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COURT-MARTIAL JURISDICTION UNDER THE UNIFORM CODE

SEYMOUR W. WURFEL*

I. SCOPE OF INQUIRY

The modest pretension of this discussion is to collect the more important pronouncements of the United States Court of Military Appeals¹ during its first two years of operation² and of the Boards of Review³ on the fundamental subject of jurisdiction. No attempt is made to review the centuries-long development of foreign and American military court jurisdiction⁴ beyond the basic statement that Congress in enacting the Uniform Code of Military Justice⁵ merely exercised once more its express constitutional power "to make Rules for the Government and Regulation of the land and naval forces."⁶ The considerable body of textual⁷ and periodic⁸ material treating military jurisdiction in the era

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¹ The court of last resort in the system of military law as prescribed by Art. 67 of the Uniform Code of Military Justice, 64 STAT. 129 (1950), 50 U. S. C. § 654 (Supp. 1952).

² Although the Uniform Code became effective on May 31, 1951 pursuant to PUB. L. No. 506, 81st Cong., § 5, c. 169 (May 5, 1950), the first decision by the Court of Military Appeals was not rendered until November 8, 1951 in *United States v. McCrary*, 1 CMR 1 (U. S. C. M. A. 1951). Accordingly, the actual period of productivity to May 31, 1953 is slightly less than nineteen months. Decisions through October 1, 1953 are considered herein. For an excellent general survey and analysis of the decisions of the Court of Military Appeals up to July 25, 1952, see Aycock, *The Court of Military Appeals—The First Year*, 31 N. C. L. REV. 1 (1952). Mr. Aycock extends this scholarly analysis to the decisions rendered by the Court of Military Appeals during its second year in an article appearing in the January 1954 issue of the EMORY UNIVERSITY JOURNAL OF PUBLIC LAW.

³ Army, Navy, Coast Guard and Air Force Boards of Review are the intermediate appellate tribunals in the military justice system. They are provided for by Art. 66 of the Uniform Code, 50 U. S. C. § 653 (Supp. 1952).

⁴ For a brief treatment of the history of the jurisdiction of military tribunals, see Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493-505 (1951).

⁵ Act of May 5, 1950, 64 STAT. 108 (1950), 50 U. S. C. §§ 551-736 (Supp. 1952).

⁶ U. S. CONST. Art. I, § 8, cl. 14. An Air Force Board of review has had occasion to hold that the words "land and naval forces" in the Constitution refer not only to the Army and Navy but equally to the Air Force. This was done in *United States v. Naar* (ACM 4215), 2 CMR 739, 745 (1951) in rejecting the contention of an Air Force lieutenant that since he was not in the land or naval forces he was entitled under the Fifth Amendment to grand jury indictment before being brought to trial. The same accused endeavored to raise the same issue by seeking an injunction to restrain the air force court-martial in a proceeding before a three judge federal court. On May 22, 1951 the District Court for the District of Columbia dismissed this complaint on the ground that it failed to state a cause of action. (Civil Action No. 2061-51).

⁷ The outstanding text is WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed.

before the Uniform Code will not be surveyed. Pre-Code Board of Review opinions⁹ dealing with jurisdiction are not extensively discussed. No effort is made to consider all the facets presented in the Code's cluster of some fifteen essentially jurisdictional Articles.¹⁰ The appellate jurisdiction vested in the Boards of Review by Article 66,¹¹ and in the Court of Military Appeals by Article 67,¹² is not explored. The versatile jurisdiction of military commissions to try law of war violations,¹³ war crimes,¹⁴ offenses under military government¹⁵ and to sit as martial law courts¹⁶ is beyond the ambit of this article. Also excluded, most reluctantly, are the inviting international law problems concerning the exercise of conflicting jurisdiction over members of visiting armed forces stationed in or passing through friendly foreign countries.¹⁷

At this juncture the reader may well cry out, "With what area of jurisdiction are we here to cope?" The answer is, with the decisions of jurisdictional matters by the Court of Military Appeals and the Boards of Review¹⁸ under the Uniform Code and the salient United States

1920). See c. VIII, pp. 81-109 on jurisdiction. Also significant is DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (3d ed. 1915).

⁹ Representative of the best law review articles of that period is Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 CALIF. L. REV. 75, 159 (1924).

¹⁰ In the thirty years before the Code, Army Board of Review opinions alone ran into thousands of pages contained in some 141 volumes.

¹¹ Arts. 2, 3, 5, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 56, which, respectively, are 50 U. S. C. §§ 552, 553, 555, 577, 578, 579, 580, 581, 586, 587, 588, 589, 590, 591, and 637 (Supp. 1952).

¹² 50 U. S. C. § 653 (Supp. 1952). For example, *United States v. Bigger* (No. 456), 7 CMR 97 (U. S. C. M. A. 1953) holding Boards of Review have jurisdiction to commute a death sentence when reducing the finding to unpremeditated murder. The case of *United States v. Washington* (CM 362541, Docket 3451) where a death sentence was similarly reduced without reduction of the finding has been certified to the Court and is now pending decision. See also *United States v. Reeves* (No. 453), 3 CMR 122 (U. S. C. M. A. 1953) and *United States v. Weeden* (No. 3338), 12 CMR 161 (U. S. C. M. A. 1953) holding a Board of Review has power to entertain a motion for reconsideration of a decision rendered by it.

¹³ 50 U. S. C. § 654 (Supp. 1952).

¹⁴ Examined in the able opinion by Chief Justice Stone in *Ex parte Quirin*, 317 U. S. 1 (1942).

¹⁵ *In re Yamashita*, 327 U. S. 1 (1946).

¹⁶ *Madsen v. Kinsella*, 343 U. S. 341 (1952).

¹⁷ *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); *Duncan v. Kahanamoku*, 327 U. S. 304 (1945). Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942).

¹⁸ This problem was first grappled with by Chief Justice John Marshall in *Schooner Exchange v. M'Fadden*, 7 Cranch 116 (U. S. 1812) in which he concluded that members of the visiting force remained exclusively subject to the criminal and civil jurisdiction of the sovereign by whom employed. It is case and treaty law of this type which Congress had in mind in prefacing both paragraphs (11) and (12) of Article 2, dealing with jurisdiction "without the continental limits of the United States" with the language, "Subject to the provisions of any treaty or agreement to which the United States is or may be a part or to any accepted rule of international law, . . ." See *United States v. Weiman* (No. 1403), 11 CMR 216 (U. S. C. M. A. 1953).

¹⁹ Board of Review opinions of the four services under the Uniform Code have burgeoned in the first ten volumes of Court-Martial Reports into a total of more

Supreme Court decisions in the field of military habeas corpus. That is to say, the current case law from which the military bar¹⁹ must seek its enlightenment and direction in matters of courts-martial jurisdiction.

It must be remembered that jurisdiction is the only aspect of a court-martial proceeding which may be inquired into by the regular federal courts,²⁰ this only by habeas corpus collateral attack and not by appeal,²¹ and then only after the petitioner has first exhausted all appellate and new trial remedies within the military law system.²² The Supreme Court has thus defined the test of jurisdiction to be applied to military courts:

“‘The single inquiry, the test is jurisdiction’ . . . In this case the court-martial had jurisdiction of the person of accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decisions.’”²³

Boards of Review and the Court of Military Appeals monitor courts-martial jurisdiction in the exercise of their normal appellate functions. In doing so they concern themselves with four questions: (1) Was the court duly constituted? (2) Did it have jurisdiction of the person tried? (3) Did it have jurisdiction of the offense charged? (4) Was the sentence imposed within the prescribed maximum limit? It will be convenient to discuss the cases by classifying them under these headings.

II. WAS THE COURT DULY CONSTITUTED?

In civil life the court is taken much for granted. Rarely is the appointment or election of a judge contested and by a liberal construction of de facto judicial powers it is even more rare to have purported judicial acts declared void because the court was not duly constituted. The judge is sworn in once for each term of office and enjoys a stabilized status.

Courts-martial, unlike ordinary civil courts, do not possess any high degree of permanence. They come into existence by express written

than 7100 pages and extend to hundreds of additional pages not yet published since 10 CMR includes decisions only through May 1953.

¹⁹ In addition to the officer lawyers of the four armed services who have become members of the bar of the Court of Military Appeals, as early as November 1, 1952, 244 civilian attorneys had been admitted. Walker and Neibank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 236 (1953). By June of 1953 this bar had grown to 1219 members, a third of whom are civilian attorneys. Address, Judge Brosman, Army Judge Advocate General's School, Charlottesville, Va., June 15, 1953.

²⁰ *In re Grimley*, 137 U. S. 147, 150 (1890).

²¹ *Ex parte Reed*, 100 U. S. 13, 23 (1879).

²² *Gusik v. Schilder*, 340 U. S. 128 (1950); *Burns v. Wilson*, 346 U. S. 137 (1953); *McKinney v. Finletter*, 205 F. 2d 761 (10th Cir. 1953).

²³ *Hiatt v. Brown*, 339 U. S. 103, 111, *rehearing denied*, 339 U. S. 939 (1950), cited with approval by Justice Minton in his separate concurring opinion in *Burns v. Wilson*, 346 U. S. 137 (1953), *rehearing denied*, 74 S. Ct. 3 (1953).

direction of the convening authority²⁴ who is normally a commanding officer, and who so far as general courts-martial are concerned is usually of general officer rank. In the Army and Air Force this is done by a special order and in the Navy by an official letter addressed to the officer who is to be President of the court. In either case the document specifically names and identifies by their service numbers the officers who are to serve as members, trial counsel, defense counsel, assistant counsel, and, for general courts, the law officer. For a summary court a single summary court officer is appointed. Although a minimum of five members is sufficient to constitute a general court and three to constitute a special court,²⁵ it is customary to name nine or more members in an order appointing a general court and five or more for a special court since members may be excused from attendance by the convening authority to perform other military duties, and are subject to peremptory challenge and challenge for cause.²⁶ This principle of flexibility was carried to extreme in a general court case in which the order appointed fifty-one members, only seven of whom attended the trial.²⁷ The Army Board of Review, after condemning the administrative wisdom of appointing so large a court, rejected a defense contention that this was a jurisdictional defect pointing out that the minimum jurisdictional requirement was the presence of five members. The Court of Military Appeals has said that where the membership of a general court is reduced to less than five: "This would constitute a palpable jurisdictional defect."²⁸

The exigencies of combat,²⁹ administrative transfer of units, and orders transferring individual officers and enlisted men to new stations all combine to make it unusual, even in peacetime, for any one court-martial to be able to try cases for a period of as long as three months. Members can be relieved and others added by amending orders, but to curtail the number of orders pertaining to any one case it is administratively desirable to appoint an entirely new court at frequent intervals. Large "jurisdictions," that is commands with authority to convene courts, often have several different general and special courts operating

²⁴ Arts. 22, 23, and 24, respectively, specify who may convene a general, special and summary court-martial. 50 U. S. C. §§ 586, 587 and 588 (Supp. 1952).

²⁵ Art. 16, 50 U. S. C. § 576 (Supp. 1952).

²⁶ Art. 41, 50 U. S. C. § 616 (Supp. 1952).

²⁷ *Holt* (CM 357002), 8 CMR 360 (1953). See, however, *United States v. Moses* (CM 363294) 10 CMR ___ (1953) where it was affirmatively shown that the trial counsel failed to notify eleven members of a thirty-one officer court and this was held to be prejudicial error.

²⁸ *United States v. Padilla and Jacobs* (No. 400), 5 CMR 31, 34 (U. S. C. M. A. 1952). See also *United States v. Tobita* (No. 710), 12 CMR ___ (U. S. C. M. A. 1953).

²⁹ The discontinuance of a trial in its midst necessitated by enemy action in Europe during the Battle of the Bulge and the later trial of the case by another general court convened by another command was held not to constitute double jeopardy in *Wade v. Hunter*, 336 U. S. 684, *rehearing denied*, 337 U. S. 921 (1949).

at the same time. Normally a given case is referred by written indorsement for trial to a specified court identified by the number and date of the special order appointing it. Unarraigned cases may be re-referred to another court, this usually being done in the order appointing the new court.

The foregoing practical considerations involved in convening a court-martial, while routine to the military lawyer, are perhaps not so well known to the bar at large. Possibly this fluid medium in which courts-martial must operate is what repeatedly motivates Congress to require members of general and special courts-martial, as well as counsel, the law officer and the reporter, in each case, to take an oath "in the presence of the accused to perform their duties faithfully."³⁰ The Court of Military Appeals has said:

"General courts-martial, being tribunals of special and limited jurisdiction, must be convened strictly in accordance with statutory requirements. . . . Members of a court-martial must have been lawfully appointed thereto in order that they may enjoy status as members."³¹

This factual and legal background lends great importance in courts-martial cases to the inquiry, "Was the court duly constituted?"

A. Who Are Proper Court Members?

Students of jurisdiction are primarily indebted to the Navy for the volume of current decisions dealing with the validity of courts-martial organization. Since the Articles for the Government of the Navy remained almost completely unchanged from 1862 until replaced by the Uniform Code in 1951³² it is not surprising that the vessel of naval justice has pitched a bit in the heavy seas of transition. Definitely a transition case was that of Seaman Apprentice Merritt³³ who was charged with the offense of absence after leave committed before the effective date of the Uniform Code. On June 6, 1951, he was arraigned, pleaded guilty and was sentenced before a navy summary court convened under the old Articles for the Government of the Navy, but not consti-

³⁰ Art. 42(a), 50 U. S. C. § 617 (Supp. 1952). This elaborate swearing of the various components of the court in each case is a time-consuming ingredient in the administration of military justice.

³¹ *United States v. Padilla and Jacobs* (No. 400), 5 CMR 31, 34 (U. S. C. M. A. 1952).

³² Walker and Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 230 (1953). It was in the Navy case of *United States v. Pulliam* (No. 2580), 11 CMR 95, 98 (U. S. M. C. A. 1953) that the question certified was: "Did the special court-martial lose jurisdiction . . . because a junior member acted as president?" The court held: ". . . the special court-martial did not, as a matter of law, lose jurisdiction . . . because a junior member acted as president. . . . there was no substantial prejudice to the rights of the accused."

³³ *United States v. Merritt* (No. 53), 1 CMR 56 (U. S. C. M. A. 1951).

tuted as required for a special court-martial, its successor equivalent, under the Uniform Code. The Court of Military Appeals held that the navy summary court lacked jurisdiction.³⁴

In the case of Ship's Serviceman Stephenson the special court which tried the accused simply was not sworn. The Navy Board of Review properly held:

"The entire membership of the new court and the personnel of the prosecution and the defense not having been duly sworn, the newly appointed court was without jurisdiction to try this case, and such lack of jurisdiction was absolutely fatal to its proceedings. (*Dynes v. Hoover*, 61 US 65, 83, 15 L Ed 278. . . .)"³⁵

The other services have also contributed cases illustrative of jurisdictional error in court membership. Corporal Heineman requested and received the services of Lieutenant Gillespie as his individual counsel at his Article 32^{35a} pre-trial investigation. Thereafter Lieutenant Gillespie was appointed and actually sat as a member of the court and was not challenged by the accused. An Army Board of Review held Gillespie was clearly incompetent to sit as a member of the court, that the proceedings were therefore null and void, and that failure of the accused to challenge the member could not operate as a waiver of the jurisdictional defect.³⁶ Similarly, it has been held that tainted court membership is jurisdictional and cannot be waived where a member testified as a prosecution witness,³⁷ or was the officer who signed the original of a morning report placed in evidence,³⁸ or attested a record of previous convictions

³⁴ At page 63 of *United States v. Merritt*, *supra* note 33, the Court said:

"The next question posed is whether or not the error was jurisdictional, and we answer this in the affirmative. . . . The phases properly processed by the court ended with the serving of the charges on the accused, as the trial phase was clearly severable from the pre-trial proceedings. . . . The only act which could have retained jurisdiction of the court to hear the trial phase would have been an arraignment. . . . A court qualified to act under the new code should have been constituted by the convening authority.

³⁵ *United States v. Stephenson* (NCM 58), 2 CMR 571, 572 (1951). The members of the special court assembled to hear the case were sworn and the accused exercised a peremptory challenge which reduced the membership to two. The convening authority instead of adding new members to the old court by amendment elected to appoint a wholly new court composed of the same personnel as the old court, including counsel, except for a member appointed to replace the one who had been challenged. Only this replacement member was sworn when the newly appointed court proceeded to try the case. See also *United States v. Anderson* (CM 334145), 1 BR/JC 123 (1949).

^{35a} 50 U. S. C. § 603 (a) (Supp. 1952).

³⁶ *United States v. Heineman* (CM 350672), 2 CMR 517 (1952). The court relied on Article 25(d)(1) of the Code which provides: "No person shall be eligible to sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case."

³⁷ *United States v. Grant* (CM 259563), 38 BR 369 (1944).

³⁸ *United States v. Beeks* (ACM S-5398), 9 CMR 743 (1953).

used in a case where the accused pleaded guilty.³⁹ However a member of the Judge Advocate General's Corps may properly serve as an ordinary member of a court-martial if he has not otherwise participated in the case.^{39a}

Airman Trent was convicted by a court, a member of which had previously been appointed as assistant defense counsel of another court to which Trent's case was originally referred for trial. Trent did not challenge and the record did not disclose whether this member ever in fact served as his counsel. The Air Force Board of Review applied a *Manual* provision that under these circumstances a court member must "Unless the contrary appears of record, . . . be deemed to have acted as a member of . . . the defense,"⁴⁰ and reversed.⁴¹ The Board did not call this situation jurisdictional error but elected instead to find in it a probability of specific material prejudice to the substantial rights of the accused. It said:

"It is difficult to envision any case where the membership . . . during the trial includes an officer who was the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case in which a 'probability of specific prejudice against the accused' . . . will not be found."⁴²

The Board here placed reliance on the decision of the Court of Military Appeals in the *Bound* case.⁴³ There a security watch officer on the night of the offense made an investigation and later sat as a member of the special court that tried the accused. An Article 32^{43a} pre-trial investigation was never made, this not being a prerequisite to a special court-martial trial. The Court pointed out that the Code does not define the term "investigating officer" as used in Article 25(d)(2), but that Paragraph 64, *Manual for Courts-Martial, United States, 1951*, defines it as "a person who . . . as an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense," and then found "a probability of specific prejudice against the accused."⁴⁴ The Court did not treat the situation as jurisdictional but did hold that the prejudice was not waived by failure to challenge even though the accused had pleaded guilty.

³⁹ United States v. Morris (ACM S-5374), 9 CMR 786 (1953).

^{39a} United States v. Glaze (No. 2078), 11 CMR 168 (U. S. C. M. A. 1953). There is no requirement that the membership of a court-martial include personnel of the same race as the accused, nor was it improper that the court was composed of senior officers or "southerners." United States v. Bryson (CM 360557), 12 CMR ___ (1953).

⁴⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 6a, p. 10.

⁴¹ United States v. Trent (ACM 5165), 5 CMR 574 (1952).

⁴² *Id.* at 576.

⁴³ United States v. Bound (No. 201), 2 CMR 130 (U. S. C. M. A. 1952).

^{43a} 50 U. S. C. § 603(a) (Supp. 1952).

⁴⁴ United States v. Bound (No. 201), 2 CMR 130, 136 (U. S. C. M. A. 1953).

These two different approaches to improper court membership may be reconciled by saying that where the court composition clearly violates a Code provision, as in the *Heineman, Grant, Beeks, and Morris* cases the defect is jurisdictional, but where the *Manual* elaboration must be resorted to to work out a defect in composition, as in *Trent and Bound*, then decision will rest on the "probability of specific prejudice." Actually, reconciliation is perhaps not so simple. Probably the situation reflects a lack of crystallization of thought as to precisely what is jurisdictional, as distinguished from what constitutes "a probability of specific prejudice" or "general prejudice."⁴⁵

B. *Inter-Service Eligibility*

A service self-imposed⁴⁶ problem of court member eligibility is whether a member of one of the services other than that of the accused may sit. A unification-conscious Congress provided:

"... Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial."⁴⁷

The several armed forces, pursuing their monadic ways, prevailed in the *Manual*⁴⁸ in prescribing a policy drastically curtailing this eligibility. Illustrative is the case of Army Private Caternolo who was tried by a special court-martial whose president was an Air Force Lieutenant assigned for duty with the 1st Infantry Division. The Board of Review reversed on another point, but said:

"While it is clear that the appointment of an Air Force officer as a member of an Army court-martial is permitted by Article 25a, *supra*, and is therefore not fatal to the court's jurisdiction, it is equally clear that such action is contrary to the general policy set forth in paragraph 4g(1), *supra*. Unless the convening authority commands a joint command or exercises reciprocal jurisdiction (MCM, 1951, par 4g(2)), members of the Air Force should not be appointed to an Army court-martial."⁴⁹

⁴⁵ *United States v. Woods and Duffer* (No. 1023), 8 CMR 3 (U. S. C. M. A. 1953) illustrates the deep division of the court as to whether there is any such thing as "general prejudice." Chief Judge Quinn, writing the majority opinion, disposed of the case in less than a page. Judge Brosman in a separate concurring opinion, and Judge Latimer in a dissenting opinion, each eleven pages long, then proceeded warmly, not to say heatedly, to discuss the merits and demerits, respectively, of the doctrine of "general prejudice."

