

LEGALITY OF ORDERS

A Thesis

Presented To

The Judge Advocate General's School

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. Reference to this study should include the foregoing statement.

by

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SCOPE

A study to determine what factors tend to make illegal orders affecting the personal rights of individuals. An analysis and survey of military cases to determine what tests have been used to declare orders illegal. A discussion of various trial and appellate problems relating to cases involving the legality of orders, including raising the defense of illegality and submitting the issue to the court members.

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CHAPTER I
INTRODUCTION

Necessity For Compliance With Orders
In The Military Services

Compliance with lawful orders is probably the most essential requirement in any military group. It is obvious that a military command could not function without obedience to the lawful orders of military superiors. One might wonder as to the necessity for discussion of such a time honored concept as obedience to military orders. However, a very real and current problem area exists as to the limitations on a military commander's authority to issue orders that affect the personal rights of his subordinates.

In the armed services of our country only a "lawful" order need be obeyed. The definition of a "lawful" order becomes most important in cases arising under Article 90, Uniform Code of Military Justice,¹ relative to the willful disobedience of a superior officer; Article 91, UCMJ, relative to the willful disobedience of a superior warrant officer, noncommissioned or petty

1. Act of May 5, 1950, 64 Stat. 108, 10 U.S.C. §§ 801-940 (hereafter referred to as "UCMJ" or "the Code").

officer; and Article 92, UCMJ, relative to the violation of or failure to obey general orders and other lawful orders.

The question of whether or not an order is "lawful" has continuously arisen since the earliest days of our country's armed services. This same question continues to arise today, particularly as to orders that restrict personal rights of servicemen. Recent cases decided by the United States Court of Military Appeals illustrate the necessity for restricting the type of order that may legally be given by a superior officer.² There are many other types of military orders in effect today throughout our armed services upon which military lawyers would disagree as to their legality.³

In tracing the history of the requirement for obedience to military orders, we find such a requirement in the earliest recorded military codes. Article IV of the Articles of War of Richard II, A.D. 1385, provided that everyone should be obedient to his captain under penalty of losing his horse and armour

2. In *United States v. Nation*, 9 USCMA 724, 26 CMR 504 (1958), the general order in issue amounted to an unreasonable restriction upon servicemen's right to marry.

3. Chapter III, infra.

and being placed in arrest.⁴ Articles 18, 19, and 25 of the Code of Articles of King Gustavus Adolphus of Sweden (1621) required obedience to the orders of military superiors under the penalty of death.⁵ Our present provisions contained in the UCMJ were derived from Article I, Section III, of the Articles of War of Charles I and Article 15 of the Articles of War of James II (1688).⁶ The forerunner of our present Article 90, UCMJ, is found in Article VII of the American Articles of War of 1775.⁷

With reference to obedience to orders, the distinguished military author, Colonel William Winthrop, states "obedience to orders is the vital principle of the military life--the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the newest recruit."⁸

Winthrop also recognized that an order that was not lawful need not be obeyed.⁹

4. Winthrop, *Military Law and Precedents* 904 (2d ed. reprint 1920).

5. *Id.* at 908-09.

6. *Id.* at 569.

7. *Id.* at 954.

8. *Id.* at 571-72.

9. *Id.* at 575.

The necessity for obedience to military orders is recognized not only by military writers but by civilian sources as well. Corpus Juris Secundum sets forth the following general principles concerning obedience to orders:

"A prompt and unhesitating obedience to orders is indispensable to the attainment of the object of the military service, and an inferior must obey the orders of his superiors according to their terms without any reference to his own judgment as to their propriety, expediency, or probable consequences, unless the illegality of such order is so clearly shown on its face that a man of ordinary sense and understanding would, when he heard it read or given, know that the order was illegal."¹⁰

It can readily be appreciated, not only from the above authorities, but from common sense alone that there must be obedience to lawful orders in the military services. Compliance with orders is such a serious matter that Article 90, UCMJ, allows the death penalty for willful disobedience of a superior officer's orders in time of war.

Military Necessity For Orders That Go Beyond

The Scope Of Purely "Official" Matters

As has already been noted, only a lawful order must be obeyed. Paragraph 169b of the Manual for

10. 6 CJS, Army and Navy, §§ 41 at 429.

Courts-Martial,¹¹ in discussing the offense of willful disobedience of a superior officer, provides that:

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. . . . A person cannot be convicted under this article if the order was illegal; but an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate."

It can immediately be seen that the question of whether an order relates to a military duty may be highly controversial. A strict view might be that to be lawful an order must relate to a matter concerned with a serviceman's military duties alone and that does not restrict personal rights.

The United States Court of Military Appeals¹² has not applied such a strict standard. There are valid reasons why such a strict rule should not be followed. One of the most obvious reasons that comes to mind is that due to the presence of our military personnel in foreign countries it might be essential to place some

11. U. S. Dep't of Defense, Manual for Courts-Martial, United States, 1951. This Manual was originally prescribed by the President by Executive Order No. 10214, Feb. 8, 1951, and will be hereafter referred to as "the Manual." It will be cited as MCM (1951).

12. The United States Court of Military Appeals (hereafter referred to as the "Court of Military Appeals" or "the Court") was created by the Act of May 5, 1950.

restrictions on what might normally be thought of as the personal affairs of individual servicemen. Thus, it may become necessary to place prohibitions upon the exchange of personal property. In the case of United States v. Martin¹³ the Court of Military Appeals was presented with a question concerning the legality of an order to an accused sailor which required the sailor to keep for his personal use cigarettes purchased on board ship and not to use them for bartering. The ship was in foreign waters at the time and the order was given by one of the ship's officers who had observed a great many cartons of cigarettes in the accused's locker. The Court stated:

"That the order related to accused's disposition of personal property owned by him does not render it illegal. Disorders arising out of transactions between members of the Armed Forces and nationals of other countries can be prevented by those in command even though the orders issued involved limitations on transferring of private property. Here, at the time the order was given, the ship was en route to a foreign port, where American cigarettes were at a premium and where black markets flourish."¹⁴

In a subsequent case¹⁵ the Court had occasion to discuss a general order which required military personnel

13. 1 USCMA 674, 5 CMR 102 (1952). (Reversed on other grounds.)

14. Id. at 676, 5 CMR at 104.

15. United States v. Yunque-Burgos, 3 USCMA 498, 13 CMR 54 (1953).

in Germany to wear their military uniforms even when in an off-duty status. It could be argued that an order of this type does not strictly relate to a military duty and imposes an unreasonable restriction upon an individual's personal dress while off-duty. The Court stated:

"The order prohibiting the wearing of civilian clothes was effective only in Germany, the occupied country of a former enemy. Our forces in that country are in proximity not only to our former enemies but to potential future enemies. The success or failure of our military operations may well depend upon the orders of the Commanding Officer. Among the precautions he is expected to take are those designed to establish control over the occupation forces. Lack of control over these forces might not only embarrass this country, but could very well spell the difference between success and failure of its occupation. It is evident that the general orders published in this instance were directly related to the control of the occupation forces. Only the uniform distinguishes the soldier from the citizen in the occupied territory. . . . A period of unauthorized absence from a unit in which his services are absolutely vital may be unduly prolonged if he is free to conceal his identity by this simple expedient. . . . Of great importance, as well, is the facility with which he can, so disguised, pass from the western to the eastern zones of occupation. Such a practice invariably leads to accusations of spying, wholesale desertions, and a variety of other allegations which needlessly multiply the vexations of our position there."¹⁶

16. Id. at 500, 13 CMR at 56.

A good example of a case that upholds an encroachment upon what might normally be considered a matter of personal right is found in United States v. Wheeler.¹⁷ There the Court upheld a general order in an overseas area that required the prior written permission of the military commander before a member of the command could enter into marriage. Other cases will be discussed subsequently wherein the Court of Military Appeals has found lawful, under the existing circumstances, orders that restrict what are generally thought of as personal rights, rather than aspects of official military duty.

Necessity For Prohibition Against Orders That
Unreasonably Restrict An Individual's
Personal Rights

While it can readily be appreciated that some orders must restrict personal rights and go beyond the scope of purely "official" matters, the necessity for placing limitations on a commander's authority in this field are equally obvious. The fact that an individual is a member of the armed services should not make every facet of his personal life subject to regulation by his military superiors.

17. 12 USCMA 387, 30 CMR 387 (1961).

In United States v. Nation¹⁸ the Court of Military Appeals considered an order of the type referred to in United States v. Wheeler, supra. This general order also prohibited marriages by members of the command without prior approval by the military commander. However, the order provided for a six months waiting period and had certain other restrictions not contained in the general order involved in the Wheeler case. In finding this order to be an unreasonable interference with the personal affairs of the accused the Court stated:

"For a commander to restrain the free exercise of a serviceman's right to marry the woman of his choice for six months just so he might reconsider his decision is an arbitrary and unreasonable interference with the latter's personal affairs which cannot be supported by the claim that the morale, discipline, and good order of the command require control of overseas marriages."¹⁹

The cases which will be subsequently analyzed and compared will reflect that when a personal right of a serviceman is restricted by a military order the Court of Military Appeals will examine closely the order to determine if it constitutes an unreasonable restriction upon the personal affairs of the individual.

18. 9 USCMA 724, 26 CMR 504 (1958).

19. Id. at 727, 26 CMR at 507.

Chapter II, infra, will consider cases decided by the Court to ascertain the legal tests the Court has applied in determining the legality of such orders.

Scope Of Material To Be Covered

A military lawyer interested in a study into the field of legality of orders will find that very little has been written on this subject. A cursory examination of reported cases will reveal that the provisions of the Manual do not provide sufficient guidance for measuring the legality of orders in all cases. This is particularly true as to orders that restrict personal rights of individuals.

The following discussion will reflect that the law relative to such orders has developed rapidly within the past four years. The better method of illustrating this development is by a survey and analysis of the more important cases in the area. A survey of these cases will serve two important functions. It will indicate the specific areas in which the law has been settled by the Court and, it will reveal the legal tests that have been utilized by the Court in determining the legality of orders. These tests will, of course, provide guidance in measuring the legality of questioned orders that arise in the future.

An examination of cases that have been before the Court is particularly important at this time due to the recent change in membership of the Court. It is essential to ascertain whether Chief Judge Quinn and Judge Ferguson are in agreement on the tests to be applied. If they are not in agreement, then it is obvious that the appointment of Judge Kilday will be quite important to the future development of the law in this field. Such a survey will also ascertain whether there is a distinction between the authority of overseas commanders and commanders in the United States in the issuance of orders.

Current problem areas will be discussed to ascertain whether the rationale of decided cases can resolve these problems. Opinions expressed relative to these problem areas will be examined to determine if these opinions are in line with the principles announced in recent cases decided by the Court.

In addition, the following material will also discuss various trial and appellate problems relating to cases involving the legality of orders, such as raising the defense of illegality and submitting the issue to the court members.

CHAPTER II

DETERMINING THE LEGALITY OF ORDERS

The Military Duty Test Of Legality

When considering a case in which the legality of an order is in issue, the first inclination of a lawyer is to search for a legal test by which the legality of the questioned order can be measured. A military lawyer who was not familiar with the impact^{of} recent cases in this field would very probably turn to the Manual as a convenient starting point in his research.

He would find that the Manual does contain a provision that has been often cited by the service boards of review and the Court of Military Appeals as constituting the proper standard to apply in testing a questioned order. That portion of the Manual provides:

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused."²⁰

This provision of military law is not new. The 1949 Manual for Courts-Martial²¹ contained identical language in discussing the Sixty-fourth Article of War relative to disobeying a superior officer.

20. Par. 169b, MCM (1951).

21. U. S. Dep't of Army, Manual for Courts-Martial United States, 1949. This Manual was promulgated by Presidential Executive Order No. 10020, Dec. 7, 1948. It will be hereafter cited as "MCM (1949)."

This particular test²² for legality is found under the substantive discussion relating to Article 90, UCMJ, which pertains to the willful disobedience of a superior officer. However, the same standard is to be applied in cases involving the willful disobedience of orders issued by warrant officers, noncommissioned officers, and petty officers arising under Article 91, UCMJ.²³ The Manual indicates a somewhat different test to be applied to general orders and regulations in cases arising under Article 92, UCMJ, by providing:

"A general order or regulation is lawful if it is not contrary to or forbidden by the Constitution, the provisions of an act of Congress or the lawful order of a superior."²⁴

However, the subsequent discussion will illustrate that actually the same test, or tests, will be applied regardless of whether the particular offense falls under Articles 90, 91, or 92.

In objectively analyzing the military duty test for legality of orders, it must be conceded that this provision does not really furnish a great deal of guidance. After all, just what does the term "military

22. This provision of the Manual will hereafter be referred to as the Military Duty test.

23. Par. 170a, MCM (1951).

24. Par. 171a, MCM (1951).

duty" mean? And when is an officer authorized under existing circumstances to give a particular order? If it is desirable to have a test for legality that furnishes a degree of real guidance, it would seem that the military duty test falls short of such a goal.

Prior to condemning this provision as being too general in nature, it would be well to examine the reported cases to ascertain if these cases develop the military duty test to a point where it is of practical guidance.

An examination of board of review cases prior to the establishment of the Court of Military Appeals is of little value in this regard. This is due to the fact that in the vast majority of such cases examined it was found that the board report did not announce a test rationale in the decision. These reports normally provide a recital of the facts with a subsequent conclusion that the order was, or was not, a lawful order. It is probably as a result of this tendency that early board of review cases are seldom mentioned in the opinions of the Court of Military Appeals in cases dealing with the legality of orders.

The broad language of the military duty test probably accounts for the large number of cases contained

in board reports in the field of legality of orders. An advocate for the defense could certainly argue that only orders that relate directly to official military duties, as distinguished from personal affairs, should be found to relate to "military duty." On the other hand, if a liberal interpretation is applied, the argument could be made that any order to, or restriction placed upon, a servicemember necessarily relates to the member's "military duty" due to his status as a member of the military services.

One of the better earlier opinions dealing with the extent of the commander's authority in regulating the personal transactions of members of his command will be found in the case of United States v. Hill.²⁵ The board of review opinion set forth the following general principle:

25. ACM S-2898, 5 CMR 665 (1952). The particular order questioned in this case was a hospital regulation prohibiting loans or other financial transactions between hospital personnel and patients. Appellate defense counsel attacked the regulation on the ground that it was an "unwarranted, arbitrary and unlawful interference with the private rights of personnel." The board of review found the regulation to be an appropriate and necessary safeguard for the protection of patients from hospital personnel on whom the patient must depend and, therefore, lawful.

"Any regulation which tends to regulate the conduct of members of the military establishment in order to properly maintain discipline and efficient discharge of the military mission is legal and proper."²⁶

This language indicates that in determining the legality of a questioned order one should look to see if the order was necessary to the military mission. In other words, military necessity is a very important factor. This is not to say that all orders will be held lawful if the commander believed the order necessary to his mission.²⁷ However, this case is one of the very few earlier cases in the field that provide any practical guidelines that may be followed in other cases involving different types of orders. It will be observed later that the Court has adopted this military necessity aspect into the Court's own opinions. The subsequent analysis of cases will also reflect that reasonableness, as well as necessity, must be considered in determining the legality of an order.

Even the Court of Military Appeals was slow to prescribe any standard other than that the order relate

26. Id. at 668.

27. In United States v. Wysong, 9 USCMA 249, 26 CMR 29 (1958), an order was held by the Court to be unlawful even though the military commander believed the order to be necessary to maintain the combat capability of his unit.

to military duty and be authorized under the circumstances. The Court all too often applied the military duty test to specific factual situations without further defining the limits of the test. While this tendency did provide guidance for future cases involving similar factual situations, it did very little to furnish guidelines for general use.

The Court first referred to the military duty test in the case of United States v. Trani.²⁸ This case, however, really involved the question of whether an order to a prisoner to perform close order drill had been given for the purpose of unauthorized punishment²⁹ or for legitimate military training. The Court, therefore, had no reason to discuss the military duty test at length. For a period of several years the Court continued to refer to this provision as the proper standard to be applied but failed to provide narrow guidelines within the broad test. In each instance the Court merely found that the particular order involved did, or did not, relate to a military duty and was, or was not, authorized under the circumstances. The cases

28. 1 USCMA 293, 3 CMR 27 (1952).

29. Par. 115, MCM (1949)...

of United States v. Voorhees³⁰ in 1954 and United States v. Musguire³¹ in 1958 are examples of this practice, although the latter case did somewhat narrow the definition of "military duty" by holding that it was not the "duty" of a person to assist in the production of evidence in violation of his privilege against self-incrimination.

