (1969).

<sup>1553</sup> 346 U.S. 137, 140 (1953).

entrusted that task to Congress.<sup>1554</sup>

In fulfillment of its responsibility under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces,"<sup>1555</sup> Congress created a military justice system which fully protects the rights of those accused of military offenses. In addition, Congress provided for "a complete system of review within the military system to secure those rights."<sup>1556</sup>

In exercising its control over the military justice system, Congress never has granted Article III courts the power to review courts-martial;<sup>1557</sup> nor has it deemed it appropriate, until recently, "to confer on [the Supreme Court of the United States] 'appellate jurisdiction to supervise the administration of criminal justice in the military.'"<sup>1558</sup> On December 3, 1983, Congress amended the Uniform Code of Military Justice to allow limited review of court-martial decisions by the Supreme Court of the United States by writ of certiorari from the

---

<sup>1554</sup> Id. at 140.

<sup>1555</sup> U.S. CONST., Art. I, § 8, cl. 14.

<sup>1556</sup> Burns v. Wilson, 346 U.S. 137, 140 (1953).

<sup>1557</sup> Schlesinger v. Councilman, 420 U.S. 738, 746 (1975).

<sup>1558</sup> Id.

United States Court of Military Appeals.<sup>1559</sup> This is the first time that there has been an exception to the long followed rule that "the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed by the civil courts."<sup>1560</sup> The exception is a limited one for it applies only to cases actually reviewed by the Court of Military Appeals. To date, the Supreme Court has not granted certiorari and set for argument any case submitted to it under the new statute.<sup>1561</sup>

## 2. Finality of Court-Martial Judgments

The fact that the military court system is separate and distinct from the federal civilian court system does not mean that court-martial decisions can never be reviewed by Article III courts. Article 76 of the Code states that:

[T]he proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by [the Code] . . . are final and conclusive [and] . . . all action taken pursuant to those proceedings [is] binding upon all departments, courts, agencies, and

---

<sup>1559</sup> Art. 67(h), U.C.M.J., 10 U.S.C. § 867(h) (Supp. 1986).

<sup>1560</sup> Smith v. Whitney, 116 U.S. 167, 177 (1886).

<sup>1561</sup> But see note 205 supra and accompanying text.

officers of the United States. . . 1562

But this language has never been read as completely precluding civilian review of military court decisions. Instead, it has been interpreted "as doing no more than describing the terminal point for proceedings within the court-martial system."<sup>1563</sup> While it is generally acknowledged that the federal civilian courts cannot directly review military court decisions for errors in findings of fact or in interpretations of law, it always has been true that Article III courts can consider petitions for extraordinary relief from soldiers and civilians who contend that the judgment of a court-martial is void because the court-martial lacked jurisdiction.

One of the earliest cases in which the judgment of a court-martial was attacked collaterally on the grounds that a court-martial lacked jurisdiction was Wise v. Withers.<sup>1564</sup> In Wise, as noted earlier, the plaintiff was a United States Justice of the Peace for the District

---

<sup>1562</sup> Art. 76, U.C.M.J., 10 U.S.C. § 876 (1983).

<sup>1563</sup> Gusik v. Schilder, 340 U.S. 128, 132 (1950). "Subject only to a petition for a writ of habeas corpus in Federal court [Article 76] provides for the finality of court-martial proceedings and judgments." S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949). See Schlesinger v. Councilman, 420 U.S. 738, 744-53 (1975) (Article 76 held not to bar accused from filing a petition for extraordinary relief in the federal courts).

<sup>1564</sup> 7 U.S. (3 Cranch) 330 (1806). See supra note 430 and accompanying text.

position," an attempt was made to enroll him in the militia of the District of Columbia. The plaintiff claimed, that as a Justice of the Peace, he was exempt under statute from such service because he was an officer of the United States. His protestations went unheeded and he was court-martialed and fined. When he failed to pay the fine imposed, the collector of militia fines entered the plaintiff's house and carried off some of the plaintiff's "goods."

The rules at the time provided that the decisions of courts-martial were "final and conclusive, like those of an ecclesiastical court, or a court of admiralty."<sup>1565</sup> The plaintiff filed a writ of error with the Supreme Court of the United States for damages and in an opinion authored by Chief Justice John Marshall, the Court held, that as "a justice of the peace, within the district of Columbia,"<sup>1566</sup> the petitioner was exempt from militia duty under the plain language of the statute, and that the court-martial which tried him had no jurisdiction over him and was "clearly without its jurisdiction."<sup>1567</sup>

Fifty years later, in 1857, the Supreme Court of

---

<sup>1565</sup> 7 U.S. at 334.

<sup>1566</sup> Id.

<sup>1567</sup> Id. at 337. See Ex parte Reed, 100 U.S. 13, 23 (1879) (Navy accused's petition for habeas corpus denied on the grounds that the court-martial had jurisdiction over the person and the subject matter).

the United States in Dynes v. Hoover<sup>1568</sup> again addressed the issue of court-martial jurisdiction. In Dynes, the accused, a Navy seaman, was charged with desertion on September 12, 1854, from his ship INDEPENDENCE docked in New York harbor. The accused was acquitted of desertion, but was found guilty of attempting to desert, and was sentenced "to be confined in the penitentiary of the District of Columbia at hard labor, without pay, for the term of six months from the date of the approval of [the] sentence, and not to be again enlisted in the naval service."<sup>1569</sup> The Secretary of the Navy approved the sentence and the accused began to serve his confinement in the penitentiary in the District of Columbia.

On appeal by writ of error to the Supreme Court of the United States,<sup>1570</sup> the accused argued that he was subjected to false imprisonment because the court-martial which tried him did not have jurisdiction to adjudge the sentence in his case. In addressing this issue, Justice Wayne stated that:

[T]he case in hand is not one of a court without jurisdiction over the subject-matter, or that of one which has ne-

---

<sup>1568</sup> 61 U.S. (20 How.) 65 (1857).

<sup>1569</sup> Id. at 77.

<sup>1570</sup> See generally Developments in the Law--Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1209 n.4 (1970) discussing types of collateral attack raising issues of jurisdiction.

glected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void.<sup>1571</sup>

Justice Wayne then examined the sentence adjudged in the accused's court-martial, and found that it "was not forbidden by law" and that it had been "approved by the Secretary of the Navy."<sup>1572</sup> He thus concluded that there was not jurisdictional error in the sentence imposed on the accused, and held that the accused was not being falsely imprisoned.<sup>1573</sup>

The Supreme Court noted that Article III courts had the power to review sentences imposed by courts-martial. But the Court noted that Article III courts only have the power to do so in "cases where the accused alleges that the sentence imposed by a court-martial is one forbidden by law."<sup>1574</sup> If the sentence adjudged is not forbidden by law and the court-martial is "convened regularly, and [has] proceeded legally,"<sup>1575</sup> Article III courts have no power to disturb either the findings

---

<sup>1571</sup> 61 U.S. (20 How.) at 81.

<sup>1572</sup> Id. at 83.

<sup>1573</sup> Id. at 84.

<sup>1574</sup> Id. at 82-83.

<sup>1575</sup> Id. at 82

or the sentence of a court-martial. "But," the Court said, "if a court-martial . . . shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquiry into the want of the court's jurisdiction, and give him redress."<sup>1576</sup>

In Dynes, the Supreme Court reaffirmed the principle announced in Wise v. Withers<sup>1577</sup> that if a court-martial does not have jurisdiction over the person, its judgment is void.<sup>1578</sup> In Dynes, the Court also stated that any sentence imposed by a court-martial in excess of that which is authorized by statute is void. But what is most significant about the Supreme Court's decision in Dynes is that the Court formulated a rule that would govern the scope of civilian court review of military court decisions for the next 100 years. What the Court said was that "[p]ersons . . . belonging to the army and navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their procedures of organization and for trial have been disregarded."<sup>1579</sup> When this occurs, the Court

---

<sup>1576</sup> Id.

<sup>1577</sup> 7 U.S. (3 Cranch) 331 (1806).

<sup>1578</sup> Id. at 337.

<sup>1579</sup> 61 U.S. (20 How.) at 81 (emphasis added).

noted, "everything which may be done is void--not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment."<sup>1580</sup>

In discussing the term "proceeding," the Court said that:

When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law.<sup>1581</sup>

The "essentials required by the statute," which the Court referred to, are what approximately 50 years later would be identified by Judge Sanborn in Deming v. McClaughry<sup>1582</sup> as the "indispensable prerequisites" of court-martial jurisdiction.<sup>1583</sup> Thus the beginning of the review by Article III courts of decisions of court-martial began with Wise v. Withers<sup>1584</sup> and Dynes v.

---

<sup>1580</sup> Id.

<sup>1581</sup> Id. at 82.

<sup>1582</sup> 113 F. 639 (8th Cir.), aff'd, 186 U.S. 49 (1902). See supra note 474 and accompanying text.

<sup>1583</sup> 113 F. at 650.

<sup>1584</sup> 7 U.S. (3 Cranch) 331 (1806).

Hoover<sup>1585</sup> and has continued to the present day.

### 3. Scope of Military Review

For 100 years after the Supreme Court's decision in Dynes, the scope of review of military decisions by Article III courts was limited to questions of jurisdiction. Professor Joseph W. Bishop, Jr., of the Yale Law School noted in this regard that:

Prior to 1944 or thereabouts, there was a nearly monolithic harmony within and beneath the Supreme Court. Nothing was better settled than the proposition that the federal courts, having no appellate jurisdiction over military tribunals, would, in collateral proceedings attacking the validity of a military sentence, most strictly limit themselves to "ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether . . . it had exceeded its powers in the sentence pronounced." "[N]o mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction."<sup>1586</sup>

Because of this, the review of military court proceedings by Article III courts was limited to "the strict but simple rule that a civilian court may look into only the

---

<sup>1585</sup> 61 U.S. (20 How.) 65 (1857).

<sup>1586</sup> Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 COL. L. REV. 40, 43-44 (1961) quoting in part from Carter v. Roberts, 177 U.S. 496, 498 (1900) and In re Grimley, 137 U.S. 147, 150 (1890). See Covington, Judicial Review of Courts-Martial, 7 GEO. WASH. L. REV. 503 (1939).

elementary matters of a court-martial's jurisdiction of the person accused and the offense charged and its power to impose the sentence awarded."<sup>1587</sup>

There are two reasons why the scope of civilian court review of court-martial decisions in the first 150 years of the nation's history was limited only to questions of jurisdiction. First, it was generally believed that military commanders should have broad discretion in dealing with matters concerning the discipline of soldiers and sailors serving in the armed forces. Commanders need this power to maintain order and discipline. In addition, commanders had the benefit of knowing how the military system works and they were familiar with military customs, traditions, and history-- all of which were important in handling disciplinary problems. Since civilian judges had little, if any, knowledge of military practices and procedures, it made good sense to allow military officials wide latitude in dealing with matters concerning discipline within the armed forces.

---

<sup>1587</sup> De Coster v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955). "Other cases have announced the complementary rule that a civilian court may not review the merits of or re-evaluate the evidence presented in court-martial proceedings." Id. But see, Calley v. Callaway, 519 F.2d 184, 198 n.20 (5th Cir. 1975) in which Judge Ainsworth notes that Justice Frankfurter and "l[ot]her commentators have agreed that there was historically no special rule for reviewing court-martial convictions." See also, J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 131-33 (New York: Charterhouse, Inc., 1974).

The second reason for restricting civilian review of military court decisions to questions of jurisdiction is because civilian judges, sooner or later, would involve themselves in military decisionmaking, and would, no doubt, start to second-guess the decisions of military commanders on the way disciplinary problems were handled. It was thought, in other words, that if the scope of review was broader, "the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, [and] from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."<sup>1588</sup>

In short, it was believed that in matters concerning "unwritten military law or usage," military and naval officers, because of "their training and experience in the service, [were] more competent judges [on how to proceed] than [were judges in the] courts of common law."<sup>1589</sup> In addition, it was thought that

---

<sup>1588</sup> Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857).

<sup>1589</sup> Smith v. Whitney, 116 U.S. 167, 178 (1886).

This [ideal] is nowhere better stated than by Mr. Justice Perry in the Supreme Court of Bombay, saying: "And the principle of the non-interference of the courts of law with the procedure of courts martial is clear and obvious. The groundwork of the jurisdiction,

military officers should be permitted to do their jobs without undue interference from the judiciary.

After World War II the Supreme Court in Burns v. Wilson<sup>1590</sup> broadened the power of the federal courts

---

and the extent of the powers of courts martial, are to be found in the Mutiny Act and the Articles of War, and upon all questions arising upon these her Majesty's judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the military code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts martial those rules which are applicable to another and different course of practice." Porret's Case, Perry's Oriental Cases, 414, 419.

Id. at 178-79.

<sup>1590</sup> 346 U.S. 137, rehearing denied, 346 U.S. 844 (1953).

I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half

to review military cases. In Burns the Court voted to deny the accuseds' petitions for writs of habeas corpus.<sup>1591</sup> The accuseds in Burns had been court-martialed separately in Guam for murder and rape and had been convicted and sentenced to death. The accuseds exhausted their military remedies and then filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia. The District Court denied their petitions<sup>1592</sup> and the Circuit Court of Appeals for the District of Columbia affirmed the District Court's decision.<sup>1593</sup>

---

million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

Warren, The Bill of Rights and the Military, 37 N.Y.U.L. REV. 181, 187-88 (1962). See J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 122-33 (New York: Charterhouse, Inc., 1974).

<sup>1591</sup> 346 U.S. at 144.

<sup>1592</sup> Burns v. Lovett, 104 F. Supp. 312, 313 (D.D.C. 1952). See Dennis v. Lovett, 104 F. Supp. 310, 312 (D.D.C. 1952).

<sup>1593</sup> Burns v. Lovett, 202 F.2d 335, 347-48 (D.C. Cir. 1952).

In his plurality opinion, affirming the judgment of the Circuit Court of Appeals for the District of Columbia,<sup>1594</sup> Chief Justice Vinson discussed the role of the civilian courts in reviewing military cases: "[I]t is the limited function of the civil courts," he said, "to determine whether the military have given fair consideration to each of [the accused's] claims"<sup>1595</sup> and "when a military decision has dealt fully and fairly with an allegation raised in [the accused's] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."<sup>1596</sup>

The standard that developed as a result of this observation is that court-martial judgments can now be reviewed by Article III courts on two grounds: The first is that a court-martial judgment is void because the court lacked jurisdiction; and the second is that the court-martial is defective or procedurally unfair in some fundamental way.<sup>1597</sup>

---

<sup>1594</sup> Chief Justice Vinson's opinion was joined by Justice Reed, Justice Burton, and Justice Clark. Justice Jackson concurred in the result. Justice Minton concurred in affirming the judgment. Justice Frankfurter thought the case should be reargued. And Justice Douglas' dissenting opinion was joined by Justice Black.

<sup>1595</sup> 346 U.S. at 144.

<sup>1596</sup> Id. at 142.

<sup>1597</sup> Schlesinger v. Councilman, 420 U.S. 738, 747 (1975).

v. Wilson,<sup>1598</sup> as expanding "the scope of review slightly, or, at least, to have shifted the emphasis from mere 'jurisdiction' and 'power,' as the proper subjects for civilian court review, to broader considerations of the 'fullness' and 'fundamental fairness' of the court-martial proceedings."<sup>1599</sup> There is disagreement in the federal courts as to what the proper scope of review of military decisions by civilian courts should be after Burns,<sup>1600</sup> but all Article III courts are in agreement

---

<sup>1598</sup> 346 U.S. 137, rehearing denied, 346 U.S. 844 (1953).

<sup>1599</sup> De Coster v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955), companion case rev'd, Jackson v. Taylor, 353 U.S. 569, 571 (1957). See Jackson v. Taylor, 353 U.S. 569, 572 n.2 (1957).

<sup>1600</sup> Calley v. Callaway, 519 F.2d 184, 198-99 n.20 (5th Cir. 1975), cert. denied sub nom., Calley v. Hoffman, 425 U.S. 911 (1976). After noting that the federal circuit courts are in considerable disagreement on the issue of the proper scope of review, the Fifth Circuit proposed the following test:

Military court-martial convictions are subject to collateral review by the federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice.

519 F.2d at 203. See Rich, Federal Court Scope of Review Over Military Habeas Corpus Cases, 6 MEMPHIS ST. U.L. REV. 83 (1975). See also Bishop, Jr., Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 COLUM. L. REV. 40, 70 (1961); Weckstein, Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military

that a claim of lack of jurisdiction is a proper reason for reviewing a court-martial conviction and that the issue of jurisdiction is clearly within the scope of permissible review.

When the accused alleges that a court-martial conviction lacks jurisdiction, he is, in effect, alleging that the government has failed to establish one or more of the five elements of court-martial jurisdiction: that a court-martial was not properly convened; that a court-martial was not properly constituted; that the

---

Responsibilities, 54 MIL. L. REV. 1, 28-54, 74-81 (1971); Burris & Jones, Civilian Courts and Courts-Martial--the Civilian Attorney's Perspective, 10 AM. CRIM. L. REV. 139 (1971). Professor Bishop believes that the test the Supreme Court of the United States would adopt is the one advanced by the District of Columbia Circuit Court of Appeals in Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013, rehearing denied, 397 U.S. 1031 (1970):

We think that the scope of review of military judgments should be the same as that in habeas corpus review of state or federal convictions, and constitutional requirements should be qualified by the special conditions of the military only where these are shown to require a different rule.

415 F.2d at 992.

We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.

Id. at 997. See J. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 135-36 (New York: Charterhouse, Inc., 1974). See also Katz & Nelson, The Need for Clarification in Military Habeas Corpus, 27 OHIO ST. L.J. 193 (1966).

court-martial did not have jurisdiction over the person; that the court-martial did not have jurisdiction over the offense; or that the sentence adjudged was not within the maximum limits authorized by the Code and the Manual. In short, an allegation that a court-martial lacks jurisdiction is a charge that the government failed to prove the elements of court-martial jurisdiction. No matter what scope of review a federal court adopts in reviewing petitions for extraordinary relief from military decisions, the issue of whether a court-martial has jurisdiction is always an issue that can be reviewed by the federal courts.

#### 4. Exhaustion of Military Court Remedies

Before a federal civilian court can review a petition for extraordinary relief, the accused must have exhausted his military remedies. Indeed, a civilian court "should not review errors which are or were capable of correction within the military judicial system."<sup>1001</sup> It is for this reason that "there is a rule which requires the exhaustion of a prisoner's administrative or military remedies before [a prisoner is permitted to petition] for a writ of habeas corpus" in the federal

---

<sup>1001</sup> De Coster v. Madigan, 223 F.2d 906, 909 (7th Cir. 1955), companion case rev'd, Jackson v. Taylor, 353 U.S. 569 (1957).

courts.<sup>1602</sup> The rule, requiring the exhaustion of military remedies, prevents premature review of military court decisions by federal courts<sup>1603</sup> and precludes unnecessary interference by civilian authorities in military matters and permits the military to exercise exclusive authority in its own affairs.<sup>1604</sup>

In Schlesinger v. Councilman,<sup>1605</sup> the accused, a Captain in the United States Army, was charged with wrongfully selling, transferring, and possessing marijuana. His court-martial began on June 27, 1972 at Fort Sill, Oklahoma, and during the Article 39(a) session, his defense counsel moved to dismiss the charges and specifications against the accused on the ground that the off post drug offenses, with which the accused was charged, were not service connected and hence not triable by

---

<sup>1602</sup> Id. See Schlesinger v. Councilman, 420 U.S. 738, 757-61 (1975)(accused's petition for extraordinary relief denied because he had not exhausted his military remedies).

<sup>1603</sup> Gusik v. Schilder, 340 U.S. 128, 132 (1950) (petition for extraordinary relief should not be considered from military service member until all military remedies have been exhausted). Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 VA. L. REV. 483 (1969).

<sup>1604</sup> See Noyd v. Bond, 395 U.S. 683, 695-96 (1969) (petition for extraordinary relief denied because accused had not exhausted military remedies); Adkins v. United States Navy, 507 F. Supp. 891, 899-90 (S.D. Tex. 1981)(petition for extraordinary relief denied because accused had not exhausted military remedies).

<sup>1605</sup> 420 U.S. 738 (1975).

court-martial. The trial judge denied the motion to dismiss for lack of jurisdiction and a trial date was set for July 11, 1972. On July 5, 1972, the accused filed a petition for extraordinary relief in the Federal District Court for the Western District of Oklahoma requesting a temporary restraining order and preliminary injunction to prevent his being tried by court-martial. After a hearing, the District Court granted a permanent injunction enjoining the Army from prosecuting the accused for the off post drug offenses, and the Tenth Circuit Court of Appeals affirmed the District Court's decision.

On appeal, the Supreme Court of the United States granted the government's petition for certiorari and, in addition, requested supplemental briefs on three issues, including the issue of exhaustion of remedies. While the Supreme Court found that the District Court had jurisdiction to hear the accused's case, the Court observed that this did "not carry with it the further conclusion that the District Court properly could reach the merits of Councilman's claim or enjoin the petitioners from proceeding with the impending court-martial."<sup>1606</sup>

The Court then dealt with the exhaustion issue. In so doing, it noted that under certain circumstances, military judgments can be collaterally attacked in the federal courts. The Court noted, however, that "implicit

---

<sup>1606</sup> Id. at 754.

in the congressional scheme embodied in the Code is the view that the military court system is generally adequate to and responsibly will perform its assigned task."<sup>1607</sup> The Court further observed that "this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights."<sup>1608</sup> In deference to the Congressional scheme and in light of the "practical considerations common to all exhaustion requirements,"<sup>1609</sup> the Court stated that it had held in the past that federal courts should refrain from interfering with ongoing cases in the military justice system until an accused had exhausted all of his military remedies.<sup>1610</sup> With this in mind, the Court reviewed the facts in the accused's case and decided to deny the accused's petition for extraordinary relief. In support of its decision, the Court stated "that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or

---

<sup>1607</sup> Id. at 758.

<sup>1608</sup> Id.

<sup>1609</sup> Id.

<sup>1610</sup> Id. See Noyd v. Bond, 395 U.S. 683, 685 n.1, 694-96 (1969).

otherwise."<sup>1611</sup>

The Court noted, however, that the requirement for the exhaustion of military remedies is not required in all cases. Where, for example, the injustice or hardship suffered by an accused is truly significant, exhaustion of military remedies is not necessary before extraordinary relief can be granted. In United States ex rel. Toth v. Quarles,<sup>1612</sup> and Reid v. Covert,<sup>1613</sup> the Court found that "the disruption caused to petitioners' civilian lives and the accompanying deprivation of liberty made it 'especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all."<sup>1614</sup> In Councilman, on the other hand, the Court saw nothing in the facts outweighing "the strong considerations favoring exhaustion of remedies or . . . warranting [intrusion] on the integrity of military court processes."<sup>1615</sup>

---

<sup>1611</sup> Id.

<sup>1612</sup> 350 U.S. 11 (1955).

<sup>1613</sup> 354 U.S. 1 (1957).

<sup>1614</sup> 420 U.S. at 759 citing Noyd v. Bond, 396 U.S. 683, 696 n.8 (1969).

<sup>1615</sup> 420 U.S. at 761.

## 6. Value of Civilian Court Review

It is by acting on petitions for extraordinary relief that the federal judges are able to exercise civilian control over the military.<sup>1616</sup> The control is a limited one, but it is effective because it "insures that the military will act within the area assigned to it by Congress and the Constitution [and it] insures [too] that the military's own judicial system will remain subject to ultimate civilian control on basic issues."<sup>1617</sup> To exercise its control over the military courts effectively, federal court judges should, as a minimum be familiar with the elements of court-martial jurisdiction, since these elements are always potential issues in petitions for extraordinary relief filed in the federal courts. To this extent, the military justice system is not altogether separate and apart from the federal system, but in fact is closely related to it.

In conclusion, the Courts of Military Review and the Court of Military Appeals, and the federal civilian courts can assist an accused who thinks a court-martial

---

<sup>1616</sup> W. DOUGLAS, THE RIGHT OF THE PEOPLE 179 (Garden City, New York: Doubleday & Company, Inc., 1958); Sherman, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 IND. L.J. 539, 580 (1974). See Yarmolinsky, Civilian Control: New Perspectives for New Problems, 49 IND. L.J. 654, 655 (1974).

<sup>1617</sup> W. DOUGLAS, THE RIGHT OF THE PEOPLE 181 (Garden City, New York: Doubleday & Company, Inc., 1958).

does not have jurisdiction to try him. If the accused's case does not present unusual circumstances or extraordinary facts, and if the accused can allege "no harm other than that attendant to resolution of his case in the military justice system,"<sup>1618</sup> the military and federal civilian courts will likely deny an accused's petition for extraordinary relief until he has exhausted his military remedies. When, however, it is clear that an accused will suffer great harm and injustice in being subjected to military justice proceedings, and that the harm and injustice is greater than the importance attached to the interest in encouraging exhaustion of remedies, both the military and federal courts will aid an accused who submits a petition for extraordinary relief.<sup>1619</sup>

---

<sup>1618</sup> Bowman v. Wilson, 672 F.2d 1145, 1159 (3rd Cir. 1982)(petition for habeas corpus denied where accused failed to exhaust military remedies and showed no extraordinary harm).

<sup>1619</sup> The Court of Military Appeals will act on petitions for extraordinary relief quickly.

In Levy v. Resor [17 USCMA 135, 37 CMR 399 (1967)], a petition for emergency relief was filed on June 20, 1967. The Court of Military Appeals promptly ordered oral argument and filed a full opinion on July 7, 1967. Both the petitioner and the Government indicate that a subsequent habeas corpus application filed by Captain Levy was ruled on by the Court of Military Appeals within five days after its submission.

Noyd v. Bond, 395 U.S. 683, 697 n.9 (1969).

What is important to remember with regard to jurisdictional errors is that there are only five elements of jurisdiction that can be raised in a petition for extraordinary relief and that, unless the error of jurisdiction alleged is one that presents a significant injustice or a major hardship on the accused, the error will have to be dealt with by the normal military appellate review process. Once review by the military authorities is completed and the military remedies available to the accused have been exhausted, the issue then can be raised by the accused in the federal civilian courts through a petition for extraordinary relief.