⁴⁶ See *Hearings Before a Subcommittee of the Committee on Armed Services on H. R. 2498*, 81st Cong., 1st Sess. 735, 754 and 1189 (1949); H. R. REP. No. 491, 81st Cong., 1st Sess. 17 (1949) to accompany H. R. 4085; and SEN. REP. No. 486, 81st Cong., 1st Sess. 14 (1949) to accompany H. R. 4080.

⁴⁷ Art. 25(a), 50 U. S. C. § 589 (Supp. 1952).

⁴⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 4g(1), states in part: "g.—Members of courts-martial should be members of the same armed force as the accused."

⁴⁹ *United States v. Caternolo* (Sp CM 4057), 2 CMR 385, 386 (1952).

The Board was undoubtedly correct in its conclusion that disregard of the *Manual* restriction, superimposed on the clear Congressional grant, was only procedural error and not a jurisdictional defect.

C. *Enlisted Members*

Article 25(c)⁵⁰ permits the accused personally to request in writing that enlisted personnel serve on the court, in which case they shall compromise not less than one-third of the total membership and may not be members of the same unit as the accused. This particular aspect of court membership has not yet engaged the attention of the Court of Military Appeals. It has been ruled administratively that an accused, if fully advised, may in writing insert into the formal proceedings at the time of trial a withdrawal of a prior written request for enlisted members. Short of thus eliminating enlisted members entirely an accused may not waive the prescribed ratio of at least one-third of the membership being enlisted where his original request stands.⁵¹ An Army Board of Review has held that a soldier who is only "attached," as distinguished from being regularly assigned, to the accused's unit may properly sit.⁵² An Air Force Board has held that a court was not legally constituted where one of its members was an airman assigned to the same squadron as the accused and that this disqualification could not be waived.⁵³

D. *Appointment of Court*

A technical question which arises is whether a member is duly designated in the writing appointing the court. The Navy practice of convening courts by official letter addressed to the officer who is to serve as president has at least four times reached the Court of Military Appeals for decision.⁵⁴ These letters, in addition to the name of the addressee, contained a direction that the court be convened and an assignment of four designated officers, other than the addressee, to serve as members and designations of trial and defense counsel, but no reference to the president except as addressee in the official form. The Court of Military Appeals in upholding jurisdiction of courts so appointed said:

" . . . courts-martial are tribunals of special and limited juris-

⁵⁰ 50 U. S. C. § 589 (Supp. 1952).

⁵¹ Ltr. JAG-J 1952 6970 (11 September 1952), cited in JAG CHRON. No. 40, p. 179 (3 October 1952).

⁵² United States v. Quimbo (CM 335865), 2 BR/JC 297 (1949).

⁵³ United States v. Chilcoat (ACM S-1285), 4 CMR (AF) 486 (1951). This case involved Article of War 16 of the Act of June 24, 1948 [62 STAT. 630 (1948)] which contained a requirement substantially the same as Art. 25(c), 50 U. S. C. § 589 (Supp. 1952).

⁵⁴ United States v. Beard (No. 1778), 8 CMR 144 (U. S. C. M. A. 1953); United States v. Lawrence (No. 1732), 8 CMR 148 (U. S. C. M. A. 1953); United States v. Swain (No. 1779), 8 CMR 147 (U. S. C. M. A. 1953), all decided March 24, 1953. United States v. Lee (No. 2119) 11 CMR 109 (U. S. C. M. A. 1953). These cases involve the construction of § 0102 e, Navy Supplement to MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951.

diction, and must, therefore, be convened strictly in accordance with statutory requirements. At the same time this admonition should not be carried to the absurd length that matters of sheer form take precedence over those of substance.

"It should not be—and is not—an unyielding condition precedent to the lawful convention of a court-martial that the appropriate form be followed parrot-like in minute detail."⁵⁵

Where court members are added by amendment there is always the possibility of administrative error.⁵⁶ The Court of Military Appeals has held that technical error in this regard is not jurisdictional.⁵⁷

A basic defect in the organization of a court, which destroys its jurisdiction, occurs if a person not in fact detailed thereto participates in its deliberations.⁵⁸

E. Law Officer Eligibility

Not only must the status of court members be scrutinized with care but other components of the tribunal as well. The law officer must be a member of the bar and also certified to be qualified for law officer duty by The Judge Advocate General of the service of which he is a member.⁵⁹ It has been held, however, that mere clerical error in describing the law officer in the order appointing the court is not jurisdictional if he is in fact a lawyer and certified.⁶⁰ Failure of the record to show

⁵⁵ *United States v. Beard* (No. 1778), 8 CMR 144, 145 (U. S. C. M. A. 1953).

⁵⁶ Typical is *United States v. Padilla* (No. 400), 5 CMR 31 (U. S. C. M. A. 1952). The original court to which the case was referred for trial was appointed by Special Orders No. 116, Headquarters 1st Infantry Division. Thereafter, Special Order No. 124 appointed a new court and provided that all unarraigned cases in the hands of the trial counsel of the court appointed by Special Orders No. 116 "be brought to trial before the court hereby appointed." Thereafter two new members were appointed by Special Order No. 128 "to the General Court-Martial convened by Special Order Number 116 . . . as amended by . . . Special Orders Number 124 . . ." The two members so named actually sat. The convening authority reversed and remanded, holding the court was without jurisdiction because these two officers were not in fact named as members of the court appointed by Special Orders No. 124, and ordered another hearing as to both the accused Padilla who had been convicted and his co-accused Jacobs who was found not guilty. On appeal from the second hearing the Court of Military Appeals held the first court was properly constituted and had jurisdiction, that jeopardy attached to the acquitted accused Jacobs, and that as to Padilla the sentence imposed at the second hearing could not exceed the first.

⁵⁷ At page 35 of *United States v. Padilla*, *supra* note 56, the court said:

" . . . This language, however, inartificial, indicates with clarity that the user regarded the second court as a replacement for the first. . . . the language is strongly persuasive of the existence of an intention to appoint the two captains to the court-martial created by Special Orders No. 124."

⁵⁸ DIG. OP. JAG §1351 (1912-30). Similarly, participation by an officer as assistant trial counsel who was not on orders as a member of the prosecution, and was not sworn, has been held by an Army Board of Review to constitute jurisdictional error. *United States v. Taylor* (CM 338217), 4 BR/JC 235 (1949).

⁵⁹ Art. 26(a), 50 U. S. C. § 590 (Supp. 1952).

⁶⁰ *United States v. Hathaway* (ACM 4183), 1 CMR 776, 778 (1951). It has been held that technical error in an order appointing a new trial counsel and adding, at the request of the accused, enlisted members to a general court already in exist-

affirmatively that the law officer was sworn necessitates disapproval of a conviction.⁶¹

Where the same officer, as Acting Staff Judge Advocate, first wrote a "detailed and painstaking" pretrial advice⁶² and then later served as law officer at the trial of the case, an Army Board of Review ordered a rehearing finding this to be error materially prejudicial to the substantial rights of the accused.⁶³ Acting in this dual capacity is not prohibited by Article 26(a),⁶⁴ which specifies who may be law officers, and probably is not jurisdictional. However, the decision that it constitutes prejudicial error appears to be proper.

F. Counsel Eligibility

The Code provides that trial and defense counsel of general courts must be bar members and certified as qualified to serve as counsel by

ence by mistakenly referring to the original court as a special court is not jurisdictional. *United States v. Barber* (ACM 5097), 5 CMR 726 (1952).

⁶¹ *United States v. Pino* (ACM 5274), 6 CMR 542 (1952). Here the record of trial stated: "the members of the court and the personnel of the prosecution and the defense were sworn," but not that the law officer was sworn. An Air Force Board found "the expression 'members of the court' does not include the law officer," and although it expressly held that failure to swear the law officer did not deprive the court-martial of jurisdiction ruled it was a "substantial error of procedure" requiring disapproval and rehearing. Since the Board did not examine the record for specific prejudice to the accused presumably it relied on either general prejudice or lack of "military due process." This Board appears to reflect the rather wary attitude the Court of Military Appeals has adopted toward at least some problems of jurisdiction. It is submitted on principle that failure to swear the law officer as required by Article 42 of the Code [50 U. S. C. § 617 (Supp. 1952)] constitutes fatal jurisdictional error. If here the law officer was in fact sworn, a certificate of correction could properly have been appended to the record and jurisdiction thus established. Cf. *Givens v. Zerbst*, 255 U. S. 11 (1921) and *McRae v. Henkes*, 273 Fed. 108 (8th Cir. 1921).

A statement in the record that "The court was then sworn" is not sufficient to show that the law officer, members, trial counsel and defense counsel were sworn. If they in fact were, a certificate of correction will be required. *JAGU* (CM 361274), March 23, 1953, cited in 2 *JAG Chron.*, No. 17, p. 74 (24 April 1953).

⁶² Art. 34(a), 50 U. S. C. § 605 (Supp. 1952) in part requires: "Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice."

⁶³ *United States v. Thorpe* (CM 360188), 9 CMR . . . (1953). *Accord*, *United States v. Hentz* (CM 347839), 1 CMR 422 (1951); cf. *United States v. Nelson* (CM 347000), 1 CMR 169 (1951) and *United States v. Montez* (CM 346677), 1 CMR 178 (1951); *contra*, *United States v. St. Ours* (CM 355349), 6 CMR 178 (1952). The problem has been treated as one of prejudicial error rather than jurisdiction.

⁶⁴ Art. 26(a), 50 U. S. C. § 590 (Supp. 1952) in pertinent part provides: "No person shall be eligible to act as law officer in a case when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case." Thus it has been declared prejudicial error for the trial counsel of a general court to which a case of one of two joint offenders was referred to serve later as law officer at the trial of the other joint offender. This is so even though the law officer was relieved within four days in the first case and there was no showing that he participated therein as trial counsel. In accord are *United States v. Tolbert* (ACM 6751), ___ CMR ___ (1953) where the law officer had been appointed defense counsel but did not participate in the previous trial of an accomplice, and *United States v. Gemelli* (ACM 6695), ___ CMR ___ (1953) where the law officer had formerly been trial counsel of the same court-martial which tried accused but was relieved as trial counsel and appointed law officer one day after accused's case was referred.

The Judge Advocate General of the service of which they are members.⁶⁵ Not only may counsel not change sides in a given case, but "no person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case."⁶⁶ The Court of Military Appeals has held that an accuser, who made a preliminary investigation in that capacity, was not an investigating officer within the meaning of either Article 32 or Article 27(a) and that he was not disqualified from thereafter serving as trial counsel in the case.⁶⁷

The Court has stated that it is only a custom of the service, and not an express requirement of the Code, that military counsel be officers. "(T)here is implicit in the Code the requirement of the Manual that appointed counsel of inferior courts-martial be an officer."⁶⁸ The Court held it was not jurisdictional error, nor prejudicial to the accused, to have appointed a non-lawyer noncommissioned pay clerk as trial counsel of a special court-martial and observed, "it is not every provision of the Code that reaches the level of a jurisdictional requirement."⁶⁹ Though this opinion appears to create a problem in order to solve it, the rule seems to emerge that the appointment of military personnel other than an officer as trial counsel of a special court is not in itself a jurisdictional defect. The special court before which Navy Airman Hutchison⁷⁰ pleaded guilty had officers appointed to it as trial and assistant trial counsel and defense counsel, and a noncommissioned warrant gunner as assistant defense counsel. None were lawyers. The Court of Military Appeals upheld jurisdiction, opining:

"Congress has not . . . conferred upon an accused an explicit and absolute right to have any assistant defense counsel appointed, nor to have such counsel, if appointed, be an officer. . . .

"There is here no violation of a mandatory requirement of the Code, and therefore no jurisdictional defect . . . nor . . . any reasonable possibility of prejudice under these circumstances."⁷¹

⁶⁵ Article 27(b), 50 U. S. C. § 591 (Supp. 1952). Individual defense counsel, whether military or civilian, does not have to be certified as qualified, nor need he be appointed or otherwise designated in the order appointing the court. A ruling by a law officer that such appointment was necessary which caused an accused to withdraw his request for an officer, who was present, to be his individual defense counsel was held by an Air Force Board to render the proceeding void. *United States v. Hanson* (ACM 6062), 8 CMR 671 (1953).

⁶⁶ 27(a), 50 U. S. C. § 591 (Supp. 1952). See *United States v. Kelsey* (ACM 5228), 6 CMR 522 (1952) and *United States v. Borner* (No. 1284), 12 CMR 69 (U. S. C. M. A. 1953).

⁶⁷ *United States v. Lee* (No. 200), 2 CMR 118 (U. S. C. M. A. 1952).

⁶⁸ *United States v. Goodson* (No. 424), 3 CMR 32 (U. S. C. M. A. 1952).

⁶⁹ *Id.* at 34.

⁷⁰ *United States v. Hutchison* (No. 425), 3 CMR 25 (U. S. C. M. A. 1952).

⁷¹ *Id.* at 26, 27. Compare with *United States v. Ness* (Sp CM 1770), 6 BR/JC 345 (1950) where an Army Board of Review held it was jurisdictional error to

A general court case tried in May 1951 under the 1948 Articles of War which raised the question of whether there must be equality of experience between trial and defense counsel is of continued interest because of its current applicability to special court cases.⁷² The trial counsel who tried Private Bartholomew⁷³ was a college and law school graduate with extensive legal experience in the Army, but not a lawyer nor a member of the Judge Advocate General's Corps. The defense counsel was a high school graduate with no professional education and relatively little Army legal experience. On appeal it was not contended that this disparity was jurisdictional but that it was prejudicial to the accused. Though charged with murder the accused was found guilty of voluntary manslaughter only. The Court affirmed the conviction saying:

" . . . the disparity in legal qualifications of counsel disclosed in the case now before us is inconsistent with the spirit although not the letter, of the Articles of War. . . .

" . . . we find here at least a literal and technical compliance with the command of Congress. . . .

" . . . we find nothing whatever which would indicate that the accused was not accorded full, fair and competent representation by his counsel. This being the case, we cannot at all say that he was materially prejudiced in any substantial right. . . .

" . . . the problem is in no sense an academic one . . . because of the possibility of its recurrence under the Uniform Code . . . in cases tried by special court-martial."⁷⁴

This *Bartholomew* decision should not be pushed very far for even though disparity of training of counsel is not jurisdictional, it is most probable the Court in most cases would find wide disparity constituted material prejudice to the substantial rights of the accused requiring reversal.

An Air Force Board of Review has held a special court-martial improperly constituted and its proceedings void where at the time of its appointment both trial and defense counsel were lawyers but neither was

appoint a warrant officer as defense counsel of a special court-martial and permit him to serve.

⁷² Art. 27(c), 50 U. S. C. § 591 (Supp. 1952), provides:

"Sec. 591. Appointment of trial counsel and defense counsel (Article 27)

* * *

"(c) In the case of a special court-martial—

(1) If the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel appointed by the convening authority shall be a person similarly qualified; and

(2) If the trial counsel is a judge advocate, or a law specialist or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing. . . ."

⁷³ *United States v. Bartholomew* (No. 166), 3 CMR 41 (U. S. C. M. A. 1952).

⁷⁴ *Id.* at 44, 45, 46.

certified and before trial the trial counsel only was certified by The Judge Advocate General of the Air Force as qualified to act as counsel.⁷⁵

Failure to swear an assistant defense counsel who participated in the trial has been held to constitute jurisdictional error. An Air Force Board of Review in reversing the conviction of Airman Nyman said:

“ . . . the record shows the Captain Mayo, an assistant defense counsel, entered the court room and seated himself at the defense table after the members of the court, personnel of the prosecution, and the other assistant defense counsel, Captain Wuhrman, had been sworn (R. 3-4). The record does not show that Captain Mayo was ever sworn, nor does it appear that he withdrew prior to the conclusion of the case. Captain Wuhrman signed the record as having examined it on behalf of the accused. The order appointing the court listed Captain Mayo as first and Captain Wuhrman as second assistant defense counsel.

“ . . . we feel that by whatever name it be known, the error of participation by unsworn defense counsel in a trial conducted after 31 May 1951 is one that is fundamentally prejudicial to the sub-

⁷⁵ *United States v. Klug* (ACM S-5219), 8 CMR 664 (1953). Where the duly appointed defense counsel of a general court was relieved from that assignment and his duties, with the consent of the accused, were taken over by the assistant defense counsel who was also qualified and certified, but no amendatory order was issued redesignating him as defense counsel, Boards of Review have disagreed as to the effect. An Army Board held the absence of a duly appointed defense counsel at the time of trial constituted error in violation of Article 27 but that this error was neither jurisdictional nor prejudicial and affirmed the conviction. *United States v. McCarthy* (CM 357972), 8 CMR 329 (1953). Under similar circumstances an Air Force Board held that a court-martial which technically had no appointed defense counsel, as distinguished from assistant defense counsel, at the time of trial was without jurisdiction and declared its findings and sentence void even though the accused was also represented by counsel of his own choice. *United States v. Butler* (ACM 6164), 8 CMR 692 (1953). This same result was reached by an earlier Army Board of Review in *United States v. Watson* (CM 337855), 4 BR/JC 157 (1949). These latter opinions appear to exalt form unduly and to disregard substance. The Court of Military Appeals has not yet passed on this question.

It has been held to be jurisdictional error for an officer not appointed as an assistant trial counsel to sit at trial counsel table and assist the trial counsel. *United States v. Taylor* (CM 338217), 4 BR/JC 235 (1949). To permit the investigating officer to serve as assistant trial counsel is a jurisdictional defect which the accused cannot waive. *United States v. Mullen* (Sp CM 2576), 7 BR/JC 359 (1950).

An investigating officer may not serve as either defense counsel nor assistant defense counsel if the accused merely states that he has no objection, and such participation constitutes reversible error. *United States v. Nelson* (CM 335048), 2 BR/JC 7 (1949) and *United States v. Henry* (CM 319176), 68 BR 181 (1947). However, where from the record it affirmatively appeared that the accused expressly desired the investigating officer to serve as defense counsel and the accuser to serve as individual defense counsel, permitting them so to serve was held to be proper. *United States v. Fleming* (CM 320233), 69 BR 271 (1947). It is a question of fact which should be fully developed in each case since Article 27(a) in pertinent part provides: “No person who has acted as investigating officer, . . . in any case shall act subsequently . . . unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case.”

stantial rights of the accused. Otherwise stated, whether the error be termed a violation of military due process, a matter of general prejudice, or failure to meet a jurisdictional requirement, as those terms have been used by the Court of Military Appeals, we conclude, under the universality of holdings on the participation of unsworn counsel, that such participation constitutes error which is fatal to the legal efficacy of the findings and sentence arrived at in these proceedings.

“ . . . We are not prepared, particularly in view of the complete unanimity of opinion hereinbefore referred to, to hold that this accused has by his plea of guilty to Charge II and its specification eliminated the necessity for compliance with this or any of the other provisions of Article 42. Past interpretations as to the administration of oaths appear to us to have been predicated upon the fact that these requirements were jurisdictional in nature and we see nothing in Article 42 as enacted which suggests a change in the fundamental nature of the requirements.”⁷⁶

Here the Board, though beset with legitimate doubts as to just which of at least three different approaches the Court of Military Appeals might take in reversing the case, at last manfully closed with the problem and held it to be “jurisdictional in nature.” The Board is to be congratulated for so doing. Failure to swear individual civilian defense counsel has been held not jurisdictional and not to constitute prejudicial error.^{76a}

G. Reference of Case to Court

Another court composition problem is whether a given case is properly before the court which in fact tries it. As already indicated, when a convening authority has determined a case should be tried the charges are forwarded by indorsement to the trial counsel of a specific existing court identified by the number and date of the special order appointing it and the case is usually tried by that court. It not infrequently is necessary to transfer unarraigned cases from the court to which they were originally referred to another court. This is usually done either by general language in the order appointing the new court to the effect that all unarraigned cases pending before the old court, specifying it by order number and date, are referred to the new court, or by transfer of individual cases from one court to another by an additional numbered indorsement to the charges so directing. The Code itself does not prescribe any procedure for referral but the *Manual* sets forth procedure for customary usage.⁷⁷ In the case of Commissary

⁷⁶ *United States v. Nyman* (ACM S-3051), 5 CMR 598, 599, 601 (1952).

^{76a} *United States v. Danilson* (ACM 6499), ___ CMR ___ (1953).

⁷⁷ See ¶ 33(j), *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*.