It would appear from what has been said to this point that there is no definite yardstick by which the legality of a questioned order may be measured in the absence of a reported decision on a case involving the same type of order. It would follow that the Court exercises the broadest type of discretion on individual factual situations by deciding that the particular order did, or did not, relate to a "military duty" and was, or was not, authorized under the circumstances. Therefore, in the absence of a more definite yardstick, the military commander would apparently also have a great deal of discretion in deciding whether his order actually related to a "military duty" and whether the

30. 4 USCMA 509, 16 CMR 83 (1954). This case is discussed in more detail at p. 22-25, infra.

31. 9 USCMA 67, 25 CMR 329 (1958). This case is further discussed at p. 55-56, infra.

order was authorized under the existing circumstances.³²

It must, of course, be realized that it would be exceedingly difficult, if not impossible, for the Court to prescribe a formula that could be applied to each questioned order that might arise in the future to ascertain the legality, or illegality, of that order. It may be argued that a test as broad as the military duty test is necessary to encompass all the many types of factual situations that may arise. With this in mind, let us examine the more recent trend of the Court in the area of legality of orders, particularly orders that affect personal rights of individual servicemen.

Development Of The Martin Case Test

Of Legality

The first occasion on which the Court indicated that there might be a different test to determine the legality of questioned orders occurred in United States v. Martin.³³ This was the case in which the accused sailor, who had purchased numerous cartons of cigarettes on board his ship, was ordered by one of his ship's officers to keep the cigarettes for his personal use

32. This is very probably the reason for the existence of the type of orders referred to in the problem areas discussed in Chapter III, infra.

33. 1 USCMA 674, 5 CMR 102 (1952). This case was previously referred to in Chapter I, p. 6, supra.

and not to use them for bartering. The ship was in a foreign port at the time. The accused was subsequently convicted of willful disobedience of this order. The conviction was reversed by the Court of Military Appeals due to the insufficiency of evidence showing disobedience of the particular order. However, the important point of this case is the test set forth by the Court for use in determining the legality of this type of order. This case is cited more often than any other case as announcing the test for legality of an order that restricts personal rights.

Appellant Defense Counsel contended the order was illegal since it did not relate to a military duty. The Court found that under the existing factual situation the officer was authorized to issue the order and set forth the following test for legality of orders:

"All activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom the responsibility of the command rests."³⁴

The Court found that in view of the difficulties encountered in controlling undercover transactions and

34. Id. at 676, 5 CMR at 104.

the disorders they create, the authority of the superior officer could reasonably include any order or regulation which would tend to discourage the participation of American military personnel in such activities.³⁵

It might be asked at this time whether this test announced by the Court is of any more practical assistance than the military duty test. Isn't the same amount of discretion involved in determining whether a questioned order was reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command as is involved in determining whether an order related to "military duty"? The question might also be asked as to whether this particular test³⁶ is really any different than the military duty test. Also of interest is whether this test is limited to orders restricting personal rights or is to be applied in all cases. The language contained in the Martin opinion

35. The opinion does not mention any significance that may have been attached to the fact that the accused purchased the cigarettes on board his ship. If the Court attached any importance on the source of the cigarettes the opinion does not so indicate. The thrust of the opinion is that the prohibition of such "profiteering" activity will promote morale, discipline and usefulness of the members of the command and will result in the maintenance of good order in the services. The source of the cigarettes would not be material in this regard.

36. This test announced by the Court will be hereafter referred to as the Martin test.

does not indicate that the application of the test is limited in any way. To provide answers to these questions let us now turn to the subsequent history of the Martin test.

Although the Martin case was cited as indicating the extent of the commander's authority in two board of review cases,³⁷ it was not again referred to by the Court of Military Appeals until the case of United States v. Voorhees³⁸ some two years later.

In this case an issue arose as to whether a particular regulation violated the accused officer's constitutional right of free speech. Army Regulations provided that personnel on active duty were required to submit their writings to military authorities for review prior to such articles being submitted to a publisher. The accused failed to comply with these regulations and even eventually refused to withdraw his articles from his publishers after having been ordered to do so by his commanding general. In discussing the many issues involved in this case, the Court found that the Army Regulations were not an unconstitutional abridgement of the accused's freedom of speech. The Court pointed out in this

37. ACM 6411, Ewing, 10 CMR 612 (1953), involving a general regulation forbidding the fraudulent possession or use of ration cards, and ACM S-6846, Barnes, 12 CMR 735 (1953), involving a base regulation prohibiting taking tax free cigarettes off base.

38. 4 USCMA 509, 16 CMR 83 (1954).

connection that the right to free speech is not an indiscriminate right and that restraints which reasonably protect the national interest do not violate the Constitutional right of free speech. This was one of the Court's earliest announcements of how far the military might lawfully go in restricting an individual's freedom of speech.

An equally interesting aspect of this case was the Court's discussion of the legality of the order to the accused from his commanding general to withdraw his manuscript from his publishers. The Court stated that the order was not palpably illegal on its face since it clearly related to a military duty and cited paragraph 169b of the Manual. It will be observed that here the Court was referring to the military duty test as the proper standard to apply in testing the legality of this order. In this same connection the Court noted that military personnel may properly be controlled in their disposition of personal property, when such disposition is not protected by any Constitutional provision or Congressional enactment and is contrary to the requirements of the service.³⁹ The Court cited the Martin case as authority for this proposition but did not discuss

39. Id. at 529, 16 CMR at 103.

the test set forth in that case for ascertaining the
legality of orders.⁴⁰

The issue as to the legality of this order involved
the interpretation of a number of executive directives
as well as the Army Regulation in question.⁴¹ Aside
from the utilization by the Court of the military duty
test and the reference to the Martin case, the opinion
contains an excellent discussion of the limitations that

40. This case, standing by itself, would seem to
indicate that the Court had not intended to prescribe
a general test for legality of orders in the Martin
case but had only held in that case that under certain
circumstances a serviceman's disposition of personal
property was subject to military control. Subsequently
discussed cases will reflect that the Martin case went
much further.

41. Directives from the President and two Secretaries
of Defense indicated that in view of the Korean conflict
manuscripts and other materials prepared by military
personnel should be examined for security purposes by
an appropriate military reviewing agency prior to pub-
lication. Army Regulations implementing these direc-
tives provided for such a review but were subject to
being interpreted as applying to a policy as well as to
a security review. The evidence reflected that the
reluctance of the reviewing authorities to approve the
accused's articles for publication was based on policy
rather than security considerations. The Court found
that an interpretation of this Army Regulation which
permitted policy, as well as security review, would be
inconsistent with a memorandum of the Secretary of
Defense as this memorandum had limited the review to
security matters. The order of the accused's superior
officer to withdraw the manuscripts from his publisher
was therefore held to be illegal as it was intended to
enforce restrictions other than security.

may legitimately be placed on a serviceman's freedom of speech.⁴²

Significance Of The Milldebrandt Case

There was little indication by the Court that the Martin case had actually established a general test for the legality of orders until the case of United States v. Milldebrandt⁴³ some six years later. This is one of the more important cases in the area of orders that restrict personal rights and is cited in most of the Court's opinions dealing with such orders in the last three years. In the Milldebrandt case the accused, who was heavily burdened with personal financial problems, requested a thirty-day leave in order to obtain civilian employment and augment his income. The leave was granted but was conditioned upon his making certain weekly reports. The officer authorizing the leave testified that

42. The question of the applicability of the protections of the first ten amendments to the United States Constitution to military personnel has, of course, been the subject of much discussion. Whether the First Amendment guaranteeing freedom of speech is applicable to service personnel will not be incorporated into this text. However, it is submitted that the Voorhees case is authority for the proposition that a serviceman does have certain protected rights relative to his freedom of speech but that these rights may be limited by reasonable restrictions. See also the discussion of United States v. Wysong, 9 USCMA 249, 26 CMR 29 (1958) at p. 35-37, infra.

43. 8 USCMA 635, 25 CMR 139 (1958).

re, as the accused's superior officer, was required to submit a weekly written report to the executive officer concerning the accused's financial condition. As a result he ordered the accused to report his financial transactions at certain specified times during the period of leave.

The accused failed to do so and was subsequently convicted of willful disobedience of this order.⁴⁴ Judge Latimer was author of the principal opinion of the Court with Judge Ferguson concurring in the result. The opinion first notes that not every order directing an accused to make a full disclosure about his personal business is valid.⁴⁵ In this connection the opinion states:

"A command to file a complete and comprehensive report may compel an accused to disclose transactions which have a tendency to incriminate him, or which might subject him to the imposition of sanctions, or which

44. The convening authority approved only the lesser included offense of failure to obey a lawful order. 8 USCMA at 636, 5 CMR at 140.

45. Appellate counsel for both sides agreed that an order to report the status of indebtedness may be lawfully issued by a commanding officer. The principal opinion expressly points this out and states that for the purpose of the case then before the Court it is unnecessary to express an opinion on that particular conclusion. This would seem to indicate the Court's unwillingness, at least at that time, to agree with such a concession by appellate counsel.

would breach confidential communications. Furthermore, such a directive might require him to publicize financial involvements which are of no concern to the military community. Certainly the legality or illegality of the order must be determined by its terms, and here the allegations of the specification leave everything to the imagination of the pleader. Unless orders concerning personal dealings by their terms are limited to the furnishing of information which essentially does not narrow or destroy the rights and privileges granted to an accused by the Code or other principles of law, they should not be considered as legal. . . . In this instance, the evidence found in the record is of no assistance in determining the legality or illegality of the order. The officer merely directed the accused to report to him on his financial affairs during stated periods. The nature of the information ordered to be furnished is not shown and, for aught that appears, the accused might have been required to give a detailed statement of every financial transaction engaged in by him while off-duty. It should be apparent that if the order was as broad as that, the accused might be prosecuted for failure to disclose information of a confidential or incriminating nature. While we do not pass on the legality of all orders dealing with personal business, we do not believe the authority of a commanding officer extends to the point that an accused can be ordered to make all facets of his personal dealings public. . . . Accordingly, under the facts of this case, we believe the order given to be so all-inclusive that it is unenforceable. Certainly we believe that, unless an order of this type is so worded as to make it specific, definite, and certain as to the information to be supplied so that it can be measured for legality, the only penalty which can be enforced is revocation of the leave."⁴⁶

46. 8 USCMA at 637-38, 25 CMR at 141-42.

The principal opinion then noted that the question of whether the accused would be compelled to comply with such an order, if legal, while in a leave status was one of first impression with the Court. Winthrop is quoted as expressing the opinion that when a soldier is on leave he ceases to be subject to the orders of his commander, except that in the event of some public exigency requiring his services, an order discontinuing his leave, or otherwise disposing of him as the public interest may require would be lawful.⁴⁷ The opinion then notes that it seems reasonable to conclude that when an enlisted man is granted leave, he ought not to be subject to orders requiring him to perform strictly military duties unless their performance is compelled by the presence of some grave danger or unusual circumstance. The opinion indicates that there may be some exceptions to this general rule but that in the instant case there was no immediate military necessity for a commander to issue this particular type of order.

The principal opinion, while not expressly citing the Martin case, refers to the Martin test in the

⁴⁷. Winthrop, Military Law and Precedents 91 (2d ed. reprint 1920).

following language:

"That order was not necessary to the successful pursuit of any military mission, and it was not required to maintain the morale, discipline, or good order of the unit or to keep the military free from disrepute."⁴⁸

The opinion then held that if there is any duty on a serviceman to furnish personal financial data, it cannot be made mandatory while he is not on a duty status.

The opinion concluded with the following language:

"We will leave for future determination how far military commanders may go in carrying out a financial responsibility program, if at all, but for the purpose of this case, we hold that the duty imposed was illegal in the light of the accused's status at the time it was disobeyed."⁴⁹

Chief Judge Quinn prepared a separate concurring opinion in which he expressed his doubts about certain implications of the principal opinion. He expressed his concern over the implication that the Court approves Winthrop's conclusions relative to the necessity for military personnel on leave to obey orders. Secondly, he expressed his concern over the implication in the principal opinion that when an order can be construed as legal or illegal, the latter is preferable to the former. Thirdly, he expressed his concern over the

48. 8 USCMA at 638, 25 CMR at 142.

49. 8 USCMA at 639, 25 CMR at 143.

implication that it is a rule of law rather than a statement of policy that persons on leave cannot be required to perform strictly military duties. Judge Quinn then found the order to be illegal⁵⁰ by an application of the test set forth in the Martin case. In expressing his opinion that the order was illegal, Judge Quinn stated:

"If an order imposes a limitation on a personal right, it must appear that it is 'reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services'. . . . In cases of this kind, we must look closely to the connection between the personal act required by the order, and the needs of the military service. . . . As the principal opinion points out, the order here is completely unrelated to any requirement of the military service."⁵¹

Both the principal opinion and Judge Quinn's concurring opinion make it clear that all three judges were then in agreement that the rationale of the Martin

50. The word "illegal" as used throughout this text simply indicates that the particular order is so void of lawfulness that the subordinate may not be punished under the UCMJ for a violation of the order. It does not infer that the superior issuing the order has committed a criminal offense in issuing an "illegal" order. The word "illegal" is used throughout this text in the same sense as the Court uses the term in discussing cases in this area.

51. 8 USCMA at 639, 25 CMR at 143. Judge Quinn's statement to the effect that the order is completely unrelated to any requirement of the military service is certainly arguable. It will also be observed that Judge Quinn is perhaps indicating that the Martin test is applicable only in situations involving orders that affect personal rights.

test should be applied in cases involving the legality of orders that restrict personal rights.⁵² The two opinions also specifically emphasize that there must be a definite connection between the personal act required by the order and the needs of the service. We observe that the idea of "military necessity" is definitely becoming a major part of the Court's rationale in testing the legality of such orders. Judge Quinn's concurring opinion also indicates quite clearly that the needs of the service must be balanced against the restriction placed on the individual serviceman.

Another important principle announced in this case is that orders restricting the personal rights of servicemembers must be narrowly and tightly drawn so as to be specific. The Court points out that an order as broad as the one in the present case may compel the accused to incriminate himself or disclose confidential communications. Subsequently discussed cases will indicate that the Court is quite concerned with the broad or narrow scope of such an order.

As to the portion of the principal opinion dealing with obedience to orders while in a leave status,

52. The principal opinion did not expressly limit the rationale of the Martin test to orders involving personal rights.

this language should certainly not be construed to indicate that a servicemember is not bound by lawful orders while in a leave status. There is little doubt but that the Court would hold the servicemember, even while in a leave status, legally bound by "off-limits" orders or orders, for example, not to cross into Russian occupied zones. It would appear that such a servicemember would also be bound by the type of order referred to in the Yunque-Burgos case⁵³ relative to the wearing of the uniform while in an off-duty status. The principal opinion in the Milldebrandt case indicates that there may be exceptions to the general rule that a serviceman on a leave status should not be saddled with his "ordinary military duties." Chief Judge Quinn's concurring opinion makes clear his exception to any implication that service personnel on leave are not bound by lawful orders.

Prior to leaving this discussion of the Milldebrandt case it might be well to mention that the military services may very well have a perfectly legitimate interest in the financial practices of a serviceman. A dishonorable failure to pay just debts is conduct proscribed by Article 134 of the UCMJ as service discrediting conduct

53. See Chapter I, p. 6, supra.

and may also subject the servicemember to action under administrative regulations.

Of equal interest to the military commander is the check cashing practices of his subordinates. The problem of orders restricting an individual's right to cash checks has been before both Army and Air Force boards of review.

In United States v. Wilson⁵⁴ the commanding officer of the accused officer ordered the accused to refrain from drawing any checks for any amount on any bank until evidence was presented to the accused's headquarters that he had sufficient funds deposited in the bank. The accused subsequently violated this order and was convicted of disobedience of the order. The test of legality applied by the board of review was whether the order related to a military duty. The board found that the order did relate to a military duty and affirmed the conviction.⁵⁵

It might be asked whether these decisions conform to the principles announced by the Court of Military Appeals in the Milldebrandt case. It could certainly

54. CM 351835, 4 CMR 311 (1952).

55. See ACM 12539, Kapla, 22 CMR 825 (1956), which involved a similar order. The Air Force Board of Review applied the same test of legality and reached the same result.

be argued that such an order directly restricts a personal right and is analogous to the order compelling disclosure of personal indebtedness held to be illegal in that case. However, the differences between the two situations are quite obvious. The Court in the Milldebrandt case was very concerned with the possibility that so broad an order might compel the accused to furnish information that would be self-incriminating. The language previously quoted from the opinion indicates that the Court was concerned with the fact that the accused might have been required to give a detailed statement of every financial transaction engaged in by him while off-duty. Such a report would certainly have been beyond the needs of the military.

In the Wilson and Kapla cases the orders involved were certainly specific. In situations where a problem exists due to the servicemember's continuous cashing of "insufficient fund" checks there should be a sufficient necessity for such action by a commander. By balancing the needs of the service against the particular right that is restricted by the order it would seem that the Court would hold orders restricting the cashing of checks under these circumstances to be lawful. On the other hand, such an order given without any grounds

other than the commander's desire to assure that members of his command do not cash "insufficient fund" checks would appear to be illegal as violating the military necessity requirement. Each factual situation would, of course, govern the legality of such an order.