## CHAPTER TEN

### PROPOSALS FOR REFORM

Commentators over the years have offered many suggestions for improving the operation of the military justice system.<sup>1620</sup> Some of the suggestions have been thoughtful and reflective,<sup>1621</sup> and others have not been very helpful.<sup>1622</sup> In recent years Congressmen have

---

<sup>1620</sup> See e.g., Bayh, The Military Justice Act of 1971: The Need for Legislative Reform, 10 AM. CRIM. L. REV. 9 (1971); Rothblatt, Military Justice: The Need for Change, 12 WILLIAM & MARY L. REV. 455 (1971); Schiesser & Benson, A Proposal to Make Courts-Martial Courts: The Removal of Commanders From Military Justice, 7 TEX. TECH. L. REV. 559, 597-618 (1976); Averna, Citizen-Servicemen and Their Constitutional Rights, 43 TEMP. L. Q. 213, 226 (1970); Comment, Military Trial of Civilian Offenses: Drumhead Justice in the Land of the Free, 43 SO. CAL. L. REV. 356, 373 (1970); Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 VAND. L. REV. 435, 459-60 (1960); Nichols, The Justice of Military Justice, 12 WILLIAM & MARY L. REV. 482, 507-510 (1971).

<sup>1621</sup> Schlueter, The Enlistment Contract: A Uniform Approach, 77 MIL. L. REV. 1 (1977).

<sup>1622</sup>

The civilian lawyers are uniformly critical of the system. Despite all the reform, says Smith, "it stinks." Fox is equally blunt: "The thing is, you don't reform an obscenity, you abolish it, whether it's slavery or the military justice system."

Schaap, Justice for G.I. Joe, 8 JURIS DOCTOR 14, 19 (Mar. 1978). See R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (New York: Harper &

introduced numerous bills proposing changes to the administration of military justice.<sup>1623</sup> In the past, many of the proposals for improving the military justice system and for reforming military law have come at the conclusion of periods of international conflict and crisis. After World War I, World War II, and during and after the Vietnam War, for example, interest in reforming the military justice system was great and some important changes and improvements occurred. In time of peace, however, there generally has been less interest in making changes in the military legal system.

Despite the many proposals and the numerous changes that have been made over the years, the basic elements of court-martial jurisdiction have remained unchanged. Even the most recent change in the 1984 Manual, adding a new "requisite" of jurisdiction, is nothing more than a restatement of one of the existing elements of jurisdiction.<sup>1624</sup> The point is that since 1900 and most likely even before that, it has been

---

Row, rev. ed., 1971).

<sup>1623</sup> See e.g., Sherman, Congressional Proposals for Reform of Military Law, 10 AM. CRIM. L. REV. 25 (1971); S. 1127, 92d Cong., 1st Sess. (1971)(Bayh Bill); S. 4168 & S. 4178, 91st Cong., 2d Sess. (1970)(Hatfield Bill); S. 1266, 91st Cong., 1st Sess. (1969)(Ervin Bill); H.R. 6901, 92d Cong., 1st Sess. (1971)(Whalen Bill); H.R. 2196, 92d Cong., 1st Sess. (1971)(Price Bill); H.R. 579, 92d Cong., 1st Sess. (1971)(Bennett Bill).

<sup>1624</sup> See supra notes 471, 669-77 and accompanying text.

acknowledged that court-martial jurisdiction consists of five elements which the government is required to prove in every case:<sup>1625</sup> namely, that the court-martial was properly convened and properly constituted, that the court-martial had jurisdiction over the person and over the offense, and that the sentence adjudged was within the maximum punishment authorized by the Code and the Manual. These five elements are the framework around which the law of court-martial jurisdiction has developed. Like the Constitution, changes in the framework of court-martial jurisdiction, should be made with great hesitancy and only after much thought, discussion and debate, since the elements are fundamental to the exercise of court-martial jurisdiction.

In contrast, the law that has developed around the elements of court-martial jurisdiction is continually changing. Incremental changes in the law are easily absorbed by the system, and even radical changes in the law of court-martial jurisdiction have been incorporated with little difficulty as is evidenced by the smooth transition in 1969 from the "military status" standard to the "service connection" standard.

A. Matters Deserving Attention

A review of the law of court-martial juris-

---

<sup>1625</sup> See supra note 494 and accompanying text.

diction confirms the importance of the five elements of court-martial jurisdiction and their critical significance to the development of the law in this area. A review of the law of jurisdiction of courts-martial, however, also reveals some matters deserving attention.

1. Lack of Uniformity in Imposition of Article 15 Punishment

The first matter concerns the uneven manner in which court-martial jurisdiction is exercised among the various services. A review of the statistics on the number of Article 15's imposed during Fiscal Year 1983 reveals a major difference in the number of Article 15's imposed by the various services. In Fiscal Year 1983, the Navy and Marines imposed 148,472 Article 15's; the Army 132,045 Article 15's, the Air Force 39,914 Article 15's, and the Coast Guard, 3,142 Article 15's. Of the 2.1 million men and women serving in the armed forces, 313,673 received Article 15's or approximately 15% of those serving in the armed forces.<sup>1426</sup> There are

---

<sup>1426</sup> See supra note 285 and accompanying text. According to figures in the ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 1982 TO SEPTEMBER 30, 1983, 18 M.J. CXV (1984), the rate of Article 15's imposed per 1000 in the various services in FY 1983 is as follows: Navy and Marine Corps = 199.6 per 1000; Army = 168.6 per 1000; Air Force = 52.05 per 1000; and the Coast Guard = 82.6 per 1000. Id. at CXLIII, CLIII, CLXIII, & CLXIX.

fewer service men and women serving in the Navy and Marines than in the Army: 760,000 in the Navy and Marines and 783,389 in the Army; a difference of more than 23,000. This means that the percentage of Article 15's imposed in the Navy is higher than that which is imposed in the Army: 20% in the Navy and Marines to 17% in the Army. In part the discrepancy is explained by the fact that service personnel "attached to or embarked in a vessel" cannot refuse an Article 15 and demand trial by court-martial.<sup>1627</sup> Whether this accounts for the fact that the Navy and Marine Corps imposed over 16,000 more Article 15's than were imposed in the Army in 1983 is an open question.

The maximum punishment that can be imposed under Article 15 is less severe than the maximum punishment which can be imposed by a summary court-martial or a special court-martial. More important, a conviction by court-martial is a federal court conviction that a service member carries with him for the rest of his life.<sup>1628</sup> The imposition of Article 15 punishment, on

---

<sup>1627</sup> Art. 15(a), U.C.M.J., 10 U.S.C. § 815(a) (1983).

<sup>1628</sup> In light of the Supreme Court of the United State's decision in Middendorf v. Henry, 425 U.S. 25, 42 (1976), that the right to counsel does not extend to accuseds in summary courts-martial because summary courts-martial are not courts, one could argue that a conviction by a summary court-martial is not a federal court conviction.

the other hand, follows an individual only as long as a person is in military service. After discharge, the Article 15 punishment is meaningless and carries no lifelong consequences. The higher number of Article 15's imposed on a fewer number of personnel serving in the Navy and Marines, means that a soldier in the Army is much more likely to be tried by court-martial for a violation of the Code, than is a service member in the Navy or Marines.

The purpose of the Uniform Code of Military Justice was to create a uniform criminal code for all of the armed forces and to improve the quality of justice rendered in the armed forces.<sup>1629</sup> The fact that the provisions of the Code are not applied equally to members serving in the various branches of the armed forces, and that some run a higher risk than others of being subjected to the exercise of court-martial jurisdiction because of the branch of the service they are in should be a matter of concern. Some variance in the percentage of Article 15's imposed among the various services can be attributed to command discretion, but a discrepancy of 3% or over 16,000 cannot all be attributed to the exercise of discretion. What these figures reveal is a lack of

---

<sup>1629</sup> One of the criticisms of the Uniform Code of Military Justice when it was enacted was that it would not be applied uniformly by the various services. See Keeffe & Moskin, Codified Military Injustice, 35 CORNELL L.Q. 151, 152 (1949).

uniformity in the exercise of court-martial jurisdiction which works an unfairness on members serving in the Army, in particular. While guidelines for the imposition of Article 15 punishment understandably cannot be set for the five services, an effort on the part of the commanders in the Army to impose more Article 15's for minor offenses would go a long way toward making the imposition of Article 15 punishment more uniform throughout the armed forces, and treating similarly situated service members more equally.

## 2. Unfair Withdrawal of Charges

A second matter deserving attention is the policy of some commanders on ships in the Navy to withdraw charges from courts-martial when the evidence has been suppressed by a military judge or when a motion for a finding of not guilty has been granted, and then to impose Article 15 punishment on the accused using the same evidence that has been suppressed or found insufficient at the trial.<sup>1630</sup> Because the accuseds in such situations are "attached to or embarked in a vessel," they are prohibited by the Code from refusing the Article 15 and demanding trial by court-martial. The Court of Military Appeals has ruled that the Code provisions

---

<sup>1630</sup> See supra notes 691 & 1532 and accompanying text.

permit such conduct on the part of commanders, but the Court has criticized the practice because it creates the appearance of unfairness and subjects the military justice system to unnecessary criticism.

This sort of conduct on the part of Navy commanders is unfortunate because it undermines the confidence of service personnel and the public in the fairness of military justice. When a commander refers charges and specifications to a court-martial and the evidence is suppressed or a motion for a finding of not guilty is granted, the commander should not be able to withdraw the charges and specifications from the trial with a view toward imposing Article 15 punishment on the accused for the same offense.

What is needed is a change in Article 15 of the Code to prohibit a commander from engaging in such conduct. A change in the Code could be made by adding a sentence to Article 15(a) of the Code to read as follows:

(a) . . . . However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. If punishment is to be imposed upon a member attached to or embarked in a vessel for an offense which previously had been referred to trial by court-martial, the member shall have the right, before

imposition of such punishment, to demand trial by court-martial in lieu of such punishment. . .<sup>1631</sup>

Under this amendment, the accused would have a choice when charges against him have been referred to a trial by court-martial and then withdrawn with a view toward imposition of an Article 15. If at the court-martial, the evidence against the accused was suppressed or a motion for a finding of not guilty was granted by the military judge, the accused could exercise his right to request trial by court-martial, which obviously would result in an acquittal. If, on the other hand, the convening authority in the exercise of his discretion decides to be lenient with the accused and withdraws the charges from the court-martial and offers the accused an Article 15 in lieu of the court-martial, then the accused could elect to take the Article 15.

In the Navy sailors, who are attached to or embarked in a vessel and who receive nonjudicial punishment, are prohibited from refusing the nonjudicial punishment and demanding trial by court-martial. The reason for this is because the personnel which are necessary to staff a court-martial are generally not present or available. Where, however, a case already has been referred to a trial by court-martial by the com-

---

<sup>1631</sup> Art. 15(a), U.C.M.J., 10 U.S.C. § 835(a) (1984).

mander of the ship, and then withdrawn by him, the "lack of available personnel" for not allowing an accused to demand trial by court-martial is no longer relevant. For this reason, the proposed change to Article 15 of the Code is not in conflict with the Navy's policy of prohibiting sailors from refusing nonjudicial punishment and demanding trial by court-martial.

In short, this amendment would effectively preclude a commander from imposing Article 15 punishment on an accused for an offense which previously had been referred to trial by court-martial in which the military judge had suppressed the evidence or granted a defense motion for a finding of not guilty.

3. Failure to Strictly Construe Detailing Provisions of the Code

A third matter deserving attention is the recent changes that have occurred in the requirements for detailing personnel to courts-martial. Under the Code, the convening authority is no longer responsible for detailing the military judge or counsel to a court-martial. The Code still requires, however, that a "military judge shall be detailed to each general" court-martial<sup>1632</sup> and that a "[t]rial counsel and defense counsel shall be detailed for each general and special court-mar-

---

<sup>1632</sup> Art. 26(a), U.C.M.J., 10 U.S.C. § 826(a) (1983)(emphasis added).

tial."<sup>1633</sup> In addition, the Code requires that "[n]o person is eligible to act as military judge in a case if he is an accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case."<sup>1634</sup> Similarly, the Code requires that "[n]o person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case."<sup>1635</sup>

In Wright v. United States,<sup>1636</sup> the Court of Military Appeals ruled that counsel are not part of a properly constituted court-martial and that errors in detail of counsel will be tested for prejudice to the accused and only if such errors are found prejudicial, will a case be reversed.<sup>1637</sup> In United States v. Wilson,<sup>1638</sup> an Air Force Court of Military Review held

---

<sup>1633</sup> Art. 27(a)(1), U.C.M.J., 10 U.S.C. § 827(a)(1) (1983)(emphasis added).

<sup>1634</sup> Art. 26(d), U.C.M.J., 10 U.S.C. § 826(d) (1983).

<sup>1635</sup> Art. 27(a)(2), U.C.M.J., 10 U.S.C. § 827(a)(2) (1983).

<sup>1636</sup> 2 M.J. 9 (C.M.A. 1976).

<sup>1637</sup> Id. at 10-11.

<sup>1638</sup> 2 M.J. 683 (AFCMR 1976), summarily aff'd, 3 M.J. 186 (C.M.A. 1977).

that the absence of the detailed defense counsel was not jurisdictional error and that the accused was not "substantially prejudiced" by the failure of the detailed defense counsel to be present or by the failure of the accused to consent to the absence of the detailed defense counsel.<sup>1639</sup> The Senate Report on the 1984 Amendments to the Code goes even further stating that "errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59."<sup>1640</sup>

What has happened is that the Court of Military Appeals and the Courts of Military Review have adopted a new standard for dealing with errors in the detail of personnel to courts-martial. The new standard is this: Was the accused "substantially prejudiced" by the failure to properly detail a party to a court-martial.<sup>1641</sup> According to the Senate Report, none of the personnel at a court-martial need be properly detailed so long a military judge, counsel and the minimum required number of court members are present at the trial.

The problem is that if the Court of Military

---

<sup>1639</sup> 2 M.J. at 687.

<sup>1640</sup> S. REP. No. 53, 98th Cong., 1st Sess. 12 (1983). See supra note 770 and accompanying text.

<sup>1641</sup> See 2 M.J. at 687.

Appeals and the Congress were writing on a clean slate, the changes they advocate and have implemented might be acceptable. But neither the Court nor the Congress are writing on a clean slate. The Code provisions are quite explicit about detailing personnel to participate in a court-martial. The Code makes no mention of the use of a "substantial prejudice" test in connection with detailing personnel to a court-martial, and it certainly does not state that so long as someone is present the jurisdictional requirements of the Code are complied with. If the Code provisions are to be strictly construed, as indeed they should and must be, the approach taken by the Air Force Court of Military Review, the Court of Military Appeals and the approach urged in the Senate Report are not in compliance with what the Code requires.

Jurisdictional requirements are either present or they are not, and test for establishing jurisdiction should be the same for each of the five elements. The convening authority either has the power to convene a court-martial or he does not. The test is not whether the accused objected to an error in convening the court-martial or whether the accused was "substantially prejudiced" by the error. A court-martial either has jurisdiction over the person or it does not. The test is not whether the accused objected to the court exercising jurisdiction over him or whether the accused was

"substantially prejudiced" by the exercise of jurisdiction over him. A court-martial either has jurisdiction over the offense or it does not. The test is not whether the accused objected to the exercise of jurisdiction over the offense or whether the accused is "substantially prejudiced" by the exercise of jurisdiction over the offense. The sentence adjudged by a court-martial is either within the maximum limits authorized by the Code and the Manual or it is not. The test is not whether the accused objected to the sentence imposed or whether the accused was "substantially prejudiced" by a sentence greater than that authorized by the Code and the Manual.

With regard to a properly constituted Court, the test should be whether the court-martial is properly constituted in accordance with the requirements of the Code. If it is not, the court-martial is not properly constituted and the conviction is void. To be consistent with the approach to the other elements, this has to be the test and the result.

What the Court of Military Appeals should do is strictly construe the requirements of the Code and let Congress change the provisions of the Code if it so desires. If Congress wishes to relax the rules concerning the appointment and excusal of court-martial personnel, it should redraft the provisions of the Uniform Code of Military Justice to provide that a court-martial is

properly constituted so long as a trial counsel, defense counsel, military judge, and court members are present. It should further provide that any error with regard to (1) the participation at a court-martial of persons not properly appointed to participate in the court-martial, or (2) the absence of persons required to be present, will be tested for prejudice to the accused. This approach is preferable to the Court's abandoning its long tradition of strictly construing provisions concerning the convening and constituting of courts-martial. Where the statutory language is clear, as it is in the provisions regarding the detail of personnel to courts-martial, the Court of Military Appeals should apply the statute as it is written. If the Court of Military Appeals and the Courts of Military Review are hesitant to enforce the Code provisions as written, the federal courts in response to petitions for extraordinary relief should grant relief where the provisions of the Code have not been strictly construed.

#### 4. Exercise of Jurisdiction over Reservists

A fourth area deserving attention is the exercise of court-martial jurisdiction over reservists on inactive duty for training, that is, those who drill on one evening a week or one weekend a month. The Code provides that "[m]embers of a reserve component" are subject to

the Code "while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to [the Code]."<sup>1642</sup>

The exercise of court-martial jurisdiction over a reservist serving on inactive duty training is handled differently by the various branches of the armed forces. Reservists serving on inactive duty for training in the Navy, Marines, and Coast Guard are subject to court-martial jurisdiction, but those serving in the Army and Air Force are not.<sup>1643</sup> In addition, the Court of Military Appeals recently has held that a reservist who commits an offense during two weeks active duty, or during a weekend or evening drill, cannot be tried for the offense at a subsequent weekend or evening drill. The Court held that this occurs because his status as someone subject to the Code terminates at the end of the two weeks active duty or at the end of a drill and does not continue to the next drill.<sup>1644</sup>

The treatment of reservists performing inactive duty training is not handled uniformly by the services. It is strange that after 35 years there is still no

---

<sup>1642</sup> Art. 2(a)(3), U.C.M.J., 10 U.S.C. § 802(a)(3) (1983).

<sup>1643</sup> See supra note 1044 and accompanying text.

<sup>1644</sup> United States v. Caputo, 18 CMR 259, 266-67 (C.M.A. 1984).

agreement among the services on the exercise of court-martial jurisdiction over reservists serving on inactive duty for training. If the Code is to be applied uniformly among the services, reservists serving on inactive duty for training should be treated similarly.

In addition, the exercise of court-martial jurisdiction over reservists who are made subject to the Code while they are serving on inactive duty for training seems unduly restrictive. It is odd that jurisdiction over a reservist should attach at the beginning of each drill session and terminate at the conclusion of the drill session as if the reservist was being discharged from military service. The rule should be that a reservist has a continuing status as a member of the reserves which is activated at the beginning of a drill session and which is deactivated at the end of a drill session, but which continues in a residual sense from drill to drill. In this way, an offense committed during one drill period would not have to be tried during that drill or some action taken with a view toward trial initiated during that drill.

There are several reasons why reservists should be viewed as having a continuing status rather than being discharged after every drill session. First, all reservists are subject to call to active duty in the event of a national emergency or international crisis.

The idea that a reservist is discharged at the end of a reserve meeting, and thus undergoes a change in his status from a soldier to a civilian, is inconsistent with the idea that he can be called up on short notice. In fact, a reservist is not a civilian, but is a soldier whose status is inactive when he is not drilling. For this reason, a soldier who commits an offense during a drill period, or while serving on active duty, should be subject to court-martial jurisdiction and trial by court-martial, at a later drill session or during a subsequent period of service on active duty.

Second, the needs of the armed forces to maintain discipline, to enforce the provisions of the Code, and to maintain the morale of service members demands that those who violate the disciplinary laws of the armed forces be tried quickly and, if convicted, punished appropriately. The fact that officers and enlisted personnel, serving on active duty, can commit serious crimes in violation of the Code and be released from active duty, and avoid prosecution and punishment for such offenses, is not only unfair to the armed forces as an institution, but also is detrimental to the morale of those who serve in the military. As members of the military establishment, those who commit crimes in violation of the Uniform Code of Military Justice should not be permitted to escape responsibility for such offenses simply because a drill

session ends or two weeks of active duty comes to a close.

The third reason in support of the exercise of court-martial jurisdiction over reservists is that, at least, in the Navy and Marines, a reservist agrees to be subject to the Uniform Code of Military Justice during drill sessions and on active duty. While jurisdiction is something a court has or doesn't have, and it is not something that the parties can grant to a court, it does seem clear that a statute can be drafted which would give military courts the power to try a reservist for offenses committed during a drill period or during two weeks of active duty. The fact that a reservist is not a full civilian in a "status" sense, and has agreed to be subject to the Code argues in favor of a provision making them subject to court-martial jurisdiction for offenses committed on active duty or during monthly or weekly drill periods.

To solve this problem the Discussion to Rule 202(a) of the Manual could be amended as follows to provide continuing status for reservists:

- (iii) Exceptions. There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge or its equivalent.

. . . .

(e) A person who was subject to the code at the time an offense was committed may be tried by court-martial for that offense despite a termination of that status if--

- (1) the person is a member of a reserve component;
- (2) the offense was committed while the member was serving on active duty for training or on inactive duty training authorized by written orders which he voluntarily accepted; and
- (3) the member at the time of court-martial is serving on active duty for training or is performing regularly scheduled inactive duty for training authorized by written orders which he voluntarily accepted.<sup>1645</sup>

This language provides that upon reacquiring military status, a reservist serving on active duty or on inactive duty for training would again become subject to court-martial jurisdiction for offenses committed during a prior period of active duty or inactive duty for training at which the reservist was subject to the Code.

##### 5. Expanding Reach of Court-Martial Jurisdiction

A fifth matter deserving attention is the growing number of offenses that are becoming subject to

---

<sup>1645</sup> See e.g., Discussion (2)(B)(iii)(b), R.C.M. 202(a), MCM, 1984, at II-12 to II-13.

court-martial jurisdiction. Recently, the Court of Military Appeals in United States v. Trottier<sup>1446</sup> observed "that almost every involvement of service personnel with the commerce in drugs is 'service connected.'"<sup>1447</sup> Similarly, in United States v. Lockwood,<sup>1448</sup> the Court of Military Appeals stated that "the conduct of servicemembers which takes place outside a military enclave is service connected and subject to trial by court-martial if it has a significant effect within that enclave."<sup>1449</sup> Any offense, therefore, which effects the "morale, reputation, and integrity of the installation"<sup>1450</sup> is now service connected and subject to court-martial jurisdiction. In light of the Court's statements in Trottier and Lockwood, the scope of what are considered service connected offenses is much broader than it was after O'Callahan was decided in 1969.

The problem is that in the 200 year history of the exercise of court-martial jurisdiction in the United States, the scope of court-martial jurisdiction has expanded considerably. While there is no specific

---

<sup>1446</sup> 9 M.J. 337 (C.M.A. 1980).

<sup>1447</sup> Id. at 350.

<sup>1448</sup> 15 M.J. 1 (C.M.A. 1983).

<sup>1449</sup> Id. at 6.

<sup>1450</sup> United States v. Shorte, 18 M.J. 518, 520 (AFCMR 1984), summarily aff'd, 20 M.J. 414 (C.M.A. 1985).

statutory, regulatory or Manual change that can reverse this trend, the Court of Military Appeals, in particular, and the Courts of Military Review and the federal civilian courts, in general, should be aware that a drift toward expanding the scope of court-martial jurisdiction is occurring and that more and more offenses are becoming subject to trial by court-martial. Where it is possible and when it is appropriate, the courts should cut back on the number of offenses subject to court-martial jurisdiction, and try to curb the amount of jurisdiction exercised by courts-martial. Only in this way can the courts show sensitivity and respect for concerns and fears expressed many years ago by the Framers of the Constitution. Only in this way too can the scope of court-martial jurisdiction be limited to the narrowest extent to possible under the Code.

B. An Approach to Deciding Jurisdictional Issues

The matters deserving special attention can be remedied by statutory change, by Manual revision, or by increased awareness on the part of judges who deal with issues of court-martial jurisdiction, and by judge advocate officers who work with courts-martial daily. The changes recommended are important for the purpose of dealing with the problems they address and their implementation will improve the exercise of court-martial

jurisdiction.

1. Jurisdictional Worksheet

From a broader perspective and realistically, none of the changes recommended, even if implemented, will have much of an impact on the law of court-martial jurisdiction. What will have a significant impact on the law of court-martial jurisdiction, however, is the development of an approach that can be used in every court-martial case for recognizing and dealing with issues of court-martial jurisdiction. A means, in other words, of analytically approaching the subject of court-martial jurisdiction, so that the issues of jurisdiction in each case can be easily identified and dealt with appropriately. A "Jurisdiction Worksheet for Courts-Martial" is set forth in Appendix A and it is designed to serve this purpose. The "Jurisdiction Worksheet" consists of five parts and sets forth a series of questions concerning issues of jurisdiction. The worksheet can be used by anyone involved in the court-martial process, that is, trial counsel, defense counsel, civilian counsel, military judges, legal clerks, chiefs of military justice, staff judge advocates, appellate counsel, commissioners, Court of Military Review judges, Court of Military Appeals judges, law clerks, federal district court judges, federal circuit court of appeals

judges, and Justices on the Supreme Court of the United States; in short, everyone who might have occasion, or who might be called upon or asked, to decide whether a court-martial has jurisdiction in a particular case.

The value of worksheet is that it identifies the elements of court-martial jurisdiction, and through the use of a series of questions, presents a checklist of potential jurisdictional issues that can be raised or should be "checked" in an effort to ensure that the court-martial has jurisdiction. For those not familiar with the jurisdiction of courts-martial, often the biggest problem is recognizing jurisdictional issues that arise at trial or appear in records of trial. The use of the worksheet set forth in Appendix A should make it easier, not only to spot jurisdiction issues, but also to anticipate problems of jurisdiction before they occur.

2. Emphasis on the Elements of Court-Martial Jurisdiction

The most important aspect of the jurisdictional worksheet is that it emphasizes the five elements of court-martial jurisdiction. In every case in which it is used, the reviewer will have to decide if a court-martial was properly convened, if the court was properly constituted, if the court had jurisdiction over the person, if the court had jurisdiction over the offense,

and if the sentence adjudged is within the limits authorized by the Code. The questions in the worksheet are designed to lead the reviewer through the elements of court-martial jurisdiction and the significant issues of law which have developed around those issues. It is important for lawyers and judges to be able to recognize and identify jurisdictional issues when they arise. Because jurisdictional issues can be raised at any stage in a court-martial proceeding and cannot be waived, there is a likelihood that they can arise on appeal as easily as they can arise at trial.

In conclusion, new proposals for improving the exercise of court-martial jurisdiction should be encouraged, and experimentation in dealing with problems of court-martial jurisdiction should not be discouraged. If the result produces a system of military justice which is fairer to the accused and which better serves the needs of the armed forces, then the change is helpful and desirable. The proposals and suggestions offered here are submitted in an effort to improve the exercise of court-martial jurisdiction. What is more significant than the statutory or Manual changes recommended, however, is the development of an approach to thinking about issues of court-martial jurisdiction. The goal is to provide those who have to deal with problems of court-martial jurisdiction on a day-to-day basis, or

even occasionally, with a way to make working with jurisdictional issues easier.