Seaman Emerson⁷⁸ which had been referred to one special court, but was actually tried without re-reference by another special court convened by the same convening authority, the Navy Board of Review held the latter was without jurisdiction. The Court of Military Appeals reversed the Board of Review, holding:

"A failure to follow the procedure set out in the Manual for customary usage does not . . . constitute a defect of sufficient import to deprive the court of jurisdiction."⁷⁹

In doing so it followed the earlier Army Board of Review rule on the point.⁸⁰ The same result has been reached under the Code by Army Boards of Review in two cases, each referred by the Commanding General of the 25th Division to a general court other than the one which tried it, but which latter court he had also appointed. The decisions were based on the ground that the action of the convening authority "approving the sentence amounts to a ratification of the actual reference of the case to the legally constituted court which tried it."⁸¹ This doctrine is safely applicable only where the trial is by a court convened by the same commanding officer who referred the case for trial, or by his official successor in that command.

H. *Personnel from Other Commands*

Officers from other commands may properly be made available to a convening authority for the purpose of sitting as members of a court-martial. This was done in the trial of then Air Force Colonel Jack Durant in the Hesse crown jewels theft case in order to convene a court each member of which was senior to the accused. On habeas corpus attack the federal courts held this court was properly constituted and was proof against jurisdictional attack.⁸²

I. *Convening Authority Competency*

Still pursuing the question "Was the court duly constituted?", we turn now from the competency of the court or its component elements to that of the convening authority which ordered the court into existence. Even where the officer appointing the court is one authorized to do so by Article 22 or 23 of the Code⁸³ there may be circumstances which so

⁷⁸ United States v. Emerson (No. 77), 1 CMR 43 (U. S. C. M. A. 1951).

⁷⁹ *Id.* at 45.

⁸⁰ United States v. Casey (CM 198108), 3 BR 159, 163 (1932); United States v. Brandon (CM 232790), 19 BR 193, 207, 208 (1943); *Cf.* United States v. Anderson (CM 334145), 1 BR/JC 123 (1949). Also in accord see Hartley v. Malanophy, 81 F. Supp. 316 (E. D. N. Y. 1948).

⁸¹ United States v. Clements (CM 346741), 1 CMR 164, 167 (1951), and United States v. Hofus (CM 348185), 4 CMR 356, 362 (1952).

⁸² Durant v. Hiatt, 81 F. Supp. 948 (N. D. Ga. 1948), *aff'd*, 177 F. 2d 373 (5th Cir. 1949).

⁸³ Arts. 22(a) and 23(a), 50 U.S.C. §§ 586, 587 (Supp. 1952) specify in considerable detail who may convene general and special courts-martial respectively.

contaminate him as to render jurisdictionally void, as to a specific accused, any court convened by him. The Code provides that when the normal convening authority "is an accuser, the court shall be convened by superior competent authority,"⁸⁴ and defines an accuser as: "a person who signs and swears to charges, . . . who directs that charges nominally be signed and sworn to by another, . . . (or) who has an interest other than an official interest in the prosecution of the accused."⁸⁵ Private Moseley⁸⁶ broke into the home of the Commanding General of Camp Campbell, Kentucky, larcenously took therefrom valuable property of the general's son, pawned it, and then went absent without leave. The General summoned Criminal Investigation Detachment agents, showed them incriminating evidence found in his garage, and thereafter convened the court which tried and convicted the accused. The charges were actually signed by a junior officer. The Army Board held the proceedings void and said:

" . . . the conclusion is inescapable that Major General Lennitzer could not but have had an interest other than an official interest in the prosecution. He was 'in fact' the accuser and thereby precluded by UCMJ, Article 22, from appointing a court-martial which could exercise jurisdiction over this accused."⁸⁷

Confronted with a similar problem the Court of Military Appeals, without reference to the previously decided *Moseley* case, reached the same result by traveling a somewhat different road. Airman Gordon⁸⁸ at Bolling Field burglarized the house of Lieutenant General Edwards and four days later attempted to burglarize the quarters of Brigadier General Lee, the base commander. General and Mrs. Lee were interviewed as part of the investigation. Who actually swore to the charges does not appear. Ultimately the charge involving General Lee's quarters was dismissed and the accused tried for the offense at General Edwards' quarters by a court convened after the event by General Lee as base commander. Conviction and sentence to a dishonorable discharge and five years confinement was reviewed by General Lee as convening authority and the period of confinement was by him reduced to two years. The offense occurred in March of 1951 so that the applicable law was Article of War 8⁸⁹ which contained language similar to that in Articles 22(b) and 23(b) of the Code⁹⁰ prohibiting an accuser from convening the court. The Court of Military Appeals held that: "General . . .

⁸⁴ Arts. 22(b) and 23(b), 50 U. S. C. §§ 586, 587 (Supp. 1952).

⁸⁵ Art. 1(11), 50 U. S. C. § 551 (Supp. 1952).

⁸⁶ *United States v. Moseley* (CM 348127), 2 CMR 263 (1951).

⁸⁷ *Id.* at 265, 266.

⁸⁸ *United States v. Gordon* (No. 258), 2 CMR 161 (U. S. C. M. A. 1952).

⁸⁹ 41 STAT. 788 (1920).

⁹⁰ 50 U. S. C. §§ 586, 587 (Supp. 1952).

Lee was disqualified to act as convening and reviewing authority in this case,"⁹¹ and said:

"... reasonable persons would impute to General Lee at the time he appointed the court a personal feeling or interest in the matter. . . .

"While General Lee reduced the sentence, who can say what, if any, additional remission might have been made by one who had no interest in the matter.

"... we find substantial rights of the accused were materially prejudiced. . . ."⁹²

Judge Brosman, in a separate concurring opinion, wrote:

"I do not understand Judge Latimer to evaluate the error . . . as jurisdictional . . . I do understand him to have concluded that the substantial rights of the accused were materially prejudiced. . . . I prefer to bottom my concurrence on the concept of general prejudice. . . ."⁹³

The writer pauses to express preference for the forthright treatment given to this problem by the Army Board of Review in the *Moseley* case where it flatly held the defect to be jurisdictional. In view of the Court's lively concern for congressional intent it is difficult to understand how, having found that "General . . . Lee was disqualified to act as convening and reviewing authority in this case," it was able to stop short of declaring this error to be jurisdictional. Brushing aside legal niceties, commanding officers should be alert to refrain from convening courts to try cases in which they, by possibility, may be "accusers" within the broad meaning of that term.⁹⁴ The point at which to draw the line presents a difficult question of fact.⁹⁵

⁹¹ *United States v. Gordon* (No. 258), 2 CMR 161, 168 (U. S. C. M. A. 1952).

⁹² *Id.* at 167, 168.

⁹³ *Id.* at 168.

⁹⁴ In *United States v. Bergin* (ACM 4374), 7 CMR 501 (1952), an Air Force Board of Review held the Commanding General of Lackland Air Force Base to be an accuser, and hence the court convened by him to be without jurisdiction. The accused, the custodian of a consolidated base welfare fund, embezzled therefrom. He had been appointed custodian by the General who himself was president of the counsel for the Central Post Fund. The accused was under bond payable to the General in event of defalcation, and such payment was in fact made to and receipted for by the General. The Board found the convening authority had "not only an official, but more—a direct and personal interest and responsibility in the funds and in the loss sustained as the result of the alleged theft of the accused." It said, "The test should be whether the appointing authority is so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter."

In *United States v. Marsh* (No. 1526), 11 CMR 48, 52 (U. S. C. M. A. 1953), the court reversed as to both specifications because it found that as to one of them the convening authority was in fact the accuser. It said "Congress concluded the probability of harm to an accused was sufficient to deny to an accuser the right to convene a court and if he elects to join specifications for trial all must fall as the court is disqualified to try any."

⁹⁵ In *United States v. Sippel* (ACM 5615), 8 CMR 698 (1953) an Air Force

J. Reference Procedure Where Convening Authority Is Disqualified

What procedure is jurisdictionally acceptable where the normal convening authority is disqualified? Articles 22(b) and 23(b) of the Code provide: "When . . . (a) commanding officer is an accuser, the court shall be convened by superior competent authority. . . ." The *Manual* states: ". . . superior competent authority . . . will convene the court or designate another competent convening authority to exercise jurisdiction."⁹⁶ A determination as to which of these divergent directions prevails became necessary in the case of Hospitalmen LaGrange and Clay.⁹⁷ These accused were charged personally by their commander, a Navy Captain, of violating regulations by misusing barbiturates and the charges were forwarded to his superior, the Commander, Naval Forces, Far East, who in turn referred the case for trial by special court to a Navy Commander commanding a naval base at Pusan, Korea. A commander is, of course, inferior in grade to a captain in the Navy. The Court of Military Appeals relying on the provision of Article 36 of the Code which provides that, "procedure . . . prescribed by the President by regulations . . . shall not be contrary to or inconsistent with the Code," ruled that only a "superior" could be a "competent convening authority" as used in the *Manual* provision, adverted to Congressional intent to adopt a procedure that would lessen command control, and held:

Board ruled that a convening authority, who had first recommended, upon the advice of his staff judge advocate, the acceptance of a resignation for the good of the service tendered by the accused, which tender was refused by higher authority, did not thereby become an accuser, and properly convened the court which thereafter tried the accused. The Board found the action of the convening authority was merely "a part of the necessary supervision which he must exercise over his command in order to preserve discipline." It was also contended that the court was without jurisdiction because the Staff Judge Advocate as well as the convening authority was disqualified. As to this the Board said: "the actions and state of mind of the convening authority and Staff Judge Advocate appear reasonable, dispassionate, and divorced from any personal interest in the matter." *Accord*, United States v. Jewson (No. 532), 5 CMR 80 (U. S. C. M. A. 1952); United States v. Grow (No. 2050), 11 CMR 77 (U. S. C. M. A. 1953). Apparently *contra*, United States v. Marsh (No. 1526), 11 CMR 48 (U. S. C. M. A. 1953). See also, United States v. Beeks (ACM S-5398), 9 CMR 743 (1953) and United States v. Huff (ACM S-5455), ___ CMR ___ (1953). Boards of Review have distinguished *Marsh, supra*, in United States v. Barnes (ACM S-6846), ___ CMR ___ (1953) and United States v. Orso (CM 365475), ___ CMR ___ (1953).

In a case where the staff judge advocate of a command accompanied investigating officers to Rome and from time to time gave them legal advice during the course of the investigation the Court has held that this did not disqualify him from subsequently reviewing the record of trial for the convening authority. United States v. DeAngelis (No. 999), 12 CMR ___ (U. S. C. M. A. 1953). The Court said: "Since a staff judge advocate is the administrator of military justice and discipline, it would be incongruous in the extreme were we to assume that he is unable to function at all unless and until charges have been preferred and investigated. . . . His services were as necessary to the accused, as to the government, and in no way disqualified him in performing his impartial task of reviewing the record of trial."

⁹⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 5b(2).

⁹⁷ United States v. La Grange & Clay (No. 313), 3 CMR 76 (U. S. C. M. A. 1952). Distinguished in United States v. Pease (No. 2349), 13 CMR ___ (U. S. C. M. A. 1953).

"The provisions with which we deal require a superior to convene the court; and these provisions having been violated, the tribunal designated was not authorized by law to try these accused and render a judgment against them."⁹⁸

The Court avoids the word "jurisdiction" itself, but paints a word picture adding up to lack of jurisdiction. The Court made it clear that the officer to appoint the court in such cases must be superior in rank to the accuser but does not squarely hold that he must also be superior in the sense of commanding an organization of which the unit commanded by the accuser is a component part. For example, suppose the commander of the Pusan Base had been a rear admiral. Since the Base and the ship commanded by the accuser both reported directly to the Commander, Naval Forces, Far East, the Base would be a command collateral, and not superior, to the accuser's ship. To avoid pitfalls prudence would dictate that where this problem is present the convening authority should be superior in both rank and command to the accuser.

An Air Force Board of Review confronted with substantially the same problem relied on the *LaGrange* and *Clay* case but frankly declared the defect to be jurisdictional. It said:

"... the convening authority in the instant case, being junior in rank to the accuser and not in the chain of command, should not properly have assumed jurisdiction over the charges herein. . . . The defect being jurisdictional in nature, the proceedings are a nullity and the findings and sentence must be set aside."⁹⁹

K. *Pretrial Investigations*

The United States Supreme Court has twice determined that neither a substantial nor a complete failure to comply with the pretrial investigative procedure required under former Article of War 70¹⁰⁰ is fatal error and has held such failure does not divest a court-martial of jurisdiction.¹⁰¹ This rule has been perpetuated by Congress in the new Code by adding to Article 32,¹⁰² the successor to old Article of War 70 as to pretrial investigations, paragraph (d) which expressly states: "The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error."

L. *Caveat*

At least some of the foregoing may initially strike the civilian practitioner as bordering on hair-splitting. Upon reflection, however, it should

⁹⁸ *Id.* at 80.

⁹⁹ *United States v. Burnette* (ACM S-3033), 5 CMR 522, 524 (1952).

¹⁰⁰ 41 STAT. 802 (1920).

¹⁰¹ *Humphrey v. Smith*, 336 U. S. 695, 700, *rehearing denied*, 337 U. S. 934 (1949); *Hiatt v. Brown*, 339 U. S. 103, 110, *rehearing denied*, 339 U. S. 937 (1950).

¹⁰² 50 U. S. C. § 603 (Supp. 1952).

be manifest that an active pursuit in military cases of the inquiry, "Was the court duly constituted?" may lead astute appellate defense counsel to legal pay dirt whether characterized as jurisdictional, or, simply, prejudicial error. Though the cause may be tried again,¹⁰³ as a practical matter it is even more difficult in the military system, plagued with worldwide distribution and constant personnel changes, to reassemble witnesses, than is the case in the civilian administration of justice. The clear caveat to those who must administer the system of military justice is that not only must evil, but even the appearance of evil, be avoided in the composition and convening of courts. A high degree of aseptic administrative care must be given to precluding the possibility of actual or constructive contamination of members, other component elements of courts-martial, and convening authorities if jurisdictional error is to be avoided.

III. DID THE COURT HAVE JURISDICTION OF THE PERSON?

The second jurisdictional inquiry, "does the court have jurisdiction of the person," is similar to the first query already considered in that it is much more likely to be remunerative to the criminally accused before a military court than to one before a civilian court. With rare exceptions any person who commits any criminal offense within the geographical boundaries of a county or other judicial district of a state, or of a federal court district, is subject to the jurisdiction of the court of that district regardless of nationality, nature of employment or other status. True Section 2 of Article III of the Constitution vests exclusive original jurisdiction in the Supreme Court of all cases affecting ambassadors and, normally, infants under seven are conclusively presumed to be incapable of crime, but such exceptions simply emphasize the general rule in civil life that exemption from criminal jurisdiction cannot be predicated upon the status of the person accused.

Under the civil rule usually the locus of the offense is all important, the status of the accused not at all. Under military law quite the reverse is true. The traditional unlimited geographical jurisdiction of courts-martial¹⁰⁴ has not only received recent judicial approval¹⁰⁵ but express

¹⁰³ *United States v. Padilla* (No. 400), 5 CMR 31, 34 (U. S. C. M. A. 1952).

¹⁰⁴ WINTHROP, *MILITARY LAW AND PRECEDENTS* 81 (2d ed. 1923). Chief Justice Chase in *Ex parte Milligan*, 4 Wall. 2 (U. S. 1867) said, "And wherever our Army or Navy may go beyond our territorial limits neither can go beyond the authority of the President or the legislation of Congress."

¹⁰⁵ *Durant v. Hiatt*, 81 F. Supp. 948 (N. D. Ga. 1948), *aff'd*, 177 F. 2d 373 (5th Cir. 1949). In this case the court-martial originally convened in Germany, recessed and reconvened in Washington, D. C., recessed and again reconvened in Germany. This was expressly held to be within the proper jurisdiction of the court. Also, *United States v. Solinsky* (No. 594), 7 CMR 29 (U. S. C. M. A. 1953) where the accused was tried in the United States for forgeries committed in Germany.

congressional sanction in Article 5 of the Uniform Code¹⁰⁶ which declares, with amazing conciseness: "This code shall be applicable in all places." This summary disposition of locus contrasts sharply with the elaborate Code provisions as to what persons in what status at what times are subject to military law.¹⁰⁷

¹⁰⁶ 50 U. S. C. § 555 (Supp. 1952).

¹⁰⁷ Art. 2, 50 U. S. C. § 552 (Supp. 1952) provides:

"The following persons are subject to this chapter:

(1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates they are required by the terms of the call or order to obey the same;

(2) Cadets, aviation cadets, and midshipmen;

(3) Reserve personnel while they are on inactive duty training authorized by written orders which are voluntarily accepted by them, which orders specify that they are subject to this code;

(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay;

(5) Retired personnel of a reserve component who are receiving hospitalization from an armed force;

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve;

(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

(8) Personnel of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces of the United States;

(9) Prisoners of war in custody of the armed forces;

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

(12) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

Art. 3, 50 U. S. C. § 553 (Supp. 1952) states:

"Sec. 553. Jurisdiction to try certain personnel (article 3)

(a) Subject to the provisions of section 618 of this title, any person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

(b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of section 618 of this title, be subject to trial by court-martial on said

Dangerously oversimplified, those persons subject to military law are: all on active federal armed forces service regardless of component or assigned duty; cadets and midshipmen; reserves on voluntary inactive duty training under an order expressly so stating; retired regular personnel entitled to receive pay; retired reserve personnel receiving armed force hospitalization; Fleet Reserve and Fleet Marine Corps Reserve personnel; prisoners sentenced by courts-martial and in armed forces custody; prisoners of war in armed forces custody; Coast and Geodetic Survey, Public Health Service and other organization personnel when assigned to and serving with the armed forces; without the continental limits of the United States, Alaska, Puerto Rico, Canal Zone and the Hawaiian and Virgin Islands all persons serving with, employed by, or accompanying the armed forces, or within an area under the control of the Secretary of a Department; and, in time of war, all persons serving with or accompanying an armed force in the field. From this hasty glance it becomes apparent that status is all important and that in some cases time and place are essential ingredients of status.

A. *Military Personnel*

Clarity will probably be promoted by discussing first jurisdictional problems regarding military persons only as distinguished from those of civilians subject to military law. The latter will be considered separately. As to military persons it should be remembered that in general they continue to be subject to civil court jurisdiction for transgressions of ordinary criminal law.¹⁰⁸ After prior trial by a court-martial former jeopardy may be asserted only where later civil prosecution is by federal authority¹⁰⁹ and not where later civil prosecution is by a state¹¹⁰ except where a state statute expressly so provides.¹¹¹ Our concern here is, simply, does the court-martial have jurisdiction of the person, and need not be complicated by determining whether such jurisdiction is exclusive or concurrent.

(1) *When Is Military Status Acquired?*

A military person cannot be tried by court-martial for a criminal offense committed by him before he acquired military status, even though

charge and shall after apprehension be subject to this chapter while in the custody of the armed forces for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this chapter committed prior to the fraudulent discharge.

(c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any subsequent period of service."

¹⁰⁸ *Caldwell v. Parker*, 252 U. S. 376 (1920).

¹⁰⁹ *Grafton v. United States*, 206 U. S. 333 (1907).

¹¹⁰ *State v. Rankin*, 44 Tenn. (4 Cold.) 145 (1867).

¹¹¹ *State ex rel. Cobb v. Mills*, 82 Okl. Cr. 155, 163 P. 2d 558 (1945).

the offense is one prohibited by military law.¹¹² This necessitates a precise rule for determining the instant at which a person ceases to be a civilian and acquires a military status. The number of cases of recalcitrance by selectees under the Selective Training and Service Act of 1940,¹¹³ or crudely put, draft-dodging, while insignificant percentage-wise, has caused this question to become one of more than mere academic interest. Fortunately the Supreme Court supplied the answer in *Billings v. Truesdale*.¹¹⁴ Billings, a teacher at the University of Texas, who claimed to be a conscientious objector, was ordered by both his draft board and appeal board to report for induction at Fort Leavenworth, Kansas. He did so and the next morning was found physically and mentally qualified whereupon he refused to take the oath of induction and refused to submit to fingerprinting. For this latter refusal he was tried and convicted by court-martial for wilful disobedience of a lawful order. The Supreme Court on habeas corpus attack granted certiorari and held the court-martial was without jurisdiction since Billings had not taken the oath of induction and so had not been "actually inducted" into the Army. It pointed out that Billings was subject to criminal prosecution in the federal district court for a violation of the Selective Training and Service Act in refusing to be inducted. This was wholly consistent with a Supreme Court statement of 1890, "that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."¹¹⁵ The Court of Military Appeals has applied the oath test in finding that a court-martial was without jurisdiction to convict an accused of desertion.¹¹⁶ In another desertion

¹¹² *United States v. Logan* (CM 248867), 31 BR 363 (1944). In this case the accused who first entered the service in 1942 was tried for a bigamous marriage celebrated in 1934. It was held the continued illicit cohabitation did not make the bigamy a continuing offense and that the court-martial was without jurisdiction.

¹¹³ 54 STAT. 894 (1940).

¹¹⁴ 321 U. S. 542 (1944).

¹¹⁵ *In re Grimley*, 137 U. S. 147, 156 (1890). *In re Grimley* was cited as controlling, in favor of jurisdiction, by a Navy Board of Review in a case in which the accused admitted that he had taken the oath. *United States v. Perry* (NCM 36), 1 CMR 516, 517 (1951).