Shortly after the Milldebrandt case the Court again had occasion to consider the legal effect of a very broad order restricting a personal right. In United States v. Wysong⁵⁶ the facts indicate that an official investigation was in progress at the accused's post to inquire into alleged incidents of sexual misconduct and immorality involving the accused's wife, minor step-daughter, and several members of his company. The company commander became aware of efforts by the accused to impede the progress of the investigation by interrogating and threatening potential witnesses. The company commander ordered the accused "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty." The justification later offered by the company commander in his testimony for issuing the order was that he was worried about the consequences if the personnel of the company continued the rumors and accusations. He testified

56. 9 USCMA 249, 26 CMR 29 (1958).

that he felt this internal dissension affected the combat capability of his company.

The accused subsequently violated this order and was convicted for this offense. Upon review the Court of Military Appeals held that the order in question was so broad in nature and all-inclusive in scope as to render it illegal. The Court further found that the order severely restricted the accused's freedom of speech, and noted that the order not only restrained the accused from communicating with certain persons on duty but off duty as well.⁵⁷

57. Concerning a serviceman's right to freedom of speech, it has already been noted in the Voorhees case, supra, that this right is subject to reasonable limitations. With relation to orders that restrict an individual's right of free speech an interesting opinion was expressed by The Judge Advocate General in SPJGA 1946/2785 (March 22, 1946). In 1946 a garrison commander in Germany issued an order forbidding soldiers of his command to express agreement with anti-Russian sentiments in their conversation with the German civilian population. The order was apparently issued due to a fear that a propaganda effort was under way to divide the Allies by spreading anti-Russian propaganda among the United States occupation forces.

The opinion was expressed that the order was legal and appropriate to the accomplishment of the military mission of forces occupying the territory of a recently defeated enemy, and the maintenance of security and order among the civilian population, as well as security, order and discipline within the command. Although this opinion was expressed several years prior to the cases we have been discussing it would seem that the rationale of the Courts opinions would agree with the expressed opinion. See also SPJA 1944/7851 (August 1, 1944) where the opinion was expressed that an order imposing an

The Court noted another defect in the vagueness and indefiniteness of the order in failing to specify the particular persons "concerned" with the investigation. The Court then noted that they were not holding that an order of the type here sought to be employed could never attain the status of a legal order, and pointed out that if the order had been narrowly and tightly drawn and so worded as to make it specific, definite, and certain, it might well have been a lawful order. In discussing the illegality of this order the Court did not refer to any specific test for ascertaining the legality of orders other than an order of the type here involved must be "narrowly and tightly drawn" and "so worded as to make it specific, definite, and certain."

One of the more recent examples of the Court's treatment of an order restricting a personal right is found in United States v. Wilson.⁵⁸ In this case the accused had confessed to criminal investigators that he

57. (Continued) absolute prohibition against the use of a foreign language under any circumstances by military personnel stationed at a post within the United States was of doubtful legality. See CM 388545, Bayes, 22 CMR 487 (1956), wherein it was held that aiding the enemy by propaganda activities was not within the right of free speech.

58. 12 USCMA 165, 30 CMR 165 (1961).

had stolen a tape recorder from an Air Force Exchange while under the influence of alcohol. The accused's squadron commander then restricted the accused to his billets and ordered him "not to indulge in alcoholic beverages." The accused was subsequently convicted of disobeying this order.

Appellate counsel agreed that in accordance with the rationale of the Martin and Milldebrandt cases every order is presumed to be legal, but if the order imposes limitations on the personal rights of an individual, it must be connected with the morale, discipline and usefulness of the military service. Appellate defense counsel contended that this order was illegal because it was without limit as to time or place or the reasonable requirements of the military service.

The Court noted that a single drink of beer would violate the order as definitely as the consumption of a fifth of whiskey; and a drink to toast the health or welfare of a friend in the privacy of his quarters was as much prohibited as a drinking spree in a public tavern. The Court then concluded that:

"In the absence of circumstances tending to show its connection to military needs, an order which is so broadly restrictive of a private right of an individual is arbitrary and illegal."⁵⁹

59. Id. at 166, 30 CMR at 166.

The opinion in the Wilson case refers to an earlier decision by a board of review in the case of United States v. Wahl.⁶⁰ In that case the accused was restricted and ordered not to indulge in alcoholic beverages. Shortly thereafter he was found in an intoxicated condition at the Officers' Club. He was subsequently convicted of a violation of that order. The Air Force board of review set aside this finding of guilty on the ground that, in its operation and effect, the order was unrelated to military duty and, therefore, illegal.⁶¹ The board of review and the Court of Military Appeals therefore reached the same result on similar facts when the board applied the military duty test and the Court applied the Martin test.

Orders Regulating Marriage

Perhaps the most recent and significant developments in the field of orders that affect personal rights have taken place in the cases involving general orders regulating marriage in overseas areas. These cases are particularly significant because they provide an insight into the attitudes of all three judges presently

60. ACM 4742, 4 CMR 767 (1952); petition for review denied, 4 CMR 173 (1952).

61. See CM 302885, Payne, 59 BR 133 (1945), to the effect that an order prohibiting drinking of intoxicating beverages while on duty is legal.

on the Court. And if our final conclusion should be that the Judges are free to exercise the broadest type of discretion in this area, it becomes vitally important to ascertain the individual attitudes of the Judges.

In the case of United States v. Nation⁶² a general regulation promulgated by the Commander, United States Naval Forces, Philippines, established a procedure to be followed by all members of the command prior to entering into marriage. The written permission of the commander was required prior to marriage. The regulation required that a request for permission to marry should be prepared by the applicant with the assistance of his chaplain, and when completed, endorsed by the applicant's commanding officer, which endorsement was to include a positive recommendation of approval or disapproval and any other information deemed advisable regarding the applicant's performance of duty and moral character. The regulation further required that as to marriages between military personnel and aliens a six-month waiting period would be required prior to final approval of the application. The accused submitted his application to marry a Philippine national. Six months and three days later he married without the Commander's

62. 9 USCMA 724, 26 CMR 504 (1958).

written permission. The application had never been forwarded to the Commander because it lacked the required inclosures. In discussing the legality of this regulation the Court stated:

"General regulations which do not offend against the Constitution, an act of Congress, or the lawful order of a superior are lawful, if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services. United States v Martin, 1 USCMA 67*f, 5 CMR 102; paragraph 171 Manual for Courts-Martial, United States, 1951; United States v Milldebrandt« 8 USCMA 635, 25 CMR 139."D3

The Court held that the regulation was so broad and unreasonable that it could not be used as a basis for prosecution. The Court found it necessary to consider only the requirement of the six-month waiting period to conclude that the regulation was an arbitrary and unreasonable interference with the accused's personal affairs, which could not be supported by the claim that the morale, discipline, and good order of **the command** required control of overseas marriages.

63. Id. at 726, 26 CMR at 506. It should be noted **that** in this language the Court has combined the test **for legality contained in Par^ 1734* MCM (1951), relative to the violation of general orders, and the requirements of the Martin test.**

6*f. The Court did, however, indicate that this regulation contained other arbitrary restrictions. 9 USCMA at 726, 26 CMR at 506.

Some two years later an Army Board of Review had occasion to pass upon the validity of a somewhat similar general order. In United States v. Jordan⁶⁵ a general order issued by Headquarters, U. S. Army, Caribbean, provided that no military member of the command should marry an alien without the prior written approval of the Commanding General. The general order further required that an applicant must apply for such approval three months in advance, obtain parental consent if under age, secure police clearances, health certificates, certain affidavits, a chaplain's recommendation, birth certificates, and provide evidence of his ability to support a wife.⁶⁶ The accused, who was already legally married, violated this general order and married an alien without the required permission.⁶⁷ He was subsequently convicted of bigamy and failure to obey a lawful order.

65. CM 403928, 30 CMR 424 (1960), petition for review denied, 30 CMR 417 (1960).

66. The general order recited that it was in implementation of Army Regs. No. 600-240 (October 14, 1953) and 608-61 (September 20, 1957). These same regulations are currently in effect and emphasize the various difficulties servicemembers may encounter as a result of entering into marriages to aliens.

67. The accused's bride was a minor. He obtained the consent of a Panamanian court to marry her by falsely swearing that there was no impediment to the marriage.

The facts of this case certainly seem to make a strong argument as to why this type of general order should be found to be reasonable rather than arbitrary and capricious. Had the accused followed the requirements of the general order a bigamous marriage, with the accompanying tragic results to the minor girl, probably would have been avoided.

The board of review distinguished this case from the Nation case and held the general order to be lawful. The board found that the three months waiting period was not unreasonable as it would take approximately three months to obtain the various documents needed to support the application. The board's opinion also noted that in the Nation case the Court's opinion indicated that provisions contained in the naval regulation other than the six months waiting period were equally arbitrary and unreasonable. The board therefore concluded that the general order under consideration may very well have differed in many other respects than the mandatory waiting period.

The board's opinion discusses generally orders that restrict personal rights. It notes that the Martin

test is to be applied in measuring the legality of such orders.⁶⁸

Shortly after this decision a Navy Board of Review was presented with substantially the same problem.⁶⁹

The general order questioned was a revision of the order involved in the Nation case. The revised order omitted the six months mandatory waiting period and provided for expeditious processing of applications. The board found the regulation to be lawful. Rather than analyze the logic of the result at this time, let us look at the Court's treatment of this same revised regulation in United States v. Wheeler.⁷⁰

The revised regulation required the military member and his prospective spouse to meet with a chaplain for counselling. The new regulation also required the

68. The opinion states that "Other restrictions on the right of the individual to enjoy his property have likewise been recognized, and the test of the lawfulness of an order or regulation which interferes with this right is the legitimacy of the grounds underlying the directive . . . United States v. Milldebrandt, supra; United States v. Martin (No. 451), 1 USCMA 674, 5 CMR 102. If it appears that the regulation or control of personal activities is 'reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the service,' the regulation is legitimate. If on the other hand an order is motivated by a desire to impose a sumptuary restriction, or by whim or personal bias, it would clearly be arbitrary, unreasonable, and, so, illegitimate."

69. WC NCM 60-00615, Levinsky, 30 CMR 641 (1960).

70. 12 USCMA 387, 30 CMR 387 (1961).

military person concerned to present a medical certificate showing both himself and the intended spouse to be free from mental illness, infectious venereal disease, active tuberculosis or major communicable disease. The regulation further required the written consent of a parent or guardian if the parties are under twenty-one years of age. A major difference between this regulation and the one condemned in United States v. Nation, was that the revised regulation required expeditious processing of the application with no arbitrary waiting period.

All appellate counsel announced their agreement with the principle enunciated in the Martin case that a military order or regulation is legal if it protects or promotes morale, discipline, good order, and the usefulness of the command. They also agreed that such an order might reasonably limit the exercise of a personal right.⁷¹ Appellate defense counsel contended that the regulation was invalid in that it constituted an unlawful restraint on the accused's personal right to marry. The principal opinion of the Court, prepared by Chief Judge Quinn and concurred in by Judge Latimer, held the revised regulation to be lawful. The accused

71. Id. at 388, 30 CMR at 388.

contended that the regulation was an intrusion into religious practices and could not be asserted against a civilian, such as his prospective spouse. This contention was predicated upon the provision that required both parties to meet with a military chaplain. The Court held that the operation of the regulation upon a prospective civilian spouse was wholly incidental to its regulation of military personnel. The Court further found that nothing in the regulation interfered with the exercise of the accused's religious beliefs.

The Court then discussed whether the marriage of service personnel serving overseas may be the subject of regulation by military commanders. In this connection the Court stated as follows:

"Activities of American military personnel in foreign countries may have different consequences from the same activities performed in the United States. . . . What may be relatively unimportant in an American environment can be tremendously significant in a foreign background. For example, marriage in the United States to a person having active tuberculosis may not be cause for too great concern because of the availability of medical facilities for treatment, cure, and control of the spread of the disease; but in a foreign community where the medical services may be few, and demands upon the service very heavy, it may be necessary to prohibit military personnel from marrying a civilian suffering from such condition in order to safeguard the health and morale of other military personnel. . . . We need only say that, in our opinion, a military commander may, at least in foreign

areas, impose reasonable restrictions on the right of military personnel of his command to marry."⁷²

The Court found that the requirements as to presentation of medical certificates and written consent of parents were reasonable. The Court further found that the waiting period required by the processing of an application was not unreasonable due to the requirement contained in the regulation for expeditious processing.

Judge Ferguson dissented and expressed his opinion that the principles announced in the majority opinion would furnish authority for the control of marriages of service personnel to American citizens in the United States. He emphasized that the test for the legality of orders and regulations was set forth in the Martin case. He expressed his opinion that the present case was analogous to the Milldebrandt case, where the Court held an order unlawful due to the complete lack of connection between the order and any requirement of the military service.

Judge Ferguson concluded that an order requiring a commander's permission to marry was void on its face due to its lack of connection with the morale, discipline,

72. Id. at 388-89, 30 CMR at 388-89.

and usefulness of the members of a command or the maintenance of good order and discipline. He stated that he would also find the requirement for a pre-marriage interview with a Navy chaplain to be unreasonable as a violation of the servicemember's religious freedom.

Inasmuch as Chief Judge Quinn and Judge Ferguson disagree as to the legality of such an order the view of Judge Kilday is of the utmost importance. In the recent case of United States v. Smith⁷³ the identical general order involved in the Wheeler case was again presented to the Court. Judge Kilday was author of the principal opinion and, in finding the general regulation to be lawful, stated that he was in accord with the majority opinion of the Wheeler case.

As the more recent cases of the Court are examined in the area of orders that affect personal rights, it becomes apparent that the Court will apply the test they first announced in the Martin case. This has particularly been true since 1957. Each of the present Court members has now expressed his inclination to apply the rule contained in the Martin case to such orders. However, it is equally apparent that in the application

73. 12 USCMA 564, 31 CMR 150 (1961).

of that test to a specific factual situation the Court members may very well disagree as to the result.

Adequacy Of The Martin Test

Having established that the Court will apply the Martin test to questioned orders that restrict personal rights, it would be well to take a closer look at the test itself. We might ask, just what is the real criteria of this test? It is certainly important to ascertain if the test provides practical guidelines that may be applied to future questioned orders in factual situations not foreseen at this time. It is also important to consider whether a better test might be utilized or, if not, whether the Martin test might be improved.

The test provides that in order to be lawful an order restricting a personal right "must be reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of the command and directly connected with the maintenance of good order in the services." The previously discussed cases have indicated that the most important two words in the test are "reasonably necessary." All members of the Court continuously refer to the aspects of "reasonableness" and "military necessity."

It might then be asked whether a test based on these two elements alone might not be more satisfactory. In other words, the test might be that the order "must be reasonable and necessary to the needs of the service." The disadvantage of this test would be in the wide latitude of discretion involved in deciding what is "reasonable" and what might be "necessary to the needs of the service." Nearly all officers and non-commissioned officers consider themselves to be reasonable men. It therefore follows that they would consider all of their orders to be "reasonable" under the circumstances. And if the order wasn't "necessary to the needs of the service" they wouldn't have issued it in the first place.⁷⁴ Something more than "reasonableness" and "necessity" must be included in the test if there is to be any degree of uniformity in its application. Therefore, the order must be reasonably necessary "to safeguard and protect the morale, discipline, and usefulness of the members of the command and directly connected with the maintenance of good order in the service." This additional requirement serves to tie the reasonableness

74. Various problem areas involving questioned orders will be discussed in Chapter III, infra. There is little doubt but that the commanders issuing such orders strongly considered them to be reasonable and necessary.

and necessity aspects to something more specific, and this must be done if the test is to furnish any practical guidelines for general use.

The Court has never defined the words, "morale, discipline, and usefulness" as they are used in the Martin test. The words are fairly well known in the military and the obvious impact of the Court's failure to define them is that the common understanding is intended. To define these terms would further limit the Martin test and would very probably cause more misunderstanding as to the limits of the test.⁷⁵ To provide any specific definition for the words would undoubtedly do an injustice to the test as it presently stands.

Any legal test of this type must be general in scope to provide for the countless factual situations that will arise in the future. At the same time, the test should be specific enough to prevent its misuse by one desiring a certain result.

The Martin test seems to achieve this result. At least it seems to come as close to it as is humanly possible. It must be admitted that the test is subject

75. The dictionary of U. S. Army Terms, Army Regs. No. 320-5 (January, 1961), does not contain a definition for any of the three words. Various dictionaries examined define the terms in varying ways.

to criticism as being too broad. However, there is no more precise yardstick that could be successfully utilized for this purpose.⁷⁶

One other aspect of this problem might be mentioned at this time. This aspect relates to the control of the military by a Court composed of civilians in the important area of legality of orders. Is the Court to be criticized for second-guessing the military commander on the reasonableness and necessity of orders to members of his command? The argument might be presented that the military commander is in a much better position to apply the Martin test than the members of the Court.