The worksheet presented in Appendix A provides a lawyer with just such a tool. The worksheet is a road map of sorts through the law of court-martial jurisdiction, highlighting the important issues that arise under each of the five elements. The worksheet will not make the resolution of jurisdictional issues any easier, but it should help in identifying issues of jurisdiction and showing how the issues relate to the law of court-martial jurisdiction as a whole. Once an issue of court-martial jurisdiction is recognized, it can be dealt with by those involved in the judicial process. In the end, the importance and value of the worksheet is that it provides the lawyer with an overview of the subject of court-martial jurisdiction, enabling him to see at the one time, not only the whole, but also the parts.

## CHAPTER ELEVEN

### CONCLUSION

The law of court-martial jurisdiction has been the subject of much litigation since the Uniform Code of Military Justice was enacted in 1950. With a few exceptions, all of the Code provisions and each of the elements of court-martial jurisdiction have been fully litigated. The result is numerous decisions and a wealth of literature on all aspects of court-martial jurisdiction. The law of court-martial jurisdiction is rich and varied, and while much of the law in the area is settled, some of it continues to change. The changes are due to amendments to the Code made by Congress, to new issues raised by defense counsel, and to the courts rethinking, reinterpreting and sometimes overruling earlier decisions.

All who are involved in the processing and trying courts-martial should be familiar with the law of court-martial jurisdiction. Defense counsel and appellate defense counsel, in particular, should be well versed in the law of court-martial jurisdiction and should be prepared to raise jurisdictional issues on behalf of their clients whenever possible, since a

reversal of a court-martial conviction on jurisdictional grounds generally works to the benefit of an accused. As a practical matter, commanders do not have much enthusiasm for retrying an individual once a case has been reversed on appeal, especially where a new commander has replaced the old commander, where witnesses are no longer present, and where evidence may not be available.

Trial counsel and appellate trial counsel too must be aware of jurisdictional issues in cases to which they are detailed. Jurisdiction is an issue which always can be raised, and it is better for trial counsel or government appellate counsel to be aware of an issue of jurisdiction before it arises and to act on it, than it is to have to respond to the issue after it has been raised. It is easier, for example, to obtain a copy of an Assumption of Command order at trial, than it is to obtain a copy of the order a year or two later when the issue of devolution of command is raised on appeal. In addition, trial counsel too have a responsibility to ensure that the record of trial is complete and correct and that the elements of court-martial jurisdiction are present in every case tried by court-martial.

Military judges and appellate judges, and the staff attorneys and commissioners who work with them, similarly should be alert to issues of court-martial jurisdiction, especially where the issue of jurisdiction

has not been litigated at trial or on appeal. It is a waste of time and resources, to say nothing of the taxpayers' money, to let cases proceed through the military system, only to be reversed by a federal civilian court for lack of jurisdiction. The primary responsibility of the federal courts in reviewing military cases is to determine if the court-martial had jurisdiction. A petition for extraordinary relief to the federal courts challenging the jurisdiction of a court-martial can occur in every court-martial case, and for this reason, judges in the military system should act to resolve obvious questions of jurisdiction that appear in the record.

Federal district court judges, federal circuit court of appeals' judges, and Supreme Court Justices, in addition to the law clerks who work for them, likewise should be aware of issues of court-martial jurisdiction. While there is disagreement among the federal courts, as to what standard should be used to review court-martial convictions, all federal judges agree that the federal courts have a responsibility as a minimum to review military cases for jurisdictional error.

Not only do the federal courts have a duty in this regard, but from the point of view of civilian control of the military, it is imperative that the federal court judges take seriously their responsibility

for reviewing military court decisions. When a military case is filed in the federal courts, a federal judge's first step in examining the case and the record of trial should be to look for the five elements of court-martial jurisdiction. It is important to remember that review by the federal courts is the only check civilians have on the jurisdiction exercised by military courts. As long as the federal courts are available to provide relief to service personnel who are convicted by courts-martial, federal judges should know something about the elements of court-martial jurisdiction.

The five elements of jurisdiction are critical to a valid conviction by court-martial, and every effort should be made to see that they exist in each court-martial case reviewed. The use of the Jurisdiction Worksheet in Appendix A should help in identifying the issues of court-martial jurisdiction and in developing an appreciation of the types of jurisdictional issues that can be raised. An increased awareness of issues of court-martial jurisdiction should result too in fewer errors of jurisdiction at the trial level and fewer reversals on jurisdictional grounds at the appellate level.

It should be remembered that one of the great concerns of the Framers of the Constitution was the importance of maintaining civilian control of the mili-

tary. To respond to the Framers' concern, civilian judges serving on the Court of Military Appeals and in the federal judiciary should understand that they have a special responsibility in military cases to ensure that the elements of jurisdiction are present in each case in which an accused has been tried by court-martial. In addition, civilian judges should be aware of the important responsibility they have in exercising control over the military judicial system. For these reasons, federal civilian judges, in particular, should be well versed in the elements of court-martial jurisdiction. By strictly construing the statutes setting forth the elements of court-martial jurisdiction, civilian judges reviewing court-martial convictions can keep the jurisdiction exercised by courts-martial within the laws prescribed by Congress and within the limits envisioned by the Framers at the time that the Constitution was ratified.

APPENDIX A

COURT-MARTIAL JURISDICTION WORKSHEET

I. Is the Court-Martial Properly Convened?

a. General

- \_\_\_\_\_ Is the convening authority's power to convene a court-martial derived from the Code?  
(Arts. 22, 23, & 24, U.C.M.J.; R.C.M. 504, MCM, 1984, at II-54; R.C.M. 1302(a), MCM, 1984, at II-202)
- \_\_\_\_\_ Is the convening authority's power derived from the President?  
(Arts. 4, 22, 23, 24, U.C.M.J)
- \_\_\_\_\_ Is the convening authority's power derived from a designation by the Secretary of the Department concerned?  
(Arts. 22, 23, 24, U.C.M.J.; United States v. Cases, 6 M.J. 950 (ACMR 1979))
- \_\_\_\_\_ If the convening authority's power is derived from a designation by the Secretary, does the court-martial convening order cite the source of the convening authority's power?  
(R.C.M. 504(d)(1) & (2), MCM, 1984, at II-55; United States v. Day, 1 M.J. 1167 (CGCMR 1975))
- \_\_\_\_\_ Does the court-martial convening order list those whom the convening authority has selected as court members?  
(App. 6, Forms for Orders Convening Courts-Martial, MCM, 1984, at A6-1)
- \_\_\_\_\_ Are there typographical errors in the court-martial convening orders?  
(United States v. Blascak, 17 M.J. 1081 (AFCMR 1984))
- \_\_\_\_\_ Are there any administrative mistakes or clerical errors in the court-martial convening order?  
(United States v. Fields, 17 M.J. 1070 (AFCMR 1984))

\_\_\_\_\_ Is the court-martial convening order included in the record of trial?

(App. 14, Guide for Preparation of Record of Trial, MCM, 1984, at A14-2; United States v. Emerson, 1 USCMA 43, 1 CMR 43 (1951)).

b. Devolution of Command

\_\_\_\_\_ Was the convening authority absent from command due to death, prolonged disability, or absent in a nonduty status?

(United States v. Guidry, 19 M.J. 984 (AFCMR 1985))

\_\_\_\_\_ Was the convening authority absent on TDY?

(United States v. Guidry, 19 M.J. 984 (AFCMR 1985))

\_\_\_\_\_ Did command devolve to the next senior officer present for duty within the organization?

(United States v. Bunting, 4 USCMA 84, 15 CMR 84 (1954))

\_\_\_\_\_ If the convening authority is absent from the command and the command devolved to the next senior officer present, are assumption of command orders in the record of trial and do they accurately reflect who was the convening authority at the time the court-martial was convened?

(United States v. Jackson, 49 CMR 717 (ACMR 1975))

\_\_\_\_\_ Have the service regulation provisions on devolution of command been complied with?

(See e.g., Air Force Regulation 35-54, para. 18a (Sept 15, 1981), reproduced in United States v. Guidry, 19 M.J. 984, 986 (AFCMR 1985)).

\_\_\_\_\_ If the convening authority is absent from the command and the command has devolved to one who is not the next senior officer present, did the officer assume command as a result of a direct order from a higher commander who has authority to assign an officer to command without regard to seniority in rank.

(United States v. O'Connor, 19 M.J. 673 (AFCMR 1984)).

c. Separate and Detached

\_\_\_\_\_ Is the convening authority a commander of a separate or detached unit?

(Arts. 23(a)(6), 24(a)(2) & (3), U.C.M.J.;  
Discussion, R.C.M. 504(b)(2)(A) & (B), MCM,  
1984, at II-54 to II-55)

\_\_\_\_\_ Does the convening authority of a separate or detached unit have the power to convene a court-martial?

(United States v. Ortiz, 15 USCMA 505, 36 CMR 3  
(1965); R.C.M. 504(b)(2)(B), MCM, 1984, at II-55)

d. Limitations on the Power of the Convening Authority to Convene Courts-Martial

\_\_\_\_\_ Is the convening authority an "accuser" who cannot convene a court-martial, i.e., did the convening authority have "an interest other than an official interest in the prosecution of the accused"?

(Art. 1(9), U.C.M.J.; 10 U.S.C. § 801(9) quoted  
in Discussion, R.C.M. 103, MCM, at II-4; United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952))

\_\_\_\_\_ If so, were the charges referred to a "superior competent authority" for disposition?

(Arts. 22(b), 23(b), & 24(b), U.C.M.J.);  
R.C.M. 302(b), MCM, 1984, at II-202)

\_\_\_\_\_ Did the convening authority swear to or sign the charges against the accused?

(United States v. Crews, 49 CMR 502 (CGCMR 1974))

\_\_\_\_\_ Did the convening authority direct a junior officer to swear to or sign the charges against the accused?

(United States v. Corcoran, 17 M.J. 137 (C.M.A.  
1984))

\_\_\_\_\_ Is the convening authority senior in rank to the accuser?

(United States v. Ridley, 18 M.J. 806 (AFCMR  
1984))

\_\_\_\_\_ Has the power to convene a court-martial been reserved by a superior competent authority?

(United States v. Hawthorne, 7 USCMA 293, 22 CMR  
83 (1956))

\_\_\_\_\_ Has a superior competent authority attempted to influence or control the recommendation of a lower commander or to dictate the type of punishment to be imposed?

(United States v. Wharton, 33 CMR 729 (AFBR 1962))

\_\_\_\_\_ Has the convening authority issued a policy directive for the purpose of maintaining discipline and order?

(United States v. Betts, 12 USCMA 214, 30 CMR 214 (1961))

\_\_\_\_\_ Has a commander informed subordinate commanders that certain types of offenses may not be referred to special court-martial without the commander's permission?

(United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956))

\_\_\_\_\_ Has the commander reserved to himself the power to refer certain types of cases to courts-martial?

(United States v. Rembert, 47 CMR 755 (ACMR 1973))

\_\_\_\_\_ Does the commander's directive constitute unlawful command influence because it denies the subordinate commanders freedom of choice in disposing of court-martial charges?

(United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956))

e. Referral of Charges

\_\_\_\_\_ Did the convening authority sign Section V of the Charge Sheet referring the charges to trial by court-martial?

(DD Form 458, Section V; App. 4, Charge Sheet, MCM, 1984, at A4-2)

\_\_\_\_\_ Does Section V of the Charge Sheet state the date and number of the court-martial convening order and the type of court-martial to which the charges were referred?

(DD Form 458, Section V; App. 4, Charge Sheet, MCM, 1984, at A4-2)

\_\_\_\_\_ Was the court-martial convened by a written court-martial convening order?

(United States v. Napier, 20 USCMA 422, 43 CMR 262 (1971))

\_\_\_\_\_ Was the court-martial convened by an oral court-martial convening order?

(United States v. Petro, 16 CMR 302 (ABR 1954))

\_\_\_\_\_ Did the convening authority withdraw the charges from the court-martial before findings?

(R.C.M. 604(a), MCM, 1984, at II-64)

\_\_\_\_\_ If the convening authority withdrew the charges from the court-martial before findings, were the charges then dismissed?

(Discussion, R.C.M. 604(a), MCM, 1984, at II-64; United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983))

\_\_\_\_\_ If the convening authority withdrew the charges from the court-martial before findings, did he withdraw them with a view toward further prosecution?

(Discussion, R.C.M. 604(a), MCM, 1984, at II-64; United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983))

\_\_\_\_\_ If the convening authority withdrew the charges from the court-martial before findings with a view toward further prosecution, are the convening authority's reasons for withdrawing the charges included in the record of trial of the earlier proceedings?

(Discussion, R.C.M. 604(b), MCM, 1984, at II-64; United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983))

\_\_\_\_\_ If the convening authority withdrew the charges from the court-martial with a view toward further prosecution, are the convening authority's reasons valid?

Discussion, R.C.M. 604(b), MCM, at II-64 to II-65; United States v. Blaylock, 15 M.J. 190 (1983))

II. Is the Court-Martial Properly Constituted?

a. Accused

- \_\_\_\_\_ Was the accused present when the court-martial began?  
(R.C.M. 804(a), MCM, 1984, at 11-91)
- \_\_\_\_\_ Was the accused present at the arraignment?  
(R.C.M. 804(a), MCM, 1984, at 11-91)
- \_\_\_\_\_ Was the accused present for all of the court-martial proceedings?  
(R.C.M. 804(a), MCM, 1984, at 11-91)
- \_\_\_\_\_ Did the accused absent himself from the court-martial after arraignment?  
(United States v. Houghtaling, 2 USCMA 230, 8 CMR 30 (1953))
- \_\_\_\_\_ If the accused absented himself after arraignment, was the accused's absence voluntary, knowing, and without authority?  
(Discussion, R.C.M. 804(b), MCM, 1984, at 11-92)
- \_\_\_\_\_ Was the accused temporarily absent during the trial?  
(App. 21, Analysis, MCM, 1984, at A21-40)

b. Defense Counsel

- \_\_\_\_\_ Was the accused represented at the court-martial by a defense counsel?  
(United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967))
- \_\_\_\_\_ Was the defense counsel detailed to represent the accused in accordance with the provisions of appropriate service regulations?  
(Art. 27(a)(1), U.C.M.J.)
- \_\_\_\_\_ Is the order detailing defense counsel to represent the accused included in the record of trial?  
(R.C.M. 503(c)(2), MCM, 1984, at 11-54)
- \_\_\_\_\_ Was the defense counsel a qualified lawyer properly certified by The Judge Advocate General?  
(Art. 27(b), U.C.M.J.)

- \_\_\_\_\_ Was the accused also represented by individual military counsel or civilian defense counsel?  
(R.C.M. 502(d)(3), MCM, 1984, at II-49)
- \_\_\_\_\_ Was the accused represented by an assistant defense counsel?  
(R.C.M. 502(d)(2), MCM, 1984, at II-49)
- \_\_\_\_\_ Was the accused's detailed defense counsel absent during the court-martial?  
(R.C.M. 805(c), MCM, 1984, at II-93)
- \_\_\_\_\_ Did the accused waive his right to be represented by detailed defense counsel by not objecting to the absence of detailed counsel?  
(United States v. Wilson, 2 M.J. 683 (AFCMR 1976), summarily aff'd, 3 M.J. 186 (C.M.A. 1977))
- \_\_\_\_\_ If the detailed defense counsel was absent during the court-martial, was another qualified counsel present during the detailed counsel's absence?  
(R.C.M. 805(c), MCM, 1984, at II-93)
- \_\_\_\_\_ If the qualified defense counsel was absent from the court-martial, was the accused represented by an unqualified defense?  
(R.C.M. 805(c), MCM, 1984, at II-93)
- \_\_\_\_\_ If one or more of the accused's defense counsels were not present at the trial, was the accused properly represented?  
(R.C.M. 805(c), MCM, 1984, at II-93)
- \_\_\_\_\_ Did the accused waive representation by detailed defense counsel and decide to represent himself?  
(R.C.M. 506(d), MCM, 1984, at II-58)
- \_\_\_\_\_ If the accused decided to represent himself, was he competent to understand the disadvantages of self-representation?  
(R.C.M. 506(d), MCM, 1984, at II-58)
- \_\_\_\_\_ If the accused did represent himself, was his waiver of defense counsel voluntary and understanding?  
(R.C.M. 506(d), MCM, 1984, at II-58)

c. Trial Counsel

\_\_\_\_\_ Was a trial counsel present at the court-martial?  
(Art. 27(a)(1), U.C.M.J.)

\_\_\_\_\_ Was the trial counsel qualified under the Code?  
(Art. 27(b)(1) & (2), U.C.M.J.)

\_\_\_\_\_ If the trial counsel was not qualified under the Code, was this defect prejudicial to the accused?  
(United States v. Daigneault, 18 M.J. 503 (AFCMR 1984))

\_\_\_\_\_ Did the trial counsel participate previously in the same case as the accuser, investigating officer, military judge or counsel in the case?  
(R.C.M. 502(d)(4), MCM, 1984, at II-49)

\_\_\_\_\_ If the trial counsel did previously participate in the same case in one of these capacities, was his prior participation prejudicial to the accused?  
(United States v. Trakowski, 10 M.J. 792 (AFCMR 1981))

\_\_\_\_\_ Did the trial counsel act previously in the same case as counsel for the accused?  
(Art. 27(a)(2), U.C.M.J.; R.C.M. 502(d)(4), MCM, 1984, at II-49)

d. Military Judge

\_\_\_\_\_ Was a military judge present at the accused's court-martial?  
(R.C.M. 805(a), MCM, 1984, at II-93)

\_\_\_\_\_ Was a military judge detailed to the accused's court-martial?  
(R.C.M. 503(b)(1), MCM, 1984, at II-53)

\_\_\_\_\_ Is the order detailing the military judge included in the record of trial or was it announced orally on the record?  
(R.C.M. 503(b)(2), MCM, 1984, at II-53)

\_\_\_\_\_ Does the writing or the announcement indicate by whom the military judge was detailed?  
(R.C.M. 503(b)(2), MCM, 1984, at II-54)

- \_\_\_\_\_ If the military judge was not properly detailed to sit on the court-martial, was the accused prejudiced by the error?  
(App. 21, Analysis, R.C.M. 503(b), MCM, at A21-25)
- \_\_\_\_\_ Was the military judge who presided at the court-martial qualified under the Code?  
(Art. 26(b), U.C.M.J.)
- \_\_\_\_\_ Did the military judge serve previously in the same case as the accuser, witness for the prosecution, or act as the investigating officer or counsel?  
(Art. 26(d), U.C.M.J.)
- \_\_\_\_\_ If so, was the prior participation of the military judge in one of these capacities prejudicial to the accused?  
(App. 21, Analysis, R.C.M. 503(b), MCM, 1984, at A21-25)
- \_\_\_\_\_ Did the accused request trial by military judge alone either in writing or orally on the record?  
(Art. 16(1)(B) & (2)(C), U.C.M.J.)

e. Court Members

- \_\_\_\_\_ Was the accused tried by court members?  
(R.C.M. 501(a)(1)(A) & (a)(2)(A), MCM, 1984, at II-47)
- \_\_\_\_\_ If so, were the proper number of court members present: 5 or more for a general court-martial and 3 or more for a special court-martial?  
(R.C.M. 501(a)(1)(A) & (a)(2)(A), MCM, 1984, at II-47; United States v. Schmidt, 1 CMR 498 (NBR 1951))
- \_\_\_\_\_ Did the convening authority personally select the court members?  
(Art. 25(d)(2), U.C.M.J.; United States v. Ryan, 5 M.J. 97 (C.M.A. 1978))
- \_\_\_\_\_ Did any of the court members serve previously in the same case as the accuser, witness for the prosecution, or counsel?  
(Art. 25(d)(2), U.C.M.J.)

- \_\_\_\_\_ Did any of the court members serve previously in the same case as court members?  
(Discussion, R.C.M. 503(a)(1), MCM, 1984, at II-53)
- \_\_\_\_\_ Was any member junior in rank to the accused?  
(Discussion, R.C.M. 503(a)(1), MCM, 1984, at II-53)
- \_\_\_\_\_ Was any court member who served as the court-martial under arrest or serving in confinement at the time of the accused's court-martial?  
(Discussion, R.C.M. 503(a)(1), MCM, 1984, at II-53)
- \_\_\_\_\_ Did the accused orally request or submit a written request for trial by enlisted court members of one-third of the court members detailed to sit on accused's court-martial?  
(Art. 25(c)(1), U.C.M.J.; R.C.M. 503(a)(2), MCM, 1984, at II-53)
- \_\_\_\_\_ If an enlisted man served on the court-martial as a court member, was he from the same unit as the accused?  
(Discussion, R.C.M. 503(a)(1), MCM, 1984, at II-53)
- \_\_\_\_\_ Were any of the court members excused by the convening authority or the convening authority's delegate or representative before assembly of the court-martial?  
(R.C.M. 505(c)(1)(A) & (B)(i), MCM, 1984, at II-56)
- \_\_\_\_\_ Did the convening authority's delegate or representative excuse more than a third of the court members before assembly?  
(R.C.M. 505(c)(1)(B)(iii), MCM, 1984, at II-56)
- \_\_\_\_\_ Did the convening authority's delegate or representative excuse any court members after assembly?  
(R.C.M. 505(c)(1)(B)(iii), MCM, 1984, at II-56)
- \_\_\_\_\_ Were any of the court members excused by the convening authority or the military judge after assembly of the court-martial?  
(Art. 29(a), U.C.M.J.; R.C.M. 505(c)(1)(A)(i) & (ii), MCM, 1984, at II-56)

\_\_\_\_\_ If any of the court members were excused after assembly, were they excused for "good cause"?  
(Art. 29(a), U.C.M.J.; United States v. Garcia, 15 M.J. 864 (ACMR 1983))

\_\_\_\_\_ Was the absence of any of the court members prejudicial to the accused?  
(United States v. Colon, 6 M.J. 73 (C.M.A. 1978))

\_\_\_\_\_ Were any of the court members, who participated on the accused's court-martial, not detailed to sit on the court?  
(United States v. Harnish, 12 USCMA 443, 31 CMR 29 (1961))

III. Did the Court-Martial Have Jurisdiction over the Person

a. When Jurisdiction Attaches

\_\_\_\_\_ Is the accused one of the 12 types of persons subject to court-martial jurisdiction?  
(Art 2(a), U.C.M.J.; Discussion, R.C.M. 202(a), MCM, 1984, at II-11 to II-13)

\_\_\_\_\_ Did the accused enlist voluntarily without the treat of coercion or force?  
(United States v. Catlow, 23 USCMA 142, 48 CMR 758 (1974). But see United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1978); United States v. Wagner, 5 M.J. 461 (C.M.A. 1978))

\_\_\_\_\_ Was the enlistee competent to enlist, that is, not insane, intoxicated, a deserter, underage or overage?  
(10 U.S.C. §§ 504 & 505 (1983))

\_\_\_\_\_ If so, did the Secretary concerned grant the accused an exemption?  
(10 U.S.C. § 504 (1983))

\_\_\_\_\_ If the enlistee was 17, did he enlist with the consent of a parent or guardian?  
(Discussion (2)(A)(i), R.C.M. 202(a), MCM, 1984, at II-12)

- \_\_\_\_\_ Did the accused's enlistment violate any service regulations?  
(e.g., AR 601-210, para. 4-11 (Change 8, June 24, 1975))
- \_\_\_\_\_ Did the accused enlist as a result of recruiter misconduct?  
(United States v. Russo, 1 M.J. 134 (C.M.A. 1975))
- \_\_\_\_\_ Were any of the defects in the accused's enlistment waived because of a constructive enlistment?  
(Art. 2(c), U.C.M.J.; Discussion (2)(A)(i), R.C.M. 202(a), MCM, 1984, at II-12)
- \_\_\_\_\_ If the accused was inducted, did he take the oath of induction?  
(United States v. Hall, 17 USCMA 88, 37 CMR 352 (1967). But see United States v. Martin, 9 USCMA 568, 26 CMR 348 (1958))
- \_\_\_\_\_ Did the accused waive the defect in his enlistment by failing to raise it at the time of his induction?  
(United States v. McNeill, 2 USCMA 383, 9 CMR 13 (1953))
- \_\_\_\_\_ If the accused is a reservist, was he charged and tried for an offense committed while serving on active duty?  
(United States v. Morris, 18 M.J. 531 (AFCMR 1984))
- \_\_\_\_\_ If the accused is a reservist, was he charged and tried for an offense committed while attending an evening or weekend drill?  
(United States v. Caputo, 18 M.J. 259 (C.M.A. 1984))
- \_\_\_\_\_ If the accused is a reservist serving on inactive duty training at an evening or weekend drill, did he voluntarily accept orders stating that he was subject to the UCMJ?  
(United States v. Abernathy, 48 CMR 205 (CGCMR 1974))

b. Continuing Jurisdiction

\_\_\_\_\_ If the accused's term of service has expired, is he subject to court-martial jurisdiction because he is being held with a view toward trial?

(Art. 2(a)(1), U.C.M.J.; Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12)

\_\_\_\_\_ If the accused is being held on active duty with a view toward trial by court-martial, did the government take some action to hold the accused for trial beyond his term of service?

(United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979) But see United States v. Kalt, 50 CMR 95 (ACMR 1975))

\_\_\_\_\_ If the accused is being held on active duty with a view toward trial by court-martial, did the accused object to his continued retention on active duty?

(Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12; United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983))

\_\_\_\_\_ If the accused is being held on active duty with a view toward trial by court-martial, does the accused have self-executing orders?

(Discussion (2)(B)(i), R.C.M. 202(a), MCM, 1984, at II-12; United States v. Hamm, 36 CMR 656 (ABR), pet. denied, 16 USCMA 655, 36 CMR 541 (1966)). But see United States v. Mansbarger, 20 CMR 449 (ABR 1955))

c. When Jurisdiction Terminates

\_\_\_\_\_ If the accused received a discharge certificate and it was revoked, was it revoked before the discharge became effective under the service regulations of the service involved?

(United States v. Howard, 20 M.J. 353 (C.M.A. 1985))

\_\_\_\_\_ If the accused has been discharged from military service, is he still subject to court-martial jurisdiction under the serious offense exception?

(Art. 3(a), U.C.M.J.; Discussion (2)(B)(iii)(a), R.C.M. 202(a), MCM, 1984, at II-12; United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957))

\_\_\_\_\_ If the accused has served his tour of active duty and has been transferred to the reserves, is he still subject to court-martial jurisdiction?