¹¹⁶ *United States v. Ornelas* (No. 446), 6 CMR 96 (U. S. C. M. A. 1952). While not itself strictly a jurisdictional problem, the military lawyer can scarcely pass by the procedural dilemma presented by the Court of Military Appeals in *Ornelas* and its companion case, *United States v. Rodriguez* (No. 365), 6 CMR 101 (U. S. C. M. A. 1952) decided the same day. In the face of the well-established rule that the law officer shall rule on interlocutory questions, save on a motion for a finding of not guilty or an accused's sanity, and that such rulings shall be final and shall constitute the ruling of the court [Article 51(b), 50 USC § 626 (Supp. 1952)] the Court in *Ornelas*, *supra*, at page 101 held:

"We conclude that where an accused raises a defense or objection which should properly be considered by the court in its determination of guilt or innocence, and which resolves itself into a question of fact, that issue must be presented to and decided by the court pursuant to appropriate instructions. But where the issue is purely interlocutory or raises solely a question of law, it is within the sole cognizance of the law officer. It follows that the law officer in this case erred in making his decision on the issue of jurisdiction

case it extended the rule in affirming jurisdiction by holding that the taking of the oath of allegiance was not necessary where the accused, a Mexican citizen, without objection reported for induction and remained in a military status for ten days before deserting.¹¹⁷ This decision finds support in the federal courts;¹¹⁸ in Army opinions;¹¹⁹ in an Air Force opinion;¹²⁰ and in a Navy Board of Review case which held a Canadian citizen, who, under selective service, had filed an application for voluntary induction and had served in the Navy for over a year before deserting, was subject to naval jurisdiction for that offense.¹²¹

As to officers, military jurisdiction commences from the time the oath of office is taken accepting the commission.¹²²

final. The accused was entitled to have the issue submitted to the court itself and decided by them under appropriate instructions. We should add that it matters not, in our opinion, whether the issue is submitted at the time the motion is made or at the conclusion of the case when the court is required to deliberate on the evidence."

In *Rodriguez*, at page 104, the Court said:

"The present case is readily distinguishable from *United States v. Ornelas, supra*. In that case, Ornelas testified that he did not at any time participate in an induction ceremony, and that he did not serve with the Army for any moment of time. Instead it was his contention that he merely took the required physical examination and returned immediately to his home in Mexico. Here, *Rodriguez* makes no claim that he did not participate in the induction ceremony, but only that he did not take the oath of allegiance. He did not object to service—in fact, he voluntarily entered upon the Army duty assigned. He proceeded to Fort MacArthur for basic training and remained in a military status, apparently without objection, for some ten days. Under such circumstances, he is in no position to claim that he was not lawfully inducted."

While the ultimate result in each case appears to be correct, the distinction in procedure required by the court to be followed depending on whether a motion to the jurisdiction "resolves itself into a question of fact" seems to impose upon the law officer the obligation of a well-nigh super-human clairvoyance in outguessing the Court. Clarification as to what is desired by the Court in this situation is essential, and until it is forthcoming law officers and Boards of Review must proceed at their peril in disposing of pleas raising jurisdiction. The Court in *United States v. McNeill* (No. 1048), 9 CMR 13, 18 (U. S. C. M. A. 1953) enlarged its position in this matter saying: "In *United States v. Ornelas*, . . . we held that if there was a factual dispute concerning jurisdiction which would have an effect on the ultimate guilt or innocence of the accused, it should be presented to the court-martial for determination. In the instance case there was no such question. The issue here raised was predicated on testimony which was undisputed and, therefore, involved only a question of law. When that is the posture of the case, the decision rests solely with the law officer." It is probable that the last word on this problem has not yet been spoken. See *United States v. Grow* (No. 2050), 1 CMR 77 (U. S. C. M. A. 1953) which held the law officer alone properly passed on the interlocutory factual question as to whether the convening authority was an "accuser."

¹¹⁷ *United States v. Rodriguez* (No. 365), 6 CMR 101 (U. S. C. M. A. 1952).

¹¹⁸ *Mayborn v. Heflebower*, 145 F. 2d 864 (5th Cir. 1944), cert. denied, 325 U. S. 854 (1945); *U. S. v. Mellis*, 59 F. Supp. 682 (M. D. N. C. 1945).

¹¹⁹ *Dir. Ops. JAG* § 467, p. 384 (1912-40), and *SPJGA* 325.34 (July 18, 1942), 1 *BULL. JAG* 165, 166.

¹²⁰ *United States v. Patton* (ACM 4272), 2 CMR 658, 662 (1951).

¹²¹ *United States v. Barlow* (NCM 113), 3 CMR 440, 445 (1952).

¹²² *WINTHROP, MILITARY LAW AND PRECEDENTS* 89 (2d ed. 1920). Under Art. 20, 50 U. S. C. § 580 (Supp. 1952), summary courts-martial have no jurisdiction over officers, warrant officers, cadets or midshipmen, nor, over objection, over anyone who has not first been offered and refused to accept non-judicial punishment under Art. 15, 50 U. S. C. § 575 (Supp. 1952).

(2) *When Does Military Status Terminate?*

The time element again becomes a significant status factor when a military person separates from the service. Reserve personnel who are no longer performing duty but who are continuing to draw active duty pay while in a terminal leave status remain subject to military jurisdiction, and prior to the expiration of such terminal leave may be recalled to active duty for the sole purpose of standing trial.¹²³ This is logical since their service was not in fact terminated.

Courts-martial jurisdiction over all military and other persons subject to the Code generally ceases upon termination of such status and, as to offenses committed prior to such termination, is not renewed by re-entry into the military service or return to another status subject to the code.¹²⁴ This well-established rule was given spectacular application by the Supreme Court in *Hirshberg v. Cooke*¹²⁵ where a Navy court-martial was held to be without jurisdiction to try the accused for mistreating fellow-American personnel while held by the Japanese as a prisoner of war. This result was reached because the accused's period of enlistment expired after his liberation and his offense did not come to light until after he had re-enlisted. An Army Board of Review followed the *Hirshberg* case in holding a court-martial without jurisdiction to try an accused who had previously been given an undesirable discharge from the Army based upon his conviction by a civil court for a criminal offense.¹²⁶ This applied to two charges of desertion, one before the discharge, the other alleged to have been committed after the discharge. The technical point in issue was whether the discharge had become effective.

A striking application of this rule occurred in the case of former Sergeant Lo Dolce¹²⁷ where a confessed killer was permitted to go free. The murder and robbery were committed in Northern Italy in 1944 when that area was occupied by Germany as a hostile belligerent and after Italy had entered into an armistice with the United States. The accused, then on active duty as an American army sergeant, killed his commanding officer, an American major, and threw the body into a mountain lake. The offenses were not discovered until long after Lo Dolce had returned to the United States, been discharged and reverted to civilian status. No attempt was made to try Lo Dolce by court-martial. The effort made by

¹²³ *Hironimus v. Durant*, 168 F. 2d 288 (4th Cir. 1948), *cert. denied*, 335 U. S. 818 (1948); *Durant v. Hiatt*, 81 F. Supp. 948 (N. D. Ga. 1949), *aff'd*, 177 F. 2d 373 (5th Cir. 1949).

¹²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 11a, p. 14.

¹²⁵ 336 U. S. 210 (1949).

¹²⁶ *United States v. Santiago* (CM 346819), 1 CMR 365, 368 (1951). *Cf. Ex parte Wilson*, 33 F. 2d 214 (E. D. Va. 1929) holding that a former officer administratively dropped from the rolls of the Navy by the President was not thereafter subject to military jurisdiction.

¹²⁷ *In re Lo Dolce*, 106 F. Supp 455 (W. D. N. Y. 1952).

Italy to extradite was rejected by the federal district court upon dual grounds. First, that since at the time of the crimes Italy had capitulated and American forces were present as friendly visiting forces the rule of *Schooner Exchange v. M'Faddon*¹²⁸ vested jurisdiction of the offense in the military authorities of the United States, and not Italy. Second, that, following the rule of *Coleman v. Tennessee*,¹²⁹ even if a state of belligerency still existed between Italy and the United States, jurisdiction over its own forces vested exclusively in the United States as a hostile occupant. Since the exercise of this jurisdiction by the United States was impossible due to Lo Dolce's fortuitous change of status from soldier to civilian, and because murder committed in Italy normally is not punishable by any American civil court, federal or state, a complete immunity bath emersion resulted for this confessed homicidist.^{129a} This fantastic situation has arisen more than once. Several similar, but unpublicized, homicides were committed in Italy during the last year of World War II by merchant seamen employed on vessels chartered by the military. Requests for extradition made after they had completed their voyages, returned to the United States and been discharged were administratively denied.

Congress, most fortunately, has taken appropriate action to remedy, in large measure at least, this glaring jurisdictional hiatus. Article 3(a)¹³⁰ of the Code now provides:

"Subject to the provisions of article 43 [statute of limitations], any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status."

Since under Article 43(a)¹³¹ the statute of limitations never runs on wartime desertion or absence without leave, aiding the enemy, mutiny or murder, offenders in these respects remain indefinitely subject to court-martial jurisdiction where the offense is not triable in an American civil court. Those committing other military or civilian type offenses not triable in other American courts and punishable by confinement of five years or more remain subject to military jurisdiction during the three-

¹²⁸ 7 Cranch 116 (U. S. 1812).

¹²⁹ 97 U. S. 509 (1878).

^{129a} Lo Dolce and a co-accused, Icardi, were tried in absentia for this offense by the Italian Government. On November 6, 1953 they were found guilty of murder by a trial court at Novara, Italy. Lo Dolce was sentenced to seventeen years confinement; Icardi, to life imprisonment. N. Y. Times, Nov. 8, 1953, p. 2 E.

¹³⁰ 50 U. S. C. § 553 (Supp. 1952).

¹³¹ 50 U. S. C. § 618 (Supp. 1952).

year period of limitation¹³² even though sooner separated from the service. As to offenses the maximum punishment for which is less than five years the jurisdictional hiatus still exists. Jurisdiction under Article 3(a) is not to be exercised without the prior consent of the Secretary of the Department concerned.¹³³ The constitutional prohibition against *ex post facto* applicability of law¹³⁴ precludes the use of this remedial legislation in any case occurring prior to May 31, 1951.¹³⁵

(3) *Military Status Not Terminated by Desertion Nor
Absence from Trial*

Within the wide ambit from oath to discharge a number of interesting problems of status arise to complicate military jurisdiction. An accused, otherwise subject thereto, may not terminate military jurisdiction by his own wrongful act. Thus, the contention of a Coast Guardsman accused that the expiration of the three-year period for which he enlisted, occurring while he was in desertion, divested the military of jurisdiction over that offense was rejected.¹³⁶ This obviously correct result in effect, applied to the Coast Guard the long-standing congressional requirement that soldiers must make up time lost, or "bad time," and that the enlistment extends until such time has been made good.¹³⁷

Similarly, where an accused, after being arraigned, voluntarily absents himself from his trial the court-martial retains jurisdiction to complete the trial, arrive at findings and sentence the accused in his absence.¹³⁸

¹³² Art. 43(b), 50 U. S. C. § 618 (Supp. 1952).

¹³³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 11b, p. 15. The case of *Toth v. Talbot*, 113 F. Supp. 330 and 114 F. Supp. 468 (D. C. D. C. 1953) testing by habeas corpus the validity of a military arrest made under Article 3(a) is now pending on appeal to the United States Court of Appeals for the District of Columbia.

¹³⁴ U. S. CONST. Art. I, § 9, cl. 3.

¹³⁵ PUB. L. No. 506, 81st Cong., c. 169, § 5, 64 STAT. 108 (1950).

¹³⁶ *United States v. Meyer* (CGCM 9737), 1 CMR 562 (1951), citing ¶ 11d, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951. *Accord, Ex parte Clark*, 271 Fed. 533 (E. D. N. Y. 1921). See also, *United States v. Klunk* (No. 2433), 11 CMR 92 (U. S. C. M. A. 1953).

¹³⁷ 64 STAT. 145 (1950), 10 U. S. C. § 629 (Supp. 1952) continues in force old Article of War 107 [41 STAT. 809 (1920)]. It provides:

"§ 629. Soldiers to make good time lost. Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve. June 4, 1920, c. 277, Subch. II, § 1, 41 Stat. 809; May 5, 1950, c. 169, § 6(a), 64 Stat. 145."

¹³⁸ *United States v. Hollings* (Sp CM 1213), 5 BR/JC 465 (1950); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 11c, p. 16.

This rule, which applies to capital as well as non-capital cases, has received the approval of the Court of Military Appeals in a rape case.¹³⁹ This doctrine has been applied to a case where after the court was sworn the accused exercised his peremptory challenge, was arraigned, then before plea, requested and was granted a continuance, and thereafter wrongfully absented himself. When the court reconvened not only was the accused absent but two members of the original court who had been excused by the convening authority. Two members of the court who were not present at the first meeting were sworn and the proceedings of the previous meeting made known to them.¹⁴⁰ The defense counsel announced he had no challenge for cause. An Army Board held the findings and sentence imposed on the absent accused by this court-martial to be valid.¹⁴¹

(4) *Changes of Military Status Not Terminating Jurisdiction*

The rigor of the discharge rule has long been tempered by limiting it largely to those discharges occurring at the end of a full term of enlistment. Thus it is necessary to examine the nature of a given honorable discharge to determine its effect on jurisdiction. Where prior to the expiration of a term of enlistment an individual is given an honorable discharge for "the convenience of the Government" for the purpose of re-enlisting or accepting a commission jurisdiction is retained over offenses committed during the previous foreshortened enlistment.¹⁴² The

¹³⁹ *United States v. Houghtaling* (No. 573), 8 CMR 30 (U. S. C. M. A. 1953). At page 34 the court, with considerable perspicacity, observed: "Of necessity military personnel are highly mobile, and on occasion are scattered to the four winds within a matter of hours. In oversea theaters, and particularly in combat areas, witnesses, both military and civilian, are exposed to uncommon hazards which make their assembly for trial difficult always and too often impossible. Certainly the degree of prosecution hardship sharply increases as the time of trial is delayed. The capital offense escapee may thus gain great advantage, which will vary directly with the length of time he is able to prolong his absence. This is, of course, true in all areas of law enforcement, but it is greatly intensified in that of military judicial administration. We discern no reason for impeding (*sic*)—perhaps even defeating—the prosecution of those who choose not to be present for trial, regardless of the offense with which they are charged. This would, we believe, be distinctly in derogation of the just claims of the military society, an interest often disregarded in febrile evaluation of the rights of frequently undeserving individuals."

"... In the civilian community there is no rigid rule demanding that a convicted man be sentenced only by the judge who presided over his trial. However, there is no provision in military criminal law procedure for the imposition of any sort of sentence save by the court which tried and convicted the accused. As a practical necessity, the court which convicts a man *in absentia* must have the power to sentence him as well, otherwise the conviction will have gone for naught. It will always be difficult, and usually impossible, ever to reassemble a court-martial—and the longer the delay, the greater the difficulty and threat of impossibility."

¹⁴⁰ This is required by Art. 29(b), 50 U. S. C. § 593 (Supp. 1952).

¹⁴¹ *United States v. Henkel* (CM 356028), 9 CMR 172 (1952).

¹⁴² *United States v. Aikens* (CM 337089), 5 BR/JC 331 (1950). The offenses involved were murder, robbery and assault. See also A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1928, ¶ 10; MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1949, ¶ 10; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 11b.

Court of Military Appeals, one judge dissenting, has subscribed to this jurisdictional principle. It upheld jurisdiction to try in 1951 a postal clerk sergeant for six money order forgeries and larcenies perpetrated in 1948, although the sergeant had been discharged in 1949 for "the convenience of the Government" to re-enlist for an indefinite period of time.¹⁴³ Here the discharge was delivered the following day after the re-enlistment had been effected.

An Air Force Board of Review has upheld jurisdiction over larcenies committed before a re-enlistment entered into in lieu of a one-year involuntary extension of the prior enlistment under Executive Order 10270 of July 9, 1951.¹⁴⁴ Jurisdiction has also been affirmed where the accused in writing first voluntarily extended a one-year enlistment to three years and later extended it for two more years without ever taking a new oath. Accused performed military duty, wore an airman's uniform and accepted pay up until he deserted during the fifth year of this extended service. Accused contended that since he had not taken a new oath he was not in the service at the time he deserted. The Air Force Board in rejecting this contention held that the extensions did not constitute either a reformation of the contract or a separate enlistment but a voluntary "holding over" in the military service effecting a constructive enlistment.¹⁴⁵ It should be noted this case did not involve the survival after the extension of the enlistment of jurisdiction as to offenses previously committed, but was directed to jurisdiction of an offense committed after the second extension.

A complicated status situation was presented in the larceny case of Airman Eaton,¹⁴⁶ who originally enlisted for three years on October 25, 1946. On October 24, 1949, he voluntarily extended his enlistment one year. Because of "bad time" his period of service continued until April 19, 1951 and he was retained in service for one year thereafter pending decision whether his enlistment was subject to involuntary extension for one year. The offense in question was committed in this last year. The Board held the accused had not been officially discharged and was, therefore, a person "awaiting discharge" within the provision of Article 2(1) of the Code,¹⁴⁷ and, hence, subject to court-martial trial. On the question of sentence evidence of five previous convictions was

¹⁴³ *United States v. Solinsky* (No. 594), 7 CMR 29 (U. S. C. M. A. 1953). At page 36 the majority of the court observed: "A momentary break in service does not necessarily break court-martial jurisdiction. Chief Judge Quinn dissented and would apply the *Hirshberg* case rule in all situations not expressly covered by statute.

¹⁴⁴ *United States v. Isidore* (ACM 5625), 7 CMR 595 (1952).

¹⁴⁵ *United States v. Patton* (ACM 4272), 2 CMR 658, 662 (1951).

¹⁴⁶ *United States v. Eaton* (ACM S-3519), 6 CMR 675 (1952).

¹⁴⁷ 50 U. S. C. § 552(1) (Supp. 1952). A similar result was reached by the Court in the Navy case of *United States v. Downes* (No. 2544), 11 CMR 90 (U. S. C. M. A. 1953).

introduced—one for an offense during the original enlistment, three during the one year voluntary extension and one during the involuntary holding over. The last four were held to be properly admitted, but the first was ruled to be inadmissible since the voluntary extension started the accused with a clean slate so far as prior convictions was concerned.

Jurisdiction exists over a person who fraudulently enlists and accepts pay or allowances. Such a person may be tried by court-martial at the same time for the fraudulent enlistment and for a subsequent desertion therefrom.¹⁴⁸

(5) *Jurisdiction Over Military Prisoners*

A prisoner in the custody of an armed force though under an executed sentence of dishonorable¹⁴⁹ or bad conduct¹⁵⁰ discharge remains subject to military jurisdiction not only for offenses committed while a prisoner but for offenses perpetrated while in the service prior to such discharge. The Court of Military Appeals has not had occasion to pass upon this point.

(6) *Effect of Service in Another Armed Force*

Naval Reserve Fireman Hazeldine, while in the inactive naval reserve, enlisted in the Air Force and served therein for two months before receiving an undesirable discharge. Thereafter he was ordered to active duty with the Navy and was subsequently convicted of a series of four absences without leave. Accused contended his Air Force service had terminated his Naval status rendering him not subject to Naval jurisdiction. In rejecting this assertion the Navy Board of Review declared:¹⁵¹

“The accused in this case, a naval reservist, was in and out of another military organization and had not been discharged from

¹⁴⁸ *United States v. Luce* (ACM 4191), 2 CMR 734 (1951). At page 738, the Board said: “The Board of Review concludes that the accused was properly tried and convicted at one trial both for fraudulent enlistment and for desertion from the period of service thereunder. His status as a person subject to military law while serving under such enlistment was a fact which cannot, as to offenses punishable by court-martial committed during such period, be considered retroactively terminated by a subsequent execution of the discharge adjudged. Such service is ‘void’ in its civil aspect as to benefits for the accused, but it is not ‘void’ in its disciplinary aspect as to burdens of service imposed on him by virtue of his status therein as a member of the armed forces.”

¹⁴⁹ The last sentence of ¶ 11b, *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1951 in part reads: “. . . a dishonorably discharged prisoner in custody of an armed force may be tried for an offense committed while a member of the armed forces and prior to the execution of his dishonorable discharge.” Presumably such a person, if not confined, or if confined in a civilian detention institution, would not continue subject to military jurisdiction other than in the exceptional cases provided for in Article 3 of the Code [50 U. S. C. § 553 (Supp. 1952)]. Military jurisdiction over a military prisoner was upheld in *Mosher v. Hudspeth*, 123 F. 2d 401 (10th Cir. 1941), *cert. denied*, 316 U. S. 670 (1942); and *Mosher v. Hunter*, 143 F. 2d 745 (10th Cir. 1944).

¹⁵⁰ *United States v. Drummond* (ACM 5243), 5 CMR 400 (1952).