It would seem that such an argument is not well grounded. The idea of control over the military by civilians is not new in our country. As to the type of control by the judiciary that is involved in our present situation, it must be remembered that the Court may exercise some control over the military in almost any of the Court's decisions. This idea of judicial review is traditional to our way of life. Congress has provided in the UCMJ that only lawful orders need

76. Even an attempt to provide narrow, separate tests for varying factual situations must fail. To utilize a more specific test will destroy the usefulness of such test to unforeseen questioned orders.

be obeyed. The final decision as to whether a questioned order is lawful is properly in the hands of the judiciary rather than the commander who issued the order.

Other Factors Affecting Legality

From an examination of the previously discussed cases one might obtain the impression that whenever the legality of an order is in issue the Court will always apply either the military duty test or the Martin test in measuring the legality of the questioned order. Such an impression would be erroneous as the Court has applied different standards under certain specific factual categories. These categories should be considered at this time as the standards applied by the Court directly determined the legality or illegality of the questioned orders.

Orders That Violate Rights Guaranteed By UCMJ

A significant area in the field of legality of orders involves orders that violate rights guaranteed to a servicemember by the UCMJ. Problems in this area arise as to the admissibility of evidence obtained as a result of such orders as well as to the legality or illegality of the order.

One of the earlier cases illustrative of this area is United States v. Rosato⁷⁷ in which a superior officer ordered the accused, who was suspected of an offense, to submit samples of his handwriting. The commanding officer had been advised by the Staff Judge Advocate that such an order was authorized by paragraph 150b of the Manual. The accused refused to comply with the order and was subsequently convicted of willful disobedience of this order. The Court held that the order violated the accused's privilege against self-incrimination provided for in Article 31, UCMJ, and was therefore illegal. No mention was made of either the military duty test or the Martin test. In another case⁷⁸ the accused was ordered during his trial to read a sentence from the Manual for the purpose of voice identification. The Court found that this order violated the accused's privilege against self-incrimination guaranteed by Article 31, UCMJ. The Court noted that where the provisions of the Manual, such as paragraph 150b authorizing such orders, conflict with the UCMJ, the latter will prevail.

77. 3 USCMA 143, 11 CMR 143 (1953).

78. United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953).

A subsequent case⁷⁹ before the Court involved an order to an accused from his commanding officer to furnish a criminal investigator a urine specimen to be used to determine the presence or absence of narcotics. The accused refused and was subsequently convicted of willful disobedience of this order. The Court held that the order was in contravention of Article 31, UCMJ, and was therefore illegal. Judge Ferguson, in a concurring opinion, discussed at length his view of the legality of orders that require self-incrimination. Judge Latimer dissented on the ground that compelling an accused to furnish a urine specimen falls within that class of acts which are not in contravention of law since it requires only passive, rather than active, cooperation on the part of the accused.

In both the Greer and Jordan cases no mention was made of any specific test for legality. The Court was satisfied as to the illegality of the order from the fact that it violated Article 31, UCMJ. In United States v. Musguire⁸⁰ the accused, who was suspected of drunkenness and certain other offenses, was ordered by a medical officer to submit to a blood alcohol test.

79. United States v. Jordan, 7 USCMA 452, 22 CMR 242 (1957).

80. 9 USCMA 67, 25 CMR 329 (1958).

He refused and was subsequently convicted of willful disobedience of this order. The Court found that order to be illegal as it was in contravention of Article 31, UCMJ. In reaching the result that the order was illegal the Court referred to the military duty test for legality. In this connection the Court stated:

"The Manual for Courts-Martial, United States, 1951, points out that the 'lawful command' contemplated by Article 90 'must relate to military duty.' Paragraph 169b. It is evident that it is not the 'duty' of a person to assist in the production of evidence which may convict him of a crime."⁸¹

In considering the above cases it must be remembered that not all orders resulting in a degree of self-incrimination are illegal. In United States v. Smith⁸² a general regulation of Headquarters United States Army, Europe, required military personnel involved in motor vehicle accidents involving personal injury, death, or property damage of a specified amount to immediately

81. See United States v. Hill, 12 USCMA 9, 30 CMR 9 (1960), wherein the Court held that evidence resulting from a blood alcohol test may be admitted where the accused had been informed of his Article 31 rights by the medical officer, advised that he could be ordered to provide a blood sample for medical purposes, that the result of such test could not be used as evidence against him if he refused to consent to the taking of such a test, and thereafter the accused consented to the test. The Court noted that an order to provide a sample of blood for clinical purposes is valid.

82. 9 USCMA 240, 26 CMR 20 (1958).

submit reports of such accidents. The accused failed to comply with this regulation and was convicted under Article 92, UCMJ, for this offense. Appellate defense counsel contended that the regulation was violative of the accused's right against self-incrimination guaranteed by Article 31, UCMJ. The Court noted that pursuant to the agreement between the Allied Powers and the Federal Republic of Germany, the Allies had retained the right to license their own military operators of private motor vehicles, to require the registration thereof, and to provide for appropriate identification. The Court made a survey of various state statutes requiring such reports, decisions under these statutes, and subsequently concluded that the regulations did not contravene the driver's privilege against self-incrimination. Judge Ferguson, in a concurring opinion, held that in this case no Article 31 question was in issue. He further expressed the opinion that had the accused complied with the regulation the Government would not have been permitted to utilize the subject matter of the report in prosecuting the accused for other offenses which grew out of the accident itself.⁸³

83. The other Court members did not disagree with Judge Ferguson on this matter. It is submitted that such a report would be inadmissible, as violative of Article 31, UCMJ, upon a subsequent trial of an accused for negligent homicide arising out of such an accident.

Another aspect of this problem was involved in United States v. Haskins⁸⁴ where the accused custodian of Air Force Aid Society funds was ordered by his superior officer to turn over fund records, even though the accused was in confinement under charges of having embezzled from another fund and presumably had hidden the missing records. The Court held that a custodian of such a fund has a pre-existing legal duty, irrespective of the investigation, to surrender such records upon proper demand. Judge Ferguson dissented on the grounds that the accused had not been shown to have possession of the records prior to being compelled to surrender them.

This short discussion is certainly not intended to exhaust the field of legality of orders that compel some measure of self-incrimination.⁸⁵ Time does not permit a lengthy and detailed coverage of this area as a complete discussion could encompass a work as lengthy as the present one. The point to be brought out by referring to the above cases is that a body of law has been developed by the Court in this area. The cases

84. 11 USCMA 365, 29 CMR 181 (1960).

85. This subject is treated in greater detail in U. S. Dep't of Army, Pamphlet No. 27-172, Military Justice--Evidence, Chapter XIII, (1961).

reflect that the Court does not apply either the military duty test or the Martin test to these factual situations. If the Court finds the order contravenes Article 31, UCMJ, the order is illegal. Had the Court chose to apply the military duty test or the Martin test to these cases the results should be the same. As the Court noted in the Musguire case, it is not the duty of a servicemember to supply evidence to assist in his conviction. Under the Martin test compulsory self-incrimination would not seem reasonable or necessary to the military mission. The final result achieved by the Court is certainly just and proper. An order requiring compulsory self-incrimination in violation of Article 31, UCMJ, should certainly be an illegal order.

Order To Perform Duty In An Officers'

Open Mess .

An example of the Court's application of a standard designed to fit one specific factual situation is found in United States v. Robinson.⁸⁶ The facts of that case reflect that the accused, after volunteering, was assigned as a cook's helper at the Fort McNair Officers' Open Mess. He subsequently became dissatisfied with his duties and eventually refused to obey a direct order

86. 6 USCMA 347, 20 CMR 63 (1955).

from the mess officer to perform his duties. He was convicted of willful disobedience of this order.

Appellate defense counsel argued that assignment to this particular duty was illegal and that the order was therefore without validity. This argument was based on the federal statute⁸⁷ prohibiting an officer from using an enlisted man as a servant. After considering the various issues involved in the case the Court found that the proper test to be applied was that set forth by an Army Board of Review in the case of United States v. Semioli⁸⁸ and quoted that test as follows:

"The test to be applied in a case where the question of disobedience of an illegal order is involved, is not whether the work which the accused was ordered to do in an officers' mess was menial in nature, such as KP, clerical work or janitor work, but rather whether these services were to be performed in the capacity of a private servant to accomplish a private purpose, or in the capacity of a soldier, i.e., to accomplish a necessary military purpose."⁸⁹

The Court then found that the messing of officers at the Fort McNair Officers' Open Mess was a military necessity, rather than a personal service to a particular group of officers, and that the questioned order

87. This provision of law is now found in 10 U.S.C. §§ 3639 (1958).

88. CM 280115, 53 BR 65 (1945).

89. 6 USCMA at 353, 20 CMR at 69.

was legal.⁹⁰ The Court made no mention of either the military duty test or the Martin test and applied a different test for this specific type of duty. The language of the test itself would seem to limit its use in measuring the legality of orders to situations involving an Officers' Open Mess. However, there is no reason why the same rationale should not be applied to similar orders such as orders to cut grass, pick up debris, and like orders. The principle of the Robinson case would be equally applicable. That is, the nature of the work is really not as important as the purpose for which the work is to be accomplished. If an order of this type is given to accomplish a necessary military purpose, the order is legal even though obedience may require the most menial type of labor. This case also illustrates that the Court is always interested in the military necessity behind the order.

Order Contrary To Military Usage

In discussing the legality of orders, Winthrop states that a serviceman may lawfully disobey an illegal order. He further states that such an order must

90. For a discussion of an earlier view that a soldier could not legally be ordered to perform duties in an officers' open mess, see CM 249667, Shields, 32 BR 149 (1944).

be clearly repugnant to some specific statute, to the law or usage of the military service, or to the general law of the land.⁹¹ He then cites as examples of such orders:

"An order given by a company commander to a soldier to have his washing done by a particular laundress. G.C.M.O. 87, Dept. of the East, 1871: An order requiring a soldier to assist in building a private stable for an officer. G.C.M.O. 130, Dept. of Dakota, 1879: An order requiring a soldier to act as an officer's servant. Digest, 28: An order forbidding a soldier to contract marriage. Id.: An order requiring a post band to play in a neighboring town for the pleasure of the citizens. . . . 'A superior officer has no right to take advantage of his military rank, to give a command which does not relate to military duty or usages, or which has as its sole object the attainment of some private end. . . . Manual 19. In an early case in our service, that of Col. Thos. Butler, (New Orleans, 1804) the officer refused to obey, as illegal, an order to crop his hair. He was tried and sentenced to be reprimanded; and, on again disobeying, was rearrested. Some seventy-five persons, civil and military, headed by Maj. Gen Jackson, addressed to Congress a formal protest against his treatment, and asked that he be relieved from 'persecution.' This appears to have been the end of the matter. Am. S. P. Mil Af., vol 1, P. 173-4."⁹²

It would seem that the legal tests previously discussed would furnish the appropriate guidelines for testing the legality of the orders contained in the

91. Winthrop, Military Law and Precedents 575 (2d ed. reprint 1920).

92. Ibid.

above quoted material. However, the Court of Military Appeals has apparently never ruled one way or the other on the question of whether an order may be illegal because it is contrary to military usage. This argument was advanced to the Court in the case of United States v. Vansant.⁹³ In that case the accused was found sleeping at night in the rear area of his unit in Korea. He was ordered by a warrant officer to proceed to the forward area to join his platoon. The accused refused to obey the order and was subsequently convicted of willful disobedience. The evidence at the trial reflected that there was a well defined trail from the rear area to the forward area but it had not been traveled alone at night and the usual procedure after dark was to send not less than two men on this trail.

In discussing the defense contention that the order should be held illegal as contrary to military usage the Court held that the evidence failed to establish such a usage, and even assuming that it did, the accused did not refuse to obey on that basis. The Court further noted that even if it was assumed a standard procedure had been adopted by the company, such a

93. 3 USCMA 30, 11 CMR 30 (1953).

generally accepted practice could be modified by order of the company commander.

It seems highly unlikely that an order would be illegal solely because it was in contravention of military usage. However, since the Court has not expressly so stated the concept of "military usage" should be noted.

Lack Of Authority By Person Issuing Order

In the event the person issuing the order lacks the necessary authority to direct the action required by the order, it is obvious that the order is illegal.⁹⁴ This situation has frequently arisen when an officer ordered his subordinate to do something which would

94. It might be well to mention at this point the validity of a defense to charges that is based upon obedience to orders. This situation may arise when a subordinate is ordered by his superior to do an act which would constitute an offense. It may be generally stated that an act done in obedience to orders is excusable when the order is apparently legal and the servicemember does not know it is illegal. Normally, if an order is apparently regular and lawful on its face, the subordinate need not go behind it. However, if the order is obviously illegal the subordinate may not fall back on obedience to a superior's orders as a defense to his criminal actions. A perfect example of this principle is found in ACM 7321, Kinder, 14 CMR 742 (1954), where the accused murdered a civilian on the orders of his superior officer. The Air Force Board of Review, in discussing the defense of obedience to orders, found that the order was so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to put the accused on note as to its illegality.

amount to punishment that the officer had no authority to impose. It is often necessary to examine the factual situation very closely to ascertain just exactly what was to be accomplished by the order.

In one of the more significant cases in this field⁹⁵ an accused prisoner had intentionally destroyed certain stockade records. For this misconduct he was assessed four hours of extra labor per day for seven days by the confinement officer. The assistant confinement officer recommended that the accused be required to perform additional close order drill as a corrective measure for his lack of discipline. This recommendation was adopted by the confinement officer. The accused subsequently refused to perform this close order drill even after being given a direct order to do so by the assistant confinement officer. The particular drill ordered was not a part of the regular compound drill session in which all prisoners participated and it was to be carried out in addition to the usual close order drill.

The accused was subsequently convicted of willful disobedience of the order of the assistant confinement officer. In deciding the case, the Court of Military

⁹⁵. United States v. Trani, 1 USCMA 293, 3 CMR 27 (1952).

Appeals referred to the Manual provision that an order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused.⁹⁶ The Court then noted that in the event the close order drill was intended as punishment the order would be illegal due to the Manual provision prohibiting imposing drill and other military duties as punishment.⁹⁷ After reviewing the facts of the case the Court found that there was no showing that the order was imposed as punishment and that an order to perform close order drill for training under the existing circumstances was a lawful one.

The case of United States v. Roadcloud⁹⁸ contained many similarities to the above case. However, the facts there indicated that the drill ordered by the accused prisoner's superior officer was intended as punishment rather than training. The board of review therefore held the order to be illegal as being beyond the command authority of the officer issuing the order.

The Court of Military Appeals considered a somewhat analogous situation in United States v. Bayhand.⁹⁹

96. Id. at 295, 3 CMR at 29.

97. Par. 115, MCM (1949).

98. CM 356552, 6 CMR 384 (1952). Petition for review denied, 7 CMR 84 (1952).

99. 6 USCMA 762, 21 CMR 84 (1956).

In this case, the accused, an unsentenced prisoner, was working with and performing the same duties performed by sentenced prisoners. He subsequently refused to obey an order connected with his assigned duties and was convicted of willful disobedience of orders issued by both a superior officer and a non-commissioned officer.

The Court found from the evidence that compliance with the orders would have required the accused to perform the same work, under the same conditions, in the same uniform, and without distinction or difference from other prisoners who were being punished as sentenced prisoners. The Court then found that orders requiring the accused to perform such duties would amount to punishment and would violate Article 13, UCMJ, which prohibits such punishment prior to trial. The orders were therefore held to be illegal as being beyond the authority of those issuing the orders.¹⁰⁰

An officer issuing an order may lack the authority to obligate Government funds necessary to carry out the order. In United States v. Marsh¹⁰¹ a soldier in an AWOL

100. See also CM 394689, McCarthy, 23 CMR 561 (1957) wherein an order requiring what amounted to confinement in a company guard room was held to amount to punishment and was thus illegal.

101. 3 USCMA 48, 11 CMR 48 (1953).

status surrendered at an Army installation other than his own station. The installation confinement officer purported to give him an order directing that he travel at Government expense to his home station. The Court noted in its opinion that the confinement officer lacked the authority to issue an order in his own name involving travel allowances as he had no authority to commit federal funds for this purpose.

Subsequent to the Marsh case there followed a series of cases in which travel orders under similar circumstances were found by the Court to be illegal.¹⁰² In these cases the Court pointed out that authority to issue travel orders is prescribed by law and regulations and that officers not authorized by such law or regulations to issue travel orders were without authority to issue such orders.