(United States v. Wheeler, 10 USCMA 646, 28 CMR 212 (1959). But see United States v. Brown, 12 USCMA 693, 31 CMR 279 (1962))

\_\_\_\_\_ If the accused has been discharged from active duty, is he still subject to court-martial jurisdiction under the fraudulent discharge exception? (Art. 3(b), U.C.M.J.; Discussion (2)(B)(iii)(d), R.C.M. 202(a), MCM, 1984, at II-13: Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981))

\_\_\_\_\_ If the accused has been discharged from active duty, is he still subject to court-martial jurisdiction under the deserter exception? (Art. 3(c), U.C.M.J.; Discussion (2)(B)(iii)(e), R.C.M. 202(a), MCM, 1984, at II-13: United States Huff, 19 CMR 603 (CGBR 1955), rev'd on other grounds, 7 USCMA 247, 22 CMR 37 (1956).)

\_\_\_\_\_ If the accused has been discharged from active duty, is he still subject to court-martial jurisdiction under the prisoner in military custody exception?

(Art. 2(a)(7), U.C.M.J.; Discussion (2)(B)(iii)(c), R.C.M. 202(a), MCM, 1984, at II-13: Peebles v. Froehke, 22 USCMA 226, 46 CMR 266 (1973))

\_\_\_\_\_ If the accused has been discharged from active duty, is he still subject to court-martial jurisdiction under the uninterrupted status exception? (United States v. Clardy, 13 M.J. 308 (C.M.A. 1982))

\_\_\_\_\_ If the accused has been discharged from active duty, is he still subject to court-martial jurisdiction under the retired persons exception?

(Art 2(a)(4), (5), & (6), U.C.M.J.; United States v. Hooper, 9 USCMA 637, 26 CMR 417 (1958))

\_\_\_\_\_ Is the accused a civilian who is not subject to court-martial jurisdiction in peacetime?

(Art. 2(a)(8), (10), (11) & (12), U.C.M.J.; Reid v. Covert, 354 U.S. 1 (1957))

\_\_\_\_\_ Is the accused a civilian who may be subject to court-martial jurisdiction in time of war?  
(Art. 2(a)(10), U.C.M.J.; United States v. Averette, 19 USCMA 363, 41 CMR 363 (1970). But see United States v. Anderson, 17 USCMA 588, 38 CMR 386 (1968))

IV. Did the Court-Martial Have Jurisdiction over the Offense?

\_\_\_\_\_ Has the accused been charged with an offense in violation of the UCMJ?  
(Arts. 77-134, U.C.M.J.)

\_\_\_\_\_ Has the accused been tried previously for the same offense in a federal or state court?  
(R.C.M. 201(d)(2), MCM, 1984 at II-8;  
R.C.M. 907(b)(2)(C), MCM, 1984, at II-114)

\_\_\_\_\_ Is the offense for which the accused has been tried service connected?  
(O'Callahan v. Parker, 395 U.S. 258 (1969))

\_\_\_\_\_ Are one or more Relford factors present?  
(Discussion (c)(1), R.C.M. 203, MCM, 1984, at II-14; Relford v. Commandant, 401 U.S. 355, 365 (1971))

\_\_\_\_\_ Is the offense for which the accused was tried a military offense?  
(Discussion (c)(2), R.C.M. 203, MCM, 1984, at II-14; App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-10)

\_\_\_\_\_ Is the victim of the offense for which the accused was tried another service member?  
(United States v. Shorte, 18 M.J. 518 (AFCMR 1984), summarily aff'd, 20 M.J. 414 (C.M.A. 1985); United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983))

\_\_\_\_\_ Is the offense for which the accused was tried an offense against military property?  
(Discussion (c)(1), R.C.M. 203, MCM, 1984, at II-14; United States v. Regan, 7 M.J. 600 (NCFM 1979))

\_\_\_\_\_ Was the offense for which the accused was tried committed on post?

(Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14; App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-10; United States v. Rogers, 7 M.J. 274 (C.M.A. 1979))

\_\_\_\_\_ Was the offense for which the accused was tried committed at or near the post?

(Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14; United States v. Mauck, 17 M.J. 1033 (ACMR), pet. denied, 19 M.J. 106 (C.M.A. 1984))

\_\_\_\_\_ Was the offense for which the accused was tried begun on post and completed off post or vice versa?

(Discussion (c)(3), R.C.M. 203, MCM, 1984, at II-14; United States v. Scott, 15 M.J. 589 (ACMR 1983))

\_\_\_\_\_ Was the offense for which the accused was tried one in which military status was used in the commission of the offense?

(Discussion (c)(5), R.C.M. 203, MCM, 1984, at II-14; United States v. Moore, 1 M.J. 448 (C.M.A. 1976). But see United States v. Hopkins, 4 M.J. 260 (C.M.A. 1978); United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983))

\_\_\_\_\_ Was the offense for which the accused was tried committed while in uniform?

(Discussion (c)(5), R.C.M. 203, MCM, 1984, at II-14 to II-15; United States v. Fryman, 19 USCMA 71, 41 CMR 71 (C.M.A. 1969); United States v. Armes, 10 USCMA 15, 41 CMR 15 (1969))

\_\_\_\_\_ Was the offense for which the accused was tried a drug offense?

(Discussion (c)(4), R.C.M. 203, MCM, 1984, at II-14; United States v. Trottier, 9 M.J. 337 (C.M.A. 1980))

\_\_\_\_\_ Was the offense for which the accused was tried committed overseas?

(Discussion (d)(1), R.C.M. 203, MCM, 1984, at II-15; App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-11; United States v. Newvine, 23 USCMA 208, 48 CMR 960 (1974))

\_\_\_\_\_ Was the offense for which the accused was tried a petty offense?

(Discussion (d)(2), R.C.M. 203, MCM, 1984, at II-15; App. 21, Analysis, R.C.M. 203, MCM, 1984, at A21-11; United States v. Sharkey, 19 USCMA 26, 41 CMR 26 (1969))

V. Is the Sentence Adjudged within the Limitations Authorized by the Code and the Manual

\_\_\_\_\_ Is the sentence adjudged for the offense within the maximum punishment authorized by the Code?

(Arts. 77-134, U.C.M.J.; App. 12, Maximum Punishment Chart, MCM, 1984, at A12-1 to A12-8)

\_\_\_\_\_ Is the sentence adjudged within the maximum punishment authorized by the Code for a general court-martial?

(Art. 18, U.C.M.J.; R.C.M. 201(f)(1)(A), MCM, 1984, at II-9 to II-10; R.C.M. 1004, MCM, 1984, at II-149 to II-152)

\_\_\_\_\_ Is the sentence adjudged within the maximum punishment authorized by the Code for a special court-martial?

(Art. 19, U.C.M.J.; R.C.M. 201(f)(2)(B), MCM, 1984, at II-10)

\_\_\_\_\_ Is the sentence adjudged within the maximum punishment authorized by the Code for a summary court-martial?

(Art. 20, U.C.M.J.; R.C.M. 1301(d), MCM, 1984, at II-201)

\_\_\_\_\_ Is the sentence adjudged on rehearing, retrial, or other trial in excess of the sentence adjudged in the prior trial?

(Art. 63, U.C.M.J.; R.C.M. 810(d)(1), MCM, 1984, at II-99)

\_\_\_\_\_ Is the sentence adjudged within the maximum punishment authorized by the Manual?

(Art. 56, U.C.M.J.; App. 12, Maximum Punishment Chart, MCM, 1984, at A12-1 to A12-8; Part IV, MCM, 1984, at IV-1 to IV-147)

\_\_\_\_\_ If a death sentence was adjudged, was it imposed by the court members?

(Art. 18, U.C.M.J.; R.C.M. 1004, MCM, 1984, at II-149 to II-152)

- \_\_\_\_\_ If a death sentence was adjudged, was the case referred to trial as a capital case?  
(R.C.M. 1004, MCM, at 1984, II-149 to II-150)
- \_\_\_\_\_ Is the punishment adjudged among the types a court-martial can impose?  
(R.C.M. 1003, MCM, 1984, at II-144 to II-147)
- \_\_\_\_\_ Does the sentence adjudged consist of a fine in addition to other punishment?  
(R.C.M, 1003(c)(1)(A)(ii), MCM, 1984, at II-147; R.C.M. 1003(b)(3), MCM, 1984, at II-145; United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953))
- \_\_\_\_\_ If the offense for which the accused is punished is not listed in Part IV of the Manual or in the Maximum Punishment Chart, is the punishment imposed within the maximum punishment authorized for a closely related offense?  
(R.C.M. 1003(c)(1)(B)(i), MCM, 1984, at II-147)
- \_\_\_\_\_ If the offense for which the accused is punished is not listed in Part IV of the Manual or in the Maximum Punishment Chart, is the punishment imposed within the maximum punishment authorized for a similar offense in the United States Code?  
(R.C.M. 1003(c)(1)(B)(ii), MCM, 1984, at II-147)
- \_\_\_\_\_ Are the offenses for which the accused is being punished multiplicitous for findings purposes?  
(R.C.M. 1003(c)(1)(C), MCM, 1984, at II-148; United States v. Rodriguez, 18 M.J. 363 (C.M.A. 1984))
- \_\_\_\_\_ Are the offenses for which the accused is being punished multiplicitous for sentencing purposes?  
(R.C.M. 1003(c)(1)(C), MCM, 1984, at II-147 to II-148)
- \_\_\_\_\_ Is the punishment imposed on the accused proper for the rank of the accused?  
(R.C.M. 1003(c)(2)(A) & (B), MCM, 1984, at II-148)
- \_\_\_\_\_ Is the punishment imposed on the accused within the limitations announced by the convening authority?  
(Discussion, R.C.M. 601(e)(1), MCM, 1984, at II-62)

\_\_\_\_\_ If a punitive discharge was adjudged, is it authorized because the accused has been convicted of a number of minor offenses within a specified period of years?

(R.C.M. 1003(d), MCM, 1984, at II-148 to II-149)

## BIBLIOGRAPHY

### Statutes

- U.S. Articles of Confederation, art. IX, § 4 (1778)
- U.S. CONST. art. I, § 8, cl. 1.
- U.S. CONST. art. I, § 8, cl. 9.
- U.S. CONST. art. I, § 8, cl. 10.
- U.S. CONST. art. I, § 8, cl. 11.
- U.S. CONST. art. I, § 8, cl. 12.
- U.S. CONST. art. I, § 8, cl. 13.
- U.S. CONST. art. I, § 8, cl. 14.
- U.S. CONST. art. I, § 8, cl. 15.
- U.S. CONST. art. I, § 8, cl. 16.
- U.S. CONST. art. I, § 8, cl. 18.
- U.S. CONST. art. II, § 2.
- U.S. CONST. art. II, § 3.
- U.S. CONST. amend. II, § 2.
- U.S. CONST. amend. II, § 3.
- U.S. CONST. amend. III.
- U.S. CONST. amend. IV, § 4.
- U.S. CONST. amend. V.
- Ordinance of Richard I (1190).

Code of Articles of King Gustavus Adolphus of Sweden (1621).

Articles of War of Richard II (1385).

Articles of War of James II (1688).

The British Mutiny Act (1689).

British Articles of War of 1765.

British Articles of War of 1774.

Massachusetts Articles of War (April 5, 1775).

Articles of War of 1775 (June 30, 1775).

Articles of War of 1776 (September 20, 1775).

Act of September 29, 1789, ch. 25, 1 Stat. 96.

Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121.

Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432.

Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486.

Act of April 10, 1806, ch. 20, 2 Stat. 359.

Act of August 3, 1861, ch. 42, § 18, 12 Stat. 290.

Act of July 17, 1862, ch. 200, § 16, 12 Stat. 596.

Act of August 3, 1861, ch. 42, § 18, 12 Stat. 290.

Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736.

Revised Statute § 1342 (1875).

Articles of War of 1886 (May 31, 1886).

Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 650.

Act of June 4, 1920, ch. 227, 41 Stat. 787.

Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

Act of May 5, 1950, ch. 169, 64 Stat. 107.

Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178.

FY 1980 Department of Defense Authorization Act, Pub. L. No. 96-107, tit. VIII, § 801, 93 Stat. 810.

Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Selective Training and Service Act of 1940, Pub. L. No. 783, 54 Stat. 885.

5 U.S.C. § 8312 (1983) (Hiss Act).

10 U.S.C. § 101(22) (1983).

10 U.S.C. § 121 (1983).

10 U.S.C. § 270 (1983).

10 U.S.C. § 331 (1983).

10 U.S.C. § 504 (1983).

10 U.S.C. § 505 (1983).

10 U.S.C. §§ 801-940 (1983).

10 U.S.C. § 1168 (1983).

10 U.S.C. § 1170 (1983).

10 U.S.C. § 1202 (1983).

10 U.S.C. § 3061 (1983).

10 U.S.C. § 3253(c) (1983).

10 U.S.C. § 6330 (1983).

10 U.S.C. § 6485 (1983).

10 U.S.C. § 8061 (1983).

28 U.S.C. § 1651(a) (1983).

33 U.S.C. § 855 (1983).

42 U.S.C. § 217 (1983).

50 U.S.C. App. § 467(c) (1983).

Uniform Code of Military Justice

Article 1, Uniform Code of Military Justice,  
10 U.S.C. § 801 (1983).

Article 2, Uniform Code of Military Justice,  
10 U.S.C. § 802 (1983).

Article 3, Uniform Code of Military Justice,  
10 U.S.C. § 803 (1983).

Article 4, Uniform Code of Military Justice,  
10 U.S.C. § 804 (1983).

Article 5, Uniform Code of Military Justice,  
10 U.S.C. § 805 (1983).

Article 15, Uniform Code of Military Justice,  
10 U.S.C. § 815 (1983).

Article 16, Uniform Code of Military Justice,  
10 U.S.C. § 816 (1983).

Article 17, Uniform Code of Military Justice,  
10 U.S.C. § 817 (1983).

Article 18, Uniform Code of Military Justice,  
10 U.S.C. § 818 (1983).

Article 19, Uniform Code of Military Justice,  
10 U.S.C. § 819 (1983).

Article 20, Uniform Code of Military Justice,  
10 U.S.C. § 820 (1983).

Article 21, Uniform Code of Military Justice,  
10 U.S.C. § 821 (1983).

Article 22, Uniform Code of Military Justice,  
10 U.S.C. § 822 (1983).

Article 23, Uniform Code of Military Justice,  
10 U.S.C. § 823 (1983).

Article 24, Uniform Code of Military Justice,  
10 U.S.C. § 824 (1983).

Article 25, Uniform Code of Military Justice,  
10 U.S.C. § 825 (1983).

Article 26, Uniform Code of Military Justice,  
10 U.S.C. § 826 (1983).

Article 27, Uniform Code of Military Justice,  
10 U.S.C. § 827 (1983).

Article 28, Uniform Code of Military Justice,  
10 U.S.C. § 828 (1983).

Article 29, Uniform Code of Military Justice,  
10 U.S.C. § 829 (1983).

Article 36, Uniform Code of Military Justice,  
10 U.S.C. § 836 (1983).

Article 37, Uniform Code of Military Justice,  
10 U.S.C. § 837 (1983).

Article 38, Uniform Code of Military Justice,  
10 U.S.C. § 838 (1983).

Article 39, Uniform Code of Military Justice,  
10 U.S.C. § 839 (1983).

Article 52, Uniform Code of Military Justice,  
10 U.S.C. § 852 (1983).

Article 55, Uniform Code of Military Justice,  
10 U.S.C. § 855 (1983).

Article 56, Uniform Code of Military Justice,  
10 U.S.C. § 856 (1983).

Article 57, Uniform Code of Military Justice,  
10 U.S.C. § 857 (1983).

Article 58, Uniform Code of Military Justice,  
10 U.S.C. § 858 (1983).

Article 59, Uniform Code of Military Justice,  
10 U.S.C. § 859 (1983).

Article 60, Uniform Code of Military Justice,  
10 U.S.C. § 860 (1983).

Article 63, Uniform Code of Military Justice,  
10 U.S.C. § 863 (1983).

Article 66, Uniform Code of Military Justice,  
10 U.S.C. § 866 (1983).

Article 67, Uniform Code of Military Justice,  
10 U.S.C. § 867 (1983).

Article 69, Uniform Code of Military Justice,  
10 U.S.C. § 869 (1983).

Article 76, Uniform Code of Military Justice,  
10 U.S.C. § 876 (1983).

Article 77, Uniform Code of Military Justice,  
10 U.S.C. § 877 (1983).

Article 78, Uniform Code of Military Justice,  
10 U.S.C. § 878 (1983).

Article 79, Uniform Code of Military Justice,  
10 U.S.C. § 879 (1983).

Article 80, Uniform Code of Military Justice,  
10 U.S.C. § 880 (1983).

Article 81, Uniform Code of Military Justice,  
10 U.S.C. § 881 (1983).

Article 82, Uniform Code of Military Justice,  
10 U.S.C. § 882 (1983).

Article 83, Uniform Code of Military Justice,  
10 U.S.C. § 883 (1983).

Article 84, Uniform Code of Military Justice,  
10 U.S.C. § 884 (1983).

Article 85, Uniform Code of Military Justice,  
10 U.S.C. § 885 (1983).

Article 86, Uniform Code of Military Justice,  
10 U.S.C. § 886 (1983).

Article 87, Uniform Code of Military Justice,  
10 U.S.C. § 887 (1983).

Article 88, Uniform Code of Military Justice,  
10 U.S.C. § 888 (1983).

Article 89, Uniform Code of Military Justice,  
10 U.S.C. § 889 (1983).

Article 90, Uniform Code of Military Justice,  
10 U.S.C. § 890 (1983).

Article 91, Uniform Code of Military Justice,  
10 U.S.C. § 891 (1983).

Article 92, Uniform Code of Military Justice,  
10 U.S.C. § 892 (1983).

Article 93, Uniform Code of Military Justice,  
10 U.S.C. § 893 (1983).

Article 94, Uniform Code of Military Justice,  
10 U.S.C. § 894 (1983).

Article 95, Uniform Code of Military Justice,  
10 U.S.C. § 895 (1983).

Article 96, Uniform Code of Military Justice,  
10 U.S.C. § 896 (1983).

Article 97, Uniform Code of Military Justice,  
10 U.S.C. § 897 (1983).

Article 98, Uniform Code of Military Justice,  
10 U.S.C. § 898 (1983).

Article 99, Uniform Code of Military Justice,  
10 U.S.C. § 899 (1983).

Article 100, Uniform Code of Military Justice,  
10 U.S.C. § 900 (1983).

Article 101, Uniform Code of Military Justice,  
10 U.S.C. § 901 (1983).

Article 102, Uniform Code of Military Justice,  
10 U.S.C. § 902 (1983).

Article 103, Uniform Code of Military Justice,  
10 U.S.C. § 903 (1983).

Article 104, Uniform Code of Military Justice,  
10 U.S.C. § 904 (1983).

Article 105, Uniform Code of Military Justice,  
10 U.S.C. § 905 (1983).

Article 106, Uniform Code of Military Justice,  
10 U.S.C. § 906 (1983).

Article 106a, Uniform Code of Military Justice,  
10 U.S.C. § 906a (Supp. 1986).

Article 107, Uniform Code of Military Justice,  
10 U.S.C. § 907 (1983).

Article 108, Uniform Code of Military Justice,  
10 U.S.C. § 908 (1983).

Article 109, Uniform Code of Military Justice,  
10 U.S.C. § 909 (1983).

Article 110, Uniform Code of Military Justice,  
10 U.S.C. § 910 (1983).

Article 111, Uniform Code of Military Justice,  
10 U.S.C. § 911 (1983).

Article 112, Uniform Code of Military Justice,  
10 U.S.C. § 912 (1983).

Article 112a, Uniform Code of Military Justice,  
10 U.S.C. § 912a (Supp. 1986).

Article 113, Uniform Code of Military Justice,  
10 U.S.C. § 913 (1983).

Article 114, Uniform Code of Military Justice,  
10 U.S.C. § 914 (1983).

Article 115, Uniform Code of Military Justice,  
10 U.S.C. § 915 (1983).

Article 116, Uniform Code of Military Justice,  
10 U.S.C. § 916 (1983).

Article 117, Uniform Code of Military Justice,  
10 U.S.C. § 917 (1983).

Article 118, Uniform Code of Military Justice,  
10 U.S.C. § 918 (1983).

Article 119, Uniform Code of Military Justice,  
10 U.S.C. § 919 (1983).

Article 120, Uniform Code of Military Justice,  
10 U.S.C. § 920 (1983).

- Article 121, Uniform Code of Military Justice,  
10 U.S.C. § 921 (1983).
- Article 122, Uniform Code of Military Justice,  
10 U.S.C. § 922 (1983).
- Article 123, Uniform Code of Military Justice,  
10 U.S.C. § 923 (1983).
- Article 124, Uniform Code of Military Justice,  
10 U.S.C. § 924 (1983).
- Article 125, Uniform Code of Military Justice,  
10 U.S.C. § 925 (1983).
- Article 126, Uniform Code of Military Justice,  
10 U.S.C. § 926 (1983).
- Article 127, Uniform Code of Military Justice,  
10 U.S.C. § 927 (1983).
- Article 128, Uniform Code of Military Justice,  
10 U.S.C. § 928 (1983).
- Article 129, Uniform Code of Military Justice,  
10 U.S.C. § 929 (1983).
- Article 130, Uniform Code of Military Justice,  
10 U.S.C. § 930 (1983).
- Article 131, Uniform Code of Military Justice,  
10 U.S.C. § 931 (1983).
- Article 132, Uniform Code of Military Justice,  
10 U.S.C. § 932 (1983).
- Article 133, Uniform Code of Military Justice,  
10 U.S.C. § 933 (1983).
- Article 134, Uniform Code of Military Justice,  
10 U.S.C. § 934 (1983).
- Article 135, Uniform Code of Military Justice,  
10 U.S.C. § 935 (1983).

Proposed Legislation

S. 1266, 91st Cong., 1st Sess. (1969)  
(Evin Bill).

S. 4168, S. 4178, 91st Cong., 2d Sess. (1970)  
(Hatfield Bill).

S. 1127, 92d Cong., 1st Sess. (1971)  
(Bayh Bill).

H.R. 579, 92d Cong., 1st Sess. (1971)  
(Bennett Bill).

H.R. 2196, 92d Cong., 1st Sess. (1971)  
(Price Bill).

H.R. 6901, 92d Cong., 1st Sess. (1971)  
(Whalen Bill).

### Treaties

Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, signed June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (entered into force for the United States, August 23, 1953).

Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany (Supplement Agreement), 14 U.S.T. 531, T.I.A.S. No. 5351 (entered into force for the United States, July 1, 1963).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force for the United States, February 2, 1956).

Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 17 U.S.T. 1677, T.I.A.S. 6127 (entered into force for the United States, February 9, 1967).

## Reports

REVISION OF THE ARTICLES OF WAR, SENATE REPORT  
NO. 130, 64th Cong., 1st Sess. (1916).

REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON  
MILITARY JUSTICE TO THE SECRETARY OF WAR (1946).

ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE,  
SENATE REPORT NO. 486, 81st Cong., 1st Sess.  
(1949).

UNIFORM CODE OF MILITARY JUSTICE, HOUSE REPORT  
NO. 491, 81st Cong., 1st Sess. (1949).

REPORT TO HONORABLE WILBER M. BRUCKNER, SECRETARY OF  
THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF  
MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN  
THE ARMY (January 18, 1960).

NONJUDICIAL PUNISHMENT, SENATE REPORT NO. 1911,  
87th Cong., 2d Sess. (1962).

FY 1980 DEFENSE AUTHORIZATION ACT, SENATE REPORT  
NO. 96-197, 96th Cong., 1st Sess. 121 (1979).

MILITARY JUSTICE ACT OF 1983, SENATE REPORT  
NO. 53, 98th Cong., 1st Sess. (1983).

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
(RESERVE AFFAIRS), END OF YEAR REPORT 1984.

ANNUAL REPORTS OF THE U.S. COURT OF MILITARY  
APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE  
ARMED FORCES AND THE GENERAL COUNSEL OF THE  
DEPARTMENT OF TRANSPORTATION PURSUANT TO THE  
UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD  
1951 TO 1984.

## Hearings

Hearings Before the House Committee on Military  
Affairs on H.R. 23628, 62d Cong., 2d Sess.  
(1912).

Hearings on S. 5320 Before the Senate Committee  
on Military Affairs, 65th Cong., 3rd Sess.  
(1919).

Hearings on S. 64 Before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess. (1919).

Hearings on H.R. 2575 Before the Subcommittee of the House Committee on Military Affairs, 80th Cong., 1st Sess. (1947).

Hearings on the Uniform Code of Military Justice Before the House Subcommittee of the Committee on Armed Services, 81st Cong., 1st Sess. (1949).

Hearings on S.857 and H.R. 4050 Before the Subcommittee on the Senate Armed Services Committee, 81st Cong., 1st Sess. (1949).

Hearings on S.428 Before the Military Personnel Subcommittee of the House Committee on Armed Services, 96th Cong., 1st Sess. (1979).

#### Executive Orders

NAVAL COURTS AND BOARDS (Washington, D.C.: U.S. Government Printing Office, 1937).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1917 (Washington, D.C.; U.S. Government Printing Office, 1917).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1920 (Washington, D.C.; U.S. Government Printing Office, December 17, 1920).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1928 (Washington, D.C.; U.S. Government Printing Office, November 29, 1927).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1949 (Washington, D.C.; U.S. Government Printing Office, 1949), Executive Order 10020, (December 7, 1948).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 (Washington, D.C.; U.S. Government Printing Office, 1951), Executive Order 10241, (February 8, 1951).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969  
(REVISED EDITION)(Washington, D.C.; U.S. Govern-  
ment Printing Office, 1969), Executive Order  
No. 11476, 34 Fed. Reg. 10502 (June 19, 1969).

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984  
(Washington, D.C.: U.S. Government Printing  
Office, 1984), Executive Order No. 12473,  
45 Fed. Reg. 28825 (1984).

Manual for Courts-Martial United States

Paragraph 34, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1917 (Washington, D.C.: U.S. Government  
Printing Office, 1917).

Paragraph 7, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1928 (Washington, D.C.: U.S. Government  
Printing Office, 1928).

Paragraph 7, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1949 (Washington, D.C.: U.S. Government  
Printing Office, 1949).

Paragraph 7, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1949 (Washington, D.C.: U.S. Government  
Printing Office, 1951).

Paragraph 8, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1969 (REVISED EDITION)(Washington,  
D.C.: U.S. Government Printing Office, 1969).

Paragraph 5a(5), MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1969 (REVISED EDITION)(Washington,  
D.C.: U.S. Government Printing Office, 1969).

Paragraph 6a, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1969 (REVISED EDITION)(Washington,  
D.C.: U.S. Government Printing Office, 1969).

Paragraph 6c, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1969 (REVISED EDITION)(Washington,  
D.C.: U.S. Government Printing Office, 1969).

Paragraph 36a, MANUAL FOR COURTS-MARTIAL, UNITED  
STATES, 1969 (REVISED EDITION)(Washington,  
D.C.: U.S. Government Printing Office, 1969).