¹⁵¹ *United States v. Hazeldine* (NCM 125), 4 CMR 429, 431 (1952).

his de jure status in the Naval Reserve prior to reporting as such reservist for active duty. He was, therefore, a naval reservist on active duty at the time of the commission of the offenses alleged, and a person subject to the Code and the court which tried him."

This decision appears to reverse *sub silentio* a 1951 opinion of the Judge Advocate General of the Navy.¹⁵² In this latter case the accused enlisted in the Naval Reserve in 1946 for a four-year term, then in 1948 enlisted in the regular navy and in 1949 received a bad conduct discharge therefrom. In 1950, prior to the expiration of his original naval reserve enlistment, accused signed an agreement extending this reserve enlistment an additional four years, later entered upon active duty thereunder and thereafter received a bad conduct discharge for absence without leave. The Judge Advocate General of the Navy said that the accused ceased to be a member of the naval establishment when discharged from the regular navy, stressed that he had not thereafter taken an oath of enlistment, and held that even though he had entered upon and performed active duty the accused could not be guilty of the offense of unauthorized absence. This opinion was rendered prior to the decision of the Court of Military Appeals in *Rodriguez*¹⁵³ which held that the taking of an oath was not indispensable to jurisdiction if the accused in fact voluntarily entered into service. Of these two Navy views, that expressed by the Board of Review in *Hazeldine* seems to be the correct one under present law.

(7) *Selective Service Induction*

Private McNeill who had previously served two years in the army and three years in the enlisted reserve corps would have been exempt from selective service induction if he had disclosed these facts. Accused simply left blank the spaces provided on the form for showing prior service and six weeks after reporting for duty deserted. Accused contended that the law officer erred in overruling a motion to dismiss for lack of jurisdiction on the ground that accused was not subject to selective service. The Court, relying on federal court authority,¹⁵⁴ affirmed jurisdiction and said:

" . . . when an accused fails to furnish a basis for an exemption he is subject to military law. . . . When he . . . does not appeal from his classification, but on the contrary reports for duty he cannot reverse the local board by concluding not to serve."¹⁵⁵

¹⁵² Op. JAGN 1951/22 (15 August 1951), digested in 1 DIG. OPS. JAG 143 (1951-52).

¹⁵³ *United States v. Rodriguez* (No. 365), 6 CMR 101 (U. S. C. M. A. 1952).

¹⁵⁴ *Harris v. Ross*, 146 F. 2d 355 (5th Cir. 1944); *United States v. Graham*, 57 F. Supp. 938 (E. D. Ark. 1944); *United States v. Mitchell*, 248 Fed. 997 (E. D. N. Y. 1918).

¹⁵⁵ *United States v. McNeill* (No. 1048), 9 CMR 13, 16 (U. S. C. M. A. 1953).

(8) *Short Active Duty Tours by Reserve Personnel*

Reservists ordered to short tours of active duty, as distinguished from those on extended active duty, also come within the jurisdictional purview of Article 2(1)¹⁵⁶ in that they are "persons lawfully . . . ordered . . . to duty in or for training in, the armed forces, from the dates they are required by the terms of the . . . order to obey the same." The Army Judge Advocate General has rendered an opinion that both officer and enlisted reservists who fail to comply with orders to active duty for fifteen days or less, or who while engaged in such duty commit offenses, may be punished by court-martial; that military jurisdiction fully attaches to such individuals if proceedings with a view to trial by court-martial are commenced, such as by arrest or service of charges, prior to expiration of the period of active duty; and that such proceedings may then be prosecuted to their conclusion.¹⁵⁷

(9) *Member of Another Armed Force*

Concerning military personnel, there remains for discussion the self-imposed inter-service difficulties as to whether courts of one service may try an accused of another service. Congress imposed no limitation whatever in this respect and expressly provided: "Each armed force shall have court-martial jurisdiction over all persons subject to this code."¹⁵⁸ Congress did, however, make possible the "segregation" which the services have adopted by adding the proviso: "The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President."¹⁵⁹ In the exercise of this authority the President approved the *Manual* provisions:¹⁶⁰ "In general, jurisdiction by one armed force over personnel of another should be exercised only when the accused cannot be delivered to the armed force of which he is a member without manifest injury to the service," and: "Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a joint or common trial." The only exemptions authorized are in the case of "The commanding officer of a joint command or joint task force who has been specifically empowered by the President or the Secretary of Defense to exercise jurisdiction over personnel of another armed

¹⁵⁶ 50 U. S. C. § 552 (Supp. 1952).

¹⁵⁷ JAGA 1951/7487 (4 December 1951), reported in 1 DIG. OPS. JAG 138 (1951-52). *In re Schulz* (D. C. Ariz. April 30, 1953) digested in JAG CHRON. No. 22, p. 99 (29 May 1953), upheld military jurisdiction to try a former reserve officer for an offense committed while on active duty, where his active duty terminated and his commission had expired before the charges were served on him, but after the charges had been preferred and referred to a court-martial for trial. In denying the petition for habeas corpus the district court relied on *Carter v. McClaughry*, 183 U. S. 365 (1902).

¹⁵⁸ Art. 17 (a), 50 U. S. C. § 577 (Supp. 1952).

¹⁵⁹ *Ibid.*

¹⁶⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 13, p. 17.

force,"¹⁶¹ and isolated commanders of small units who have first been so authorized by the Secretary of the Department primarily concerned with the concurrence of the Secretary of the other Department.¹⁶² Presidential authority to so empower a joint commander was delegated to the Secretary of Defense by Executive Order 10428 of January 17, 1953.¹⁶³

The Judge Advocate General of the Army has rendered an opinion that a member of the Marine Corps may not be tried by a court-martial convened by an armed force other than the Navy where the accused can be delivered to the Navy without manifest injury to the service.¹⁶⁴ This result definitely changed the rule prescribed by the Articles of War prior to the Uniform Code that "Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by Order of the President,"¹⁶⁵ were subject to army courts-martial jurisdiction. An Army Regulation¹⁶⁶ cautions that Naval medical and dental officers assigned for duty with the Army are not subject to Army courts-martial or to non-judicial punishment under Article 15¹⁶⁷ by an Army commanding officer unless the President or Secretary of Defense has specifically so empowered the Army commanding officer. Where disciplinary action is deemed necessary a request should be made to the Chief of Naval Personnel through the Surgeon General, Department of the Army, to have the individual relieved from duty with the Army.

An Air Force Board of Review¹⁶⁸ has reversed a desertion conviction of an Air Force private imposed by an Army court-martial holding that its purported exercise of jurisdiction was "nugatory."¹⁶⁹ The Air Force Board said:

" . . . it was the Congressional purpose that the exercise of reciprocal jurisdiction under Article 17 was conditioned upon compliance with Presidential regulations and that purported exercise of such jurisdiction without such compliance is nugatory. Accordingly, accused could not be tried by an Army court-martial for the offense of desertion (Specification 2 of the Charge), inception of which occurred after he had been transferred administratively to the Air Force without specific authority to do so."¹⁷⁰

¹⁶¹ *Id.* at ¶ 4g(2), p. 5.

¹⁶² *Id.* at ¶ 4g(3), p. 6.

¹⁶³ 18 FED. REG. 408 (1953).

¹⁶⁴ JAGJ 1952/2903 (25 March 1952), cited in JAG CHRON. No. 18, p. 75 (2 May 1952).

¹⁶⁵ Article of War 2(c), 41 STAT. 787 (1920) and Article of War 2(c) of 62 STAT. 628 (1948).

¹⁶⁶ ¶ 7, SR 605-145-25 (25 August 1952).

¹⁶⁷ 50 U. S. C. § 571 (Supp. 1952).

¹⁶⁸ Art. 17(b), 50 U. S. C. § 577 (Supp. 1952) reads: "In all cases, departmental review subsequent to that by the officer with authority to convene a general court-martial for the command which held the trial, where such review is required under the provisions of this code, shall be carried out by the armed force of which the accused is a member."

¹⁶⁹ United States v. Mack (ACM 4920), 4 CMR 536 (1952).

¹⁷⁰ *Id.* at 542.

A case which arose at the United States Disciplinary Barracks at Camp Gordon, Georgia, resulted in an interesting application of the administrative prohibition against cross-service trials. Six army prisoners and one air force prisoner, all under courts-martial sentences including dishonorable discharge, engaged in a common offense within the Army operated confinement facility. The Code expressly provides that "all persons in custody of the armed forces serving a sentence imposed by a court-martial"¹⁷¹ are subject to its jurisdiction, and does not concern itself with their source of origin. The Judge Advocate General of the Army, in response to a pre-trial inquiry, rendered an opinion that prisoners confined at disciplinary barracks who at the time of their original conviction were Air Force members, and who commit offenses while in confinement, should be tried by an Air Force court-martial in the absence of a showing of manifest injury to the service.¹⁷² Pursuant thereto separate courts were convened, one by the Army¹⁷³ and one by the Air Force.¹⁷⁴

In these cases where the accused is of a service other than that of the convening authority it must be kept in mind that the impediment to the exercise of jurisdiction is administrative and not congressional, and that the administrative bar is to the exercise of existing jurisdiction and does not destroy jurisdiction itself. If and when the President should elect to withdraw the administrative impediment, or the Secretary of Defense expressly empowers a joint commander to exercise such jurisdiction, the basic congressional grant thereof remains and could properly be exercised.^{174a} The problem is not by any means wholly academic since there are many occasions where small groups from one service must perform duty with another of the services for extended periods of time. For example, so common are such assignments for some army men that their status has been officially alphabetized and they are characterized an ARWAF and SCARWAF personnel. Translated, these mean "Army with Air Force" and "Special Category Army with Air Force." Prompt administration of discipline, when occasion arises, encounters great administrative difficulty.

¹⁷¹ Art. 2(7), 50 U. S. C. § 552 (Supp. 1952).

¹⁷² JAGJ 1952/8435 (5 November 1952) cited in JAG CHRON. No. 48, p. 211 (28 November 1952).

¹⁷³ United States v. Duggan, Mendiola, Fowler, Gomez, Comeaux and Simcox (CM 361674) 10 CMR ____ (1953).

¹⁷⁴ United States v. Criswell (ACM 4815), 10 CMR ____ (1953).

^{174a} The Secretary of Defense on July 20, 1953 elected under his delegated authority to empower the commanding officers of three joint commands, one in Greenland, one in Newfoundland, and one at Sandia Base, New Mexico, ". . . to refer for trial by courts-martial the cases of members of any of the armed forces assigned or attached to or on duty with such command." Dept. of Defense Directive No. 5510.2 (20 July 1953), and companion directives.

B. Civilian Personnel

Congress, with a lively concern for the basic principle of American government of separation of powers, has in general consistently limited the jurisdiction of military tribunals over ordinary civilians to situations where the civil courts are not functioning¹⁷⁵ or where no American civil court has jurisdiction to adjudicate the cause. This continued concern is evidenced by the limitation in Article 3(a)¹⁷⁶ upon the survival of jurisdiction after the termination of military status to those cases where "the person cannot be tried in the courts of the United States or of a State or Territory thereof or of the District of Columbia," and by the common provision in paragraphs (11) and (12) of Article 2¹⁷⁷ which limits the jurisdiction therein conferred over civilians to areas "without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands." Thus, where American civil courts are available jurisdiction over civilians is reserved to them except for the provision of paragraph (10) of Article 2¹⁷⁸ that "In time of war, all persons serving with or accompanying an armed force in the field" are subject to military jurisdiction. Only the above cited paragraphs (10), (11) and (12) of Article 2 confer jurisdiction over civilians, while the first seven paragraphs thereof are concerned with defining military personnel for jurisdictional purposes. The global nature of missions which during the past decade have been assigned to the military establishment of the United States has been productive of decisions which have enriched the law of military jurisdiction over civilians.

Most of the decisions deal with former Article of War 2(d),¹⁷⁹ in effect from 1920 to 1951, which subjected to military jurisdiction:

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

Most of these decisions continue to be of value in applying the current

¹⁷⁵ *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866). *Duncan v. Kahanomoku*, 327 U. S. 304 (1945).

¹⁷⁶ 50 U. S. C. § 503 (Supp. 1952).

¹⁷⁷ 50 U. S. C. § 554 (Supp. 1952).

¹⁷⁸ *Ibid.* See, however, IV, C, *post*, p. 47.

¹⁷⁹ 41 STAT. 787 (1920) and 62 STAT. 628 (1948).

jurisdictional provisions regarding civilians. Many of the cases prior to 1945 are collected in a published opinion of The Judge Advocate General of the Army.¹⁸⁰

Of historical interest are Civil and Indian War rulings holding the following civilians subject to military law: ambulance drivers employed by the army;¹⁸¹ guides for the army during warfare with Indians;¹⁸² conductor and engineer on a train running from Alexandria to Manassas;¹⁸³ pilots and crews employed in the "Ram Fleet" in western waters;¹⁸⁴ contract surgeons;¹⁸⁵ teamsters employed by the Quartermaster;¹⁸⁶ deputies appointed by district provost marshals;¹⁸⁷ paymaster's clerks;¹⁸⁸ civilian horse trader with the army;¹⁸⁹ and War Department employees serving with the army in the Indian country.¹⁹⁰

During World War I civilians in the following categories were held to be subject to military jurisdiction: field auditor in Quartermaster office at Camp Jackson, South Carolina;¹⁹¹ Port of Brooklyn storage office chauffeur¹⁹² and laborers;¹⁹³ laborers employed by civilian contractors engaged in constructing facilities for the American Expeditionary Force in France;¹⁹⁴ cook employed by quartermaster at New Mexico camp;¹⁹⁵ scout in Texas;¹⁹⁶ quartermaster civilian employee laborers on docks at ports of embarkation¹⁹⁷ and at Camp Upton, New York;¹⁹⁸ civilian member of a labor unit in France;¹⁹⁹ stevedore employed by the Army in France;²⁰⁰ clerks employed by the Quartermaster overseas²⁰¹

¹⁸⁰ SP-JGW 1945/4990 (23 June 1945 and 2 July 1945) published in 4 BULL. JAG No. 6, pp. 223-229 (1945).

¹⁸¹ Record Book No. 9, p. 146 (May 1864).

¹⁸² Record Book No. 36, p. 435 (May 1875), DIG. OPS. JAG 49 (1880).

¹⁸³ Record Book No. 7, p. 116 (February 1864), DIG. OPS. JAG 38 (1865).

¹⁸⁴ Record Book No. 2, p. 570 (June 1863), DIG. OPS. JAG 107 (1865).

¹⁸⁵ Record Book No. 11, p. 493 (March 1865), DIG. OPS. JAG 11 (1866);

Record Book No. 12, p. 376 (March 1865); Record Book No. 13, p. 459 (March 1865).

¹⁸⁶ Record Book No. 9, p. 111 (May 1864), DIG. OPS. JAG 38 (1865).

¹⁸⁷ Record Book No. 8, p. 246, DIG. OPS. JAG 69 (1866).

¹⁸⁸ Record Book No. 3, p. 269, DIG. OPS. JAG 92 (1865).

¹⁸⁹ Record Book No. 7, p. 511 (April 1864).

¹⁹⁰ 14 OP. ATT'Y GEN. 22 (1872); Record Book No. 32, p. 385.

¹⁹¹ Rines v. Mikell, 259 F. 28 (4th Cir. 1919), *cert. denied*, 250 U. S. 645 (1919); JAG 205.4 (15 October 1918), DIG. OPS. JAG § 359(9) (1912-40).

¹⁹² CM 133361 (1919).

¹⁹³ CM 133362 (1919); CM 133363 (1919).

¹⁹⁴ JAG 250.4 (4 April 1948), Op. JAG 246 (1918), DIG. OPS. JAG § 359(12) (1912-40); CM 117642 (1918); CM 127110 (1919); CM 127126 (1919); CM 115772 (1918).

¹⁹⁵ CM 111573 (1918).

¹⁹⁶ CM 136256 (1919).

¹⁹⁷ JAG 250.4 (3 April 1918), DIG. OPS. JAG § 359(9) (1912-40); CM 133364 (1919).

¹⁹⁸ CM 117909 (1918), DIG. OPS. JAG § 359(12) (1912-40); CM 117910 (1918); CM 117911 (1918); CM 117912 (1918); CM 117914 (1918); CM 117915 (1918); CM 118055 (1918); CM 118120 (1918).

¹⁹⁹ CM 115773 (1918).

²⁰⁰ CM 108605 (1918).

²⁰¹ CM 108116 (1917); CM 110496 (1918); CM 133032 (1919).

and at Camp Meade, Maryland;²⁰² civilian passengers on an army transport;²⁰³ Red Cross personnel serving with the Army overseas;²⁰⁴ Captain of an Army transport in the Port of New York;²⁰⁵ chief cook on an Army transport carrying military cargo;²⁰⁶ merchant seamen on Army transports at sea or in English, French, or American ports;²⁰⁷ telephone operator employed by Army in France;²⁰⁸ secretaries and other employees of the Young Men's Christian Association and Knights of Columbus in France;²⁰⁹ the superintendent for the Quartermaster Corps in Texas;²¹⁰ and a caretaker employed by the Army in France.²¹¹

World War II cases in which military jurisdiction was exercised over civilian personnel were even more voluminous and included: employees of the Board of Economic Warfare sent overseas at the request of a Theater Commander to feed and clothe the civilian population;²¹² decoding experts employed by the Signal Corps at installations in the United States;²¹³ employees of civilian contractors in overseas areas;²¹⁴ discharged employees of a contractor with the Army awaiting transportation to the United States;²¹⁵ electricians employed by the Corps of Engineers in the Caribbean Defense Command,²¹⁶ the British West

²⁰² CM 132707 (1919).

²⁰³ *Ex parte* Gerlach, 247 Fed. 616 (S. D. N. Y. 1917).

²⁰⁴ JAG 080 (3 February 1919), Dig. Ops. JAG § 359(14) (1912-40); JAG 250.4 (21, 29 December 1917), Dig. Ops. JAG 98 (April-December 1917); CM 128898 (1919); *cf.* United States v. Snyder (CM 330683), 79 BR 121 (1948).

²⁰⁵ CM 110574 (1918).

²⁰⁶ *Ex parte* Falls, 251 Fed. 415 (D. C. N. J. 1918).

²⁰⁷ JAG 251 (5 February 1918); Dig. Op. JAG 79 (1918); and twenty-five courts-martial cases cited in 4 BULL. JAG No. 6, pp. 227-228 (1945).

²⁰⁸ CM 120393 (1918).

²⁰⁹ CM 118327 (1918); CM 118333 (1918); CM 119135 (1918); CM 120639 (1918); CM 122855 (1918); CM 127502 (1919); CM 130005 (1919); CM 132387 (1919); CM 132407 (1919); CM 132607 (1919); CM 133387 (1919); CM 133818 (1919); JAG 000.51 (1 February 1919).

²¹⁰ *Ex parte* Jochen, 257 Fed. 200 (S. D. Tex. 1919).

²¹¹ CM 136620 (1919).

²¹² SPJGW 1943/230 (1 March 1943); SPJGW 1943/6250 (14 May 1943), 2 BULL. JAG 235.

²¹³ SPJGW 1944/8675 (19 July 1944).

²¹⁴ *In re* Di Bartolo, 50 F. Supp. 929 (S. D. N. Y. 1943), 2 BULL. JAG 338 (occupied enemy territory); SPJGW 1943/14720 (4 November 1943) (airfield overseas); SPJGW 1943/4722 (13 April 1943) (West Africa); SPJGW 1944/11096 (9 September 1944) (Alaska); SPJGW 1943/7941 (10 June 1943) (Alaska); CM 269448 (1944) (Alaska); the following in the Northwest Service Command: CM 245670 (1943); CM 247236 (1944); CM 248244 (1944); 31 BR 203, 3 BULL. JAG 58; CM 248722 (1944); CM 248725 (1944); CM 249973 (1944); CM 250124 (1944); CM 259249 (1944); the following at United States Military installations on bases leased in British possessions: SPJGW 1942/5668 (1 December 1942), 1 BULL. JAG 357; CM 218308 (1941); CM 221982 (1942); CM 228677 (1942); CM 230704 (1943).

²¹⁵ *Perlstein v. United States*, 57 F. Supp. 123 (M. D. Penn. 1944); JAG 250.401 (27 December 1941); CM 254272 (1944). Distinguished in *United States v. Guidry* (CM 357066), 7 CMR 305 (1952) where a discharged merchant seaman, not entitled to, and not awaiting, transportation to the United States, was held not subject to military jurisdiction for offenses committed in Japan after termination of his employment.

²¹⁶ SPJGW 1941/12887 (17 September 1943).