Impossibility Of Compliance

Suppose an officer issues what appears to be a perfectly valid order but the officer has reason to know that the accused will be unable to comply with

102. United States v. Young, 8 USCMA 70, 24 CMR 70 (1957); United States v. Long, 8 USCMA 93, 23 CMR 317 (1957); and United States v. Matthews, 8 USCMA 94, 23 CMR 318 (1957). All three cases involve travel orders issued by a warrant officer in his own name rather than in a representative capacity in behalf of a superior officer.

the order. It would seem that regardless of whether the military duty test or the Martin test is applied the order would be illegal. A case on this specific point has apparently never been before the Court or the service boards of review. A case that was somewhat analogous was before an Air Force board of review in United States v. Gordon.¹⁰³ The facts indicate that the accused was living off base without the necessary permission required by his unit. His commanding officer saw him at 1510 hours on a certain day and gave him an order to move himself, clothing and baggage back to his quarters on base, approximately twenty-four miles away, by 2400 hours. The accused was without funds or any means whatever to accomplish the move and so advised his commanding officer. The accused subsequently failed to obey the order and was convicted of this offense.

The board of review, in setting aside the findings of guilty, noted that compliance with the order within the limited time depended on uncertain factors such as the ability of the accused to hitchhike the distance, or borrow money to pay for transportation, or borrow a vehicle. The board noted that an order for performance of a military duty cannot be predicated on such uncertainties,

103. ACM S-2130, 3 CMR 603 (1952).

when they are within the knowledge of the officer issuing the order. The board further stated:

"Situations can be envisioned in which the order in this case could be proper and valid, no matter what hardships the recipient had to endure, but under the circumstances of this case, the Board considers Captain Senkbeils' order (insomuch as it directed the trip to Liverpool) illegal for the reason that obedience necessitated expenditures of accused's personal funds, which expenditure the officer had no right to demand in this situation. Noncompliance was due to accused's lack of funds, not to dereliction on his part."¹⁰⁴

This decision should certainly not be taken as authority for the proposition that a soldier cannot be given a lawful order if the order requires him to expend his personal funds. The board pointed out that an order to a service member to have his duty uniform cleaned or to get a needed haircut may very well be legal orders.

In the event the officer issuing the order is not aware that his subordinate lacks funds necessary to comply with an order the order itself would be legal, but an affirmative defense may very well be placed into issue. Such a situation arose in United States v. Pinkston.¹⁰⁵

¹⁰⁴. Id. at 606.

¹⁰⁵. 6 USCMA 700, 21 CMR 22 (1956).

The evidence reflected that as a result of an inspection the accused was ordered to purchase two tropical uniforms he was required to have but which he had not yet obtained. He was ordered to procure these uniforms within three days and to have available at that time evidence as to the circumstances of the purchase of the uniforms.

The accused testified at his trial for disobeying the order that it had been impossible for him to purchase the uniforms because of his poor financial condition. He attempted to obtain an advance in pay and to borrow money but had been unsuccessful in each instance. The Court found that impossibility due to financial incapacity may constitute a valid defense and the accused's conviction was reversed due to the failure of the law officer to so instruct.¹⁰⁶

Other MCM Proscriptions

There is one other provision contained in the Manual that should be considered with relation to the legality of orders. That provision is contained in the

106. A physical inability to comply with an order may also be an affirmative defense. *United States v. Heims*, 3 USCMA 418, 12 CMR 194 (1953).

discussion of Article 90, UCMJ, and provides as follows:

"Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."¹⁰⁷

The first proscription contained in the above provision was found to have been violated in United States v. Parker.¹⁰⁸ The accused airman had been involved in an automobile accident with an officer from his base. The officer ordered the accused to report to the officer's place of duty the following morning. The accused failed to report to the officer as ordered and was subsequently convicted of a failure to obey the order of his superior officer. The Air Force Board of Review found that there was no legitimate military need for the order¹⁰⁹ and that the palpable import of the order was to have the accused present to discuss his liability for damaging the officer's automobile. The board held that an order given for such purpose was one given for the attainment of a private end and was accordingly illegal.

107. Par. 169b, MCM (1951).
108. ACM S-10012, 18 CMR 559 (1954).
109. The officer was not the accused's commanding officer nor one who would normally exercise discipline over the accused.

The principle contained in the latter proscription of the above Manual provision has been recognized for many years by the services. An early case illustrative of this was United States v. Tracz.¹¹⁰ The accused, a prisoner, had refused to obey an order of his stockade sergeant. The confinement officer repeated the order to the accused who again refused to obey. At the trial of the accused for disobedience of the second order, the confinement officer testified that he gave the accused this particular order because the previous disobedience was of a minor nature when compared to the disobedience of a commissioned officer. The accused was convicted of willful disobedience of the confinement officer's order. The Army Board of Review found the order was given for the sole purpose of increasing the penalty for an offense which the accused was expected to commit and that the order was therefore illegal.¹¹¹

These two proscriptions have become so firmly entrenched in military law over the years that cases involving them are not very likely to arise at this time.

110. CM 219946, 12 BR 317 (1941).

111. This case must be distinguished from cases in which the purpose of the order was to obtain obedience and not merely to expose the accused to a greater punishment. In this connection, see CM 281923, Hosford, 54 BR 261 (1945).

Summary

It may be said, in summary, that the law has been defined in certain limited areas involving legality of orders. The cases have shown us the principles to be applied in cases involving orders given for the attainment of private ends, orders given solely for the purpose of increasing the penalty for an offense which the accused is expected to commit, orders to perform duties in Officers' Open Messes, orders given to accomplish unlawful punishment, orders that violate rights guaranteed by the UCMJ, orders that place unreasonable restrictions on an individual's freedom of speech, orders relative to the disposition of personal property, orders requiring the reporting of personal indebtedness, orders prohibiting the drinking of intoxicants, and orders restricting the right of marriage.

As to areas that have not yet been before the Court of Military Appeals we know that the Court will apply certain legal tests to measure the legality of questioned orders. We have learned that all three of the Judges are in agreement on the tests to be applied even though they may reach different conclusions resulting from the application of such tests as in the Wheeler case.

The cases indicate that the Court has not always been uniform as to what specific test should be applied to a given factual situation. In certain cases the Court has applied the test set forth in the Manual. This test requires that to be legal an order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused.

In another group of cases relating to orders that restrict personal rights the Court applied the Martin test. This test requires that to be legal an order must be reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and must be directly connected with the maintenance of good order in the services.

In the application of this latter test we observed in the Milldebrandt and Wilson cases that the Court will look closely to ascertain whether the order was necessary to the successful pursuit of a military mission. The cases examined further reflect that the Court is quite interested in whether the particular order was reasonable under the existing circumstances or whether it appeared to be arbitrary and capricious.

It was also noted in the Wysong and Milldebrandt cases that orders restricting personal rights of individuals must be narrowly and tightly drawn and so worded as to be specific, definite and certain. In other words, when an order restricts a personal right of a serviceman it must be narrow in scope so that it will not be any more of a curtailment of personal rights than is necessary to accomplish the military need which required the order in the first place.

The Court has applied other tests than the two previously mentioned to specific factual situations. It has been pointed out that a somewhat different test was applied in the Robinson case dealing with orders to perform duties in officers' messes. The series of cases relative to orders that violate the right against self-incrimination guaranteed by the UCMJ reveal that such a violation in itself will render the order illegal. In the event the Court finds that the superior lacked the necessary authority to issue the order under law or regulations the order will be found to be illegal. Cases in this category would include orders requiring the obligation of funds when the superior had no authority to obligate such funds and orders given to effect a punishment that the superior had no authority to impose.

However, the law as to these categories of cases has been fairly well settled by the Court. Our main area of concern at this time should be the recent development of the law as it relates to orders that more directly restrict personal rights of servicemembers.

It might be asked just how is one to predict whether the Court will apply the military duty test or the Martin test to an order of that type. An examination of the cases decided by the Court reveals that in the area of orders that apply more specifically to official duty matters, as distinguished from personal rights, the Court has generally applied the military duty test. In the area of orders that restrict personal rights the Court has applied the Martin test. It is realized that it is not always possible to draw a clear-cut line between orders that affect official duty matters and those that affect personal rights. An example of this may be found in the order involved in the Milldebrandt case to report on personal indebtedness matters or the Voorhees case orders that restricted the use of the accused's writings dealing with Army subjects. These types of orders go both to official and personal matters.

It is clear, however, that the recent trend of the Court is to apply the Martin test in the event the questioned order involves personal rights of the accused. As to orders that pertain to strictly official matters alone there is no indication that the Court will depart from the military duty test. For example, should the Court consider an order to a soldier to clean an area of the supply room it is hardly likely that the Court would look to see if such an order was "reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and was directly connected with the maintenance of good order in the services." Such a test is designed for orders that affect an individual's personal rights or affairs. As to an ordinary order to perform a military duty the Court would look only to see if the order "related to a military duty and was one which the superior was authorized to give under the circumstances." This has been shown by the Court's application of the military duty test subsequent to the Martin case.

It is submitted that these two tests may not be as different as they may first appear. The real criteria of the Martin test appears to consist of two main elements. These are "reasonableness" and "military necessity."

The language of the test states that "the order must be reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and must be directly connected with the maintenance of good order in the services." The cases discussed in this Chapter have indicated that the present trend of the Court is to center its inquiry upon the "reasonableness" and "military necessity" aspects of such orders.

This actually appears to be an extension of the military duty test. This is indicated by looking at the two basic provisions of this test. The first is that the order relate to a military duty. In the application of the Martin test it is generally true that the order must relate to a military duty in some way or it will not be made reasonably necessary by the needs of the service. The second portion of the military duty test which requires that the officer be authorized under the circumstances to give the order may certainly be said to be included within the Martin test.

In the application of the military duty test, reasonableness and military necessity are certainly to be considered. However, the reasonableness and military necessity aspects of orders that restrict

personal rights will be examined much more closely by the Court in the application of the Martin test. It is not likely that the Court would concern itself too much with the overall military necessity of an order to a private to assist in mowing the yard in the company area. On the other hand, the military necessity of an order to that private to report all of his personal financial transactions to his commander will be very closely examined.

What is reasonable and necessary to the military mission may very well be different in a critical overseas area and an installation located within the continental United States. This was clearly demonstrated by the Court's language in the Yunque-Burgos,¹¹² Martin,¹¹³ and Wheeler¹¹⁴ cases. It is equally clear from the Court's language in these cases that the standards of reasonableness and military necessity may be different in combat operations during war when a commander may require broader authority than during normal peace time conditions.

112. See Chapter I, p. 7, supra.

113. See Chapter I, p. 6, supra.

114. See Chapter II, p. 44, supra.

With these general principles in mind let us now turn to some current problem areas and ascertain if these principles furnish adequate guidance in these particular areas.

CHAPTER III

CURRENT PROBLEM AREAS

One of the most interesting aspects of a study in the field of legality of orders is that there are currently several problem areas that should receive consideration. Inasmuch as the members of the Court of Military Appeals disagree among themselves as to the result to be obtained from applying a commonly acceptable test to a specific order,¹¹⁵ it is to be expected that judge advocates will likewise disagree as to the legality or illegality of certain orders. It is submitted, however, that the rationale of the cases previously discussed do resolve many of these questionable areas.

Orders Relating To Privately Owned Vehicles

One of the more controversial areas relative to this subject involves the limits upon a commander's authority in the control of privately owned vehicles.

In General

It has long been recognized that a post commander may require the operator of a motor vehicle on the military installation to carry insurance coverage on

115. United States v. Wheeler, supra.

his vehicle.¹¹⁶ However, the opinion has been expressed that a post commander may not legally require that liability insurance be carried on an automobile owned and operated off post by a serviceman.¹¹⁷ Further, that a post commander may not require a servicemember to have liability insurance coverage off post as a condition precedent to the operation of his motor vehicle on post.¹¹⁸

With regard to the ownership of vehicles, the opinion has been expressed that a post commander has no authority to require personnel of his command to obtain permission to purchase or own a motor vehicle, or to interfere with the legitimate ownership thereof.¹¹⁹ A post commander may not restrict the use of privately owned vehicles by military personnel off the post.¹²⁰ Further, a post commander may not legally require his prior approval for the loan of a privately owned vehicle.¹²¹ The opinion has further been expressed that a post commander may not require that all privately

116. JAG 004.69 (May 18, 1932).

117. Ibid.

118. JAGA 1954/6913 (Aug. 5, 1954); id. 1954/7432 (Aug. 27, 1954); JAG 220.46 (Sept. 9, 1931).

119. JAGA 1952/1133 (Feb. 4, 1952); id. 1953/6701 (Sept. 1, 1953).

120. JAGA 1952/5707 (July 3, 1952).

121. JAGA 1957/7417 (Sept. 20, 1957).

owned motor vehicles operated by personnel of his command within the geographical limits of the State in which the post is located be registered with the Provost Marshal of the post.¹²² The Judge Advocate General of the Air Force has stated that control of private vehicles off base is a matter for civil authorities.¹²³

The operation of privately owned vehicles on post is a different matter and the post commander may establish reasonable requirements in that regard.¹²⁴ In addition to the requirement of insurance coverage already mentioned, he may specify safety requirements and identification procedures.¹²⁵ The post commander may require the registration of such vehicles,¹²⁶ mechanical inspection,¹²⁷ and an operator's license.¹²⁸ He may not condition the privilege of operating a vehicle on post on the servicemember's rank or pay.¹²⁹

122. JAGA 1952/9045 (Nov. 20, 1952); id. 1954/5482 (June 11, 1954).

123. 1 Dig. Ops. JAG, Post, Bases, etc., §§ 29.5 (Oct. 22, 1951).

124. The "legislative authority" of a post commander over the installation will not be discussed in detail. A complete study in this particular field would be beyond the scope of this text.

125. JAG 004.69, supra; JAGA 1952/1133, supra.

126. JAGA 1952/5213 (June 19, 1952).

127. JAGA 1956/8214 (Nov. 9, 1956).

128. JAGA 1957/7417 (Sept. 20, 1957).

129. JAG 537.4 (May 13, 1933).

Legal questions concerning privately owned motor vehicles continuously arise even at the present time. In an effort to curb the practice of selling automobiles transported by service personnel from overseas posts to the United States at Government expense, a recent proposal was made that prior to shipping an automobile from a foreign post to the United States the service-member be required to enter into an agreement to reimburse the Government for the cost of transportation in the event the vehicle was disposed of within one year from the date of purchase. The opinion was expressed that such action would be legally objectionable in that the requirement to be imposed bears no reasonable relationship to the privilege granted and constitutes an unjustifiable interference with the inherent legal right to use and enjoy private property.¹³⁰

Although most of the above opinions were expressed prior to the development of the law in the field of legality of orders by the Court of Military Appeals, it would appear that these opinions are generally in conformance with the principles contained in the opinions of the Court.

130. JAGA 1960/5198 (Dec. 16, 1960). See also JAGA 1961/3416 (Jan. 6, 1961) to same effect.

Control Of Off-Post Traffic In
Overseas Commands

A very real problem area today is that of the desire of commanders to control off-post traffic in overseas commands. It is a problem that has continued to exist among all of the services for sometime now, and it is a problem for which no solution acceptable to the commanders concerned seems to exist.¹³¹

The opinion was first expressed in 1954 that commanders had no authority to regulate speed limits of privately owned vehicles on the public highways of Germany.¹³² That opinion was reaffirmed in 1955 and 1957.¹³³ The same opinion was also expressed with regard to France.¹³⁴

The effect of these opinions was felt by some to be undesirable in Germany and as a result the question has been raised anew every few years. One point often mentioned in the requests for a reappraisal is that many German highways have no speed limits. It can

131. See Memorandum of Business and Minutes of Interservice Legal Committee, 18th Session, May 22-24, 1961, pages 62-66.

132. JAGA 1954/8196 (Oct. 11, 1954).

133. JAGA 1955/3672 (April 13, 1955); *id.* 1957/5798 (July 5, 1957); *id.* 1958/5147 (July 10, 1958).

134. JAGA 1955/9288 (Nov. 14, 1955).

readily be imagined that the lack of speed limits might encourage young and immature service personnel to drive at an excessive speed with resulting personal injuries or damages to property. At the request of the interested overseas commanders the above opinions were reconsidered in 1961 with specific emphasis placed on the three following questions:

1. May an individual be tried under UCMJ for the violation of a foreign traffic law?

2. May an appropriate commander, stationed in a foreign country, promulgate traffic regulations (either by adoption of that country's law or otherwise), the violation of which would constitute a triable offense under Article 92, UCMJ?

3. May an appropriate commander, stationed in a foreign country, control the driving habits of the personnel of his command, through such administrative actions as the suspension or revocation of a driver's license or vehicle registration?

The above questions were answered in conformance to the principles previously announced in earlier opinions.¹³⁵ In answering the above questions, recognition was given to the fact that the Commanding General, United States Army, Europe, controls to some extent the use of private vehicles by licensing both the vehicles and the operators thereof in accordance

135. JAGA 1961/4821 (Aug. 18, 1961).

with the existing agreement between the allied powers and Germany.