Paragraph 213a, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION)(Washington, D.C.: U.S. Government Printing Office, 1969).

Appendix 4, Forms for Orders Convening Courts-Martial, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION)(Washington, D.C.: U.S. Government Printing Office, 1969).

Part I, Paragraph 1, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Part I, Paragraph 2, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Part I, Paragraph 3, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 201, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 202, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 501, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 502, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 503, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 504, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

- R.C.M. 506, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 601, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 602, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 603, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 604, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 801, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 804, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 805, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 806, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 903(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 905, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 907, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).
- R.C.M. 911, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1001, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1002, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1003, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1004, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1205, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1301, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 1302, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

R.C.M. 3001, MANUAL FOR COURTS-MARTIAL (Washington, D.C.: U.S. Government Printing Office, 1984).

Part IV, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 1, Constitution of the United States, MANUAL FOR COURTS-MARTIAL (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 2, Uniform Code of Military Justice, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 4, Charge Sheet, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 6, Forms for Orders Convening Courts-Martial, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 8, Guide for General and Special Courts-Martial, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 12, Maximum Punishment Chart, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 21, Analysis, R.C.M. 203, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 21, Analysis, R.C.M. 503(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

Appendix 21, Analysis, R.C.M. 804(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984).

#### Presidential Proclamations

President Wilson's Veto Message, 53 Cong. Rec. 12845 (1916).

Presidential Proclamation No. 4360, March 29, 1975, 40 Fed. Reg. 14567 (1975).

Presidential Proclamation No. 4771, July 2, 1980, 45 Fed. Reg. 45247 (1980).

#### Memorandum of Understanding

Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes over which the Two Departments Have Concurrent Jurisdiction (19 July 1955).

## Regulations

Paragraph 18a, Air Force Regulation 35-54  
(September 15, 1981).

Air Force Regulation 111-1 (1 August 1984).

Paragraph 2-4b, Army Regulation 27-10  
(September 1984).

Paragraph 2-16, Army Regulation 27-10  
(September 1984).

Paragraph 5-3a, Army Regulation 27-10  
(September 1984).

Paragraph 5-4a, Army Regulation 27-10  
(September 1984).

Paragraph 8-6, Army Regulations 27-10  
(September 1984).

Paragraph 3-4, Army Regulation 600-20  
(15 October 1981).

Paragraph 4-11, Army Regulation 601-210  
(Change 8, 24 June 1975).

Paragraph 4-12, Army Regulation 601-210  
(Change 6, 24 June 1975).

Army Regulation 635-200 (15 October 1985).

Status of Forces Policies, Procedures, and  
Information, Army Regulation 27-50/Secretary of  
the Navy Instruction 5820.4F/ Air Force  
Regulation 110-12 (1 December 1984).

0102b Navy Regulation Supplement to the Manual  
for Courts-Martial 1-7 (Change 5, 20 May  
1986).

## Pamphlets

MILITARY JUSTICE JURISDICTION OF COURTS-MARTIAL  
(Department of the Army Pamphlet 27-174, June  
1965).

MILITARY JUSTICE JURISDICTION OF COURTS-MARTIAL  
(Department of the Army Pamphlet 27-174, November  
1973).

MILITARY JUSTICE JURISDICTION OF COURTS-MARTIAL  
(Department of the Army Pamphlet 27-174, November  
1976).

MILITARY JUSTICE JURISDICTION OF COURTS-MARTIAL  
(Department of the Army Pamphlet 27-174, May  
1980).

### Rules of Practice

United States Court of Military Appeals Rules of  
Practice and Procedure, 4 M.J. CXIII (July 1,  
1977).

Courts of Military Review Rules of Practice, 10 M.J.  
LXXIX (3 February 1980).

Federal Rules of Criminal Procedure, Rule 23(c),  
18 U.S.C. Rule 23(a) (1975).

### Cases

#### Supreme Court of the United States

Billings v. Truesdell, 321 U.S. 542 (1944).

Brown v. Glines, 444 U.S. 348 (1980).

Brown v. Keene, 33 U.S. 112 (1834).

Burns v. Wilson, 346 U.S. 137, rehearing denied, 346  
U.S. 844 (1953).

Calley v. Callaway, 425 U.S. 911 (1976).

Carter v. McClaughry, 183 U.S. 365 (1902).

Carter v. Roberts, 177 U.S. 496 (1900).

Chicot County Distr. v. Bank, 308 U.S. 371 (1940).

Duncan v. Kahanamoku, 327 U.S. 304 (1946).

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

Elliot v. Peirsol, 26 U.S. (1 Pet.) 328 (1828).

Ex parte Bigelow, 113 U.S. 328 (1884).

Ex parte Mason, 105 U.S. 696 (1881).

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

Ex parte Quirin, 317 U.S. 1 (1942).

Ex parte Reed, 100 U.S. 13 (1879).

Ex parte Vallandigham, 68 U.S. (1 Wall.) 243  
(1863).

Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).

Faretta v. California, 422 U.S. 806 (1975).

Fauntleroy v. Lum, 210 U.S. 230 (1908).

Givens v. Zerbst, 255 U.S. 11 (1921).

Gosa v. Mayden, 413 U.S. 665 (1973).

Gratiot v. United States, 45 U.S. (4 How.) 80  
(1846).

Grisham v. Hagan, 361 U.S. 278 (1960).

Gusik v. Schilder, 340 U.S. 128 (1950).

Humphrey v. Smith, 336 U.S. 695 (1949).

In re Grimley, 137 U.S. 147 (1890).

In re Yamashita, 327 U.S. 1 (1946).

Jackson v. Taylor, 353 U.S. 569 (1957).

Jurek v. Texas, 428 U.S. 262 (1976).

Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173  
(1809).

Kinsella v. United States ex rel. Singleton,  
361 U.S. 234 (1960).

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

Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

Madsen v. Kinsella, 343 U.S. 341 (1952).

Martin v. Mott, 25 U.S. (12 Wheat.) 410 (1827).

McClaghry v. Deming, 186 U.S. 49 (1902).

McElroy v. United States ex rel. Guagliardo,  
361 U.S. 281 (1960).

McKart v. United States, 395 U.S. 185 (1969).

Middendorf v. Henry, 425 U.S. 25 (1976).

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

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

Orloff v. Willoughby, 345 U.S. 83 (1953).

Parisi v. Davidson, 405 U.S. 34 (1972).

Parker v. Levy, 417 U.S. 733 (1974).

Reid v. Covert, 354 U.S. 1 (1957).

Relford v. Commandant, 401 U.S. 355 (1971).

Rostker v. Goldberg, 453 U.S. 57 (1981).

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

The Schooner Exchange v. M'Faddon, 11 U.S. (7  
Cranch) 116 (1812).

Scheuer v. Rhodes, 416 U.S. 232 (1974).

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Schlesinger v. Councilman, 420 U.S. 738 (1975).

Singer v. United States, 380 U.S. 24 (1965).

Smith v. Whitney, 116 U.S. 167 (1886).

Sterling v. Constantin, 287 U.S. 378 (1932).

Swain v. United States, 165 U.S. 553 (1897).

Thompson v. Tolmie, 27 U.S. (2 Pet.) 157 (1829).

United States v. Eliason, 41 U.S. (16 Pet.) 291  
(1842).

United States v. Morgan, 346 U.S. 502 (1954).

United States ex rel. Hirschberg v. Cooke, 336 U.S.  
210 (1949).

United States ex rel. Pasela v. Fenno, 335 U.S. 806  
(1948).

United States v. Pridgeon, 153 U.S. 48 (1894).

United States v. Pugh, 99 U.S. 265 (1878).

United States ex rel. Toth v. Quarles, 350 U.S. 11  
(1955).

VonMoltke v. Gillies, 332 U.S. 708 (1948).

Wise v. Withers, 7 U.S. (3 Cranch) 330 (1806).

#### Federal Circuit Courts of Appeal

Bowman v. Wilson, 672 F.2d 1145 (3rd Cir. 1982).

Brown v. Resor, 407 F.2d 281 (5th Cir. 1969),  
cert. denied sub nom., Gilliam v. Resor, 399  
U.S. 933 (1970).

Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975),  
cert. denied sub nom., Calley v. Hoffman, 425  
U.S. 911 (1976).

Cole v. Laird, 468 F.2d 829 (5th Cir. 1972).

Curry v. Secretary of Army, 595 F.2d 873 (D.C. Cir.  
1979).

De Coster v. Madigan, 223 F.2d 906 (7th Cir. 1955),  
companion case rev'd, Jackson v. Taylor, 353  
U.S. 569 (1957).

Deming v. McClaughry, 113 F. 639 (8th Cir.),  
aff'd, 186 U.S. 49 (1902).

Hemphill v. Moseley, 443 F.2d 322 (10th Cir. 1971).

Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970), rehearing denied, 397 U.S. 1031 (1970).

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

McKinney v. Finletter, 205 F.2d 761 (10th Cir. 1953).

Relford v. Commandant, 409 F.2d 824 (10th Cir. 1969), aff'd, 401 U.S. 355 (1971).

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

Silvero v. Chief of Naval Air Basic Training, 428 F.2d 1009 (5th Cir. 1970).

United States v. Maney, 61 F. 140 (Cir. Minn. 1894).

United States v. Nelson, 570 F.2d 258 (8th Cir. 1978).

United States v. Taylor, 562 F.2d 1345 (2d Cir.), cert. denied, 434 U.S. 853 (1977).

United States v. Walls, 577 F.2d 690 (9th Cir.), cert. denied, 439 U.S. 859 (1978).

Wickham v. Hall, 706 F.2d 713, rehearing en banc denied, 712 F.2d 1416 (5th Cir. 1983).

Wallace v. Chafee, 451 F.2d 1374 (9th Cir. 1971).

#### Federal District Courts

Adkins v. United States Navy, 507 F. Supp. 891 (S.D. Tex. 1981).

Burns v. Lovett, 104 F. Supp. 312 (D.D.C.), aff'd, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom, Burns v. Wilson, 346 U.S. 137, rehearing denied, 346 U.S. 844 (1953).

Brown v. Hiatt, 81 F. Supp. 647 (N.D. Ga. 1948).

Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974); rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom., Calley v. Hoffman, 425 U.S. 911 (1976).

Chambers v. Russell, 192 F. Supp. 425 (N.D. Calif. 1961).

Dennis v. Lovett, 104 F. Supp. 310 (D.D.C.), aff'd sub nom, Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), aff'd sub nom, Burns v. Wilson, 346 U.S. 137, rehearing denied, 346 U.S. 844 (1953).

Ex parte Billings, 45 F. Supp. 663 (D. Kan. 1942), aff'd sub nom, 135 F.2d 505 (10th Cir. 1943), rev'd, 321 U.S. 542 (1944).

Ex parte Drainer, 65 F. Supp. 410 (N.D. Calif. 1946), aff'd sub nom, Gould v. Drainer, 158 F.2d 981 (9th Cir. 1947).

Ex parte Henderson, 11 Fed. Cas. 1067 (No. 6,349) (C.C.D. Ky. 1878).

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

In re Taylor, 160 F. Supp. 932 (W.D. Mo. 1958).

Lucas v. Matthews, 90 F. Supp. 21 (D. Me. 1950).

Pasela v. Fenno, 76 F. Supp. 203 (D. Conn. 1947), aff'd, 167 F.2d 593 (2d Cir.), cert. denied, 335 U.S. 806 (1948).

United States v. Meinster, 481 F. Supp. 1112 (S.D. Fla. 1979).

United States ex rel. O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966), aff'd, 390 F.2d 360 (3rd Cir. 1968).

United States v. Shibley, 112 F. Supp. 734 (S.D. Calif. 1953).

#### Court of Claims

Hooper v. United States, 326 F.2d 982 (Ct. Cl. 1964), cert. denied, 377 U.S. 977 (1964).

Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972).

The W.B. Chester's Owners v. United States, 19  
Ct. Cl. 681 (1884).

### State

Joyce v. Guenther, 351 A.2d 331 (1976).

### United States Court of Military Appeals

Brookins v. Cullins, 23 USCMA 216, 49 CMR 5 (1974).

Chenoweth v. Van Arsdall, 22 USCMA 183, 46 CMR 183  
(1973).

DeChamplain v. McLucas, 22 USCMA 462, 47 CMR 552  
(1973).

Del Prado v. United States, 23 USCMA 132, 48 CMR 748  
(1974).

Dettinger v. United States, 7 M.J. 216 (C.M.A.  
1979).

Dobzynski v. Green, 16 M.J. 84 (C.M.A. 1983).

Fleiner v. Koch, 19 USCMA 630, \_\_\_ CMR \_\_\_ (1969).

Gale v. United States, 17 USCMA 40, 37 CMR 304  
(1967).

Goodson v. United States, 18 M.J. 243 (C.M.A.  
1984), cert. granted, decision vacated and  
case remanded, \_\_\_ U.S. \_\_\_ (No. 84-1015,  
rev'd sub nom., United States v. Goodson, 22  
M.J. 22 (1986).

Hutchinson v. United States, 18 M.J. 281 (C.M.A.  
1984), cert. denied, \_\_\_ U.S. \_\_\_ (No. 84-254,  
Nov. 5, 1984).

In re Watson, 19 USCMA 401, 42 CMR 3 (1970).

Jones v. Commander, 18 M.J. 198 (C.M.A. 1984).

Levy v. Resor, 17 USCMA 135, 37 CMR 399 (1967).

Peelbes v. Froehke, 22 USCMA 226, 46 CMR 266  
(1973).

Porter v. Rochardson, 50 CMR 910 (C.M.A. 1975)

McPhail v. United States, 1 M.J. 457 (C.M.A.  
1976).

Medina v. Resor, 20 USCMA 403, 43 CMR 243 (1971).

Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

Petty v. Moriarty, 20 USCMA 438, 43 CMR 278 (1971).

Robertson v. Wetterill, 21 USCMA 77, 44 CMR 131  
(1971).

United States v. Acevedo-Valez, 17 M.J. 1 (C.M.A.  
1983).

United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

United States v. Allen, 5 USCMA 626, 18 CMR 250  
(1955).

United States v. Alsup, 17 M.J. 166 (C.M.A. 1984).

United States v. Anderson, 17 USCMA 588, 38 CMR 386  
(1968).

United States v. Armes, 19 USCMA 15, 41 CMR 15  
(1969).

United States v. Armstrong, 19 USCMA 5, 41 CMR 5  
(1969).

United States v. Averette, 19 USCMA 363, 41 CMR 363  
(1970).

United States v. Barrett, 23 USCMA 474, 50 CMR 493  
(1975).

United States v. Blaylock, 15 M.J. 190 (C.M.A.  
1983).

United States v. Beard, 18 USCMA 337, 40 CMR 91  
(1969).

United States v. Beeker, 18 USCMA 563, 40 CMR 275  
(1969).

United States v. Betts, 12 USCMA 214, 30 CMR 214  
(1961).

United States v. Black, 1 M.J. 340 (C.M.A. 1976).

United States v. Bowie, 14 USCMA 631, 34 CMR 411  
(1964).

United States v. Boysen, 11 USCMA 331, 29 CMR 147  
(1960).

United States v. Bradley, 7 M.J. 332 (C.M.A. 1979).

United States v. Brandt, 20 M.J. 74 (C.M.A. 1985).

United States v. Brown, 12 USCMA 693, 31 CMR 279  
(1962).

United States v. Brown, 23 USCMA 162, 48 CMR 778  
(1974).

United States v. Brown, 1 M.J. 465 (C.M.A. 1976).

United States v. Bunting, 4 USCMA 84, 15 CMR 84  
(1954).

United States v. Burden, 1 M.J. 89 (C.M.A. 1975).

United States v. Butler, 14 M.J. 72 (C.M.A. 1982).

United States v. Calley, 22 USCMA 534, 48 CMR 19  
(1973), rev'd sub nom., Calley v. Callaway, 382  
F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184  
(5th Cir. 1975), cert. denied sub nom., Calley  
v. Hoffman, 425 U.S. 911 (1976).

United States v. Camacho, 19 USCMA 11, 41 CMR 11  
(1969).

United States v. Caputo, 18 M.J. 259 (C.M.A. 1984).

United States v. Carey, 23 USCMA 315, 49 CMR 605  
(1975).

United States v. Catlow, 23 USCMA 142, 48 CMR 758  
(1974).

United States v. Catt, 23 USCMA 422, 50 CMR 326  
(1975).

United States v. Charette, 15 M.J. 197 (C.M.A. 1983).

United States v. Clardy, 13 M.J. 308 (C.M.A. 1982).

United States v. Coleman, 21 USCMA 524, 42 CMR 126 (1970).

United States v. Conn, 6 M.J. 351 (C.M.A. 1979).

United States v. Colon, 6 M.J. 73 (C.M.A. 1978).

United States v. Cook, 19 USCMA 13, 41 CMR 13 (1969).

United States v. Cook, 20 USCMA 504, 43 CMR 344 (1971).

United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984).

United States v. Crapo, 18 USCMA 594, 40 CMR 306 (1969).

United States v. Crossley, 10 M.J. 376 (C.M.A. 1981).

United States v. Cuen, 9 USCMA 332, 26 CMR 112 (1958).

United States v. Cunningham, 21 USCMA 144, 44 CMR 198 (1971).

United States v. Cutting, 14 USCMA 347, 34 CMR 127 (1964).

United States v. Dean, 20 USCMA 212, 43 CMR 52 (1970).

United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953).

United States v. Douse, 12 M.J. 473 (C.M.A. 1982).

United States v. Doyle, 9 USCMA 302, 26 CMR 82 (1958).

United States v. Durham, 15 USCMA 479, 35 CMR 451 (1965).

United States v. Easter, 19 USCMA 68, 41 CMR 68  
(1969).

United States v. Ellison, 13 M.J. 90 (C.M.A. 1982).

United States v. Ellsey, 16 USCMA 455, 37 CMR 75  
(1966).

United States v. Emerson, 1 USCMA 43, 1 CMR 43  
(1951).

United States v. Esobar, 7 M.J. 197 (C.M.A. 1979).

United States v. Everson, 19 USCMA 70, 41 CMR 70  
(1969).

United States v. Febus-Santini, 23 USCMA 226, 49 CMR  
145 (1974).

United States v. Ferguson, 5 USCMA 68, 17 CMR 68  
(1954).

United States v. Fitzpatrick, 14 M.J. 394 (C.M.A.  
1983).

United States v. Francis, 15 M.J. 424 (C.M.A. 1983).

United States v. Frischholz, 16 USCMA 150, 36 CMR  
306 (1966).

United States v. Fryman, 19 USCMA 71, 41 CMR 71  
(1969).

United States v. Gallagher, 7 USCMA 506, 22 CMR 296  
(1957).

United States v. Garcia, 5 USCMA 88, 17 CMR 88  
(1954).

United States v. Ginyard, 16 USCMA 512, 37 CMR 132  
(1967).

United States v. Glover, 15 M.J. 419 (C.M.A. 1983).

United States v. Gladue, 4 M.J. 1 (C.M.A. 1977).

United States v. Gnibus, 21 M.J. 1 (C.M.A. 1985).

United States v. Goldman, 18 USCMA 389, 40 CMR 101  
(1969).

United States v. Goodson, 1 USCMA 298, 3 CMR 32  
(1952).

United States v. Gordon, 1 USCMA 255, 2 CMR 161  
(1952).

United States v. Graham, 22 USCMA 75, 46 CMR 75  
(1972).

United States v. Greenwell, 19 USCMA 460, 42 CMR 62  
(1970).

United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953).

United States v. Haimson, 5 USCMA 208, 17 CMR 208  
(1954).

United States v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

United States v. Hall, 17 USCMA 88, 37 CMR 352  
(1967).

United States v. Hardin, 7 M.J. 399 (C.M.A. 1979).

United States v. Hardy, 4 M.J. 20 (C.M.A. 1977).

United States v. Harnish, 12 USCMA 443, 31 CMR 29  
(1961).

United States v. Harrison, 18 USCMA 596, 40 CMR 308  
(1969).

United States v. Hawthorne, 7 USCMA 293, 22 CMR 83  
(1956).

United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976).

United States v. Hemp, 1 USCMA 280, 3 CMR 14 (1952).

United States v. Henderson, 18 USCMA 601, 40 CMR 313  
(1969).

United States v. Hopkins, 4 M.J. 260 (C.M.A. 1978).

United States v. Hooper, 9 USCMA 637, 26 CMR 417  
(1958).

United States v. Houghtaling, 2 USCMA 230, 8 CMR 30  
(1953).

United States v. Hout, 19 USCMA 299, 41 CMR 299  
(1970).

United States v. Howard, 20 M.J. 353 (C.M.A. 1985).

United States v. Howell, 11 USCMA 712, 29 CMR 528  
(1960).

United States v. Huchins, 4 M.J. 190 (C.M.A. 1978).

United States v. Iverson, 5 M.J. 440 (C.M.A. 1978).

United States v. Jackson, 1 M.J. 242 (C.M.A. 1976).

United States v. Jewson, 1 USCMA 652, 5 CMR 80  
(1952).

United States v. Johnson, 7 M.J. 396 (C.M.A. 1979).

United States v. Jones, 3 M.J. 348 (C.M.A. 1977).

United States v. Justice, 3 M.J. 451 (C.M.A. 1977).

United States v. Keaton, 19 USCMA 64, 41 CMR 64  
(1969).

United States v. Keith, 3 USCMA 579, 13 CMR 135  
(1953).

United States v. Kelly, 16 M.J. 244 (C.M.A. 1983).

United States v. Kemp, 22 USCMA 152, 46 CMR 152  
(1973).

United States v. King, 11 USCMA 19, 28 CMR 243  
(1959).

United States v. Klunk, 3 USCMA 92, 11 CMR 92  
(1953).

United States v. Kraskouskas, 9 USCMA 607, 26 CMR  
387 (1958).

United States v. Kugima, 16 USCMA 183, 36 CMR 334  
(1966).

United States v. LaGrange, 1 USCMA 342, 3 CMR 76  
(1952).

United States v. Laws, 11 M.J. 475 (C.M.A. 1981).

United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1978).

United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983).

United States v. Marsh, 3 USCMA 48, 11 CMR 48 (1953).

United States v. Martin, 9 USCMA 568, 26 CMR 348 (1958).

United States v. Masterman, 22 USCMA 250, 46 CMR 250 (1973).

United States v. Matthews, 16 M.J. 254 (C.M.A. 1983).

United States v. Mausock, 1 USCMA 32, 1 CMR 32 (1951).

United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976).

United States v. McClenny, 5 USCMA 507, 18 CMR 131 (1955).

United States v. McCollum, 6 M.J. 224 (C.M.A. 1979).

United States v. McGonigal, 19 USCMA 94, 41 CMR 94 (1969).

United States v. McNeill, 2 USCMA 383, 9 CMR 13 (1953).

United States v. Miller, 16 M.J. 169 (C.M.A. 1983).

United States v. Mitchell, 14 USCMA 516, 36 CMR 14 (1965).

United States v. Moore, 1 M.J. 448 (C.M.A. 1976).

United States v. Morisseau, 19 USCMA 17, 41 CMR 17 (1969).

United States v. Morley, 20 USCMA 179, 43 CMR 19 (1970).

United States v. Morris, 23 USCMA 319, 49 CMR 653 (1975).

United States v. Moschella, 20 USCMA 543, 43 CMR 383 (1971).

United States v. Napier, 20 USCMA 422, 43 CMR 262  
(1971).

United States v. Nardell, 21 USCMA 327, 45 CMR 101  
(1972).

United States v. Nelson, 14 USCMA 93, 33 CMR 305  
(1963).

United States v. Newvine, 23 USCMA 208, 48 CMR 960  
(1974).

United States v. Noyd, 18 USCMA 483, 40 CMR 195  
(1969).

United States v. Ornelas, 2 USCMA 96, 6 CMR 96  
(1952).

United States v. Ortiz, 15 USCMA 505, 36 CMR 3  
(1965), pet. for reconsideration denied, 16 USCMA  
127, 36 CMR 283 (1966).

United States v. Padilla, 1 USCMA 603, 5 CMR 31  
(1952).

United States v. Peak, 19 USCMA 19, 41 CMR 19  
(1969).

United States v. Peebles, 3 M.J. 177 (C.M.A. 1977).

United States v. Peel, 4 M.J. 28 (C.M.A. 1977).

United States v. Perkinson, 16 M.J. 400 (C.M.A.  
1983).

United States v. Phipps, 12 USCMA 14, 30 CMR 14  
(1960).

United States v. Posnick, 8 USCMA 201, 24 CMR 11  
(1957).

United States v. Quinones, 23 USCMA 457, 50 CMR 476  
(1975).

United States v. Ragan, 14 USCMA 119, 33 CMR 331  
(1963).

United States v. Rego, 19 USCMA 9, 41 CMR 9 (1969).

United States v. Renton, 8 USCMA 697, 25 CMR 201  
(1958).

United States v. Riehle, 18 USCMA 603, 40 CMR 315  
(1969).

United States v. Roberts, 7 USCMA 322, 22 CMR 112  
(1956).

United States v. Rodriguez, 18 M.J. 363 (C.M.A.  
1984).

United States v. Rodriguez, 2 USCMA 101, 6 CMR 101  
(1952).

United States v. Rogers, 7 M.J. 274 (C.M.A. 1979).

United States v. Rollins, 7 M.J. 125 (C.M.A. 1979).

United States v. Rountree, 21 USCMA 62, 44 CMR 116  
(1971).

United States v. Russo, 1 M.J. 134 (C.M.A. 1975).

United States v. Ryan, 5 M.J. 97 (C.M.A. 1978).

United States v. Scheunemann, 14 USCMA 479, 34 CMR  
259 (1964).

United States v. Schuering, 16 USCMA 324, 36 CMR 480  
(1966).

United States v. Scott, 11 USCMA 646, 29 CMR 462  
(1960).

United States v. Sears, 18 M.J. 190 (C.M.A. 1984).

United States v. Self, 13 M.J. 132 (C.M.A. 1982).

United States v. Sharkey, 19 USCMA 26, 41 CMR 26  
(1969).

United States v. Shepherd, 9 USCMA 90, 25 CMR 352  
(1958).

United States v. Shockley, 18 USCMA 610, 40 CMR 322  
(1969).

United States v. Simpson, 16 USCMA 137, 36 CMR 293  
(1966).

United States v. Sims, 2 M.J. 109 (C.M.A. 1977).

United States v. Singleton, 21 USCMA 432, 45 CMR 206  
(1972).

United States v. Smith, 18 USCMA 609, 40 CMR 321  
(1969).

United States v. Snyder, 18 USCMA 480, 40 CMR 192  
(1969).

United States v. Snyder, 20 USCMA 102, 42 CMR 294  
(1970).

United States v. Solorio, 21 M.J. 251 (C.M.A. 1986).