Indies,²¹⁷ and Alaska;²¹⁸ laborers, construction and maintenance personnel employed by the Army overseas;²¹⁹ mechanics at overseas bases;²²⁰ USO Camp Shows entertainers with troops overseas;²²¹ American newspaper correspondents overseas officially accredited to the Army;²²² employees of Psychological Warfare Branch, Office of War Information, attached to the Army in Algiers;²²³ civilian passengers on Army transports;²²⁴ commercial vessels operated under Army control carrying troops and military cargo,²²⁵ and on War Shipping Administration vessels allocated to the Army carrying military personnel and cargo;²²⁶ employees of post exchanges at camps in the United States;²²⁷ Treasury Department agents in North Africa on foreign fund control work;²²⁸ firefighters at an air base within the United States;²²⁹ Civil Service pilots with Air Corps Ferrying Command and subject to military orders;²³⁰ pilots of Civil Air Patrol who receive some of their orders from Army theater commanders;²³¹ policemen and guards at installations in the United States important to the prosecution of war²³² and at overseas bases;²³³ messman²³⁴ and chief cook²³⁵ on ships operated by private shipping corporation carrying military cargo; civilian seamen serving

²¹⁷ CM 269484 (1944).

²¹⁸ CM 243080 (1943).

²¹⁹ SPJGW 1942/6245 (28 December 1942) (Engineer Corps workers on Pan-American Highway in Nicaragua and Costa Rica, not normally resident there); CM 279377 (1945) (caretaker at partially abandoned airfield in Costa Rica recruited from Canal Zone); CM 267338 (1944) and CM 272817 (1945) (Northwest Service Command); CM 254962 (1944) (laborer in Persian Gulf Command); CM 243309 (1943) (construction worker at leased base in a British possession); CM 241292 (1943) (engineer employed at base in British West Indies); CM 245662 (1943) (storekeeper); SPJGW 1943/12887 (17 September 1943) (Panama Canal Department).

In *United States v. Weiman* (No. 1403), 11 CMR 216 (U. S. C. M. A. 1953) two Polish nationals, members of a Labor Service Company brought to France for service with United States forces there located, were convicted by court-martial. In upholding jurisdiction the Court said: "... we are here concerned with nationals of a country other than the United States, present in a foreign country friendly to the United States, solely as employees of the military forces of the United States. We are not here concerned with nationals of a host nation, employed by our forces within the borders of such a nation."

²²⁰ CM 245165 (1943); CM 245661 (1943).

²²¹ SPJGA 1943/6116 (29 April 1943).

²²² SPJGW 1942/4281 (17 September 1942); 1 BULL. JAG 212.

²²³ SPJGW 1944/977 (13 March 1944).

²²⁴ *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y. 1917) (A World War I case).

²²⁵ SPJGW 1944/6511 (16 June 1944).

²²⁶ SPJGW 1944/9568 (18 August 1944).

²²⁷ CM 222383 (1942). A civilian employee of a post exchange concessionaire on Okinawa is subject to military jurisdiction. *United States v. Biagini* (ACM 6341), ___ CMR ___ (18 May 1953).

²²⁸ SPJGW 1943/7335 (26 May 1943).

²²⁹ SPJGW 1943/9505 (12 July 1943).

²³⁰ SPJGW 1942/318 (30 January 1942).

²³¹ SPJGW 1942/1877 (8 May 1942), 1 BULL. JAG 12.

²³² SPJGW 1943/9505 (12 July 1943); CM 248051 (1944); CM 276755 (1945).

²³³ SPJGW 1942/214 (21 January 1942), 1 BULL. JAG 12; CM 238012 (1943).

²³⁴ *In re Berue*, 54 F. Supp. 252 (S. D. Ohio 1944), 3 BULL. JAG 135, 139.

²³⁵ *McCune v. Kilpatrick*, 53 F. Supp. 80 (E. D. Va. 1943), 3 BULL. JAG 6.

on ships under army control or with troops or army cargo aboard;²³⁶ and civilian employees of army transports and mine planters.²³⁷

The foregoing cases all arose either without the territorial limits of the United States or in the field in time of war. Through all of the former group runs a hard core of common sense thinking, shared in by Congress, that those whose employment, either directly or indirectly for military purposes, carries them beyond the territorial jurisdiction of state and federal civil courts should be subject to the jurisdiction of the only American courts which can reach them, namely, military tribunals. The latter group of cases, confined to those who in time of war serve with or accompany an armed force in the field, include some arising within the United States as well as overseas. Normally this jurisdiction is sparingly exercised in the United States and is reserved for cases where the individual is not only serving with or accompanying the armed force in the field but is also engaged in work essential to the war effort. The Attorney General has ruled that the words "in the field" imply military operations with a view to an enemy. The federal courts have held that the question of whether an armed force is "in the field" is to be determined by the activity in which it is engaged at the time rather than by the locality in which it may be. Thus a temporary training camp in the United States is "in the field."²³⁸ So also is a merchant ship and crew engaged in transporting troops and supplies to a battle zone.²³⁹

The Judge Advocate General of the Army has administratively determined that the following classes of persons are not subject to military law: laborers, mechanics or professional personnel at industrial establishments in the United States;²⁴⁰ employees of an independent contractor engaged in construction work on the Inter-American highway supervised by a few Army Engineer officers but where no troops were present;²⁴¹ War Department clerical employees in Washington or in a field office in the United States not located at a military camp;²⁴² and, armed civilian guards at an Office of Strategic Services installation in a foreign country.²⁴³ The Attorney General in 1878 rendered an opinion that clerks employed by the quartermaster in time of peace in the United States were not subject to military law.²⁴⁴

²³⁶ SPJGW 1942/2777 (30 June 1942); CM 226362 (1942), 15 BR 95, 1 BULL. JAG 357; CM 260578 (1944); CM 276748 (1945). Cf. *Forgione v. United States*, 100 F. Supp. 239 (E. D. Penn. 1951).

²³⁷ *Weber v. Squier* (W. D. Wash., May 31, 1945) (No opinion filed); 4 BULL. JAG 229 (June 1945).

²³⁸ *Hines v. Mikell*, 259 Fed. 28, 34 (4th Cir. 1919).

²³⁹ *McCune v. Kilpatrick*, 53 F. Supp. 80 (S. D. Va. 1943); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio 1944); *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y. 1917).

²⁴⁰ SPJGJ 1943/9505 (12 July 1943).

²⁴¹ SPJGW 1943/2645 (12 February 1943).

²⁴² SPJGW 1943/9505 (12 July 1943) and SPJGW 1944/5969 (22 May 1944).

²⁴³ SPJGW 1944/12441 (19 October 1944).

²⁴⁴ 16 OP. ATT'Y GEN. 13, 48 (1878), DIG. OPS. JAG 49, 50 (1880).

The Court of Military Appeals has as yet had little occasion to consider military jurisdiction over civilians. It has affirmed the traditional jurisdiction of the military over its civilian employees in overseas areas in the case of *Marker*, a General Service-11, Department of Army civil service employee, who was the superintendent of a tire plant operated by the Army in Japan under a contract with a Japanese corporation. His conviction by court-martial for forcing from officials of the corporation substantial "gifts" and the construction of a residence for his personal use was approved by the court.²⁴⁵

A civilian, subject to the Code, who has been placed in arrest for an offense committed in an overseas area cannot by his own wrongful acts of breaching such arrest and returning to the United States divest the military of jurisdiction.²⁴⁶

By way of *dictum*, the Court has indicated that military personnel who are discharged and re-enlist in overseas areas continue subject to military jurisdiction during the interim as persons "accompanying the armed forces without the continental limits of the United States." It said:

"If . . . accused's status changed, we would be faced with this factual situation. For an infinitesimal period of time the accused became a civilian without the territorial jurisdiction of the United States. During this period he was housed, maintained, paid, and otherwise serviced by the United States Army. He was transported overseas and he was returned to the United States by the Army. Between these two events he was always a soldier. Under these circumstances he would either be accompanying or serving with the Armies of the United States from the moment he left these shores until he returned. If, for a moment, he stepped from his uniform into civilian clothes and then back again, he never stepped into a category which was not subject to military law. . . ."²⁴⁷

²⁴⁵ *United States v. Marker* (No. 281), 3 CMR 127 (U. S. C. M. A. 1952). At page 132, the court stated: "Federal cases make it clear that . . . petitioner was 'accompanying or serving with the armies of the United States,' *Perlstein v. United States*, 151 F. (2d) 167 (C. A. 3rd Cir.), *cert. dismissed*, 328 U. S. 822, 90 L. Ed. 1602, 66 S. Ct. 1358; *Greive v. France*, 75 F. Supp. 433; *Ex parte Jochen*, 257 Fed. 200; U. S. *ex rel. Mobley v. Handy*, 176 F. (2d) 491 (C. A. 5th Cir.), *cert. den.*, 338 U. S. 904, 94 L. Ed. 556, 70 S. Ct. 306, *Hines v. Mickell*, 259 F. 28 (C. A. 4th Cir.)."

²⁴⁶ *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (5th Cir. 1949). See also, *United States v. Biagini* (ACM 6341), — CMR — (1953). However, where an individual who was both a former officer and former civilian employee of an officer's club had completely severed all connection with the military and had been granted a permit to remain in occupied Japan as a civilian, the Court of Military Appeals held that he was not thereafter within the jurisdiction of the Uniform Code when charges were finally preferred for an earlier offense. *United States v. Schultz* (No. 394), 4 CMR 104 (U. S. C. M. A. 1952).

²⁴⁷ *United States v. Solinsky* (No. 594), 7 CMR 29 (U. S. C. M. A. 1953).

C. Dependents

The problem of jurisdiction over "dependents," that is principally wives and children, of military and other personnel subject to military law does not appear to have arisen until the close of World War II. This is not surprising since such dependents while in the United States are subject to ordinary civil jurisdiction and while at typical overseas stations before World War II, such as Puerto Rico, the Canal Zone, Alaska and the Philippines were triable in United States territorial courts. Military attaché personnel in foreign countries were carefully selected, including close scrutiny of their families, and the question either did not arise or was settled administratively. Only after World War II were families in large numbers permitted to accompany, or to join, military or civilian employee heads of families in foreign countries. Where such dependents committed offenses in occupied enemy countries, under the laws of war, they were subject to trial by military commission, or other tribunals in the nature of military commissions, convened by the occupying power in the discharge of its obligation under international law to establish and maintain law and order in the occupied area.²⁴⁸

The Military Government Court solution was inapplicable to cases arising in friendly foreign countries such as England, France and the Philippine Republic after it acquired full sovereignty on July 4, 1946. Executive agreements with friendly foreign countries even where they accorded jurisdiction over dependents to the United States did not afford a complete answer, since the problem still remained as to whether American military jurisdiction extended to dependents who were otherwise not subject thereto. Of course, where a wife or grown child took civilian employment with one of the United States armed forces, as many in fact did, they thereby became subject to military jurisdiction. Still left in question was the status of those who did not become so employed. The Judge Advocate General of the Army in 1947 made a policy decision that military jurisdiction over such dependents would not be exercised in spite of the fact that they were "accompanying . . . the armies of the United States without the territorial jurisdiction of the United States."²⁴⁹ Not until May 31, 1951 did the Congressional grant of military jurisdiction over "all persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of a Secretary of a Department and which is without the continental limits of the United States . . ." (and its territories)²⁵⁰ become effective. This now covers all offenses committed by

²⁴⁸ *Madsen v. Kinsella*, 343 U. S. 341 (1952).

²⁴⁹ Article of War 2(d), 41 STAT. 787 (1920).

²⁵⁰ Art. 2(12), 50 U. S. C. § 552 (Supp. 1952).

dependents while on such leased bases but is inapplicable to off base offenses.

Fortunately, it is probable that by a deft dictum, the United States Supreme Court has approved a simple solution which will hereafter be followed where dependents commit offenses in foreign countries, either friendly or hostile. Yvette Madsen killed her American Air Force lieutenant husband at their residence in Frankfurt, Germany in October 1949, was thereafter tried for and convicted of murder by a United States Court of the Allied High Commission for Germany, and after affirmance by the "Court of Appeals for the Allied High Commission for Germany" was confined in the Federal Reformatory for Women at Alderson, West Virginia, to serve a fifteen year sentence. She petitioned for habeas corpus relief contending that she should have been tried by a court-martial and that the tribunal which tried her was without jurisdiction. The Supreme Court granted certiorari, upheld the jurisdiction of the court which tried petitioner, denied relief and discussed petitioner's status and liability to trial by court-martial, as follows:

"Petitioner is a native-born citizen of the United States who lawfully entered the American Zone of Occupied Germany in 1947 with her husband, Lieutenant Madsen of the United States Air Force. In 1949, she resided there, with him, in a house requisitioned for military use, furnished and maintained by military authority. She was permitted to use the facilities of the United States Army maintained there for persons in its service and for those serving with or accompanying the United States Armed Forces. In brief, her status was that of a civilian dependent wife of a member of the United States Armed Forces which were then occupying the United States Area of Control in Germany."²⁵¹

". . . Article of War 2(d) further defined 'any person subject to military law' as including 'all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . .' . This included petitioner."²⁵²

In this concise manner the high court has stated, what on principle appears to be perfectly clear, that dependents overseas, "accompany" the Armies of the United States and so, under present Article 2(11),²⁵³ may be tried by court-martial.

In 1952 in occupied Japan, Dorothy Krueger Smith killed her Army colonel husband in their military residence in Tokyo. An Army court-martial convicted her of premeditated murder and imposed a life sen-

²⁵¹ Madsen v. Kinsella, 343 U. S. 341, 343 (1952).

²⁵² *Id.* at 361.

²⁵³ 50 U. S. C. § 552 (Supp. 1952).

tence which action was affirmed by a Board of Review.²⁵⁴ It was seriously contended that the accused upon the death of her husband ceased to be a dependent and so at the time of trial was not subject to court-martial jurisdiction. In rejecting this contention, the Board, in part, relied on the *Madsen* case, and said:

“. . . her status as a spouse or dependent ceased to exist upon her husband's death; but . . . she remained a person 'accompanying' the armed forces of the United States within the meaning of the Code and subject to the jurisdiction thereof for all purposes herein considered."²⁵⁵

A point not raised by the *Smith* case is whether a court-martial convened by the Navy, Coast Guard or Air Force would have had jurisdiction. A reading of the Code would seem to impel an affirmative answer. Having in mind, however, the administrative ruling made as to the trial of 'dishonorably discharged military prisoners,'²⁵⁶ it is probable that the opinion of the respective Judge Advocates General on this point would be that jurisdiction should be exercised only by the service of which the dependent's sponsor is, or was, a member.

D. *Miscellaneous*

There remain for discussion a few problems of status of the person which do not fall within the three foregoing classifications. It should be noted that Congress has expressly preserved military jurisdiction in Article 3(b) over those who have fraudulently obtained their discharge from the armed forces, and in Article 3(c) over undetected deserters who have obtained a separation from any subsequent period of service.²⁵⁷

National Guard personnel, who have no other dual military status, are not in the armed forces of the United States except when called into the active federal service by direction of the President either as units or as individuals. Thus, such National Guard personnel while attending service schools in the United States under Section 99 of the National Defense Act²⁵⁸ have been held to be not subject to trial by court-martial convened by the commanding officer of the service school.²⁵⁹ Similarly

²⁵⁴ *United States v. Smith* (CM 360857), 10 CMR — (1953).

²⁵⁵ *Id.* p. 15 *adv. op.*

²⁵⁶ See note 172, *supra*. See, however, *United States v. Biagini* (ACM 6341), — CMR — (1953) which held a civilian employee on Okinawa of a concessionaire of the central exchange, an army activity, was subject to the jurisdiction of an Air Force court-martial.

²⁵⁷ The provisions of Article 3(b) and 3(c) are set forth in full in note 107 *supra*.

²⁵⁸ 39 STAT. 207 (1916).

²⁵⁹ DIG. OPS. JAG § 359(5) (1912-40) and Letter JAGJ 1953/2104 (4 March 1953), cited in 2 JAG CHRON. No. 14, p. 56 (April 3, 1953). See also *Johnson v. Sayre*, 158 U. S. 109 (1895). See, however, Armed Forces Reserve Act of July 9, 1952, 66 STAT. 481 (1952), 50 U. S. C. A. §§ 901-1124 (Supp. 1952). Section 1001

National Guard personnel on garrison duty or at summer encampments while under state control, as distinguished from being in active federal service, are not normally subject to trial by a federally convened court-martial. While in a non-federal duty status such personnel are subject to trial by state courts-martial where the law of the state makes separate provision therefor. In a number of the states detailed legislative provision is made for all aspects of the government of the state militia or national guard when not in federal service.²⁶⁰ The propriety of the exercise of such jurisdiction by the states was recognized by the Supreme Court at least as early as 1820.²⁶¹

To the reader who has persisted thus far it becomes apparent that between those who obviously are and those who obviously are not subject to military jurisdiction there lies a large peripheral area containing persons whose status is such as to require discriminating evaluation by those charged with the enforcement of the military law, alert examination by defense counsel and measured judgment by all who discharge judicial duties within the system of military law.

IV. DID THE COURT HAVE JURISDICTION OF THE OFFENSE?

A. Offenses Punishable Are Purely Statutory

Although the authority for courts-martial does not stem from the Third or Judiciary Article of the Constitution,²⁶² courts-martial are analogous to other federal courts in that the offenses to which their jurisdiction extend are confined to those expressly denounced by Congress in the punitive articles.²⁶³ This statement is subject to the qualification that Congress by Article 18 has specified: "General courts-

thereof provides: "There shall be no discrimination between and among members of the Regular and reserve components in the administration of laws applicable to both Regulars and Reserves." Section 1112 thereof in substance provides that the National Guard and Air National Guard of the United States shall consist of members who in addition to their status as such are Reserves of the Army and Air Force in the same grade they hold in the Guard. Section 1124 in part provides: "For the purpose of . . . benefits . . . full-time training or other full-time duty performed by members of the National Guard . . . or the Air National Guard of the United States . . . for which they are entitled to receive pay from the United States . . . shall be considered active duty for training in the Service of the United States as Reserve members of the Army or Air Force . . ." and contains a similar provision as to inactive-duty training. The impact of this legislation, if any, in the area of federal courts-martial jurisdiction has not yet been tested. It might be urged that this legislation places National Guard personnel in the same jurisdictional status as other reserve personnel. On the other hand it could be argued that Congress would not extend Article 2 jurisdiction by implication. It is probable this question will ultimately engage the attention of the Court of Military Appeals.

²⁶⁰ Typical are CAL. MIL. AND VET. CODE §§ 450-473 (Supp. 1949) and New York Laws 1953, c. 617, approved April 8, 1953.

²⁶¹ *Houston v. Moore*, 5 Wheat. 27 (U. S. 1820).

²⁶² *Dynes v. Hoover*, 20 How. 65 (U. S. 1857).

²⁶³ Arts. 77 to 134 inclusive, 50 U. S. C. §§ 671-728 (Supp. 1952).

martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal. . . ."²⁶⁴ This derivative jurisdiction from the law of war widens the horizon of general courts-martial not only as to persons but as to offenses as well. As previously stated, the ramifications of this derivative jurisdiction are beyond the scope of this paper. It should be remembered, however, that this law of war jurisdiction vests in general courts-martial, as distinguished from military commissions, only because Congress has expressly so provided. Courts-martial *per se* do not have any residual or common law jurisdiction as to either persons or offenses such as normally resides in state courts of general jurisdiction. Accordingly, the investigation by defense counsel as to jurisdiction of the offense is in the military system potentially more remunerative than is normally the case in state criminal proceedings.

B. Only Military Personnel Can Commit Certain Offenses

It should be observed that a few of the offenses denounced in the punitive articles are strictly military offenses and so can be committed only by military personnel, whereas the others are of such a nature that anyone subject to the Code, either military or civilian, may commit them. For example, desertion²⁶⁵ cannot be committed by a civilian, nor can it be committed by a military prisoner with an executed dishonorable discharge.²⁶⁶ On the other hand, the Court of Military Appeals has decided that a civilian employee overseas can commit under Article 134, the general article, the offense of "conduct of a nature to bring discredit upon the armed forces. . . ."²⁶⁷ There the specific conduct found to be violative of the article was the coercing, from subordinate Japanese civilian employees manufacturing tires for the military, of substantial donations of both goods and services for the personal benefit of the accused.

The offenses of desertion,²⁶⁸ absence without leave²⁶⁹ and the nine separate offenses denounced under the collective heading of "Misbehavior before the enemy"²⁷⁰ can be committed only by "Any member of

²⁶⁴ 50 U. S. C. § 578 (Supp. 1952). Special and summary courts-martial do not possess this derivative jurisdiction, nor do they have jurisdiction over any capital offenses. Arts. 19 and 20, 50 U. S. C. §§ 579, 580 (Supp. 1952). However, a special court may try non-mandatory sentence capital offenses if a general court-martial convening authority has first directed that the case be treated as non-capital. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 15(a) (3), p. 19.

²⁶⁵ Art. 85, 50 U. S. C. §§ 679 (Supp. 1952).

²⁶⁶ *United States v. Rushing* (CM 272382), 46 BR 301 (1945). However, it has been held that a military prisoner with an executed dishonorable discharge can be guilty of the offense of assaulting a superior officer. [Art. 90, 50 U. S. C. § 684 (Supp. 1952)]. *United States v. Scott* (CM 252812), 34 BR 197, 201 (1944).