In response to the first question posed above, the opinion noted that the violation of a foreign traffic law is not, per se, an offense under the UCMJ. Further, that should the conduct involved amount to the violation of a specific article of the UCMJ, such as that proscribing drunken or reckless driving, or constitute disorders or neglects to the prejudice of good order and discipline in the armed forces or conduct of a nature to bring discredit upon the armed forces, the offense would be triable.¹³⁶

With regard to the second question presented, the opinion concluded that the violation of such regulations would not constitute a triable offense under Article 92, UCMJ. Further, that there is no justifiable distinction to be drawn between general regulations which adopt foreign law and those which are original with the commander concerned.¹³⁷ The opinion emphasized

136. Citing ACM 5636, Hughes, 7 CMR 803 (1953); ACM S-5504, Wolverton, 10 CMR 641 (1953); ACM 8289, Peterson, 16 CMR 565 (1954); United States v. Grosso, 7 USCMA 566, 23 CMR 30 (1957); JAGJ 1956/1730 (Feb. 15, 1956); JAGM 1956/8622 (Nov. 23, 1956); JAGJ 1957/578 (Oct. 2, 1957); and JAGJ 1961/8323 (April 23, 1961).

137. Citing JAGJ 1957/578, supra, and JAGA 1961/8323, supra.

the rationale of the Court in the Martin, Voorhees, and Milldebrandt cases, in arriving at a conclusion concerning the instant problem.

The opinion recognizes that a great deal of control over privately owned vehicles has come about due to the fact that the commander concerned has the responsibility of licensing privately owned vehicles of military personnel in Germany. It concludes, however, that the authority to license does not also carry with it the authority to regulate the speed of off-post traffic in the absence of a grant of such authority by the host country.

As to the last question posed, the opinion was expressed that while the commander could not prescribe speed limits as such, he could prescribe reasonable standards to be employed in determining whether an individual's operators license should be withdrawn or suspended and that such standards could properly include operating a vehicle at such speed as to be dangerous to the driver or the public under the circumstances of the particular case.

Now that we have a rather detailed opinion expressed on this matter, let us examine this opinion in light of the guidelines furnished by the Court of Military

Appeals in cases that have been before that Court. Does the opinion expressed above accurately state the present law in this field?

Probably very few military lawyers would contend that under normal circumstances a military commander may lawfully regulate the speed of privately owned vehicles driven by military personnel outside of military reservations in the United States. The generally accepted position is that such regulation is within the province of agencies other than the military. Such a result seems to not only embody good legal principles but includes reasonableness as well. The fact that an individual is in the military service should certainly not mean that all of his conduct and personal affairs both on and off-duty are subject to regulation by the military.

It might be well to consider first whether the Court would apply the military duty test or the Martin test to general orders controlling off-post traffic. It would seem that since this type of activity relates more to the unofficial aspect of a serviceman's life that the Court would apply the Martin test. A serviceman's actions in taking his family for a drive on Sunday afternoon hardly relates directly to the type

of military duty referred to in the military duty test.

In the application of the Martin test one of the first and most important elements that the Court will examine is the military necessity for such off-post control of traffic. It would seem that this would be an exceedingly difficult hurdle for the proponents of such control to overcome. There may very well be merit in the argument that accidents involving military personnel will be decreased if the commander is allowed to impose speed limits where none now exist.¹³⁸ However, the same argument exists with relation to the control of off-post traffic within the United States.

In applying the specific language of the Martin test we might ask whether this off-post control of traffic is reasonably necessary to safeguard and protect the morale of the members of the command. It would seem exceedingly unlikely that the morale of our personnel will suffer because speed limits are not imposed. This would bring us to the question of whether

138. These speed limits would, of course, not be applicable to the German populace. Therefore, an argument could be made that a servicemember driving under a rigid speed limit might be placed in the dangerous position of slowing down faster moving vehicles operating under no such limit. In other words, he might be more likely to become involved in an accident by driving too slowly in fast moving traffic.

such off-post control would safeguard and protect the discipline of the members of the command. This must also be answered in the negative. It would strain reason and experience too far to say that discipline will suffer because the individual serviceman is free of military control when driving his privately owned vehicle off the military installation. In the event the servicemember does commit an offense under the UCMJ, such as drunken or reckless driving, he would be subject to the disciplinary powers of the military.

If the latter two questions are to be answered in the negative, we must then consider whether such control is reasonably necessary to safeguard and protect the usefulness of the members of the command. If some servicemembers are spared injury, or even death, by this control then certainly their usefulness has been protected. However, the Court would obviously look to something more than the protection of a relatively small number of servicemen. If not, then this argument could also be used to justify such control within the United States.

Turning to the last requirement of the Martin test, we are faced with the question of whether such control is directly connected with the maintenance of good

order in the services. Reason again dictates that good order in the services will not suffer as a result of the lack of such control. It would therefore appear that the series of expressed opinions previously cited correctly state the present law as to this factual situation.

It could well be, however, that exceptional circumstances would provide a legal basis for the control of off-post traffic. Suppose, for example, that the traffic conduct of United States service personnel had become so notorious that the existing situation was adversely affecting our good relations with Germany. Certainly, the continuance of excellent relations between this country and Germany are of the utmost importance to our military mission in Europe during these critical times. It can be appreciated that such a situation would well satisfy the reasonable and military necessity requirements of the Martin test. Under these circumstances it could likewise be appreciated that such control by the military would protect the morale, discipline and usefulness of our servicemen. If relations between our military members and the German populace had deteriorated to this extent, it may readily be seen that drastic action by the military

commander would be necessary to prevent the type of disorders involving United States service personnel referred to in the Martin case.¹³⁹ As we have already observed, the cases clearly indicate that a commander in a tense overseas area may very well have broader authority in the issuance of orders restricting personal rights than his counterpart in the United States.¹⁴⁰

Another possible basis for this type of control by the military might be found if it could be shown that the accident rates on the highways were so unusually high that the morale of servicemembers was directly affected. It might be shown that the actual usefulness of a substantial number of servicemembers was curtailed due to injuries received on these highways. It may be appreciated that a marked deterioration of morale or a substantial number of hospitalized personnel could affect the Army's military mission. In the event such factors could be affirmatively established, it is submitted that the commander would

139. Note the language used by the Court in that opinion as quoted in Chapter I, p. 6, supra.

140. It is possible for strong arguments to be made as to such control of traffic on highways that have particular military significance, such as the highway between West Germany and Berlin. The existing military situation might necessitate direct control by the commander.

have a perfectly legal basis for issuing orders controlling off-post traffic.

It must be conceded, however, that the types of factual situations referred to above are hardly likely to be in existence in Germany at the present time. Another weakness in espousing this cause is that in the event our service personnel were guilty of such notorious traffic conduct, they would undoubtedly be subject to disciplinary action under the UCMJ without the necessity for the type of off-post control desired by the military commander in Europe.

It is therefore submitted that, in the absence of an affirmative showing of factors not now known to exist, the cited opinions correctly state the law as to all three of the presented questions.

Orders Imposing Restrictions On Type Of
Civilian Clothing That May Be Worn
Off-Duty

The language of the Court in United States v. Yunque-Burgos¹⁴¹ indicates that an order requiring military personnel in an overseas area to wear a military uniform even while in an off-duty status may be

141. See Chapter I, p. 7, supra.

entirely legal and proper. But what of an order that permits the wearing of civilian clothing off-duty but requires that a coat and tie be worn with civilian clothing when military personnel go into civilian communities within the overseas area?

While no written opinions could be located on this matter, it would appear that this may be a real problem area. Such an order is not too likely to come before the Court of Military Appeals as a violation of such order would normally be tried by a summary or special court-martial, if tried at all. However, this would certainly not justify the existence of such an order in the event it fails to meet the tests for legality as established by the Court.

It seems logical that in testing the legality of this type of order the Court would apply the Martin test. The appropriateness of off-duty civilian attire would normally be more in the nature of a personal matter than official military duty.

The proponents of the legality of such an order would have fewer legal arguments on their behalf than the proponents of the control of off-post traffic. It could hardly be seriously contended that the coat and tie requirement is reasonably necessary to safeguard

the morale, discipline, and usefulness of the members of the command. It would be even more difficult to earnestly contend that such a requirement is directly connected with the maintenance of good order in the service.

It can be seen where it would be advantageous to the military for all American military personnel to wear a coat and tie when off-post whether in an overseas area or in the United States. An excellent appearance by such personnel while in the civilian community would very probably enhance the reputation of the service.

However, this is not the test established for the legality of an order. And when the Court established test is applied to such an order it must fall as being outside the province of the commander. As Chief Judge Quinn noted in the Milldebrandt case:

"Persons in the military service are neither puppets nor robots. They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial and punishment by court-martial is concerned. In that area they are human beings endowed with legal and personal rights which are not subject to military order. Congress left no room for doubt about that. It did not say that the violation of any order was punishable by court-martial, but only that the violation of a lawful order was. . . . The legality of an order is not determined solely by its source. Consideration

must also be given to its content. If an order imposes a limitation on a personal right, it must appear that it is 'reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services.' . . . In cases of this kind, we must look closely to the connection between the personal act required by the order, and the needs of the military service. . . . As the principal opinion points out, the order here is completely unrelated to any requirement of the military service. On that basis it is not a 'lawful order' within the meaning of Article 92 of the Code."

It is submitted that such an order would be illegal under the principles contained in the recent cases pertaining to orders that restrict personal rights. There should be little doubt that the Court would strike down any such attempt to so regulate the civilian attire of off-duty personnel.¹⁴²

Order Imposing Curfew

General orders establishing a curfew are not unknown to the military. Is it an unreasonable invasion

142. There may be a legitimate basis for the commander to impose reasonable requirements as to civilian dress in certain circumstances. For example, if the dress of our servicemembers was scandalous and offensive to the civilian populace, then certainly the commander could correct this situation. In any application of the Martin test one becomes involved in a question of degree and reasonableness. The needs of the service must be balanced against the restriction of an individual's personal right. However, the trend of the Court in this field should leave little doubt as to the illegality of the coat and tie requirement referred to above.

of a private right to require all military personnel who are not on duty to be in their quarters by a certain hour?

Curfews exist in civilian communities in the United States. However, such a curfew is normally effective only as to minors and not adults. A serious legal question might very well arise if a city ordinance were enacted which imposed a midnight curfew on adults in the absence of some extreme emergency situation. However, such an ordinance is not likely to^{be} enacted as the city's governing body must look forward to re-election. But what of such a curfew for adults in the military during the present time? Is this an unreasonable restriction on a private right?

Naturally it would be necessary to look at the specific factual situation involved to answer this question accurately. In a combat area it seems obvious without further discussion that a reasonable curfew order would be legal.

But what of an order at this time in Germany, for example, that requires all military personnel to be in their quarters prior to 2400 hours? Would such an order be legal under the principles announced by the Court of Military Appeals?

The Court would certainly note the existing time of world tension and the need for an alert combat force.¹⁴³ The Court has never been reluctant to take notice of such factors.

The Court would undoubtedly recognize the need for this type of control over military personnel in such a tense situation as presently exists in Germany. Such an order could very well be found to be reasonably necessary to the military mission there. Existing circumstances clearly reflect that the commander must know of the whereabouts of his personnel and must be able to alert his subordinates on very short notice. With the close proximity of a potential enemy such an order could very well be said to be reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and directly connected with the maintenance of good order in the service.

Order To Shave Beard Worn For Religious

Reasons

A question was recently presented as to whether a servicemember who professed to be a member of the

143. United States v. Yunque-Burgos, supra.

Moslem faith could legally be ordered to shave a beard the servicemember contended was necessary to his religious faith. The factual situation reflected that the individual soldier, who had been inducted into the Army, was convicted of the willful disobedience of his commanding officer's order to shave his beard. The soldier professed to be a member of the Moslem faith and that his faith required that he wear the beard. There was evidence indicating that the wearing of a beard by a Moslem is in commemoration of the Holy Prophet and is a form of worship practiced by true members of the Moslem faith. There were also facts which indicated that the particular soldier involved wore his beard due to a personal desire on his part rather than due to any religious duty.

The opinion was expressed that as a matter of law the order to shave the beard was legal.¹⁴⁴ The opinion cited the military duty test for legality of orders as the basis for the conclusion that the order was lawful. A Department of the Army Field Manual and regulation were referred to as making a neat personal appearance of considerable military significance.¹⁴⁵ The opinion

144. JAGJ 1960/8230 (March 10, 1960).

145. Para. 130c, Dep't of Army FM 21-10, May 6, 1957, and para. 5a, Army Regs. No. 600-10, Dec. 19, 1958.

further noted that service boards of review had held that a religious belief by an accused is not a defense to a charge of willful disobedience of a superior officer.¹⁴⁶

The opinion also made reference to an established Department of the Army policy pertaining to the wearing of long hair by members of the Sikh religion.¹⁴⁷ This policy provides that a Sikh who is inducted into the Army will not be required to cut his hair in violation of his religious principles. However, if a Sikh voluntarily enlists in the Army, he will be required to conform to military practices relative to the wearing of his hair even though such practice may violate his religious beliefs.

The opinion then concluded by adhering to the decision that the order to shave the beard was lawful and indicating that the Sikh policy is somewhat analogous to the instant problem and might be used as a guide for future treatment of this particular individual.

146. Citing ACM 9036, Morgan, 17 CMR 584 (1954), wherein the accused refused to salute his superior, and ACM 13462, Cupp, 24 CMR 565 (1957), wherein the accused refused to salute his superior and to return to his place of duty. See also para. 169b, MCM (1951) to the same effect.

147. The opinion indicates that this policy was provided for the guidance of Adjutant General personnel involved in recruiting and the procuring of personnel for the Army, and has apparently not been disseminated to the field.

The drafters of the above opinion might very well have applied the Martin test to measure the legality of this particular order. That particular test would seem more in line with the tests applied in previous cases decided by the Court of Military Appeals than the Manual test since this order goes substantially to a personal right of the serviceman. However, the result should be the same in either event. The personal appearance on duty of military personnel is undoubtedly within the category of orders necessary for the needs of the military service. It is obvious that a military unit in which the commander had no control over the appearance of his subordinates would lack the necessary discipline to accomplish military missions. In this particular area the Court would have little difficulty in concluding that the order was reasonably necessary to protect the morale, discipline and usefulness of the members of the command and directly connected with the maintenance of good order in the service.¹⁴⁸

148. See also JAGA 1960/3793 (March 22, 1960), wherein the opinion was expressed that an order to a former professional writer on a short period of active duty to shave his beard is a lawful order. JAGA 1960/4018 and JAGJ 1960/8230 concurred with a proposed Department of the Army policy relative to the wearing of beards and mustaches to the effect that:

148. (Continued)

- a. Mustaches may be worn provided that they are kept short and neatly trimmed. No eccentricity in the manner of wearing them shall be permitted.
- b. A man who is drafted and whose religious beliefs include the wearing of a beard will be granted authority to wear a beard while on extended active duty.
- c. Persons in the reserve components not on active duty will be authorized to wear beards while performing military duties when such beard is based on religious or other cogent reasons.

The proposed policy apparently resulted from the two opinions previously noted relative to beards and the policy relative to the wearing of hair by members of the Sikh religion.

CHAPTER IV

TRIAL AND APPELLATE PROBLEMS

Submitting The Issue To The Court Members

From a military lawyer's point of view one of the most important parts of any court-martial is the law officer's instructions to the members. In our court-martial system it is certainly an area of great concern to the law officer. Not only must he furnish legal guidance to the court members but the language he uses must be very carefully chosen to stand up under the automatic review of all cases in which he participates. Let us consider whether the recent cases in the field of legality of orders have had any impact in the instructional area.

The initial point of inquiry into this matter would logically be The Law Officer's Handbook.¹⁴⁹ It will be noted that the sample instructions contained in Appendix II of this handbook relative to the offense of willful disobedience of orders refer to the military duty test for determining the legality orders.¹⁵⁰ As to the particular order involved in the sample instructions, an order to the accused to make up his bunk,

149. U. S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook--The Law Officer (1958).

150. Id. at 132.

the language contained in the sample instructions should be sufficient guidance for the court.

But what of an order that restricts a personal right of the accused such as the orders previously discussed in Chapter II, supra? Would a law officer properly instruct the court members as to the law concerning the legality of this type of order by reciting the military duty test to them?

We have seen that the Court of Military Appeals has held that a different legal test is to be applied in cases involving such orders. The order must be reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and must be directly connected with the maintenance of good order in the service. In addition, the order must have been required by the needs of the military service.

Inasmuch as the Court has established these factors as constituting the true test of the legality of such an order the court members should receive an instruction covering these factors. Such an instruction will, of course, vary with each factual situation presented and type of order involved.