United States v. Stafford, 19 USCMA 33, 41 CMR 33  
(1969).

United States v. Staten, 21 USCMA 493, 45 CMR 267  
(1972).

United States v. Stearman, 7 M.J. 13 (C.M.A. 1979).

United States v. Stegall, 6 M.J. 176 (C.M.A. 1979).

United States v. Stevenson, 19 USCMA 69, 41 CMR 69  
(1969).

United States v. Stipe, 23 USCMA 11, 48 CMR 267  
(1974).

United States v. Surtasky, 16 USCMA 241, 36 CMR 397  
(1966).

United States v. Teel, 4 USCMA 39, 15 CMR 39 (1954).

United States v. Tempia, 16 USCMA 629, 37 CMR 249  
(1967).

United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

United States v. Tucker, 1 M.J. 463 (C.M.A. 1976).

United States v. Uhlman, 1 M.J. 419 (C.M.A. 1976).

United States v. Vanderpool, 4 USCMA 561, 16 CMR 135  
(1954).

United States v. Vick, 4 M.J. 235 (C.M.A. 1978).

United States v. Wagner, 5 M.J. 461 (C.M.A. 1978).

United States v. Walsh, 22 USCMA 509, 47 CMR 927  
(1973).

United States v. Ward, 3 M.J. 365 (C.M.A. 1977)

United States v. Ware, 5 M.J. 24 (C.M.A. 1978).

United States v. Weinstein, 19 USCMA 29, 41 CMR 29  
(1969).

United States v. Wheeler, 10 USCMA 646, 28 CMR 212  
(1959).

United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979).

United States v. White, 21 USCMA 583, 45 CMR 357  
(1972).

United States v. Williams, 6 USCMA 243, 9 CMR 369  
(1955).

United States v. Williams, 11 USCMA 459, 29 CMR 275  
(1960).

United States v. Williams, 18 USCMA 615, 40 CMR 317  
(1969).

United States v. Williams, 4 M.J. 336 (C.M.A. 1978).

United States v. Williams, 17 M.J. 207 (C.M.A.  
1984).

United States v. Williams, 18 M.J. 186 (C.M.A.  
(1984).

United States v. Wilson, 22 USCMA 416, 47 CMR 353  
(1973).

United States v. Wilson, 2 M.J. 25 (C.M.A. 1976).

United States v. Woodward, 16 USCMA 266, 36 CMR 422  
(1966).

United States v. Zunino, 15 USCMA 179, 35 CMR 151  
(1964).

Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981).

Wright v. United States, 2 M.J. 9 (C.M.A. 1976).

Zamora v. Woodson, 19 USCMA 403, 42 CMR 56 (1970).

Air Force Court of Military Review

Strayton v. Westbrook, 18 M.J. 520 (AFCMR 1984).

United States v. Abilar, 14 M.J. 733 (AFCMR 1982).

United States v. Avery, 30 CMR 885 (AFBR 1960).

United States v. Barbeau, 9 M.J. 569 (AFCMR), pet. denied, 9 M.J. 277 (C.M.A. 1980).

United States v. Bartlett, 12 M.J. 880 (AFCMR 1981).

United States v. Bergin, 7 CMR 501 (AFBR 1952).

United States v. Blascak, 17 M.J. 1081 (AFCMR), pet. denied, 19 M.J. 21 (1984).

United States v. Bowers, 47 CMR 516 (AFCMR 1973).

United States v. Bowie, 34 CMR 808 (AFBR), aff'd, 14 USCMA 631, 34 CMR 411 (1964).

United States v. Brace, 11 M.J. 794 (AFCMR), pet. denied, 12 M.J. 109 (C.M.A. 1981).

United States v. Braucher, 15 M.J. 755 (AFCMR 1983).

United States v. Buckingham, 9 M.J. 514 (AFCMR 1980), aff'd on other grounds, 11 M.J. 184 (C.M.A. 1981).

United States v. Christian, 22 CMR 780 (AFBR 1956).

United States v. Daigneault, 18 M.J. 503 (AFCMR 1984).

United States v. Davis, 18 M.J. 820 (AFCMR 1984).

United States v. Dean, 13 M.J. 676 (AFCMR 1982).

United States v. Dienst, 16 M.J. 727 (AFCMR 1983).

United States v. Dupree, 45 CMR 456 (AFCMR), pet. denied, 21 USCMA 640, 45 CMR 928 (1972).

United States v. Fields, 17 M.J. 1070 (AFCMR 1984).

United States v. Garcia, 15 M.J. 864 (AFCMR 1983).

United States v. Garries, 19 M.J. 845 (AFCMR 1985).

United States v. Gordon, 2 CMR 832 (AFBR 1951),  
rev'd, 1 USCMA 255, 2 CMR 161 (1952).

United States v. Guidry, 19 CMR 984 (AFCMR 1985).

United States v. Gunterman, 13 CMR 668 (AFBR  
1953).

United States v. Justice, 2 M.J. 344 (AFCMR 1976),  
aff'd on reconsideration, 2 M.J. 623 (AFCMR),  
aff'd, 3 M.J. 451 (C.M.A. 1977).

United States v. Kehrl, 44 CMR 582 (AFCMR 1971),  
pet. denied, 21 USCMA 621, 44 CMR 940 (1972).

United States v. Kellough, 19 M.J. 871 (AFCMR 1985)

United States v. Lange, 11 M.J. 884 (AFCMR), pet.  
denied, 12 M.J. 318 (C.M.A. 1981).

United States v. Moore, 50 CMR 432 (AFCMR 1975),  
aff'd, 1 M.J. 448 (C.M.A. 1976).

United States v. Morris, 18 M.J. 531 (AFCMR 1984).

United States v. Newvine, 48 CMR 188 (AFCMR),  
aff'd, 23 USCMA 208, 48 CMR 960 (1974).

United States v. O'Connor, 19 M.J. 673 (AFCMR 1984).

United States v. O'Quin, 16 M.J. 650 (AFCMR 1983).

United States v. Price, 48 CMR 645 (AFCMR 1974).

United States v. Rappaport, 19 M.J. 708 (AFCMR  
1984).

United States v. Ridley, 18 M.J. 806 (AFCMR 1984).

United States v. Shepardson, 17 M.J. 793 (AFCMR  
1983), pet. denied, 18 M.J. 282 (C.M.A. 1984).

United States v. Shorte, 18 M.J. 518 (AFCMR 1984),  
summarily aff'd, 20 M.J. 414 (C.M.A. 1985).

United States v. Shrader, 50 CMR 767 (AFCMR 1975).

United States v. Smiley, 17 M.J. 790 (AFCMR 1983).

United States v. Taylor, 16 M.J. 882 (AFCMR 1983).

United States v. Trakowski, 10 M.J. 792 (AFCMR 1981).

United States v. Wharton, 33 CMR 729 (AFBR 1962),  
pet. denied, 14 USCMA 670, 33 CMR 436 (1963).

United States v. Wilson, 2 M.J. 683 (AFCMR 1976),  
summarily aff'd, 3 M.J. 186 (C.M.A. 1977).

United States v. Winn, 46 CMR 871 (AFCMR 1972), pet. denied, 22 USCMA 625, 46 CMR 1324, pet. for reconsideration denied, 22 USCMA 626, 45 CMR 1324 (C.M.A. 1973).

#### Army Court of Military Review

Barnett v. Persons, 4 M.J. 934 (ACMR 1978).

Jameson v. Strom, 17 M.J. 808 (ACMR 1984).

Talbert v. Lurker, 17 M.J. 692 (ACMR 1983).

United States v. Albright, 23 CMR 619 (ABR 1957).

United States v. Aldridge, 16 M.J. 1008 (ACMR 1983).

United States v. Averette, 40 CMR 891 (ACMR 1969),  
rev'd, 19 USCMA 363, 41 CMR 363 (1970).

United States v. Bachand, 16 M.J. 896 (ACMR 1983).

United States v. Baker, 21 M.J. 618 (ACMR 1985).

United States v. Banner, 22 CMR 510 (ABR 1956).

United States v. Beauchamp, 17 M.J. 590 (ACMR 1983).

United States v. Black, 49 CMR 805 (ACMR 1975),  
rev'd, 1 M.J. 340 (C.M.A. 1976).

United States v. Blair, 45 CMR 413 (ACMR), pet. denied, 45 CMR 928 (C.M.A. 1972).

United States v. Boone, 10 M.J. 715 (ACMR 1981),  
aff'd, 15 M.J. 159 (C.M.A. 1985).

United States v. Browers, 20 M.J. 542 (ACMR 1985).

United States v. Brandy, 40 CMR 674 (ABR), pet. denied, 18 USCMA 640, 40 CMR 327 (1969).

United States v. Bridges, 15 CMR 731 (ABR 1954).

United States v. Caldwell, 16 M.J. 575 (ACMR 1983).

United States v. Calley, 46 CMR 1131 (ACMR), aff'd, 22 USCMA 534, 48 CMR 19 (1973), rev'd sub nom., Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied sub nom., Calley v. Hoffman, 425 U.S. 911 (1976).

United States v. Carroll, 26 CMR 598 (ABR 1958).

United States v. Cases, 6 M.J. 950 (ACMR 1979).

United States v. Condon, 3 M.J. 782 (ACMR 1977).

United States v. Cross, 50 CMR 501 (ACMR 1975).

United States v. Cruz-Maldonado, 20 M.J. 831 (ACMR 1983).

United States v. Daley, 47 CMR 365 (ACMR 1973).

United States v. Dauphine, 46 CMR 862 (ACMR 1972).

United States v. Davis, 8 M.J. 575 (ACMR 1979).

United States v. Davis, 29 CMR 798 (ABR 1960).

United States v. Daye, 17 M.J. 555 (ACMR 1983).

United States v. DeAngelis, 4 CMR 654 (ABR 1952), aff'd, 3 USCMA 298, 12 CMR 54 (1953).

United States v. Dionne, 6 M.J. 791 (ACMR 1978).

United States v. Gallagher, 22 CMR 435 (ABR 1956), rev'd, 7 USCMA 506, 22 CMR 296 (1957).

United States v. Garback, 50 CMR 673 (ACMR 1975).

United States v. Gates, 21 M.J. 722 (ACMR 1985).

United States v. Goudge, 39 CMR 324 (ABR 1968).

United States v. Hamlin, 49 CMR 18 (ACMR 1974).

United States v. Hamm, 36 CMR 656 (ABR 1965),  
pet. denied, 16 USCMA 655, 36 CMR 541 (1966).

United States v. Hammork, 13 CMR 385 (ABR 1953).

United States v. Harmash, 48 CMR 809 (ACMR 1974).

United States v. Holston, 41 CMR 589 (ACMR 1969).

United States v. Houghtaling, 2 CMR 229 (ABR  
1951), rev'd, 2 USCMA 230, 8 CMR 30 (1953).

United States v. Howard, 19 M.J. 795 (ACMR), rev'd,  
20 M.J. 353 (C.M.A. 1985).

United States v. Huff, 19 CMR 603 (ABR 1955),  
rev'd on other grounds, 7 USCMA 247, 22 CMR 37  
(1956).

United States v. Jackson, 49 CMR 717 (ACMR 1975).

United States v. Jessie, 5 M.J. 573 (ACMR), pet.  
denied, 5 M.J. 300 (C.M.A. 1978).

United States v. Johnson, 12 M.J. 670 (ACMR 1981).

United States v. Johnson, 48 CMR 665 (ACMR 1974).

United States v. Jones, 15 M.J. 890 (ACMR 1983).

United States v. Kalt, 50 CMR 95 (ACMR 1975).

United States v. Kearney, 3 JAGD BR 63 (1931).

United States v. King, 6 M.J. 553 (ACMR 1978),  
pet. denied, 6 M.J. 290 (C.M.A. 1979).

United States v. Kostas, 38 CMR 512 (ABR 1967).

United States v. Lawrence, 19 M.J. 609 (ACMR 1984).

United States v. Lewis, 5 M.J. 712 (ACMR 1978), pet.  
denied, 6 M.J. 294 (C.M.A. 1979).

United States v. Livingston, 7 M.J. 638 (ACMR 1979),  
aff'd, 8 M.J. 278 (C.M.A. 1980).

United States v. Logan, 31 BR 363 (1944).

United States v. Mansbarger, 20 CMR 449 (ABR 1955).

United States v. Mauck, 17 M.J. 1033 (ACMR), pet. denied, 19 M.J. 106 (C.M.A. 1984).

United States v. Miller, 17 M.J. 817 (ACMR 1984).

United States v. Moore, 9 M.J. 527 (ACMR 1980).

United States v. Morgan, 50 CMR 589 (ACMR 1975).

United States v. Moseley, 2 CMR 263 (ABR 1951).

United States v. O'Callahan, CM 393590 (ABR 1956) (unpublished opinion), aff'd, 7 USCMA 800, \_\_\_ CMR \_\_\_ (1957), pet. coram nobis denied, 16 USCMA 568, 37 CMR 188 (1967).

United States v. Petro, 16 CMR 302 (1954).

United States v. Quintal, 10 M.J. 532 (ACMR 1980).

United States v. Ragan, 32 CMR 913 (ABR 1962), aff'd, 14 USCMA 119, 33 CMR 331 (1963).

United States v. Relford, CM 407213 (ABR 1963) (unpublished opinion), pet. denied, 14 USCMA 687, \_\_\_ CMR \_\_\_ (1963).

United States v. Rembert, 47 CMR 755 (ACMR 1973).

United States v. Rivera, 45 CMR 582 (ACMR 1972).

United States v. Rosado-Marrero, 32 CMR 583 (ABR), pet. denied, 13 USCMA 700, 32 CMR 472 (1962).

United States v. Royal, 17 M.J. 669 (ACMR 1983).

United States v. Santiago, 1 CMR 365 (ABR 1951).

United States v. Saunders, 6 M.J. 731 (ACMR 1978).

United States v. Scaife, 48 CMR 290 (ACMR), rev'd. on other grounds, 23 USCMA 234, 49 CMR 287 (1974).

United States v. Scantland, 14 M.J. 531 (ACMR 1982).

United States v. Schaffner, 16 M.J. 903 (ACMR 1983).

United States v. Scott, 15 M.J. 589 (ACMR 1983).

United States v. Shearer, 6 M.J. 737 (ACMR 1978).

United States v. Shenefield, 40 CMR 393 (ABR 1968),  
rev'd on other grounds, 18 USCMA 453, 40 CMR 165  
(1969).

United States v. Sims, 22 CMR 591 (ABR 1956).

United States v. Singleton, 15 M.J. 579 (ACMR 1983).

United States v. Stafford, 15 M.J. 866 (ACMR 1983).

United States v. Stewart, 2 M.J. 423 (ACMR 1975).

United States v. Stoutmire, 5 M.J. 724 (ACMR 1978).

United States v. Tomberlin, 5 M.J. 790 (ACMR 1978).

United States v. Treakle, 18 M.J. 646 (ACMR 1984).

United States v. Vinyard, 3 M.J. 551 (ACMR), pet.  
denied, 3 M.J. 207 (C.M.A. 1977).

United States v. Wood, 47 CMR 957 (ACMR 1973).

United States v. Yslava, 18 M.J. 670 (ACMR 1984).

#### Coast Guard Court of Military Review

United States v. Abernathy, 48 CMR 205 (CGCMR  
1974).

United States v. Crews, 49 CMR 502 (CGCMR 1974).

United States v. Day, 1 M.J. 1167 (CGCMR 1975).

United States v. Huff, 19 CMR 603 (CGBR 1955), rev'd  
on other grounds, 7 USCMA 247, 22 CMR 37 (1956).

United States v. Kelly, 16 M.J. 244 (CGCMR 1983).

United States v. Kennedy, 11 M.J. 669 (CGCMR),  
pet. denied, 12 M.J. 103 (C.M.A. 1981).

United States v. Solorio, 21 M.J. 512 (CGCMR 1985),  
aff'd, 21 M.J. 251 (C.M.A. 1986).

Navy Marine Court of Military Review

Caputo v. United States, 17 M.J. 921 (NMCMR 1984),  
rev'd., 18 M.J. 259 (C.M.A. 1985).

United States v. Bailey, 6 M.J. 965 (NCOMR 1979).

United States v. Brown, 12 M.J. 728 (NMCMR 1981).

United States v. Brown, 15 M.J. 620 (NMCMR 1982).

United States v. Brown, 47 CMR 522 (NCOMR 1973).

United States v. Bystrzycki, 8 M.J. 540 (NCOMR 1979).

United States v. Chapman, 20 M.J. 717 (NMCMR 1985).

United States v. Delano, 12 M.J. 948 (NMCMR 1982).

United States v. Dewitt, 50 CMR 13 (NCOMR 1974).

United States v. Edwards, 49 CMR 305 (NCOMR 1974).

United States v. Fountain, 2 M.J. 1202 (NCOMR 1976).

United States v. George, 14 M.J. 990 (NMCMR).

United States v. Gnibus, 16 M.J. 844 (NMCMR 1983).

United States v. Goodson, 3 CMR 32 (NBR 1952).

United States v. Hannon, 19 M.J. 726 (NMCMR 1984).

United States v. Hazeldine, 4 CMR 429 (NBR 1952).

United States v. Hicks, 6 M.J. 587 (NCOMR 1978).

United States v. Hurd, 8 M.J. 555 (NCOMR 1979).

United States v. Imler, 17 M.J. 1021 (NMCMR 1984).

United States v. Jarrell, 12 M.J. 917 (NMCMR 1982).

United States v. Kinard, 15 M.J. 1052 (NMCMR 1983).

United States v. Kyles, 20 M.J. 571 (NMCMR 1985).

United States v. Lahman, 12 M.J. 513 (NMCMR 1981).

United States v. Lalla, 17 M.J. 622 (NMCMR 1983).

United States v. Otterbeck, 50 CMR 7 (NCOMR 1974).  
United States v. Overton, 20 M.J. 998 (NMCMR 1985).  
United States v. Porter, No. 73 0213 (NCOMR May 3, 1973)(unpublished opinion).  
United States v. Regan, 7 M.J. 600 (NCOMR 1979).  
United States v. Schmidt, 1 CMR 498 (NBR 1951).  
United States v. Shoemake, 17 M.J. 858 (NMCMR 1984).  
United States v. Snow, 10 M.J. 742 (NCOMR 1981).  
United States v. Talty, 17 M.J. 1127 (NMCMR 1984).  
United States v. Tanner, 16 M.J. 930 (NMCMR 1983).  
United States v. Waruszewski, No. 73 0941 (NCOMR Feb. 6, 1973)(unpublished opinion).

#### British

Grant v. Gould, 2 H.Bl. 69 (1792).

#### Books

ABRAHAM, HENRY J., THE JUDICIAL PROCESS (New York: Oxford University Press, 3rd ed., 1975).  
AHLUND, N., GUSTAV ADOLF THE GREAT (Princeton, New Jersey: Princeton University Press, trans. Michael Roberts, 1940).  
AYCOCK, WILLIAM B., & WURFEL, SEYMOUR W., MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE (Chapel Hill, North Carolina: The University of North Carolina Press, 1955).  
BECKER, CARL L., THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (New York: Harcourt, Brace and Company, Inc., 1922).

BISHOP, JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (New York: Charterhouse, Inc., 1974).

BLOOM, SOL, THE STORY OF THE CONSTITUTION (Washington, D.C.: United States Constitutional Sesquicentennial Commission, 1937).

BRAND, CHARLES E., ROMAN MILITARY LAW (Austin, Texas: University of Texas Press, 1968).

BRIERLY, JAMES LESLIE, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (New York: Oxford University Press, 6th ed., 1963).

BYRNE, EDWARD M., MILITARY LAW (Annapolis, Maryland: Naval Institute Press, 3rd ed., 1981).

CLARK, DORA MAE, BRITISH OPINION AND THE AMERICAN REVOLUTION (New Haven, Connecticut: Yale University Press, 1930).

CLODE, CHARLES M., THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW, AS APPLICABLE TO THE ARMY, NAVY, MARINES, AND AUXILIARY FORCES (London: John Murray, Albemarle Street, 2d ed., 1874).

DAVIS, GEORGE B., A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (New York: John Wiley & Sons, Inc., 2nd ed., 1915).

DE HART, WILLIAM C., OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL, WITH A SUMMARY OF THE LAW OF EVIDENCE, AS APPLICABLE TO MILITARY TRIALS; APPLIED TO THE LAWS, REGULATIONS AND CUSTOMS OF THE ARMY AND NAVY OF THE UNITED STATES (New York: D. Appleton & Co., 1862).

DOUGLAS, WILLIAM O., THE ANATOMY OF LIBERTY; THE RIGHTS OF MAN WITHOUT FORCE (New York: Trident Press, 1963).

---

\_\_\_\_\_, THE RIGHT OF THE PEOPLE (Garden City, New York: Doubleday and Company, Inc., 1958).

EVERETT, ROBINSON O., MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (Westport, Connecticut: Greenwood Press Publishers, 1976 reprint).

- FAIRMAN, CHARLES, THE LAW OF MARTIAL RULE (Chicago, Illinois: Callaghan and Company, 2d ed., 1943).
- THE FEDERALIST (Middletown, Connecticut: Wesleyan University Press, Jacob E. Cooke, ed., 1961).
- FLEXNER, JAMES T., GEORGE WASHINGTON: IN THE AMERICAN REVOLUTION (1775-1783) (Boston, Massachusetts: Little, Brown & Co., 1967).
- FUNDAMENTALS OF MILITARY LAW (Washington, D.C.: ROTC Manual 145-83, September 30, 1976).
- GENEROUS, JR., WILLIAM T., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (Port Washington, New York: Kennikat Press, 1973).
- GEORGE A. CUSTER, MY LIFE ON THE PLAINS (Lincoln, Nebraska: University of Nebraska Press, Milo Milton Quaife, ed. 1966).
- GLENN, GARRARD, & SCHILLER, A. ARTHUR, THE ARMY AND THE LAW (New York: Columbia University Press, 1943).
- GILMORE, JAMES H., ARTICLES OF CONFEDERATION AND CONSTITUTION OF THE UNITED STATES AND NOTES OF A COURSE OF LECTURES ON THE CONSTITUTION OF THE UNITED STATES (Washington, D.C.: James Blakey, 1891).
- GROSE, FRANCIS, II MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY FROM THE CONQUEST TO THE PRESENT TIME 63 (London: I. Stockdale, 1812).
- 1 JOURNALS OF CONGRESS, CONTAINING PROCEEDINGS FROM SEPT. 5, 1774 TO JAN. 1, 1776 (Philadelphia: R. Aitken, 1887).
- II JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 (Washington, D.C.: U.S. Government Printing Office, Worthington Chauncey Ford, ed., 1905).
- 34 JOURNALS OF THE CONTINENTAL CONGRESS (Washington, D.C.: U.S. Government Printing Office, Roscoe R. Hill, ed., 1937).

KELLY, ALFRED H., & HARBISON, WINFRED A., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (New York: W. W. Norton & Company, Inc., 4th ed., 1970).

THE LAW OF LAND WARFARE (Department of the Army Field Manual, FM 27-10, July 1956).

LAZAREFF, SERGE, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW (Leyden, Netherlands: A.W. Sejthoff, 1971).

LONES, JR., CHAMBERS E., NAVAL COURTS AND BOARDS SYLLABUS (Port Hueneme, California: Advance Base Receiving Barracks, U.S. Naval Base, 1944).

MACAULAY, THOMAS BABINGTON, I THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II (Boston, Massachusetts: Phillips, Sampson & Co., 1886).

MARKE, JULIUS J, VIGNETTES OF LEGAL HISTORY (South Hackensack, New Jersey: Fred B. Rothman & Co., 1965).

MILLIS, WALTER, ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY (New York: G.P. Putnam's Sons, 1956).

MOYER, HOMER E., JR., JUSTICE AND THE MILITARY (Washington, D.C.: Public Law Education Institute, 1972).

MUNSON, FREDERIC G., MILITARY LAW (Baltimore, Maryland: The Lord Baltimore Press, 1923).

O'BRIEN, JOHN, A TREATISE ON AMERICAN MILITARY LAWS AND THE PRACTICE OF COURTS MARTIAL; SUGGESTIONS FOR THEIR IMPROVEMENT (Philadelphia, Pennsylvania: Lea & Blanchard, 1846)

RADIN, MAX, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (St. Paul, Minnesota: West Publishing Co., 1936).

\_\_\_\_\_, HANDBOOK OF ROMAN LAW (St. Paul, Minnesota: West Publishing Co., 1927).

ROBERTS, MICHAEL I., GUSTAVUS ADOLPHUS: A HISTORY OF SWEDEN 1611-1632 (London: Longman, Green & Co., 1957).

\_\_\_\_\_, THE MILITARY REVOLUTION (Belfast, Northern Ireland: Matjury Boyd, 1956).

- ROSE, MICHAEL T., A PRAYER FOR RELIEF: THE CONSTITUTIONAL INFIRMITIES OF THE MILITARY ACADEMIES' CONDUCT, HONOR AND ETHIC SYSTEMS (New York: The New York University Law School, 1973).
- ROSSITER, CLINTON, THE SUPREME COURT AND THE COMMANDER IN CHIEF (Ithaca, New York: Cornell University Press, 1976).
- SCHILLER, A. ARTHUR, MILITARY LAW (New York: Columbia Law School, 1968).
- SCHLUETER, DAVID A., MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (Charlottesville, Virginia: The Michie Company, 1982).
- SCHUG, WILLIS S., UNITED STATES LAW AND THE ARMED FORCES: CASES AND MATERIALS ON CONSTITUTIONAL LAW, COURTS-MARTIAL, AND THE RIGHTS OF SERVICEMEN (New York: Praeger Publishers, Inc., 1972).
- SHERRILL, ROBERT, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (New York: Harper & Row, rev. ed., 1971).
- SNEDEKER, JAMES, A BRIEF HISTORY OF COURTS-MARTIAL (Annapolis, Maryland: United States Naval Institute, 1954).
- SNEE, JOSEPH M., & PYE, A. KENNETH, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION (New York: Oceana Publications, Inc., 1957).
- STATE DEMOGRAPHICS: POPULATION PROFILES OF THE 50 STATES (Homewood, Illinois: Dow Jones-Irwin, The American Demographics Magazine Editors, ed., 1984).
- VON GLAHN, GERUARD. THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION (Minneapolis, Minnesota: The University of Minnesota Press, 1957).
- WALKER, DANIEL, MILITARY LAW (New York: Prentice Hall, Inc., 1954).
- WIENER, FREDERICK BERNAYS, A PRACTICAL MANUAL OF MARTIAL LAW (Harrisburg, Pennsylvania: The Military Service Publishing Company, 1940).