²⁶⁷ *United States v. Marker* (No. 281), 3 CMR 127 (U. S. C. M. A. 1952).

²⁶⁸ Art. 85, 50 U. S. C. § 679 (Supp. 1952).

²⁶⁹ Art. 86, 50 U. S. C. § 680 (Supp. 1952).

²⁷⁰ Art. 99, 50 U. S. C. § 693 (Supp. 1952).

the armed forces. . . ." The offenses of using contemptuous words against certain government officials can be committed only by an officer.²⁷¹ Conduct unbecoming an officer and a gentleman can be accomplished only by an officer, cadet or midshipman.²⁷² Insubordinate conduct towards warrant officers, noncommissioned officers or petty officers can be perpetrated only by warrant officers and enlisted persons.²⁷³ The offenses of being drunk or sleeping upon his post, or leaving it before being regularly relieved, can be committed only by a person who has been posted as a sentinel or look-out.²⁷⁴ All of the other punitive articles, presumptively at least, may be violated by any person subject to the Code whether civilian or military.

C. Jurisdiction Unlimited As to Certain Offenses

There are three offenses for which a court-martial may try any person, even though in all other respects such persons are not in any other manner subject to the Code. These are aiding the enemy,²⁷⁵ spying,²⁷⁶ and contempt of a court-martial by menacing words, signs or gestures in its presence, or by disturbing its proceedings by any riot or disorder.²⁷⁷ This jurisdiction has been sparingly exercised, if at all. Where civilians, who are American citizens, engage in conduct which constitutes aiding the enemy, normally they are tried for treason²⁷⁸ in a United States District Court.²⁷⁹ Similarly, American civilians who engage in spying are tried in the United States District Court.²⁸⁰

D. Jurisdiction Is a Question of Fact, Not Pleading

Defects in pretrial procedure, not involving the composition of the court, generally will not divest a court-martial of jurisdiction.²⁸¹ Thus, although Article 30(a)²⁸² requires that, "Charges and specifications shall be signed by a person subject to this code under oath before an officer of the armed forces authorized to administer oaths . . .," the Court of Military Appeals has held that, where the accused does not promptly

²⁷¹ Art. 88, 50 U. S. C. § 682 (Supp. 1952).

²⁷² Art. 133, 50 U. S. C. § 727 (Supp. 1952).

²⁷³ Art. 91, 50 U. S. C. § 685 (Supp. 1952).

²⁷⁴ Art. 113, 50 U. S. C. § 707 (Supp. 1952).

²⁷⁵ Art. 104, 50 U. S. C. § 698 (Supp. 1952).

²⁷⁶ Art. 106, 50 U. S. C. § 700 (Supp. 1952).

²⁷⁷ Art. 48, 50 U. S. C. § 623 (Supp. 1952).

²⁷⁸ 18 U. S. C. § 1 (Supp. 1952) based upon the definition of treason contained in U. S. CONST. Art. III § 3 providing: "Whoever, owing allegiance to the United States levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere is guilty of treason."

²⁷⁹ Typical is *United States v. Kawakita*, 343 U. S. 717 (1952).

²⁸⁰ *United States v. Rosenberg*, 195 F. 2d 583 (2d Cir. 1952), *cert. denied*, 344 U. S. 838 (1952); *rehearing denied*, 344 U. S. 889 (1952); order dismissing petition for new trial affirmed, 200 F. 2d 666 (2d Cir. 1952); motion to vacate stay granted, 346 U. S. 273 (1953).

²⁸¹ *United States v. Floyd* (CM 229477), 17 BR 149 (1943).

²⁸² 50 U. S. C. § 601 (Supp. 1952).

object, a trial on unsworn charges is valid.²⁸³ Similarly, Congress has confirmed previous decisions of the Supreme Court which held that defects in, or the complete absence of, a pretrial investigation did not divest a general court-martial of jurisdiction.²⁸⁴ It has also been held that material changes made in charges after the investigation and without a new investigation being conducted is neither jurisdictional nor prejudicial error.²⁸⁵

Military pleading requires that the article, or articles, of the Code violated be set forth in the "Charge" or "Charges"²⁸⁶ and that the "Specification," or specifications should include the name of the accused, his status subjecting him to the Code, where and when the offense was committed, and in simple concise language, the facts constituting the offense.²⁸⁷ However, neither the designation of a wrong article^{287a} in the charge nor the failure to designate any article is ordinarily material, so long as the specification states an offense subject to court-martial jurisdiction. Charging murder under the wrong article has been held on habeas corpus attack not to constitute jurisdictional error.²⁸⁸ The Court of Military Appeals has gone further and ruled it to be immaterial that the charge recited a violation of Article of War 93,²⁸⁹ when in fact the accused, having finally and completely separated from the service and all connection therewith, was not subject to the Articles of War. The conviction was affirmed because the specification stated a violation of the Japanese criminal code which had been continued in effect by military order and which a court-martial could enforce by reason of its derivative jurisdiction conferred by Article of War 12²⁹⁰ to try offenses against the law of war. In upholding jurisdiction in the case the Court said:

"Jurisdiction is neither vested nor divested by the formalities of pleading. . . . If a specification states an offense in violation of the law of war, categorizing it as a violation of military law is not a fatal error."²⁹¹

²⁸³ *United States v. May* (No. 241), 2 CMR 80 (U. S. C. M. A. 1952). Also, *United States v. Simpson* (CM 310246), 61 BR 225 (1946). However, where prior to entering a plea the accused objected to being brought to trial on unsworn charges, it was prejudicial error for the law officer to overrule the objection. *United States v. Oliveri* (ACM 6055), ___ CMR ___ (1953).

²⁸⁴ See notes 100, 101 and 102 *supra*.

²⁸⁵ *United States v. Hawkins* (CM ETO 4570), 13 BR ETO 57 (1945).

²⁸⁶ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 27, p. 30.

²⁸⁷ *Id.* at ¶ 28, pp. 30, 31.

^{287a} *United States v. Deller* (No. 1859), 12 CMR 165 (U. S. C. M. A. 1953). Desertion with intent to shirk important service erroneously charged under Article 134.

²⁸⁸ *Johnson v. Biddle*, 12 F. 2d 366 (8th Cir. 1926).

²⁸⁹ 41 STAT. 805 (1920) (involuntary manslaughter).

²⁹⁰ 41 STAT. 789 (1920). The present equivalent provision is Art. 18, 50 U. S. C. § 578 (Supp. 1952).

²⁹¹ *United States v. Schultz* (No. 394), 4 CMR 104, 115 (U. S. C. M. A. 1952), affirming (ACM 3786) 4 CMR 574. Reliance was placed on *Givens v. Zerbst*, 255 U. S. 11 (1921). *Accord*, *United States v. Fleming* (CM 347931), 2 CMR 312

The general rule as to the sufficiency of the wording of a specification is that it must fairly inform the accused of the offense with which he stands charged and must be sufficiently definite to prevent the accused from again being tried for the same offense, but it need not be framed in technical language nor with the exactitude of a common law indictment.²⁹² The Court has aptly observed in this regard, "Sight must not be lost of the fact that the prosecution of crime—military or civilian—is not a fox hunt, and that rather different ground rules should obtain."²⁹³

E. Specific Offenses

With this enlightened approach it is not surprising that only a few cases have reached the Court which challenge a specification as not stating an offense punishable under the Code. Article 121,²⁹⁴ which prolixly combined common law larceny, embezzlement, and larceny by false pretense into the single offense of larceny and collectively characterized all three by the word "steals," has been examined. A specification drawn thereunder was found to state an offense though it did not contain language which would identify it as one of the common law offenses to the exclusion of the others. The specification in question alleged that the accused did "steal" specified sums of money from named individuals. The Court of Military Appeals found this properly pleaded the elements of this offense consisting of:

"... two elements: (1) that the accused obtained possession

(1951) (forgery), and *United States v. Kaukoreit* (CM 302791), 59 BR 7 (1946). See *Williams v. United States*, 168 U. S. 382 (1897). See, however, *United States v. Bernard* (ACM 6383) — CMR — (1953).

²⁹² *United States v. Marker* (No. 281), 3 CMR 127 (U. S. C. M. A. 1952); *United States v. Snyder* (No. 409), 4 CMR 15 (U. S. C. M. A. 1952); *United States v. Aldridge* (No. 686), 8 CMR 130 (M. S. C. M. A. 1953); *United States v. Johnson* (No. 2097), 11 CMR 174, 176 (U. S. C. M. A. 1953); *United States v. Field* (No. 2210), 11 CMR 182, 185 (U. S. C. M. A. 1953); *United States v. Bunch* (No. 2297), 11 CMR 186, 189 (U. S. C. M. A. 1953); *United States v. Sell* (No. 1939) 11 CMR 202, 206 (U. S. C. M. A. 1953); *United States v. Cowan* (CM 364954), 11 CMR — (1953); *United States v. Karl* (No. 1904), 12 CMR — (U. S. C. M. A. 1953); *United States v. Greenlee* (No. 1930), 13 CMR — (U. S. C. M. A. 1953).

²⁹³ *United States v. Aldridge*, *supra* note 292, at p. 133.

²⁹⁴ 50 U.S.C. § 715 (Supp. 1952). Paragraph (a) thereof reads:

"Larceny and wrongful appropriation (article 121)

(a) Any person subject to this code who wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any other person other than the true owner is guilty of wrongful appropriation . . ."

In a prosecution under Article 121 it is unnecessary to allege the false pretenses by which the property was obtained, but they must be proved. *United States v.*

of the property in question, of some value, (2) with an intent, then or thereafter conceived, permanently to deprive the true owner of its use and benefit."²⁹⁵

The Court has upheld a specification under Article 132^{295a} which in essence alleged that the accused "did . . . by preparing a request for commutation of rations for presentment to the commanding general . . . make a claim against the United States . . . which claim was false and fraudulent . . . in that he . . . did not then intend to so subsist with his family and was then known by the (accused) to be false and fraudulent."²⁹⁶ Accused pleaded guilty to this specification but on appeal contended that it did not state an offense. Article 132 in pertinent part denounces as offenses, among others, the conduct of one "(1) who, knowing it to be false or fraudulent—(A) makes a claim against the United States . . . ; or (B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States. . . ." Accused's appellate contention was that merely the preparation of a claim was alleged and nothing which carried the act of the accused beyond the preparatory stage. The Court pointed out that by motion before or during trial the accused could have required a more artful wording of the specification but that, as against jurisdictional attack, the specification as drawn alleged that the accused "did . . . make a claim," and that this stated an offense since it was "susceptible of an interpretation that a voucher was prepared by (accused) and placed in the hands of some individual who in the normal course of events would present it to the general."²⁹⁷

In a Navy case the Board of Review reversed a conviction for missing ship through neglect. This and the more serious act of missing ship through design are both declared to be offenses by Article 87.²⁹⁸ The evidence showed the accused on June 7, 1952 acknowledged in writing the information that his ship was scheduled to sail for overseas duty on July 7, 1952, and that the ship so sailed. Accused pleaded guilty to

Beasley (No. 2173), 11 CMR 110, 112 (U. S. C. M. A. 1953). See also *United States v. Buck* (No. 2330), 12 CMR 97 (U. S. C. M. A. 1953).

²⁹⁵ *United States v. Aldridge* (No. 686), 8 CMR 130, 132 (U. S. C. M. A. 1953). It has been held that a specification alleging the larceny of "the property of the Trailer Court Fund, Fort Benjamin Harrison, Indiana" is good since the owner need not be a legal entity. *United States v. Wilkey* (CM 358746), — CMR — (1953).

As to whether a larceny is single or multiple for the purpose of determining the value of the property taken, see *United States v. Florence* (No. 207), 5 CMR 48 (U. S. C. M. A. 1953).

^{295a} 50 U. S. C. § 726 (Supp. 1952). Forging a signature to a payroll and obtaining money thereby constitutes presenting a claim and is a fraud against the government properly chargeable under Article 132. *United States v. Field* (No. 2210), 11 CMR 182 (U. S. C. M. A. 1952).

²⁹⁶ *United States v. Steele* (No. 943), 9 CMR 9, 10 (U. S. C. M. A. 1953).

²⁹⁷ *Id.* at p. 5.

²⁹⁸ 50 U. S. C. § 681 (Supp. 1952).

unauthorized absence from June 17, 1952 until July 27, 1952. The Board based its reversal on the absence of evidence establishing causal connection between accused's neglect and the missing of the scheduled movement. Upon certification of the case by the Navy Judge Advocate General, the Court found this evidence established a prima facie case of missing ship through neglect, reversed the Board, and said:

"Where a definite movement date is set and known to the accused, who thereupon remains absent without authority beyond the scheduled date of departure, we can see no necessity for any special proof of causal connection. Assuming knowledge, the only rational explanations are either deliberate avoidance or carelessness resulting in avoidance."²⁹⁹

There is a salty tang to the case of Seaman Simpson who, it was alleged, "having knowledge of a lawful order issued by the Commanding Officer . . . in part as follows: 'Liberty Uniform . . . white jumper is mandatory,' an order which it was his duty to obey, did, while at . . . Guam . . . fail to obey the same, to wit: not wearing the jumper."³⁰⁰ Simpson pleaded guilty to this offense under Article 92,³⁰¹ but the Board of Review conclude the failure to allege that the accused was on liberty at the time the order was violated constituted a fatal defect. Upon certification the Court again reversed the Board, held the specification good and said:

". . . The accused could not disobey the order without being on liberty. There could not be a disobedience unless the accused was

²⁹⁹ *United States v. Thompson* (No. 1673), 9 CMR 90, 94 (U. S. C. M. A. 1953). The accused need not be assigned to duty with the aircraft or ship involved in the movement missed to constitute the offense of missing movement. *United States v. Johnson* (No. 2097), 11 CMR 174 (U. S. C. M. A. 1953).

³⁰⁰ *United States v. Simpson* (No. 1938), 9 CMR 123, 124 (U. S. C. M. A. 1953).

³⁰¹ 50 U. S. C. § 686 (Supp. 1952). *United States v. Snyder* (No. 409), 4 CMR 15, 19 (U. S. C. M. A. 1953) held evidence supporting a specification that accused ". . . did . . . violate a lawful regulation, to wit, . . . camp regulations . . . 'Female civilians will not be permitted to enter the barracks . . .'; in that he did permit . . . to enter . . . and did accompany . . . Gertrude Williams into . . . building number BB-12," properly established the offense under Article 92 of violating a lawful general order or regulation. The court stated in substance that "general orders" are what were formerly referred to in the services as "standing orders" and include post regulations. The *Snyder* case, however, is no longer law so far as the naval service is concerned. After its decision the Naval Supplement to the MANUAL was published which defines a "commander," as used in paragraph 171(a) of the MANUAL as "an officer of flag or general rank." Based on this definition, the Court distinguished the *Snyder* case and held the allegation of the violation of a ship order, issued by a navy commander commanding a destroyer, did not state a violation of a general order under Article 92(1). *United States v. Bunch* (No. 2297), 11 CMR 186 (U. S. C. M. A. 1953).

For a discussion of the limitation imposed on punishment of offenses charged under Article 92 by the provisions of MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, p. 221, n. 5, see *United States v. Buckmiller* (No. 492), 4 CMR 96 (U. S. C. M. A. 1953). See also *United States v. Sell* (No. 1939), 11 CMR 202 (U. S. C. M. A. 1953).

in that status as failure to wear it on other occasions would not be a violation of the order. We do not understand the rule governing pleading to go so far as to hold that every self-evident fact must be alleged. Neither do we understand that required implication cannot be considered in determining the sufficiency of a specification."³⁰²

F. *Offenses Under the General Articles*

As might be expected, most attacks against the insufficiency of specifications to state, or evidence to establish, cognizable offenses have been launched in cases brought under the general Articles 133 or 134³⁰³ or their predecessors. The punitive Articles from 80 to 132 inclusive,³⁰⁴ though many of them state more than one offense in a single article, all deal with specific offenses the elements of which are precisely defined therein. In addition to these, however, Congress has again seen fit to denounce as offenses, in general terms in Articles 133 and 134, conduct which traditionally from the foundation of the Government has been prohibited by the Articles of War.³⁰⁵ Thus under Article 133, "Any officer, cadet or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." What constitutes "conduct unbecoming an officer and a gentleman" is not defined by Congress. Article 134 may be violated by any person subject to the Code. It provides for punishment of, "Though not specifically mentioned in this code," (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces," (2) "all conduct of a nature to bring discredit upon the armed forces, and" (3) "crimes and offenses not capital, of which persons subject to this code may be guilty." This Article defines three distinct classes of of-

³⁰² *United States v. Simpson* (No. 1938), 9 CMR 123, 125 (U. S. C. M. A. 1953). Similarly, it has been held under Art. 108, 50 U. S. C. § 702 (Supp. 1952) that ". . . destruction of government property through neglect appears to be a lesser included offense of willful destruction of such property, whenever it is reasonably raised by the evidence without regard to its description in the specification." *United States v. Wright* (No. 2653), 13 CMR ____ (U. S. C. M. A. 1953).

³⁰³ 50 U. S. C. §§ 727, 728 (Supp. 1952).

³⁰⁴ 50 U. S. C. §§ 674-726 (Supp. 1952).

³⁰⁵ The American Articles of War enacted by the Second Continental Congress on June 30, 1775 contained these provisions:

"XLVII. Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner such as is unbecoming the character of an officer and a gentleman, shall be discharged from the services."

"L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion."

Reprinted in WINTHROP, *MILITARY LAW AND PRECEDENTS* 957 (2d ed. 1920); see discussion at page 720.

fenses,³⁰⁸ although Congress has not seen fit to set them off by number or paragraphing, but leaves to custom and case law the determination of precisely what specific acts constitute violations under each of these prohibitions. Actually the type of conduct which will be charged as violative of these general articles has become considerably rigidified. It is unusual to proceed under the general articles unless the conduct is of a type expressly classified thereunder in the Manual³⁰⁷ and for which sample specifications are provided.³⁰⁸

"Crimes and offenses not capital" include acts, not made punishable by another article, which are denounced as crimes by Congress or under authority of Congress and made triable in the Federal civil courts.³⁰⁹ Examples of these are indecent assaults; assaults with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary and housebreaking which are not embraced within Article 128; counterfeiting; false swearing; bribery; offenses against the mail; and misprison of felony. This list, which is by no means exhaustive, indicates that Congress has been content to leave a number of offenses which it has denounced in the United States Criminal Code³¹⁰ to be enforced by military justice procedures, against those subject to the Code, under the general articles rather than duplicating them in specific articles of the Code. As to murder,³¹¹ manslaughter,³¹² rape,³¹³ larceny,³¹⁴ robbery,³¹⁵ forgery,³¹⁶ maiming,³¹⁷ sodomy,³¹⁸ arson,³¹⁹ extortion,³²⁰ certain assaults,³²¹ burglary,³²² housebreaking,³²³ perjury,³²⁴ and making or pre-

³⁰⁸ See *United States v. Snyder* (No. 409), 4 CMR 15 (U. S. C. M. A. 1952); *United States v. Messenger* (No. 310), 6 CMR 21 (U. S. C. M. A. 1952); *United States v. Long* (No. 464), 6 CMR 60 (U. S. C. M. A. 1952); and *United States v. Frantz* (No. 1114), 7 CMR 37 (U. S. C. M. A. 1953).

³⁰⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 §§ 212, 213, pp. 380-387.

³⁰⁸ *Id.* App. 6c, pp. 488-495.

³⁰⁹ *Id.* § 213c, p. 383. Included are offenses denounced by state law, as to federal reservations within any given state, as provided by the Assimilative Crimes Act, 18 U. S. C. § 13 (Supp. 1952). This is true, however, only to the extent that such state law does not conflict with federal law or regulation. *Williams v. United States*, 327 U. S. 711 (1946); and see *Johnson v. Yellow Cab Co.*, 321 U. S. 383 (1944); *Air Terminal Services Inc., v. Rentzel*, 81 F. Supp. 611 (E. D. Va. 1949); *Nash v. Air Terminal Services Inc.*, 85 F. Supp. 545 (E. D. Va. 1949).

³¹⁰ Title 18, U. S. C. (Supp. 1952).

³¹¹ Art. 118, 50 U. S. C. § 712 (Supp. 1952).

³¹² Art. 119, 50 U. S. C. § 713 (Supp. 1952).

³¹³ Art. 120, 50 U. S. C. § 714 (Supp. 1952).

³¹⁴ Art. 121, 50 U. S. C. § 715 (Supp. 1952).

³¹⁵ Art. 122, 50 U. S. C. § 716 (Supp. 1952).

³¹⁶ Art. 123, 50 U. S. C. § 717 (Supp. 1952).

³¹⁷ Art. 124, 50 U. S. C. § 718 (Supp. 1952).

³¹⁸ Art. 125, 50 U. S. C. § 719 (Supp. 1952).

³¹⁹ Art. 126, 50 U. S. C. § 720 (Supp. 1952).

³²⁰ Art. 127, 50 U. S. C. § 721 (Supp. 1952).