It will be observed that in Appendix I of the law officer pamphlet dealing with the elements of the offenses under Articles 90 and 91 the reader is also referred to the military duty test as furnishing the proper test of legality.¹⁵¹ Therefore, this portion of the pamphlet is equally out of date with the portion previously referred to in Appendix II insofar as orders restricting personal rights are concerned. In addition, the proposed instructions relative to the elements under Article 92(1) refer to paragraph 171a for the proper definition of a lawful general order.¹⁵² It will be recalled that the test established there was that a general order or regulation is lawful if it is not contrary to or forbidden by the Constitution, the provisions of Act of Congress or the lawful order of a superior. If there were any beliefs that this test remained in effect as to general orders that restrict personal rights subsequent to the Martin case, the matter should have been settled completely by United States v. Nation, supra, wherein the Court stated:

151. U. S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook--The Law Officer (1958) at p. 84.

152. Id. at 85.

"General regulations which do not offend against the Constitution, an act of Congress, or the lawful order of a superior are lawful if 'reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and . . . directly connected with the maintenance of good order in the services.'" /Emphasis supplied./

It may therefore be seen that regardless of the punitive article under which the offense is alleged, the test for legality is the same when the order restricts a personal right.

It is certainly to be recommended that in cases in which the legality of an order affecting a personal right is in issue, the law officer instruct the court members in terms of the now established law in this area. Such instructions must necessarily vary with the factual situation involved. To be properly instructed in such cases the court members should certainly not be automatically instructed in terms of the military duty test as suggested by the law officer handbook.

Another instructional matter that the law officer should consider is whether his instructions will refer to a presumption of legality in view of the disfavor expressed by the Court of Military Appeals with reference to use of the terms "presume" or "presumption."

The Manual provides that an order requiring the performance of a military duty or act is presumed to be lawful and is disobeyed at the peril of the subordinate.¹⁵³ This provision was given early recognition by the Court. In the case of United States v. Trani¹⁵⁴ the Court stated:

"It is a familiar and long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defense. . . . Certainly the presumption of legality of orders emanating from a superior officer is, and of necessity must be, a strong one, requiring for an adverse determination a clear showing of unlawfulness."
/Emphasis supplied./

Even after the Court's announced suspicion of the use of the terms "presume" and "presumption" in instructions in the case of United States v. Ball,¹⁵⁵ these terms have continuously been used in cases involving the legality of orders. In the case of United States v. Coombs¹⁵⁶ the Court had before it a case in which the accused had pleaded guilty to a specification alleging a failure to obey a travel order. Appellate defense counsel attacked the specification on the

153. Para. 169b, MCM (1951).

154. 1 USCMA 293, 3 CMR 27 (1952).

155. 8 USCMA 25, 23 CMR 249 (1957).

156. 8 USCMA 749, 25 CMR 253 (1958).

grounds that it did not allege an offense. The Court noted the well recognized presumption of the legality of an order by a superior to a subordinate in finding that the specification did allege an offense. In the 1961 case of United States v. Wilson¹⁵⁷ the Court noted that all appellate counsel were in agreement that every military order is presumed legal.

It will be noted that in the law officer handbook¹⁵⁸ the suggested instructions in Appendix I relative to instructing on the elements of the offenses for Articles 90, 91, and 92 make no mention of a presumption of legality of orders. However, in the sample instructions contained in Appendix II of the handbook the sample instructions¹⁵⁹ relative to willful disobedience offenses contain the following language:

"An order requiring the performance of a military duty or act is presumed to be lawful unless the contrary appears."

It is difficult to see where this presumption is really any more than a justifiable inference. The Manual provides that generally the word "presume," as used in the Manual, means no more than "justifiably infer."¹⁶⁰

157. 12 USCMA 165, 30 CMR 165 (1961).

158. U. S. Dep't of Army, Pamphlet No. 27-9, Military Justice Handbook--The Law Officer (1958) at pp. 84-86.

159. Id. at 132.

160. Para. 138a, MCM (1951).

In United States v. Ball, supra, the Court, in discussing the presumption that a person must have intended the natural and probable consequences of his acts and the presumption arising from possession of recently stolen property, stated:

"'Presumption' is the slipperiest member of the family of legal terms. Insofar as the term 'presumption' refers to justifiable inferences the court-martial may draw from the facts, it is quite properly before the triers of fact. When the term is used to describe 'presumptions of law' it is not properly before the members of the court-martial except in instructing the court that they are bound by the legal conclusion to be drawn from facts proved. Of course, this last mentioned type is not a true 'presumption' but is a rule of law grown out of an earlier presumption. . . . In the future, law officers would be well advised to utilize the correct usage--justifiable inferences--rather than the ambiguous usage--presumptions--which, as in this case, required a detailed definition to save error. The use of the phrase 'the law presumes' is, of course, especially bad in this connection and is incorrect. The use implies a 'presumption of law' which is not the type of presumption involved in this case."

A review of cases involving legality of orders decided by the Court since the Ball case fails to reveal that the Court has ever discussed this aspect of the law officer's instructions. However, if it is conceded that the presumption of legality of orders is no more than a justifiable inference then the law officer should not use the language quoted from the law officer

handbook and should phrase his instructions in this regard in terms of a justifiable inference. This would appear to be the proper course of action to follow as there is no basis in the cases decided by the Court for concluding that this "presumption" is any more than a justifiable inference.

Once an affirmative defense is placed in issue by the evidence, the law officer must instruct on the defense sua sponte.¹⁶¹

The test as to whether such an affirmative defense has actually been placed in issue now appears to be whether there is any foundation in the evidence for such a defense theory. If so, instructions must be given sua sponte.¹⁶²

As a result, the Court has found error due to the law officer's failure to instruct sua sponte on the defenses of physical inability,¹⁶³ financial inability,¹⁶⁴ mistake,¹⁶⁵ lack of knowledge that the person issuing the order was a military superior,¹⁶⁶ and intoxication.¹⁶⁷

161. United States v. Ginn, 1 USCMA 453, 4 CMR 45 (1953).

162. United States v. Amie, 7 USCMA 514, 22 CMR 304 (1957).

163. United States v. Heims, supra.

164. United States v. Pinkston, supra.

165. United States v. Holder, 7 USCMA 213, 22 CMR 3 (1956).

166. United States v. Simmons, 1 USCMA 691, 5 CMR 119 (1952).

167. Ibid.

As in other offenses, mistake may be a valid defense to a charge involving disobedience of orders. As a general rule, for mistake to be a defense in a general intent type of offense, the mistake must be predicated on an honest and reasonable belief of the accused. As to offenses involving a specific intent, the cases generally hold that an honest mistake is a defense if it negates the intent required to establish an element of the offense.¹⁶⁸ There are certain exceptions to these general rules.¹⁶⁹

As to the offense of willful disobedience of an order the accused must have had knowledge that he had received an order from his military superior and then have willfully disobeyed the order. An honest mistake in this connection on the part of the accused should therefore constitute a valid defense. As to the offense of failure to obey a lawful order it must be shown that the accused knew of the order and that he failed to obey it. A mistake as to the accused's knowledge of the order need only be honest. As to the accused's failure to obey the order the mistake may have to be both honest and reasonable since the failure

168. United States v. Holder, supra.

169. United States v. Connell, 7 USCMA 228, 22 CMR 18 (1956).

to obey could be based on simple negligence.

In United States v. Jones¹⁷⁰ the accused was convicted by special court-martial of the offense of willful disobedience. The convening authority approved only a failure to obey under Article 92 of the UCMJ. The Judge Advocate General of the Air Force certified to the Court the question of whether mistake may be a defense to the offense of disobedience of orders. Chief Judge Quinn did not specifically rule on this question in his opinion and found that the issue of mistake was not reasonably raised by the evidence. Judge Latimer prepared a concurring opinion in which he concluded that mistake could be a defense to failure to obey offenses and that the mistake would have to be both honest and reasonable. Judge Ferguson did not participate in the opinion.

In cases involving the offense of willful disobedience it has been observed that the accused must have had knowledge that the person issuing the order was his military superior. In United States v. Simmons¹⁷¹ the Court held that the failure of the law officer to so instruct where an issue had been raised

170. 7 USCMA 83, 21 CMR 209 (1956).

171. 1 USCMA 691, 5 CMR 119 (1952).

as to such knowledge constituted error. In the Manual discussion of willful disobedience offenses¹⁷² it will be noted that such knowledge is not listed as an element of the offense. In the Simmons case the Court did not specifically hold that knowledge was an essential element of the offense. The Court stated:

"It follows that regardless of whether we view knowledge as an element of the offense or defense, the court-martial was not properly instructed."

The Court then suggested that the Manual be corrected to show that in willful disobedience cases knowledge is an element which must be included in the proof.

There should be no serious instructional problems when the accused attempts to explain his disobedience of orders by contending that to obey such orders would violate his religious scruples. The Manual provides that the fact that obedience to a command involves a violation of the religious scruples of an accused is not a defense.¹⁷³ Various boards of review have affirmed this provision.¹⁷⁴ The matter of religious

172. Para. 169b, MCM (1951).

173. Para. 169b, MCM (1951).

174. ACM 13462, Cupp, 24 CMR 565 (1957), which involved an order to salute and return to the accused's place of duty; ACM 9036, Morgan, 17 CMR 584 (1954), which involved an order to salute.

scruples was previously discussed with relation to an order to shave a beard worn for religious reasons.¹⁷⁵

Raising The Defense Of Illegality

In the great majority of cases examined the defense of illegality of the orders was raised by the defense during the defense portion of the court-martial. In a general court-martial the legally qualified counsel for the accused is hardly likely to overlook the potential defense of illegality of an order.¹⁷⁶ But suppose the record fails to show that legality of the order was placed in issue at the trial level. Is the accused thereby precluded from raising the issue for the first time on appeal?

There are several different aspects of this problem which should be discussed separately. Let us assume in the first instance that the particular order as set forth in the specification appears to be legal. In other words, there is no indication on the face of the order that it is palpably illegal. Let us further

175. See Chapter III, pp. 100-03.

176. It should be noted that the legality of an order may be placed in issue during the trial by evidence other than that adduced by the defense. Normally, an order from a superior relating to military duty is presumed to be lawful. The burden is on the accused to establish illegality. For this purpose the defense may rely on the prosecution evidence to establish illegality. *United States v. Bayhand*, 6 USCMA 762, 21 CMR 84 (1956).

assume that the evidence contained in the record does not indicate that legality of the order was placed in issue at the trial level.

An Army Board of Review considered this type of situation in United States v. Wilson.¹⁷⁷ In that case the accused had been found guilty of the disobedience of an order to refrain from cashing checks without first presenting evidence to his headquarters that he had sufficient funds in the bank to cover payment of his checks. At the trial of the case no objection was raised as to the validity of the order and no evidence was presented on that question. In discussing the failure to contest this issue at the trial level the Army Board of Review stated:

"If the accused or his counsel had any real doubt as to the validity of the order, the question should have been raised at the trial where evidence as to the basis for the order, the motive of Colonel Kleinman in giving it, and all the circumstances could have been presented for the determination of that matter by the court-martial. Appellate courts will not generally consider such objections raised for the first time on appeal."

The board, however, then discussed the legality of the order in question and found it to be a legal order.

177. CM 351835, 4 CMR 311 (1952).

This precise question involving a questioned order has apparently never been before the Court of Military Appeals. However, the Court has considered situations that are somewhat analogous.

There are a number of such cases dealing with the question of whether the failure to raise an issue relative to various evidentiary matters during the trial precludes raising such an issue for the first time on appeal. The general rule as to this problem was announced by the Court in United States v. Masusock.¹⁷⁸ This case held that the Court would not normally consider such matters when alleged as error for the first time on appeal. The Court noted that an exception to this rule would be made where the alleged error would result in a manifest miscarriage of justice or would otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. The Court also limited the application of the general rule to cases in which the accused is represented by legally qualified counsel. This general rule is also the

178. 1 USCMA 32, 1 CMR 32 (1951).

generally followed rule in civilian courts.¹⁷⁹ The obvious reason for the rule is that the defense should be required to raise defense issues at the trial level where opposing counsel may present the other side of the issue and the matter may be resolved at that time. Once the trial is completed it may be exceedingly difficult for an appellate court to judiciously determine such an issue. However, it will often be noted that when an appellate court invokes this rule the court will then proceed to find that the issue would have been decided adversely to the accused in any event. Thus, in the Masusock case the Court found that the appellate objection to the documentary evidence would not have been sustained by the Court. This general rule has been reaffirmed many times by the Court.¹⁸⁰

179. Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928); Jenkins v. United States, 58 F.2d 556, 557 (4th Cir. 1932); Stephenson v. State, 119 Ohio 349, 164 NE 359, 362 (1928); State v. Bohn, 67 Utah 362, 248 Pac 119, 121 (1926); 24 CJS sec. 1842, pp. 693-94.

180. See United States v. Dupree, 1 USCMA 665, 5 CMR 93 (1952), relative to raising an issue of illegal search for the first time on appeal; United States v. Fisher, 4 USCMA 152, 15 CMR 152 (1954); and United States v. Henny, 4 USCMA 158, 15 CMR 158 (1954), relative to raising the issue of an involuntary confession; United States v. Mitchell, 7 USCMA 238, 22 CMR 28 (1956), as to a variance between the pleadings and the proof; and ACM 15690, Morris, 27 CMR 965 (1952), petition for review denied, 27 CMR 512 (1952), relative to considering a new issue when the accused claims inadequate representation at his trial.

The Court noted another exception to this rule in the case of United States v. Stringer¹⁸¹ when it held that the Court would consider an error raised for the first time on appeal where the error is apparent on the face of the record and sufficiently prejudicial as to preclude application of the doctrine of harmless error.

Closely connected to the above principle is the general rule that when the defense proceeds on one theory at the trial level such theory may not be abandoned and a completely new theory adopted on appeal. This principle was announced by the Court in United States v. Bouie.¹⁸² The Court also noted in that case that this principle is not applied without exception, and that an exception does exist where the alleged error would result in a miscarriage of justice or would seriously affect the fairness, integrity or public reputation of judicial proceedings.

An interesting variation of this problem arose in United States v. Woolbright.¹⁸³ There the accused and several other prisoners who were working on a golf course being constructed at Fort Leonard Wood, Missouri, refused to obey orders from their guard supervisor to

181. 4 USCMA 494, 16 CMR 68 (1954).

182. 9 USCMA 228, 26 CMR 8 (1958).

183. 12 USCMA 450, 31 CMR 36 (1961).

return to work and were otherwise generally unruly. The accused was subsequently convicted of escape from confinement and mutiny resulting from his conduct arising out of this incident.

The Court of Military Appeals found that the accused had not committed mutiny but that the lesser included offense of willful disobedience of the guard's order to return to work could be affirmed. Appellate defense counsel petitioned for a new trial due to newly discovered evidence that the project upon which the accused had been assigned to work was the property of a private association, the Fort Leonard Wood Golf Club. Thus, it may be readily observed that a substantial argument could be made that the order should be held illegal since the work was to benefit only a private association. It can be seen that the principles announced in the cases previously discussed¹⁸⁴ would provide the defense with some strong arguments relative to the possible illegality of this order.

In disposing of this matter the Court stated:

"We need not reach the issue which this petition presents. It is clear that each item of evidence presented in support of the allegation was in existence prior to the trial

184. See Chapter II, supra.

and was easily available to defense counsel. Yet, the entire record is devoid of any proof concerning the ownership of the golf course or the nature of the Fort Leonard Wood Golf Club. In order to warrant granting a petition for new trial, it must appear that the 'newly discovered' matters would not have been disclosed by the exercise of due diligence at or before the original trial. Here, we are not offered a shred of evidence which would not have been revealed by the most casual inquiry prior to accused's trial, nor is there any explanation concerning the lack of such an investigation. Thus, under the circumstances, we must hold that petitioner has failed to show the exercise of due diligence and is, therefore, not entitled to another trial."¹⁸⁵

It is therefore submitted that the board of review decision in the Wilson case does represent the present law in this area and that the defense would be well advised under such circumstances to assure that the question of legality of an order, apparently valid on its face, is raised at the trial level. The analogous situations described above that have actually been

185. See also United States v. Fidler, 12 USCMA 454, 31 CMR 40 (1960), a companion case to the Woolbright case. In this case the accused had been convicted of disobedience of orders to return to work on the golf course. The Court granted review on the issue of the legality of the orders. The Court noted that the record of trial was devoid of any evidence that the golf course was privately owned or operated and that the record indicated only that the course appears to be located on a military reservation. The Court found that on the basis of the record, it could not hold that the orders were unlawful. The Court refused to entertain a motion for a new trial on the same grounds used in the Woolbright case.

before the Court indicate that the Court would apply the rule that such an issue must normally be raised at the trial level and may not be raised for the first time on appeal in the absence of the exceptions previously mentioned.