\_\_\_\_\_, THE UNIFORM CODE OF  
MILITARY JUSTICE: EXPLANATION, COMPARATIVE  
TEXT, AND COMMENTARY (Washington, D.C.: Combat  
Forces Press, 1950).

WINTHROP, WILLIAM W., MILITARY LAW AND PRECEDENTS  
(Washington, D.C.: U.S. Government Printing  
Office, 2d ed., 1896, 1920 reprint).

3 WORKS OF JOHN ADAMS (Freeport, New York: Books for  
Libraries Press, Charles F. Adams, ed., 1969).

THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL  
MANUSCRIPT SOURCES: 1745-1799 (Westport, Connect-  
icut: Greenwood Press, Publishers, John C.  
Fitzpatrick ed., 1970 reprint, 1938).

ZILLMAN, DONALD N., BLAUSTEIN, ALBERT P., SHERMAN,  
EDWARD F., THE MILITARY IN AMERICAN SOCIETY (New  
York: Matthew Bender, 1978).

#### Articles

Ackroyd, Gilbert G., The General Articles, 133 and  
134 of the Uniform Code of Military Justice, 35  
ST. JOHN'S LAW REVIEW 264 (1961).

\_\_\_\_\_, Professor Morgan and the  
Drafting of the Manual for Courts-Martial, 28  
MILITARY LAW REVIEW 14 (1965).

Alley, Wayne E., The Litigious Aftermath of Martial  
Law, 15 OKLAHOMA LAW REVIEW 17 (1962).

\_\_\_\_\_, The Overseas Commander's Power to  
Regulate the Private Life, 37 MILITARY LAW  
REVIEW 57 (July 1967).

Analysis of Recent MCM/UCMJ Changes, THE ARMY  
LAWYER 7 (May 1975).

Ansell, Samuel T., Military Justice, 5 CORNELL LAW  
QUARTERLY 1 (1919).

\_\_\_\_\_, Some Reforms in Our System of  
Military Justice, 32 YALE LAW JOURNAL 146 (1922).

- Anthony, Garner, Martial Law in Hawaii, 30 CALIFORNIA LAW REVIEW 371 (1942).
- Antieau, Chester J., Courts-Martial and the Constitution, 33 MARQUETTE LAW REVIEW 25 (1949).
- Antonides, John, First Amendment Goes AWOL, 8 JURIS DOCTOR 25 (March 1978).
- Attempt to Enjoin Courts-Martial, THE ARMY LAWYER 15 (February 1975).
- Avena, Vincent S., Citizen-Servicemen and Their Constitutional Rights, 43 TEMPLE LAW QUARTERLY 213 (1970).
- Baldwin, Robert R., Disciplinary Infractions Involving Active Guard/Reserve Enlisted Soldiers: Some Thoughts For Commanders and Judge Advocates, THE ARMY LAWYER 7 (March 1986).
- \_\_\_\_\_, & McMennis, James E., Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates, THE ARMY LAWYER 5 (February 1981), revised and reprinted in THE ARMY LAWYER 10 (March 1984).
- Baldwin, William R., III, Requests for Trial by Military Judge Alone under Article 16(1)(B) of the Uniform Code of Military Justice, 72 MILITARY LAW REVIEW 153 (1976).
- Ballantine, Henry Winthrop, The Effect of War on Constitutional Liberty, 24 CASE AND COMMENT 3 (1917).
- \_\_\_\_\_, Qualified Martial Law: Part I, 14 MICHIGAN LAW REVIEW 102 (1915).
- \_\_\_\_\_, Qualified Martial Law: Part II, 14 MICHIGAN LAW REVIEW 197 (1915).
- Barker, Frank E., Military Law--A Separate System of Jurisprudence, 36 UNIVERSITY OF CINCINNATI LAW REVIEW 223 (1967).
- Bartley, H. Michael, Military Law in the 1970's: The Effects of Schlesinger v. Councilman, 17 AIR FORCE LAW REVIEW 65 (Winter 1975).

Bauer, Frederic G., The Court-Martial Controversy and the New Articles of War, 6 MASSACHUSETTS LAW QUARTERLY 61 (February 1921).

Bayh, Birch, The Military Justice Act of 1971: The Need for Legislative Reform, 10 AMERICAN CRIMINAL LAW REVIEW 9 (1971).

Berg, Gordon O., Jurisdiction Over Air National Guard Members Called to Short Tours of Active Duty, 3 UNITED STATES AIR FORCE JAG BULLETIN 19 (July 1961).

Betts, Edward C., Constitutional Powers and Limitations Respecting the Military, 2 ALABAMA LAWYER 426 (1941).

Bernard, Kent S., Structures of American Military Justice, 125 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 307 (1976).

Bibliography of Military Law, 10 AMERICAN CRIMINAL LAW REVIEW 175 (1971).

Birnbaum, Myron L., Clemency Procedures After COMR Review, 15 AIR FORCE JAG LAW REVIEW 169 (Summer 1974).

\_\_\_\_\_, & Fowler, Charles W., O'Callahan v. Parker: The Relford Decision and Further Developments in Military Justice, 39 FORDHAM LAW REVIEW 729 (1971).

Bishop, Joseph W., Jr., The Case for Military Justice, 62 MILITARY LAW REVIEW 215 (1973).

\_\_\_\_\_, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 COLUMBIA LAW REVIEW 40 (1961).

\_\_\_\_\_, Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners, 112 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 317 (1964).

\_\_\_\_\_, The Quality of Military Justice, The New York Times Magazine 32 (February 22, 1970).

- Blair, Richard E., Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power, 50 GEORGETOWN LAW JOURNAL 79 (1961).
- Blake, W. C., Punishment Aspects of a Bad Conduct Discharge, THE JAG JOURNAL 5 (December 1952).
- Blumenfeld, Norman L., Court-Martial Jurisdiction Over Civilian-Type Crimes, 10 AMERICAN CRIMINAL LAW REVIEW 51 (1971).
- \_\_\_\_\_, Retroactivity After O'Callahan: An Analytical and Statistical Approach, 60 GEORGETOWN LAW JOURNAL 551 (1972).
- Bogert, George G., Courts-Martial: Criticisms and Proposed Reforms, 5 CORNELL LAW QUARTERLY 18 (1919).
- The "Born Again" Court of Military Appeals, 8 JURIS DOCTOR 20 (March 1978).
- Brosman, Paul W., Foreward: Comments by the Court-- The Court: Freer Than Most, 6 VANDERBILT LAW REVIEW 166 (1953).
- \_\_\_\_\_, The Uniform Code of Military Justice: Some Problems and Opportunities, 25 OKLAHOMA STATE BAR JOURNAL 1605 (1954).
- Brown, Michael E., Building a System of Military Justice Through the All Writs Act, 52 INDIANA LAW REVIEW 189 (1976).
- Brown, Terry W., The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell, 35 MILITARY LAW REVIEW 1 (1967).
- Bruce, Andrew A., Double Jeopardy and the Power of Review in Courts-Martial Proceedings, 3 MINNESOTA LAW REVIEW 484 (1919).
- Bruinooge, Jon P., Mobilization for a European War: The Impact of Habeas Corpus, 22 THE AIR FORCE LAW REVIEW 205 (1980-1981).
- Bryson, G. P., Obstruction of Justice: The Federal and Military Offense, THE ARMY LAWYER 1 (June 1975).

- Burris, Donald S., & Jones, David Anthony, Civilian Courts and Courts-Martial--The Civilian Attorney's Perspective, 10 AMERICAN CRIMINAL LAW REVIEW 139 (1971).
- Carney, Daniel F., United States Court of Military Appeals, 5 FEDERAL BAR NEWS 100 (April 1958).
- Casella, William P., Armed Forces Enlistment: The Use and Abuse of Contract, 39 UNIVERSITY OF CHICAGO LAW REVIEW 783 (1972).
- Cassidy, David J., Rehearing Procedure, 21 THE JAG JOURNAL 54 (September, October, November 1966)
- Caudell-Feagan, Michael, & Warshawsky, Daniel, Service Connection and Drug-Related Offenses: The Military Courts' Ever-Expanding Jurisdiction, 54 GEORGE WASHINGTON LAW REVIEW 118 (1985).
- Chmelik, Frank J., The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Court-Martial for Service Connected Offenses, 8 HASTINGS CONSTITUTIONAL LAW QUARTERLY 617 (1981).
- Clark, William, United States Military Government Courts Practice and Procedure, 9 FEDERAL RULES DECISIONS 35 (1948).
- Colby, Elbridge, Occupation under the Laws of War I, 25 COLUMBIA LAW REVIEW 904 (1925).
- \_\_\_\_\_, Occupation under the Laws of War II, 26 COLUMBIA LAW REVIEW 146 (1926).
- Comment, Civilian Control: New Perspectives for New Problems, 49 INDIANA LAW JOURNAL 654 (1974).
- Comment, Constitutional Law: Limitations of Court-Martial Jurisdiction, 22 UNIVERSITY OF FLORIDA LAW REVIEW 476 (1970).
- Comment, Courts-Martial Jurisdiction--Service-Connection, 21 SOUTH CAROLINA LAW REVIEW 781 (1969).
- Comment, Military Law--Jurisdiction--Serviceman's Implied Consent to Military Status After Enlistment Term Expired Held Sufficient for Continuing Military Jurisdiction--United States v. Hout, 46 NEW YORK UNIVERSITY LAW REVIEW 384 (1971).

- Comment, Military Trial of Civilian Offenses: Drumhead Justice in the Land of the Free, 43 SOUTHERN CALIFORNIA LAW REVIEW 356 (1970).
- Compton, Charles T.C., Toward Professional Sentencing, 15 AIR FORCE JAG LAW REVIEW 195 (Summer 1974).
- A Convening Authority Junior in Rank to the Accuser, THE ARMY LAWYER 15 (March 1977).
- Cook, William H., Courts-Martial: The Third System in American Criminal Law, 1978 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 1.
- Cooke, John S., Highlights of the Military Justice Act of 1983, THE ARMY LAWYER 40 (February 1984).
- \_\_\_\_\_, Recent Developments in the Wake of United States v. Booker, THE ARMY LAWYER 4 (November 1978).
- \_\_\_\_\_, The United States Court of Military Appeals 1975-1977: Judicializing the Military Justice System, 76 MILITARY LAW REVIEW 43 (Spring 1977).
- Cooper, Norman G., Gustavus Adolphus and Military Justice, 92 MILITARY LAW REVIEW 129 (1981).
- \_\_\_\_\_, O'Callahan Revisited: Severing the Service Connection, 76 MILITARY LAW REVIEW 165 (1977).
- \_\_\_\_\_, Turning Over a New Alef: A Modest Proposal, THE ARMY LAWYER 8 (March 1982).
- Court-Martial Authority under the Reorganization, THE ARMY LAWYER 18 (May 1973).
- Court-Members--Excusal--"Excusal of a Court Member Assembly", 15 THE ADVOCATE 179 (May-June 1983).
- Covington, H. S., Judicial Review of Courts-Martial, 7 GEORGE WASHINGTON LAW REVIEW 503 (1939).
- Cowles, Willard B., Trial of War Criminals by Military Tribunals, 30 AMERICAN BAR ASSOCIATION JOURNAL 330 (1944).

Crawford, Jr., William A., The Ambit of O'Callahan,  
12 THE AIR FORCE JAG LAW REVIEW 100 (Spring  
1970).

Criminal Law Items, THE ARMY LAWYER 28 (February  
1975).

Criminal Law Section, THE ARMY LAWYER para. 1, 15  
(March 1977).

Currier, Roger M., & Kent, Irwin M., The Boards of  
Review of the Armed Services, 6 VANDERBILT LAW  
REVIEW 241 (1953).

Curtis, Eugene N., Sentences of Courts-Martial,  
THE JAG JOURNAL 3 (January 1953).

Cutts III, John A., Article 134: Vague or Valid?, 15  
AIR FORCE JAG LAW REVIEW 129 (1974).

David, Leon, An Episode in Naval Justice, 57 CASE  
AND COMMENT 20 (July-August 1952).

Davisson, Malcolm M., Constitutional Law--Applica-  
bility of Curfew Regulations and Exclusion  
Orders to Persons of Japanese Ancestry, 41  
MICHIGAN LAW REVIEW 522 (1942).

DeGiulio, Anthony P., Command Control: Lawful Versus  
Unlawful Application, 10 SAN DIEGO LAW REVIEW 72  
(1972).

Determination of Maximum Punishments, THE ARMY  
LAWYER 13 (June 1975).

Deutsch, Eberhard P., Military Government:  
Administration of Occupied Territory, 33  
AMERICAN BAR ASSOCIATION JOURNAL 133 (1947).

Developments in the Law--Federal Habeas Corpus,  
83 HARVARD LAW REVIEW 1038, 1208-38 (1970).

DeVico, Anthony J., Evolution of Military Law, THE  
JAG JOURNAL 63 (December 1966, January 1967).

Dilloff, Neil, J., A Contractual Analysis of the  
Military Enlistment, 8 UNIVERSITY OF RICHMOND LAW  
REVIEW 121 (1974).

Disqualification of Convening Authority, THE ARMY  
LAWYER 18 (June 1984).

- Douglas, William O., Review of "Civilians under Military Justice" by Frederick B. Wiener, 35 UNIVERSITY OF CHICAGO LAW REVIEW 568 (1968).
- Douglass, John Jay, The Judicialization of Military Courts, 22 HASTINGS LAW JOURNAL 213 (1971).
- Duke, Robert D., & Vogel, Howard S., The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 VANDERBILT LAW REVIEW 435 (1960).
- Earle, Edward M., American Military Policy and National Security, 53 POLITICAL SCIENCE QUARTERLY 1 (1938).
- \_\_\_\_\_, National Defense and Political Science, 55 POLITICAL SCIENCE QUARTERLY 481 (1940).
- Easby-Smith, James S., Powers of the Congress and of the President over the Land Forces: A Reply to Hannis Taylor's Recent "Address to the Congress of the United States", 45 THE WASHINGTON LAW REPORTER 385 (1917).
- Eckhardt, William G., Command Criminal Responsibility: A Plea for a Workable Standard, 97 MILITARY LAW REVIEW 1 (Summer 1982).
- Elliott, Frank W., Jr., & McCune, James N., Reservists' Rights: The UCMJ Today, 20 ARMY RESERVE MAGAZINE 22 (May 1972).
- England, Thomas F., The Active Guard/Reserve Program: A New Military Personnel Status, 106 MILITARY LAW REVIEW 1 (1984).
- Ervin, Sam J., Jr., The Military Justice Act of 1968, 45 MILITARY LAW REVIEW 77 (1969).
- Everett, Robinson O., Article 134, Uniform Code of Military Justice--A Study in Vagueness, 37 NORTH CAROLINA LAW REVIEW 142 (1959).
- \_\_\_\_\_, Military Justice Is to Justice, 12 AIR FORCE JAG LAW REVIEW 202 (Summer 1970).
- \_\_\_\_\_, O'Callahan v. Parker-- Milestone or Millstone in Military Justice?, 1969 DUKE LAW JOURNAL 853.

\_\_\_\_\_, Some Comments on the  
Civilianization of Military Justice, THE ARMY  
LAWYER 1 (September 1980).

\_\_\_\_\_, The United States Court of  
Military Appeals, 7 WESTERN RESERVE LAW REVIEW 45  
(1955).

\_\_\_\_\_, & Hourcle, Laurent R., Crime  
Without Punishment--Ex-Servicemen, Civilian  
Employees and Dependents, 13 AIR FORCE JAG LAW  
REVIEW 184 (1971).

Facter, Federal Civilian Court Intervention in  
Pending Courts-Martial and the Proper Scope of  
Military Jurisdiction Over Criminal Defendants:  
Schlesinger v. Councilman and McLucas v.  
DeChamplain, 11 HARVARD CIVIL RIGHTS-CIVIL  
LIBERTIES LAW REVIEW 432 (1976).

Fairman, Charles, The Law of Martial Rule and the  
National Emergency, 55 HARVARD LAW REVIEW 1253  
(1942).

\_\_\_\_\_, Martial Rule and the Suppression  
of Insurrection, 53 ILLINOIS LAW REVIEW 766  
(1929).

\_\_\_\_\_, Some Observations on Military  
Occupation, 32 MINNESOTA LAW REVIEW 319 (1948).

\_\_\_\_\_, The Supreme Court on Military  
Jurisdiction: Martial Rule in Hawaii and the  
Yamashita Case, 59 HARVARD LAW REVIEW 833 (1946).

Finan, Robert J., & Vorbach, Joseph E., Military  
Jurisdiction--Active Restraint Required To Attach  
Jurisdiction Over Reservist for Court-Martial on  
Non-Drill Day--United States v. Schuering, 16  
U.S.C.M.A. 324, 36 C.M.R. 480 (1966), 35 GEORGE  
WASHINGTON LAW REVIEW 611 (1967).

Fletcher, Albert B., The Continuing Jurisdiction  
Court, THE ARMY LAWYER 5 (January 1976).

For the Perfect Crime, Go Abroad, THE CLEVELAND  
PLAIN DEALER 14-A (October 1, 1979).

Forman, Robert A., Appellate Procedure under the  
Uniform Code of Military Justice, 38  
MASSACHUSETTS LAW QUARTERLY 77 (April 1953).

- Frank, John P., Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii, 44 COLUMBIA LAW REVIEW 639 (1944).
- Fratcher, William F., Appellate Review in American Military Law, 14 MISSOURI LAW REVIEW 15 (1949).
- \_\_\_\_\_, Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals, 34 NEW YORK UNIVERSITY LAW REVIEW 861 (1959).
- \_\_\_\_\_, Review by the Civil Courts of Judgments of Federal Military Tribunals, 10 OHIO STATE LAW JOURNAL 271 (1949).
- Garraty, Raymond F., United States Court of Military Appeals, THE JAG JOURNAL 3 (March 1952).
- Garner, James K., Structural Changes in Military Criminal Practice at the Trial and Appellate Level as a Result of the Military Justice Act of 1983, 33 FEDERAL BAR NEWS AND JOURNAL 116 (March 1986).
- Gaynor, James K., Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 HASTINGS LAW JOURNAL 259 (1971).
- Gerwig, Robert, Court-Martial Jurisdiction Over Weekend Reservists?, 44 MILITARY LAW REVIEW 123 (1969).
- Ghent, David T., Military Appellate Processes, 10 AMERICAN CRIMINAL LAW REVIEW 125 (1971).
- Giovagnoni, Robert E., Jurisdiction: Minus a Uniform, 14 AIR FORCE JAG LAW REVIEW 190 (1973).
- Girard, Robert, The Constitution and Court-Martial of Civilians Accompanying the Armed Forces--A Preliminary Analysis, 13 STANFORD LAW REVIEW 461 (1960).
- Gordon, Jr., Earl C., Responsibilities of the Investigating Officer, THE JAG JOURNAL 14 (May 1952).

- Gorman, Robert N., Military Courts in Occupied Areas, 17 OHIO BAR ASSOCIATION REPORT 479 (December 1944).
- Grayson, Brett L., Recent Developments in Court-Martial Jurisdiction: The Demise of Constructive Enlistment, 72 MILITARY LAW REVIEW 117 (1976).
- Green, A. Wigfall, The Military Commission, 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 832 (1948).
- Grishman, Peter J., Defining Military Jurisdiction Over Civilians, 19 CATHOLIC UNIVERSITY LAW REVIEW 351 (1970).
- Griswold, Erwin N., Appellate Advocacy, THE ARMY LAWYER 11 (October 1973).
- Halleck, Henry Wagner, Military Tribunals and Their Jurisdiction, 5 AMERICAN JOURNAL OF INTERNATIONAL LAW 958 (1911).
- Hansen, Donald W., Judicial Functions for the Commander?, 41 MILITARY LAW REVIEW 1 (July 1968).
- Hardy, Timothy S., & Mills, Christopher H., Constitutional Law: Military Jurisdiction over Inactive Reservists, 27 THE JAG JOURNAL 129 (1972).
- Heinl, Jr., Robert D., Military Justice Under Attack, 110 ARMED FORCES JOURNAL INTERNATIONAL 38 (June 1973).
- Henderson, Gordon D., Courts-Martial and the Constitution: The Original Understanding, 71 HARVARD LAW REVIEW 293 (1957).
- Henderson, Paul F., Recurring Special Court-Martial Errors with Some Solutions, 19 THE JAG JOURNAL 145 (May-June 1966).
- Hetlage, Robert O., Court-Martial Jurisdiction Over Civilians, 5 FEDERAL BAR NEWS 109 (April 1958).
- Hewitt, James W., Constitutional Law--Uniform Code of Military Justice--General Article Void for Vagueness?, 34 NEBRASKA LAW REVIEW 518 (March 1955).

- Higley, David A., Military Law: Courts-Martial Jurisdiction: Finality of Proceedings Conducted Without Indispensable Jurisdictional Prerequisites, 27 THE JAG JOURNAL 112 (1972).
- \_\_\_\_\_, O'Callahan Retroactivity: An Argument for the Proposition, 27 THE JAG JOURNAL 85 (1972).
- Hindley, Douglas, M., The Effect of O'Callahan on Drug Abuse Cases, 12 AIR FORCE JAG LAW REVIEW 154 (1970).
- Hirschhorn, James M., The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 NORTH CAROLINA LAW REVIEW 177 (1984).
- History of the Judge Advocate General's Department, THE ARMY LAWYER 13 (June 1975).
- Hodson, Kenneth J., Courts-Martial and the Commander, 10 SAN DIEGO LAW REVIEW 51 (1972).
- Holtzoff, Alexander, Administration of Justice in the United States Army, 22 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 1 (1947).
- Horbaly, Jan, & Mullin, Miles J., Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas, 71 MILITARY LAW REVIEW 1 (1977).
- HQDA Message--Military Justice Act of 1983, THE ARMY LAWYER 30 (January 1984).
- Hunt, Dennis R., Sentencing in the Military, 10 AMERICAN CRIMINAL LAW REVIEW 107 (1971).
- \_\_\_\_\_, Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice, 63 THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE 23 (1972).
- Hunter IV, Rozell Dulaney, The Extraterritorial Application of the Constitution--Unalienable Rights, 72 VIRGINIA LAW REVIEW 649 (1986).
- Huzar, Elias, Congress and the Army: Appropriations, 37 AMERICAN POLITICAL SCIENCE REVIEW 661 (1943).

Improperly Constituted Courts, THE ARMY LAWYER 28  
(February 1975).

Improved Quality Control of Enlistment Processing  
Since U.S. v. Russo, THE ARMY LAWYER 2 (January  
1979).

Jarvis, Rupert C., The Lieutenancy and Militia Law  
in 1745, 64 JURIDICAL REVIEW 29 (1952).

Joseph, Robert E., The Need for Including a Course  
on Military Justice in the Law School Curriculum,  
7 JOURNAL OF LEGAL EDUCATION 79 (1954).

Judiciary Notes: Convening Authority's Action, THE  
ARMY LAWYER 37 (December 1978).

Judiciary Notes: Court-Martial Orders, THE ARMY  
LAWYER 37 (December 1978).

Judiciary Notes: SJA Review--Policy on Forfeitures,  
THE ARMY LAWYER 37 (December 1978).

Jurisdiction Over the Offense--Service Connection--  
Drugs--"Okay, Soldier--Excrete", 15 THE ADVOCATE  
191 (May-June 1983).

Karlen, Delmar, & Pepper, Louis H., The Scope of  
Military Justice, 43 JOURNAL OF CRIMINAL LAW,  
CRIMINOLOGY, AND POLICE SCIENCE 285 (1952).

Katz, Lewis R., & Nelson, Grant S., The Need for  
Clarification in Military Habeas Corpus, 27 OHIO  
STATE LAW JOURNAL 193 (1966).

Keefe, Arthur J., Drumhead Justice: A Look at Our  
Military Courts, 59 THE READER'S DIGEST 37  
(August 1951).

\_\_\_\_\_, & Moskin, Morton, Codified  
Military Injustice, 35 CORNELL LAW QUARTERLY 151  
(1949).

Kiechel, Walter, Jr., The Scope of Collateral Review  
of Court-Martial Convictions in Federal Courts, 3  
UNITED STATES AIR FORCE JAG BULLETIN 19 (July  
1961).

King, Archibald, The Legality of Martial Law in  
Hawaii, 30 CALIFORNIA LAW REVIEW 599 (1942).

- Kuehl, Albert R., Applicability of the Hiss Act to Individuals Convicted by Courts-Martial, 3 UNITED STATES AIR FORCE JAG BULLETIN 6 (May 1961).
- Kunkel, Wolfgang, Legal Thought in Greece and Rome, 65 JURIDICAL REVIEW 1 (1953).
- Landman, Bernard, Jr., One Year of the Uniform Code of Military Justice: A Report of Progress, 4 STANFORD LAW REVIEW 491 (1952).
- Larkin, Felix E., Professor Edmund M. Morgan and the Drafting of the Uniform Code, 28 MILITARY LAW REVIEW 7 (1965).
- Larkin, Murl A., Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?, 22 HASTINGS LAW REVIEW 237 (1971).
- Latimer, George W., Foreword: Comments by the Court--"Good Cause" in Petitions for Review, 6 VANDERBILT LAW REVIEW 163 (1953).
- Lehman, Douglas C., & McClatchey, Larry J., The Prospectivity Doctrine: Which Way Out of the Morass, 29 THE JAG JOURNAL 65 (1976).
- Levinthal, Louis E., Some Problems of Military Law and Government, 19 PENNSYLVANIA BAR ASSOCIATION QUARTERLY 246 (1948).
- Lobb, Albert J., Civil Authority Versus Military, 3 MINNESOTA LAW REVIEW 105 (1919).
- The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues, THE ARMY LAWYER 1 (July 1984).
- Marion, John H., Organization for Internal Control and Coordination in the United States Army, 32 AMERICAN POLITICAL SCIENCE REVIEW 877 (1938).
- Mason, Alpheus Thomas, Inter Arma Silent Leges. Chief Justice Stone's Views, 69 HARVARD LAW REVIEW 806 (1956).
- Matthews, Victor H., Legal Aspects of Military Service in Ancient Mesopotamia, 102 MILITARY LAW REVIEW 135-51 (Fall 1983).