It should be noted that failure to attack the specifications as not stating an offense at the trial level does not preclude such an attack for the first time on appeal. This rule is stated in the Manual¹⁸⁶ and has been adhered to consistently by the Court of Military Appeals. In United States v. Reams¹⁸⁷ the Court gave notice, however, that defense counsel had best make such an attack at the trial level. The factual situation involved in the Reams case illustrates the danger to the defense in waiting until the case is heard on appeal before contending that the specification does not allege an offense.

In that case the accused had pleaded guilty to two offenses of making false official statements and certain other offenses. The false official statements were made to a legal officer and the accused's commanding officer concerning the accused's personal indebtedness. Appellate defense counsel attacked

186. Para. 67a, MCM (1951).

187. 9 USCMA 696, 26 CMR 476 (1958).

these specifications as not stating offenses contending that the accused was under no duty to make true statements to the officers involved about his payment of personal debts. The Court noted that under the rationale of the Milldebrandt case there are circumstances under which military superiors have no authority to scrutinize the personal financial affairs of those in their command. However, the Court found that the proper test to be applied to the specifications was:

" . . . When the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, if the necessary facts appear in any form or by fair construction can be found within the terms of the specification."¹⁸⁸

The Court noted that pursuant to the rationale announced in United States v. Kirksey¹⁸⁹ commanders may have a legitimate interest in the financial irresponsibility of members of the command. The Court found that by the accused's plea of guilty he had admitted his false statements were made to his superiors who were inquiring into a matter of official interest and that the accused thereby chose not to put the Government to

188. Id. at 699, 26 CMR at 479.

189. 6 USCMA 556, 20 CMR 272 (1955).

its proof that the designated officers were acting officially in questioning him. The Court held that since the fact that the officers involved were conducting their interrogation as an official matter went unchallenged, the accused's false statements were a perversion of a Governmental function, regardless of the importance to that function of the matters with which the statements were concerned. The Court then found that the accused's statements could be fairly construed as having been officially made.

It should be noted that Judge Ferguson dissented on this point. He expressed his opinion that the circumstances described in the specifications substantially approximated those held by the Court not to be false official statements in United States v. Washington.¹⁹⁰ He concluded that since the accused's actions did not constitute an offense the plea of guilty could not convert those actions into an offense. It should be observed, however, that Judge Ferguson did not take exception to the general test to be applied to the sufficiency of a specification attacked for the first time on appeal, but only with the interpretation of the allegations of the specification admitted to by the accused's

190. 9 USCMA 131, 25 CMR 393 (1958).

plea. Judge Ferguson was the author of the opinion in United States v. Coombs¹⁹¹ wherein the Court applied the previously stated general test for the sufficiency of a specification attacked for the first time on appeal.¹⁹²

The question might be presented as to whether the defense may properly direct to the law officer a motion to dismiss based on the alleged illegality of the order prior to the receipt of evidence. In other words, the defense counsel might contend that the specification alone shows the illegality of the order and that the specification therefore does not properly allege an offense. In the event the specification does not actually allege an offense such a motion is proper and should be granted.¹⁹³ In this connection, the question might arise as to how far the law officer should go in allowing evidence to be presented in an out of court hearing to establish whether under the factual circumstances the order was illegal.¹⁹⁴

191. 8 USCMA 749, 25 CMR 253 (1958).

192. See also United States v. Petree, 8 USCMA 9, 23 CMR 233 (1957); United States v. Fout, 3 USCMA 565, 13 CMR 121 (1953); and United States v. Sell, 3 USCMA 202, 11 CMR 202 (1953), for cases applying the same general test for the sufficiency of a specification attacked for the first time on appeal.

193. Para. 67a, MCM (1951).

194. In United States v. Cates, 9 USCMA 480, 26 CMR 260 (1958), the Court held that an accused had a right to an out of court hearing on the admissibility of his pretrial statement.

The Manual provides that if the motion raises a contested issue of fact which should properly be considered by the court in connection with its determination of the accused's guilt or innocence, the introduction of evidence thereon may be deferred until evidence on the general issue is received.¹⁹⁵ The Court of Military Appeals indicated in an early case that the law officer should follow this course of action when confronted by such a situation. In United States v. Richardson¹⁹⁶ the accused was charged with taking immoral and improper liberties with a female under 16 years of age. Prior to pleading to these offenses the defense directed a motion to the law officer to dismiss the specifications pertaining thereto, contending that the accused and the girl involved were husband and wife by virtue of a common law marriage entered into in another state. A hearing was held outside the presence of the court at which both the accused and the girl testified as to the circumstances of the purported common law marriage. The law officer then reopened the court and denied the motion. The question of the propriety of the law officer's action was certified to

195. Para. 67e, MCM (1951).

196. 1 USCMA 558, 4 CMR 150 (1952).

the Court of Military Appeals by The Judge Advocate General.

The Court found that the law officer's actions relative to this motion were in error because the law officer's ruling required a finding on a critical issue of fact which was one of the major portions of the defense, and in legal effect was a motion for a finding of not guilty. The Court noted that the appropriate time to make this type of motion is after the taking of evidence has been completed. The relationship of the parties determined the material part of the offense, and as such, had to be considered by the court in arriving at a finding. The Court noted that had the law officer determined that a valid marriage existed between the parties he would have invaded the province of the court members and would have, by his action, precluded the members from objecting to his ruling as is their privilege with respect to a motion for a finding of not guilty. Such action would be prohibited by the UCMJ, as upon objection by any member, the court is required to vote on the correctness of the law officer's ruling.¹⁹⁷

197. Article 51(b), UCMJ.

It may be said then that as a general rule the law officer may not rule/on^{finally} such a motion to dismiss when the ruling necessitates a determination of a disputed question of fact regarding a matter which would bar or be a complete defense to the prosecution without submitting this issue to the court. A matter of that kind is to be considered by the court in connection with its determination of the accused's guilt or innocence.¹⁹⁸

If the motion goes only to a question of law, as distinguished from a question of fact, the law officer may properly rule upon the motion without making his

198. This principle was utilized by the Court in *United States v. Ornelas*, 2 USCMA 96, 6 CMR 96 (1952). The accused was tried for desertion. The defense made a motion to dismiss for lack of jurisdiction based on the accused's testimony that he had never completed the induction ceremony. Other evidence indicated that the accused had been lawfully inducted. The law officer ruled on the motion as a question of law and refused to submit the issue to the court members. The Court of Military Appeals found that a disputed question of fact existed as to whether the accused was actually inducted into the Army and that the law officer erred in not submitting the issue to the court under appropriate instructions. In the subsequent case of *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956), the Court again, by way of dicta, emphasized the above principles. In *United States v. McNeill*, 2 USCMA 383, 9 CMR 13 (1953), no issue of fact arose concerning whether the accused had been lawfully inducted. The Court ruled that the issue of the accused's induction was therefore a question of law for the law officer's determination alone.

ruling subject to review by the court members. A motion to dismiss based on the illegality of an order may involve a question of law or a question of fact.

In United States v. Buttrick¹⁹⁹ an issue arose as to whether an order to salute was given for a legitimate military reason or was given solely with the anticipation that the accused would refuse to obey and subject himself to prosecution. The Air Force Board of Review found that no factual issue as to the lawfulness of the order was raised and that the legality of the order was therefore solely a question of law. A similar order was involved in the case of United States v. Morgan.²⁰⁰ However, the evidence here was conflicting as to the reason for giving the accused the order to salute. The board of review found that the order was not palpably illegal as a matter of law. The board further found that the conflicting evidence as to the reason such an order was given the accused raised a factual issue as to the legality of the order that should have been determined by the court members.

It is therefore observed that a motion to dismiss based upon the illegality of an order may involve only

199. ACM 9652, 18 CMR 622 (1954).

200. ACM 9036, 17 CMR 584 (1954).

a question of law to be decided by the law officer alone. On the other hand, the legality of the disputed order may turn upon a disputed question of fact that must be ultimately decided by the court members.²⁰¹

Responsibility Of The Trial Counsel

It might be well to consider whether any new responsibility has been placed on the trial counsel by the recent trend in cases involving the legality of orders that affect personal rights. It has been observed that the Martin test requires both "reasonableness" and "military necessity." It is submitted that the appellate determination of the legality of an order may very well turn upon whether the prosecution has established by sufficient evidence that the questioned order was reasonable and necessary under the existing circumstances.

To use the Martin case as an example, the Court noted that at the time of the order limiting the accused's disposition of personal property his ship was in a foreign port where American cigarettes were at a premium and where black markets flourish.²⁰² The opinion does not indicate whether these facts were

201. In this same connection, see ACM 12539, Kapla, 22 CMR 825 (1956).

202. See Chapter I, p. 6, supra.

contained in the record of trial or whether the Court took notice of this existing situation in the absence of such evidence in the record. It would certainly appear that the trial counsel would be well advised to present such evidence to the court-martial. While the local court members may be well aware of exceptional local circumstances, such evidence should be available for the consideration of appellate courts.

A good example of a case in which such evidence might be essential would be a case arising from the violation of an order imposing off-post speed limits in overseas commands.²⁰³ Let us assume that the appropriate commander in an overseas area determined that such an order was both reasonable and a military necessity due to circumstances existing within his command. It would certainly be essential that the prosecution present evidence of these exceptional circumstances for the consideration of the court members and subsequent appellate review. In the absence of convincing evidence in this regard, it is submitted that such an order would be almost certain to be held illegal upon review.

203. See Chapter III, pp. 86-95, supra.

It has been previously mentioned that the Manual provides that an order requiring the performance of a military duty or act is presumed to be lawful.²⁰⁴

While this so-called presumption might more properly be called a justifiable inference, it may often be of assistance in convincing an appellate court that a somewhat questionable order was in fact legal.²⁰⁵

However, this inference certainly has its limitations, as does any inference,²⁰⁶ and may be overcome by even the prosecution evidence.²⁰⁷

The Court of Military Appeals indicated in the Milldebrandt case that the trial counsel should introduce evidence supporting the legality of the questioned order. The Court there stated:

"In this instance, the evidence found in the record is of no assistance in determining the legality or illegality of the order. . . . The nature of the information ordered to be furnished is not shown and, for aught that appears, the accused might have been required to give a detailed statement of every financial transaction engaged in by him while off duty. It should be apparent that if the order was as broad as

204. Para. 169b, MCM (1951).

205. United States v. Coombs, 8 USCMA 749, 25 CMR 253 (1958).

206. See U. S. Dep't of Army, Pamphlet No. 27-172, Military Justice--Evidence, Chapter III, pp. 30-33, (1961).

207. United States v. Bayhand, 6 USCMA 762, 21 CMR 84 (1956).

that, the accused might be prosecuted for failure to disclose information of a confidential or incriminating nature."

It is submitted that the burden on the trial counsel in this regard may very well be greater in cases involving orders that restrict personal rights. As to the usual order pertaining to a strictly military duty, the Court would probably not need a great abundance of background information by which the order could be legally tested. However, in the event the order restricts a personal right, then the factors of "military necessity" and "reasonableness" enter much more closely into the Court's consideration. It would therefore be advisable for the trial counsel to assure that the record of trial contains sufficient evidence of the local circumstances so that the Court may properly judge the reasonableness of the order under these circumstances and the particular need of the service that required issuance of the order.

CHAPTER V

SUMMARY AND CONCLUSIONS

Every person who has any degree of familiarity with military matters knows that the obedience of orders is one of the most essential requirements in either military training or combat operations. Experience has shown the necessity for orders that go beyond what is ordinarily thought of as a servicemember's military duties and affect that individual's personal rights. If an individual's personal rights, as distinguished from his official duties, are to be restricted it is necessary that reasonable limitations be placed on a commander's authority in this regard. An individual in the service should be allowed as much freedom in his personal affairs as the needs of the military permit.

The principle of military law which provides that only lawful orders must be obeyed assures that unreasonable restrictions on a servicemember's personal rights will not be allowed. The question of whether such a restriction is in fact reasonable or unreasonable is a question upon which military lawyers, as well as individual members of the Court of Military Appeals, may be expected to disagree.

The military duty test for legality of orders provides sufficient guidance for measuring the legality of orders that relate to what we ordinarily think of as official duty matters. The Court of Military Appeals has indicated that this test is the proper standard to apply to such orders. However, this test was not designed for use in measuring the legality of orders that restrict an individual's personal rights. The military duty test would furnish very little practical guidance as to such orders.

A survey of military cases reflects that the Court has adopted a different test to be used in measuring the legality of this type of order. This has been referred to as the Martin test. This test could be criticized as being too broad in scope. However, a test that is more narrow in scope would not be sufficient to provide guidelines for the varying factual situations that are likely to arise. While this test may not be perfect, it would be difficult to provide a legal test that would provide more definite guidelines for the many types of orders to be evaluated.

Analysis of the two tests reveals that they are not as different as might first appear. The most essential criteria of the Martin test is really the

"reasonableness" and "military necessity" of the order. The same elements enter into the military duty test even though they are not specifically mentioned in the language of the test. However, as to orders that restrict personal rights, the Court will look much more closely into the reasonableness of the order and the need of the service that prompted issuance of the order. The Martin test is actually an extension of the military duty test and imposes more rigid requirements when an order restricts an individual's personal rights.

It must be concluded that neither the military duty test nor the Martin test provide a completely satisfactory guide when standing alone. There is no magic formula that will accomplish this purpose. The law as developed in the cases decided by the Court must implement these broad tests to determine whether a questioned order is legal.

In certain areas involving the legality of orders the law has been fairly well settled by decisions of the Court. In other areas considerable litigation may be expected in the future.

The cases have demonstrated that the authority of a commander in an overseas area where a tense military situation is in existence has broader authority as to

the orders he may lawfully issue than an equivalent commander in a less tense area. However, the cases have also indicated that a bare assertion by a commander that an order was necessary to achieve a high status of unit combat readiness will not validate an illegal order. The Court will closely examine the existing circumstances to determine the actual military necessity for orders that curtail personal rights.

The Court has applied tests other than the two previously mentioned to specific factual situations. For example, the Court uses a somewhat different standard in examining the legality of orders that violate rights guaranteed by the UCMJ. This makes very little practical difference as the result in this instance should be the same regardless of whether this separate standard is applied or the other two tests are utilized. The major problem area, though, at this time is in the field of orders that restrict personal rights.

With regard to trial matters involving legality of orders, the trial defense counsel must keep in mind that should he fail to raise the issue of legality of an order at the trial level he may find that he is precluded from raising the issue for the first time on appeal. This is certainly true as to orders that are

apparently legal from the wording of the specification. On the other hand, an attack may be made for the first time on appeal on an order that is so palpably illegal that the specification fails to state an offense. However, the defense would be well advised to raise the issue of legality at the trial level.

The trial counsel, when dealing with orders that restrict personal rights, must remember that the elements of "reasonableness" and "military necessity" will vary from one factual situation to another. An application of the Martin test often involves a question of degree and a fine line between the legality or illegality of an order. He must therefore be certain that he introduces sufficient evidence of the local circumstances that prompted the issuance of the questioned order.

Law officers must look beyond the sample instructions provided in the law officer handbook to frame proper instructions in cases involving the legality of an order. Consideration must be given to removing any implication from the instructions that a presumption of law, rather than a justifiable inference, exists as to the legality of orders. As to orders involving personal rights of a servicemember the instructions must

reflect the test currently applied by the Court of Military Appeals rather than the military duty test as indicated in the present sample instructions in the law officer's handbook.

Concerning the general area of orders that affect the personal rights of individuals, it is submitted that in all probability there are general orders in existence today that will not meet the tests for legality contained in the Court's recent opinions. This is not surprising because under the previously accepted military duty test almost any order to a servicemember could be argued to relate to military duty in some way. The Martin test is, of course, more restrictive in nature.

There has been very little written on this subject in the past. As a result, there has probably been a tendency to look only to the military duty test for legality that has been generally accepted as the proper test for many years. However, we now realize that as to orders restrictive of personal rights the more rigid requirements of the Martin test are to be imposed.

While there certainly remains room for argument as to the legality of certain orders involving personal rights there are problem areas that may now be more

clearly answered by the principles announced in the Court's opinions. An example of this is to be found in the controversial area of control of off-post traffic by overseas commanders. An even clearer example of the illegality of an order under the rationale of recent cases in this field would be an order that requires off-duty servicemembers to wear a coat and tie when wearing civilian clothing into civilian communities in overseas areas. This type of order is not likely to come before the Court of Military Appeals. However, this is certainly no reason for its continuing existence.

There can be no doubt that the Court has furnished a specific test to measure the legality of orders that affect personal rights. This test is reasonable and, as implemented by the cases discussed herein, furnishes the most practical guidelines available to determine the legality of such orders. This particular area of military law has been more clearly defined in cases subsequent to 1957. In view of this fact, it would be well to review existing general orders in this field to determine whether such orders meet the now established requirements for legality. If a commander is to effectively achieve the military mission of his command, he must constantly be aware of his authority, and the limitations upon that authority, in the important area of legality of orders.

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