- McAtamney, James A., Multiplicity: A Functional Analysis, 106 MILITARY LAW REVIEW 115 (Fall 1984).
- McCauliff, C.M.A., The Reach of the Constitution: American Peace-time Court in West Berlin, 55 NOTRE DAME LAWYER 682 (1980).
- McCoy, Francis T., Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker, 16 NEW YORK LAW FORUM 1 (1970).
- Meador, Daniel J., Judicial Determinations of Military Status, 72 YALE LAW JOURNAL 1292 (1963).
- Military Justice Act of 1983, 15 THE ADVOCATE 293 (September-October 1983).
- Military Justice Act of 1983, THE ARMY LAWYER 38 (January 1984).
- Military Justice: The United States Court of Military Appeals 29 November 1951 to 30 June 1958, 3 MILITARY LAW REVIEW 67 (January 1959).
- Military Tribunals: Appointment of Judges at Nurenberg, 33 AMERICAN BAR ASSOCIATION JOURNAL 896 (1947).
- Minor Symposium on Enlistment Procedure and Personal Jurisdiction: Introduction, THE ARMY LAWYER 1 (January 1979).
- Mobilization: The Types, The Phases, 32 ARMY RESERVE MAGAZINE 10 (Winter 1986).
- Morgan, Edmund M., Jr., The Background of the Uniform Code of Military Justice, 6 VANDERBILT LAW REVIEW 169 (1953).
- \_\_\_\_\_, The Existing Court-Martial System and the Ansell Army Articles, 29 YALE LAW JOURNAL 52 (1919).
- \_\_\_\_\_, Military Justice, 24 MARYLAND STATE BAR ASSOCIATION 197 (1919).
- Moorehead, E. G., The Commanding Officer As the Accuser, THE JAG JOURNAL 8 (September 1952).

Mott, William C., An Appraisal of Proposed Changes in the Uniform Code of Military Justice, 35 ST. JOHN'S LAW REVIEW 300 (1961).

\_\_\_\_\_, & Hartnett, Jr., John E., & Morton, Kenneth B., A Survey of the Literature of Military Law--A Selective Bibliography, 6 VANDERBILT LAW REVIEW 333 (1953).

Mounts, James A., & Sugarman, Myron G., The Military Justice Act of 1968, 55 AMERICAN BAR ASSOCIATION JOURNAL 470 (1969).

Moyer, Homer E., Jr., Procedural Rights of the Military Accused: Advantages over a Civilian Defendant, 22 MAINE LAW REVIEW 105 (1970).

Murray, Francis P., Court-Martial Jurisdiction Over Reservists, 10 AIR FORCE JAG LAW REVIEW 10 (July-August 1968).

Nelson, Grant S., & Westbrook, James E., Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 MINNESOTA LAW REVIEW 1 (1969).

Nelson, Keith E., Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 AIR FORCE JAG LAW REVIEW 124 (1970).

Nichols, D. B., The Devil's Article, 22 MILITARY LAW REVIEW 111 (1963).

Nichols, Louis B., The Justice of Military Justice, 12 WILLIAM AND MARY LAW REVIEW 482 (1971).

Nobleman, Eli E., The Administration of Justice in the United States Zone of Germany, 8 FEDERAL BAR JOURNAL 70 (1946).

\_\_\_\_\_, American Military Government Courts in Germany, 40 AMERICAN JOURNAL OF INTERNATIONAL LAW 803 (1946).

\_\_\_\_\_, Military Government Courts: Law and Justice in the American Zone of Germany, 33 AMERICAN BAR ASSOCIATION JOURNAL 777 (1947).

\_\_\_\_\_, Procedure and Evidence in American Military Government Courts in the United States Zone of Germany, 8 FEDERAL BAR JOURNAL 212 (1947).

- Nolan, John M., Recusal: The Need for the Exercise of Sound Discretion, THE ARMY LAWYER 21 (May 1975).
- Note, Building a System of Military Justice Through the All Writs Act, 52 INDIANA LAW JOURNAL 189 (1976).
- Note, Civilian Court Review of Court-Martial Adjudications, 69 COLUMBIA LAW REVIEW 1259 (1969).
- Note, Conflict of Laws: Jurisdiction over Extraterritorial Crimes: United States Military Commission in Germany: Office of the United States High Commissioner for Germany v. Hrneck, United States Court of the Allied High Commission for German Area Five, 41 CORNELL LAW REVIEW 276 (1956).
- Note, Constitutional Law: Military Jurisdiction Over Inactive Reservists, 27 THE JAG JOURNAL 129 (1972).
- Note, Constitutional Law--Retroactivity of O'Callahan v. Parker--United States ex rel. Flemings v. Chafee, 47 ST. JOHN'S LAW REVIEW 235 (1972).
- Note, Constitutional Law - Saboteurs and the Jurisdiction of the Military Commission, 41 MICHIGAN LAW REVIEW 481 (1942).
- Note, Courts-Martial--Jurisdiction Over Persons Discharged and Re-enlisted for Offenses Committed During Prior Enlistment, 48 MICHIGAN LAW REVIEW 234 (1949).
- Note, Denial of Military Jurisdiction Over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts, 64 NORTHWESTERN LAW REVIEW 930 (1970).
- Note, Federal Military Commissions: Procedure and "Wartime Base" of Jurisdiction, 56 HARVARD LAW REVIEW 631 (1956).
- Note, Habeas Corpus Review of Military "Gross Sentence" Usage, 65 YALE LAW JOURNAL 413 (1956).

Note, Judicial Review and Military Discipline--  
Cortright v. Resor: The Case of the Boys in the  
Band, 72 COLUMBIA LAW REVIEW 1048 (1972).

Note, Jurisdictional Problems Related to the  
Prosecution of Former Servicemen for Violations  
of the Law of War, 56 VIRGINIA LAW REVIEW 947  
(1970).

Note, Military Law--Constitutional Law--Court-  
Martial Jurisdiction Limited to "Service  
Connected" Cases, 44 TULANE LAW REVIEW 417  
(1970).

Note, Military Law--"In Time of War", Under the  
Uniform Code of Military Justice: An Elusive  
Standard, 67 MICHIGAN LAW REVIEW 841 (1969).

Note, Military Law--Military Jurisdiction over  
Crimes Committed by Military Personnel Outside  
the United States: The Effect of O'Callahan  
v. Parker, 68 MICHIGAN LAW REVIEW 1016 (1970).

Note, O'Callahan v. Parker, A Military Jurisdic-  
tional Dilemma, 22 BAYLOR LAW REVIEW 64 (1970).

Note, Post-Conviction Review in the Federal Courts  
for the Servicemember Not in Custody, 73 MICHIGAN  
LAW REVIEW 886 (1975).

Note, Retroactivity--Military Jurisdiction--Military  
Convictions for Nonservice-Connected Offenses  
Should Be Vacated Retroactively, United States ex  
rel. Flemings v. Chafee, 330 F. Supp. 193  
(E.D. N.Y. 1971), 50 TEXAS LAW REVIEW 405 (1972).

Note, Servicemen in Civilian Courts, 76 YALE LAW  
JOURNAL 380 (1966).

Note, Supervisory and Advisory Mandamus under the Al  
Writs Act, 86 HARVARD LAW REVIEW 595 (1973).

Note, The Sword and Nice Subtleties of Constitu-  
tional Law: O'Callahan v. Parker, 3 LOYOLA  
UNIVERSITY OF LOS ANGELES LAW REVIEW 188 (1970).

Note, What Remains of Court-Martial Jurisdiction  
over Civilians?--The Toth and Kinsella Cases, 51  
NORTHWESTERN UNIVERSITY LAW REVIEW 474 (1956).

Oversights in Convening Orders, THE ARMY LAWYER 25  
(October 1974).

Page, William H., Military Law--A Study in Comparative Law, 32 HARVARD LAW REVIEW 349 (1919).

Pasley, Robert S., Jr., A Comparative Study of Military Justice Reforms in Britain and America, 6 VANDERBILT LAW REVIEW 305 (1953).

\_\_\_\_\_, & Larkin, Felix E., The Navy Court-Martial Proposals for Its Reform, 33 CORNELL LAW QUARTERLY 195 (1947).

Parker, Robert, Parties and Offenses in the Military Justice System: Court-Martial Jurisdiction, 52 INDIANA LAW JOURNAL 167 (1976).

Partington, Earle A., Court-Martial Jurisdiction Over the Weekend Reservist: Wallace v. Chafee, 7 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 57 (1957).

Pavlick, John J., Jr., Extraordinary Writs in the Military Justice System: A Different Perspective, 84 MILITARY LAW REVIEW 7 (1979).

Peluso, Ernest F., Safe Passage Through the Manual for Courts-Martial, 1984, 15 THE ADVOCATE 89 (March-April 1984).

Peltzer, Vernon A., The Military Crime of Prejudicial Conduct: An Appraisal of United States v. Messenger, 22 GEORGE WASHINGTON LAW REVIEW 76 (1953).

Peppler, Thomas R., Extraordinary Writs in Military Practice, 15 THE ADVOCATE 80 (March-April 1983).

Poydasheff, Robert S., & Suter, William K., Military Justice?--Definitely, 49 TULANE LAW REVIEW 588 (1975).

Project: The Administrative Consequences of Courts-Martial: Part One, 14 THE ADVOCATE 215 (July-August 1982).

Project: The Administrative Consequences of Courts-Martial: Part Two, 15 THE ADVOCATE 199 (July-August 1984).

Prugh, George S., Evolving Military Law: Sentences and Sentencing, THE ARMY LAWYER 1 (December 1974).

- \_\_\_\_\_, Some Observations on the Uniform Code of Military Justice, 50 THE BRIEF 1 (Fall 1954).
- Quinn, Robert E., The Court's Responsibility, 6 VANDERBILT LAW REVIEW 161 (1953).
- \_\_\_\_\_, Courts-Martial Practice: A View from the Top, 22 HASTINGS LAW JOURNAL 201 (1971).
- \_\_\_\_\_, Some Comparisons Between Courts-Martial and Civilian Practice, 15 U.C.L.A. 1240 (1968).
- Radin, Max, Martial Law and the State of Seige, 30 CALIFORNIA LAW REVIEW 634 (1942).
- \_\_\_\_\_, The United States Court of Military Appeals and Military Due Process, 35 ST. JOHN'S LAW REVIEW 225 (1961).
- Raezer, Timothy, Trial Counsel's Guide to Multiplicity, THE ARMY LAWYER 21 (April 1985).
- Rankin, Thomas M., The All Writs Act and the Military Justice System, 53 MILITARY LAW REVIEW 103 (1971).
- Re, Edward D., The NATO Status of Forces Agreements and International Law, 50 NORTHWESTERN UNIVERSITY LAW REVIEW 349 (1955).
- \_\_\_\_\_, Status of Forces Agreements: The American Experience, 35 ST. JOHN'S LAW REVIEW (1961).
- Recent Cases, Habeas Corpus--Exhaustion of Remedies--Military Cases, 20 CASE WESTERN RESERVE UNIVERSITY LAW REVIEW 677 (1969).
- Recent Decision, Wallace v. Chafee, 23 CASE WESTERN RESERVE LAW REVIEW 668 (1972).
- Request for Individual Counsel, THE ARMY LAWYER 27 (January 1975).
- Rice, Paul Jackson, O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman, 51 MILITARY LAW REVIEW 41 (1971).

- Rich, Randi B., Federal Court Scope of Review Over Military Habeas Corpus Cases, 6 MEMPHIS STATE UNIVERSITY LAW REVIEW 83 (1975).
- Robertson, Horace B., Authority and Jurisdiction under the UCMJ, 35 FEDERAL BAR JOURNAL 34 (1976).
- Robie, William P., The Court-Martial of a Judge Advocate General: Brigadier General David A. Swaim, 56 MILITARY LAW REVIEW 211 (1972).
- Robinson, Horace B., Jr., Authority and Jurisdiction under the UCMJ, 35 FEDERAL BAR JOURNAL 34 (1976).
- Rogers, Richard M., The USCMA and the Involuntary Volunteer: United States v. Catlow, THE ARMY LAWYER 1 (July 1974).
- Rolfson, J.O., Income Taxes Following Separation or Retirement from Active Duty, 19 THE JAG JOURNAL (November-December 1964).
- Rollman, Robert O., Of Crimes, Courts-Martial and Punishment--A Short History of Military Justice, 11 AIR FORCE JAG LAW REVIEW 212 (1969).
- Rosen, Richard D., Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 MILITARY LAW REVIEW 5 (1985).
- Ross, Joseph E., The Military Justice Act of 1968: Historical Background, 23 THE JAG JOURNAL 125 (1969).
- \_\_\_\_\_, Russo Revitalized, THE ARMY LAWYER 9 (May 1983).
- Rothblatt, Henry B., Military Justice: The Need for Change, 12 WILLIAM AND MARY LAW REVIEW 455 (1971).
- Saxon, Donald P., The Week-end Warrior and the Uniform Code of Military Justice: Does the Military Have Jurisdiction Over Week-end Reservists?, 7 CALIFORNIA WESTERN LAW REVIEW 238 (1970).
- Schaap, William H., Justice for G.I. Joe, 8 JURIS DOCTOR 14 (March 1978).

- \_\_\_\_\_, Trial By Peers--Enlisted Members in Courts-Martial, 15 CATHOLIC UNIVERSITY LAW REVIEW 171 (1966).
- Schiesser, Charles W., Trial by Peers--Enlisted Members on Courts-Martial, 15 CATHOLIC LAW REVIEW 171 (1966).
- \_\_\_\_\_, & Benson, Daniel H., Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice, 7 TEXAS TECH LAW REVIEW 559 (1976).
- Schlueter, David A., Constructive Enlistments: Alive and Well, THE ARMY LAWYER 6 (November 1977).
- \_\_\_\_\_, The Court-Martial: An Historical Survey, 87 MILITARY LAW REVIEW 129 (1980).
- \_\_\_\_\_, Court-Martial Jurisdiction: An Expansion of the Least Possible Power, 73 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 74 (1982).
- \_\_\_\_\_, The Enlistment Contract: A Uniform Approach, 77 MILITARY LAW REVIEW 1 (1977).
- \_\_\_\_\_, Personal Jurisdiction under Article 2, UCMJ: Whither Russo, Catlow, and Brown?, THE ARMY LAWYER 3 (December 1979).
- \_\_\_\_\_, Wagner, Valadez, and Harrison: A Definitive Enlistment Trilogy?, THE ARMY LAWYER 4 (January 1979).
- Schutz, Ronald J., Trottier and the War Against Drugs: An Update, THE ARMY LAWYER 20 (February 1983).
- Schwabe, Charles L., Guilty Pleas in the Absence of Jurisdiction--An Unanswered Question, THE ARMY LAWYER 12 (April 1979).
- Schwartz, Murray L., International Law and the NATO Status of Forces Agreement, 53 COLUMBIA LAW REVIEW 1091 (1953).
- Schwender, Craig S., One Potato, Two Potato . . . : A Method to Select Court Members, THE ARMY LAWYER 12 (May 1984).

- Shaw, David A., Withdrawn Charges: A Trap for the Unwary, THE ARMY LAWYER 30 (March 1975).
- Shelton, Thomas W., The Pioneers' Military Establishment--A Question of the Constitution, 7 JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 817 (1917).
- Sherman, Charles P., The Modernness of Roman Military Law, 13 ILLINOIS LAW REVIEW 581 (1919).
- Sherman, Edward F., The Civilianization of Military Law, 22 UNIVERSITY OF MAINE LAW REVIEW 3 (1970).
- \_\_\_\_\_, Congressional Proposals for Reform of Military Law, 10 AMERICAN CRIMINAL LAW REVIEW 25 (1971).
- \_\_\_\_\_, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 VIRGINIA LAW REVIEW 483 (1969).
- \_\_\_\_\_, Legal Inadequacies and Doctrinal Restraints in Controlling the Military, 49 INDIANA LAW JOURNAL 539 (1974).
- Simmons, David A., The Philosophy of Force, 17 NORTH DAKOTA BAR BRIEFS 25 (1940).
- Stephens, Karl W., The Bench Trial: The Accused's Right to Trial Without Court Members, 15 AIR FORCE JAG LAW REVIEW 158 (Summer 1974).
- Stallknecht, Leland P., Courts of Inquiry and Investigations: Some Observations Concerning Common Errors, THE JAG JOURNAL 5 (October 1953).
- Sterritt, Christopher J., Military Law: Jurisdiction: Recruiter Misconduct Sufficient to Preclude a Constructive Enlistment: United States v. Harrison, 3 M.J. 1020 (NCMR 1972), 30 THE JAG JOURNAL 105 (1978).
- Stevens, David B., & Farfaglia, Theodore S., Court-Martial Jurisdiction in a Unified Command, 10 AIR FORCE JAG LAW REVIEW 37 (May-June 1968).
- Strassburg, Thomas M., Civilian Judicial Review of Military Criminal Justice, 66 MILITARY LAW REVIEW 1 (1974).

- Stuart-Smith, James, Military Law: Its History, Administration and Practice, 85 LAW QUARTERLY REVIEW 478 (1969).
- Sutherland, Arthur E., Jr., The Constitution, the Civilian and Military Justice, 35 ST. JOHN'S LAW REVIEW 215 (1961).
- \_\_\_\_\_, Edmund Morris Morgan: Lawyer-Professor and Citizen-Soldier, 28 MILITARY LAW REVIEW 3 (1965).
- Taraska, Joseph, Procedural Safeguards in the Administration of Military Justice Insuring the Effective Assistance of Defense Counsel: A Model for Civil Jurisdiction, 15 AIR FORCE JAG LAW REVIEW 52 (September 1973).
- Taylor, Edward J., Criminal Jurisdiction Under the North Atlantic Treaty, THE JAG JOURNAL 11 (1952).
- Thorne, Gary F., Jurisdictional Issues at Trial and Beyond, THE ARMY LAWYER 15 (September 1980).
- Thornton, John V., Military Law, 1951 ANNUAL SURVEY OF AMERICAN LAW 155 (1952).
- Thwing, James B., Service Connection: A Bridge Over Troubled Waters, Part I, THE ARMY LAWYER 20 (May 1986).
- \_\_\_\_\_, Service Connection: A Bridge Over Troubled Waters, Part II, THE ARMY LAWYER 26 (June 1986).
- TJAG Outlines Disposition of "Forced Volunteers" in Light of Catlow, THE ARMY LAWYER 21 (February 1975).
- Tomes, Jonathan P., The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker, 25 AIR FORCE LAW REVIEW 1 (1985).
- Tracy, Thomas G., Off-Post Use and Possession of Marijuana, THE ARMY LAWYER 8 (January 1974).
- Uberman, Joseph S., Multiplicity under the New Manual for Courts-Martial, THE ARMY LAWYER 31 (June 1985).

- Underhill, L. K., Jurisdiction of Military Tribunals in the United States over Civilians, 12 CALIFORNIA LAW REVIEW 75 (1924).
- Van Loan III, Eugene M., The Jury, the Court-Martial, and the Constitution, 57 CORNELL LAW REVIEW 363 (1972).
- Van Sant, John D., Trial by Jury of Military Peers, 15 AIR FORCE JAG LAW REVIEW 185 (Summer 1974).
- Wacker, Daniel J., The "Unreviewable" Court-Martial Conviction: Supervisory Relief under the All Writs Act from the United States Court of Military Appeals, 10 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 33 (1975).
- Walker, Daniel, The United States Court of Appeals: A Long Overdue Addition to the Judiciary, 38 AMERICAN BAR ASSOCIATION JOURNAL 567 (1952).
- \_\_\_\_\_, & Niebank, C. George, The Court of Military Appeals--Its History, Organization and Operation, 6 VANDERBILT LAW REVIEW 228 (1953).
- Walsh, William F., Military Law: Return to Drumhead Justice?, 42 AMERICAN BAR ASSOCIATION JOURNAL 521 (1956).
- Waltz, Jon R., The Court of Military Appeals: An Experiment in Judicial Revolution, 45 AMERICAN BAR ASSOCIATION JOURNAL 1185 (1959).
- Ward, Chester, UCMJ--Does It Work? Evaluation at the Field Level, 18 Months Experience, 6 VANDERBILT LAW SCHOOL 186 (1953).
- Warren, Earl, The Bill of Rights and the Military, 37 NEW YORK UNIVERSITY LAW REVIEW 181 (1962).
- Weckstein, Donald T., Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, 54 MILITARY LAW REVIEW 1 (1971).
- Weise, James H., Double Jeopardy: Changes by the Supreme Court and Their Effect on the Military, 11 THE ADVOCATE 28 (January-February 1979).
- Westmoreland, William C., Military Justice--A Commander's Viewpoint, 10 AMERICAN CRIMINAL LAW REVIEW 5 (1971).

What Mobilization Would Mean to You, 32 ARMY RESERVE MAGAZINE 12 (Winter 1986).

What's the Story for Individual Mobilization Augmentees?, 32 ARMY RESERVE MAGAZINE 13 (Winter 1986).

When Saboteurs Invaded America, MODERN MATURITY 82 (June/July 1983).

White, Robert J., Has the Uniform Code of Military Justice Improved the Courts-Martial System?, 28 ST. JOHN'S LAW REVIEW 19 (1953).

\_\_\_\_\_, The Uniform Code of Military Justice--Its Promise and Performance (The First Decade: 1951-1961): A Symposium--The Background and the Problem, 35 ST. JOHN'S LAW REVIEW 197 (1961).

Wiener, Frederick Bernays, Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith, 80 MILITARY LAW REVIEW 1 (1978).

\_\_\_\_\_, Are the General Military Articles Unconstitutionally Vague?, 54 AMERICAN BAR ASSOCIATION JOURNAL 357 (1968).

\_\_\_\_\_, The Army's Field Judiciary System: A Notable Advance, 46 AMERICAN BAR ASSOCIATION JOURNAL 1178 (1960).

\_\_\_\_\_, Courts-Martial and the Bill of Rights: The Original Practice I, 72 HARVARD LAW REVIEW 1 (1958).

\_\_\_\_\_, Courts-Martial and the Bill of Rights: The Original Practice II, 72 HARVARD LAW REVIEW 266 (1958).

\_\_\_\_\_, History Vindicates the Supreme Court's Ruling on Military Jurisdiction, 51 AMERICAN BAR ASSOCIATION JOURNAL 1127 (1965).

\_\_\_\_\_, Martial Law Today, 55 AMERICAN BAR ASSOCIATION JOURNAL 723 (1969).

\_\_\_\_\_, The New Articles of War, 63 INFANTRY JOURNAL 24 (September 1948).

- Wigmore, John H., Some Lessons for Civil Justice to be Learned from Federal Military Justice, 24 MARYLAND STATE BAR ASSOCIATION 188 (1919).
- Wilkinson, Ronald L., The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker, 9 WASHBURN LAW REVIEW 193 (1970).
- Willis, John T. The United States Court of Military Appeals--"Born Again", 52 INDIANA LAW JOURNAL 151 (1976).
- Wolfson, Richard F., Americans Abroad and Habeas Corpus, 9 FEDERAL BAR JOURNAL 142 (1948).
- Woodruff, William A., The Rule in Ginyard's Case-- Congressional Intent or Judicial Field Expedient, 21 AIR FORCE JAG LAW REVIEW 285 (1979).
- Wurfel, Seymour W., Court-Martial Jurisdiction Under the Uniform Code, 32 NORTH CAROLINA LAW REVIEW 1 (1953).
- \_\_\_\_\_, Military Habeas Corpus I, 49 MICHIGAN LAW REVIEW 493 (1951).
- Wurtzel, O'Callahan v. Parker: Where Are We Now?, 56 AMERICAN BAR ASSOCIATION JOURNAL 686 (1970).
- \_\_\_\_\_, Military Habeas Corpus I, 49 MICHIGAN LAW REVIEW 493 (1951).
- \_\_\_\_\_, Military Habeas Corpus II, 48 MICHIGAN LAW REVIEW 699 (1951).
- Weyand, Alexander M., Quality in the Volunteer Army, THE ARMY LAWYER 8 (October 1974).
- Yarmolinsky, Adam, Civilian Control: New Perspectives for New Problems, 49 INDIANA LAW JOURNAL 654 (1974).
- You May Be Mustered If You're Not a Unit Member, 32 ARMY RESERVE MAGAZINE 8 (Winter 1986).
- Young, Jr., Hubert H., An Overview of the Military Criminal Justice System, 19 THE PRACTICAL LAWYER 45 (February 1973).
- Young, Lucius E., Military Law: The Jungle of Jurisdiction, AMERICAN UNIVERSITY INTRAMURAL LAW REVIEW 1 (1953).

- Zajicek, David E., General Court-Martial Authority: Air Force Prisoners in United States Disciplinary Barracks, 10 AIR FORCE JAG LAW REVIEW 24 (May-June 1968).
- Zbar, Allan L., & Mazza, James D., Legal Status of Cadets, 7 UNITED STATES AIR FORCE JAG LAW REVIEW 31 (November-December 1965).
- Zeigler, William A., The Termination of Jurisdiction Over the Person and the Offense, 10 MILITARY LAW REVIEW 139 (1960).
- Zillman, Donald N., Federal Court Challenges to Reservists Involuntary Activation: Mellinger v. Laird, 339 F. Supp. 434 (E.D. Pa. 1972), 2 THE ARMY LAWYER 6 (October 1972).
- \_\_\_\_\_, Relford v. Commandant, U.S. (24 February 1971): On-Post Offenses and Military Jurisdiction, 52 MILITARY LAW REVIEW 169 (1971).
- Zimmermann, Jack B., Civilian v. Military Justice: A Comparison of Defendants' Rights, 17 TRIAL 34 (October 1981).

### Dissertations

- Attaya, Louise, Review of Courts-Martial Sentences, (Advanced Class Thesis, United States Army Judge Advocate General's School, Charlottesville, Virginia, April 1964).
- Cook, Peter H., Military Jurisdiction over Non-Military Type Offenses (Advanced Class Thesis, United States Army Judge Advocate General's School, Charlottesville, Virginia, April 1962).
- Edwards, Morris Oswald, A Case Study of Military Government in Germany During and After World War II (Ph.D. Dissertation: Georgetown University, 1957).

- Feld, Benjamin, The United States Court of Military Appeals: A Study of the Origin and Early Development of the First Civilian Tribunal for Direct Review of Courts-Martial (1951-1959) (Ph.D. Dissertation: Georgetown University, 1960).
- Gaynor, James Kenneth, Common Law Military Offenses (S.J.D. Dissertation: The George Washington University, 1957).
- Harris, Jeffrey L., The Military "Jury", A Palladium of Justice--Its Creation, Constitution, and Selection (Graduate Course Thesis: United States Army Judge Advocate General's School, Charlottesville, Virginia, April 1984).
- Jernigan, George W., The Courts of Military Review: Evolution of Judicial Institutions (Ph.D. Dissertation: The Louisiana State University and Agricultural and Mechanical College, 1973).
- Lermack, Paul, Summary and Special Courts-Martial (Ph.D. Dissertation: University of Minnesota, 1972).
- McKay, Jack O., The Powers Over Military Justice, Their Interplay and Significance (Advanced Class Thesis: United States Army Judge Advocate General's School, Charlottesville, Virginia, April 1966).
- Summerford, William Aubry, The United States Court of Military Appeals: A Study in Judicial Process and Administration (Ph.D. Dissertation: The University of Tennessee, 1973).