³²¹ Art. 128, 50 U. S. C. § 722 (Supp. 1952).

³²² Art. 129, 50 U. S. C. § 723 (Supp. 1952).

³²³ Art. 130, 50 U. S. C. § 724 (Supp. 1952).

³²⁴ Art. 131, 50 U. S. C. § 725 (Supp. 1952).

senting a false or fraudulent claim,³²⁵ Congress has seen fit to duplicate its prohibition in both the Criminal Code and in separate articles of the Uniform Code. Generally, these offenses to which separate articles are devoted are the more serious ones, but why Congress persists in using both the method of express denunciation and incorporation by reference in solving essentially the same legislative problem remains an inscrutable Congressional prerogative. Perhaps the best answer is that each approach is a proper exercise of its power, "To make Rules for the Government and Regulation of the land and naval Forces."³²⁶

The contention that the general articles are unconstitutional because of uncertainty, and hence that an offense cannot be stated thereunder, is a favorite one with defense counsel. It was urged upon the Court of Military Appeals in the case of Marine Private Frantz, whom under Article 134 it was charged "did . . . wrongfully have in his possession with intent to deceive, an armed forces liberty pass . . . well knowing the same to be false." The Navy Board of Review reversed a conviction holding that an allegation of "intent to deceive" did not state an "intent to defraud" which was required by 18 U. S. C. § 499 which renders criminal the possession of a military pass "with intent to defraud." On certification, the Court ruled that the Board erred in assuming that the specification was laid under the "crimes and offenses not capital" part of the Article and held that deceitful possession of a liberty card was conduct "to the prejudice of good order and discipline," and that it was unnecessary to decide whether it also was "conduct of a nature to bring discredit upon the armed forces."³²⁷ Passing to the asserted unconstitutionality of Article 134, the Court rejected this contention and said:

"Surely the third clause of the Article is not vague. However, we cannot ignore the conceivable presence of uncertainty in the first two clauses. Assuming that civilian precedents in the field are applicable in full force to the military community, we do not perceive in the Article vagueness or uncertainty to an unconstitutional degree. The provision as it appears in the Uniform Code is no novelty to service criminal law. . . . On the contrary it has been a part of our military law since 1775, and directly traces its origin to British sources. . . . It must be judged, therefore, not *in vacuo*, but in the context in which the years have placed it. . . . That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder ex-

³²⁵ Art. 132, 50 U. S. C. § 726 (Supp. 1952).

³²⁶ U. S. CONST., Art. I, § 8, cl. 14.

³²⁷ *United States v. Frantz* (No. 1114), 7 CMR 37, 38 (U. S. C. M. A. 1953).
Accord, *United States v. Tomes* (ACM 6187), 9 CMR 679 (1953).

plicitly included in the Table of Maximum Punishments of the Manual, . . . paragraph 127c, pages 224-227. Accordingly, we conclude that the Article establishes a standard 'well enough known to enable those within . . . (its) reach to correctly apply them.'"³²⁸

WAC Sergeant First Class Long and other enlisted WAC's were charged with and convicted of a violation of Article 134, "In that (they) . . . did . . . violate Title 18, Section 241, United States Code . . . by committing an assault and battery upon Private First Class Carol A. Kierce, on account of her having previously attended and testified as a witness in a court of the United States, namely a Summary Court-Martial."³²⁹ The contention was made that this allegation and proof did not establish an offense under Title 18, Section 241 because a summary court-martial was not a "court of the United States." The Court affirmed the conviction and held it was unnecessary to decide this question since in any event, the assaulting of a witness because she had testified before a military court would constitute a disorder to the prejudice of good order and discipline of the armed forces and, hence, an offense under Article 134. As to the fact that the pleader patently had considered the offense not "a disorder," but rather an "offense not capital" the Court said:

"The phrase in the specification which states 'violate Title 18, Section 241, United States Code . . . ' may be deleted and a substantive offense contrary to Article 134 is sufficiently alleged. The quoted clause may, therefore, be considered redundant and unnecessary."³³⁰

The case of Navy Captain Schumacher involved Article I, Paragraph 1, Articles for the Government of the Navy,³³¹ the naval antecedent of general Article 134. Under it accused was charged with and convicted of, among other things, that he did in violation of Section 311 of the Penal Code of Guam, from on or about June 15, 1950 to on or about August 1, 1950, expose his person and private parts to a young girl, who was offended and annoyed thereby, and further that he did during the same period take indecent liberties with a fifteen-year-old girl by placing his hand on the leg and under the dress of the girl. The Court rejected a contention that the specifications were defective in that they failed to allege with particularity the time of the commission of the offenses specified and expressly approved the *Manual* provision that "When the

³²⁸ United States v. Frantz, *supra* note 327, p. 38.

³²⁹ United States v. Long (No. 1114), 6 CMR 60, 64 (U. S. C. M. A. 1953).

³³⁰ *Id.* at 66.

³³¹ REV. STAT. § 1624 (1800), 34 U. S. C. § 1200 (1946).

acts specified extend over a considerable period of time it is proper to allege them as having occurred, for example, "from about 15 June 1951 to about 4 November 1951."³³² In affirming the sentence of dismissal the Court also rejected the contention that this evidence established no crimes. It found that the indecent exposure violated the Guam Penal Code and thus was an "offense not capital, and that the indecent liberties taken by this commanding officer of a Naval Air Station constituted scandalous conduct which tended to the destruction of good morals and was also prejudicial to good order and military discipline."³³³

Naval Airman Messenger was convicted by a special court-martial of impersonating an officer in violation of Article 134. The Board of Review reversed because there was no evidence that by the impersonation the accused gained some advantage to the prejudice of the person counterfeited. In the absence of such evidence the Board felt the offense was so minor that it should have been disposed of by trial by a summary court or by non-judicial punishment under Article 15.³³⁴ On certification the Court reversed the Board and declared that, except possibly in a clear case of abuse, a Board of Review could not interfere with the discretion of the convening authority in the selection of the type of court to try a case and that here there had been no abuse in selecting a special court. The Court further held that:

"The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces."³³⁵

Marine Sergeant Snyder was charged with and convicted of three different violations of Article 134 in that he "did at Camp Lejeune . . . attempt to entice (three different military persons) to engage in sexual intercourse with a female to be directed to him by . . . Snyder."³³⁶

³³² MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶7, app. 6a, p. 470.

³³³ United States v. Schumacher (No. 680), 7 CMR 10, 12 (U. S. C. M. A. 1953).

³³⁴ 50 U. S. C. § 571 (Supp. 1952).

³³⁵ United States v. Messenger (No. 310), 6 CMR 21, 24, 25 (U. S. C. M. A. 1952). Cited with approval were United States v. Miller (CM 266137), 43 BR 135 (1944) and United States v. Yaroslowsky (CM 316932), 66 BR 121 (1947). See United States v. Gillispie (CM 360289) 9 CMR 299 (1953). Similarly, it has been held that the unauthorized sale of blank pass forms constitutes conduct prejudicial to the Naval service and that an intent to deceive or defraud is not an essential element of the offense. United States v. Karl (No. 1904), 12 CMR — (U. S. C. M. A. 1953).

³³⁶ United States v. Snyder (No. 409), 4 CMR 15, 16 (U. S. C. M. A. 1952). It has been held that the mere act of a single man and single woman registering as husband and wife and occupying a room together for the night with no other circumstances shown does not amount to an offense in violation of Article 134. United States v. Walters (CM 362540), 11 CMR — (1953); United States v.

Apparently in all seriousness, appellate defense counsel urged that pandering was not an offense under the Code and the Navy Board of Review agreed. Again the Navy Judge Advocate General certified the case and the Court held that such solicitation even though not shown to have been accompanied by an expectation of financial gain constituted the offense of conduct prejudicial to good order and military discipline under the general article.

Navy Lieutenant Herndon was found guilty of a violation of Article 134 under a specification charging that he did at "Yokosuka, Japan, . . . unlawfully receive about two hundred pounds of coffee, . . . the property of the United States Government, which property . . . he . . . then well knew, had been stolen."³³⁷ The Board of Review assumed that the specification intended to allege a violation of 18 U. S. C. § 641 and fell short of doing so in that it failed to state that the receiving was "with intent to convert to his own use or gain." For this reason it held the proceedings fatally defective. The Navy Judge Advocate General certified the case and the Court, while agreeing with the Board that the specification did not state an offense under Title 18, found it did define an offense under Article 134 as a disorder and neglect to the prejudice of good order and discipline, and that the knowing receipt of stolen government property is such an offense regardless of the presence of an intent to "convert it to his use or gain." Again the Board of Review was reversed. It is perhaps appropriate to observe here that since dismissal is no longer mandatory upon a conviction under Article 133 and may be imposed as a part of the sentence against an erring officer under Article 134, and since Article 134 is considerably broader than Article 133, there is a current trend away from the use of Article 133 and to Article 134 in officer cases. However Article 133 may still be used.^{337a}

Basic Airman Shores' conviction under Article 134 for being disrespectful in language to an air policeman while in the exercise of police duties was upheld by an Air Force Board as a disorder to the prejudice

Prater (CM 339731), 5 BR/JC 221, 229 (1950); *United States v. Martin* (CM 317233), 66 BR 259 (1947). Apparently *contra* is *United States v. Andrews* (ACM 6105), 9 CMR 667 (1953).

³³⁷ *United States v. Herndon* (No. 570), 4 CMR 53, 55 (U. S. C. M. A. 1952).

^{337a} In *United States v. Gomes* (No. 2165), 11 CMR 232, 236 (U. S. C. M. A. 1953) the Court held: ". . . an allegation that an officer of the armed forces who, with intent to deceive, gives a known false statement to a special agent of the Federal Bureau of Investigation making inquiry on acts touching upon the execution of his official duties while in the employ of the Government sufficiently charges conduct unbecoming an officer and gentleman."

A specification alleging that the accused officer "did . . . wrongfully, corruptly, and dishonorably solicit (Sgt K) to aid and assist him . . . to obtain from the United States a jacket, field, wool, OD, and a pair of trousers, wool, OD, for his own personal use, to which he . . . was not entitled" sufficiently alleges an offense in violation of Article 133. *United States v. Love* (CM 365501), 12 CMR . . . (1953).

of good order and discipline.³³⁸ It referred to as analogous, but not controlling, Army Board of Review cases holding it to be an offense in violation of Article of War 95, the predecessor of Article 133, for an officer to be disrespectful toward a military policeman in the execution of his duties.³³⁹

It has been previously noted that a civilian employee of the military in an overseas area who requires subordinate employees to donate goods and services for his personal use thereby engages in conduct of a nature to bring discredit upon the armed forces and may be convicted under Article 134.³⁴⁰

From the foregoing collection of authorities it is apparent that the persistent assaults of defense counsel against the general article have been singularly unsuccessful.^{340a} There remains for consideration the one small area in which their efforts have been rewarded with success. Army Private Norris was charged with larceny of a vehicle under Article 121³⁴¹ and pleaded guilty to "taking without authority" in violation of Article 134. The law officer instructed the court that the accused could not be found guilty of any offense other than larceny or wrongful appropriation but failed to instruct as to the possible effect of intoxication on intent. The Court found the accused guilty of wrongful appropriation. The Board of Review held the law officer erred in both respects and affirmed only a finding of wrongful taking under Article 134. Upon certification, the Court affirmed the ruling that it was prejudicial

³³⁸ United States v. Shores (ACM S-4378), 8 CMR 636 (1953).

³³⁹ United States v. Grubb (CM 234008), 20 BR 213, 219 (1943); United States v. Brandt (CM 253339), 34 BR 359, 363 (1944); United States v. Warren (CM 263080), 41 BR 181, 196 (1944); United States v. Rippey (CM 327522), 76 BR 131, 142 (1948).

³⁴⁰ United States v. Marker (No. 281), 3 CMR 127 (U. S. C. M. A. 1952). See notes 245 and 267 *supra*.

^{340a} The acts of operating a house of prostitution and misuse of assigned government billets by permitting rooms therein to be used for the purpose of carrying on illicit sexual relations, though both arising out of the same general course of conduct, have been held to constitute separate violations of Article 134 for each of which punishment may be imposed. United States v. Butler (CM 363644), 12 CMR . . . (1953).

It has been held that the misappropriation of a government vehicle for the purpose of transportation of a Korean prostitute constituted not only a violation of Article 121 as charged, but also a separate violation of Article 134 as an act to the prejudice of good order and discipline in the armed forces under a specification charging that the accused did ". . . wrongfully and unlawfully accept . . . the sum of thirty dollars to transport a Korean female in a government vehicle." United States v. Alexander (No. 2334). 12 CMR . . . (U. S. C. M. A. 1953). In this case it was found that this violation of Article 134 constituted the offense of "graft" as listed in the Table of Maximum Punishments and hence would support a sentence of confinement of up to three years.

³⁴¹ 50 U. S. C. § 715 (Supp. 1952). In pertinent part it provides: "Any person . . . who wrongfully takes . . . from the possession of . . . any other person . . . personal property . . . with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use . . . is guilty of wrongful appropriation."

error not to instruct on intoxication, but held there was no such offense as wrongful taking without the specific intent either permanently or temporarily to deprive another of the property. The Court said:

“ . . . we are convinced that the general article . . . embraces no criminal conversion offense lesser than wrongful appropriation as defined by Article 121. . . .

“ . . . Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive articles. . . . We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.”³⁴²

In a separate concurring opinion Judge Brosman pointed out the need for a statutory offense of “wrongful taking” in the military service not predicated upon a specific intent to deprive and in a later companion case said:

“ . . . under the Code as presently written, wrongful taking is not an offense punishable under Article 134. The remedy for this hiatus must rest with the Congress.”³⁴³

An Air Force Board of Review has held that simple negligence in the operation of an automobile, thereby causing non-fatal injury to another person, in the absence of other circumstances, is not conduct of a nature to bring discredit upon the armed forces within the meaning of Article 134, and is not an offense under the Code.³⁴⁴

From the very nature of the problem, and as a result of the small encouragement to be drawn from the careful and correct decision in the *Norris* case, it is likely that defense counsel will avidly continue to assail the validity of offenses charged under the general articles. It is also likely that their batting average in this effort will be unimpressive.

³⁴² *United States v. Norris* (No. 1756), 8 CMR 38, 39 (U. S. C. M. A. 1953). Followed in *United States v. Haywood* (No. 1852), 9 CMR 6 (U. S. C. M. A. 1953). See also, *United States v. Holy Rock* (CM 362791), 12 CMR ___ (1953).

³⁴³ *United States v. Haywood*, *supra*.

³⁴⁴ *United States v. Eagleson* (ACM 5666), 10 CMR ___ (1953). This must be distinguished from the offense of negligent homicide which may be sustained by evidence of simple negligence. The Court of Military Appeals has held that negligent homicide is an offense under Article 134 and may be punished as conduct of a nature to bring discredit upon the armed forces or, alternatively, as a disorder and neglect to the prejudice of good order and discipline in the armed forces. *United States v. Roman* (No. 191) 2 CMR 150 (U. S. M. C. A. 1952); *United States v. Clark* (No. 190) 2 CMR 107 (U. S. C. M. A. 1952); *United States v. Kirchner* (No. 654), 4 CMR 69 (U. S. C. M. A. 1952).

V. WAS THE SENTENCE IMPOSED WITHIN THE JURISDICTIONAL MAXIMUM?

A. *The Framework of Authorized Punishments*

The framework of legally authorized punishment in the courts-martial system is somewhat more complicated than that prevailing in most civilian penal systems. The basic jurisdiction to punish is prescribed by Congress as an integral part of each of the punitive articles. The only wholly mandatory sentence prescribed is that of death for wartime spying.³⁴⁵ A mandatory alternative is imposed for premeditated murder and murder committed "in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson," which compels a sentence of "death or imprisonment for life as a court-martial may direct."³⁴⁶ Those convicted of wartime desertion or attempted desertion,³⁴⁷ mutiny or sedition,³⁴⁸ misbehavior before the enemy,³⁴⁹ compelling or attempting to compel a commander to surrender,³⁵⁰ improper use of a countersign,³⁵¹ forcing a safeguard,³⁵² aiding the enemy,³⁵³ misbehavior of a sentinel in time of war³⁵⁴ and rape by force³⁵⁵ "shall suffer death or such other punishment as a court-martial shall direct." This unlimited discretion is permitted only for the most serious military offenses and forceful rape. All other offenses, no matter how trivial, so far as the basic provision in the punitive articles is concerned, may "be punished as a court-martial may direct."³⁵⁶ The effect is to permit up to life imprisonment to be imposed for any offense. Congress traditionally has vested in the military this very broad discretion so that it might adequately cope with the widely differing conditions and considerations involved, depending on whether an offense was committed in peace or in war, at home or abroad, in garrison, in the field or in combat.³⁵⁷

Also traditional in the system of military punishments is the drastic

³⁴⁵ Art. 106, 50 U. S. C. § 700 (Supp. 1952).

³⁴⁶ Art. 118, 50 U. S. C. § 712 (Supp. 1952).

³⁴⁷ Art. 85, 50 U. S. C. § 679 (Supp. 1952).

³⁴⁸ Art. 94, 50 U. S. C. § 688 (Supp. 1952).

³⁴⁹ Art. 99, 50 U. S. C. § 693 (Supp. 1952).

³⁵⁰ Art. 100, 50 U. S. C. § 694 (Supp. 1952).

³⁵¹ Art. 101, 50 U. S. C. § 695 (Supp. 1952).

³⁵² Art. 102, 50 U. S. C. § 696 (Supp. 1952).

³⁵³ Art. 104, 50 U. S. C. § 698 (Supp. 1952).

³⁵⁴ Art. 113, 50 U. S. C. § 707 (Supp. 1952).

³⁵⁵ Art. 120, 50 U. S. C. § 714 (Supp. 1952).

³⁵⁶ The only deviation from this language is found in general Art. 134, 50 U. S. C. § 728 (Supp. 1952) where the wording is: "shall be taken cognizance of by a general or special or summary court court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." This occurs because of the express reference to the inferior military courts. As phrased, it excludes from the power of a general court the death sentence only.

³⁵⁷ *Hearing of Subcommittee of the Committee on Armed Services, H. R. REP. No. 37, 81st Cong., 1st Sess., pp. 1087-1089 (1949).*

curtailment of this power by the President in what is known as the Table of Maximum Punishments. Congress has continued this practice, in the Uniform Code, by expressly providing: "The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for the offense."³⁵⁸ This permits curtailment, but not enlargement, of the punishment authorized by the punitive articles. The President liberally exercised this power in the Table of Maximum Punishments, an integral part of the *Manual*,³⁵⁹ prescribed by Executive Order 10214, February 8, 1951.³⁶⁰ For example, a two-day absence without leave which could be punishable by life imprisonment, dishonorable discharge and total forfeitures under the literal terms of punitive Article 86, can under the Table of Maximum Punishments not be punished more severely than by six days' confinement at hard labor, forfeiture of four days' pay, reduction in grade and a reprimand.³⁶¹ The Table of Maximum Punishments in fact substantially curtails authorized punishments for all offenses except mutiny, sedition, misbehavior before the enemy, compelling surrender, improper use of a countersign, knowingly forcing a safeguard, aiding the enemy, misconduct as a prisoner, spying, murder, rape, and conduct unbecoming an officer and a gentleman.³⁶² In dealing with general Article 134, the Table expressly sets forth some sixty-seven different specific offenses thereunder and establishes maximum penalties for each, running from twenty years for assaulting with intent to commit murder or rape, down to one month for breach of restriction.³⁶³

Under Article 56 the President may at any time change the provisions of the Table of Maximum Punishments by executive order so long as such change does not exceed the limit prescribed by Congress in the punitive article itself. This power has been sparingly exercised. During World War II the Table was suspended as to desertion, advising or aiding desertion, absence without leave, and misbehavior of sentinels,³⁶⁴ but was promptly reimposed shortly after the termination of actual hostilities.³⁶⁵ On August 8, 1950, the President again suspended the Table

³⁵⁸ Art. 56, 50 U. S. C. § 637 (Supp. 1952).

³⁵⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, pp. 214-228.

³⁶⁰ *Id.* at IX.

³⁶¹ *Id.* at 221-224.

³⁶² *Id.* at 224-227.

The rule applicable to the other offenses chargeable under the general article is stated at page 214 of the MANUAL, as follows: "Offenses not listed in this table, and not included within an offense listed, or not closely related to either, remain punishable as authorized by the United States Code (see, generally, Title 18) or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service." Applied in *United States v. Long* (No. 461), 6 CMR 60, 71 (U. S. C. M. A. 1953).

³⁶⁴ Exec. Order No. 9048, 7 FED. REG. 775 (1942) and Exec. Order No. 9267, 7 FED. REG. 9221 (1942).

³⁶⁵ Exec. Order No. 9683, 11 FED. REG. 789 (1946) and Exec. Order No. 9772, 11 FED. REG. 9325 (1946).

as to desertion, advising or aiding desertion, absence without leave, assaulting or disobeying a superior officer, insubordination to a noncommissioned officer in the execution of his office and misbehavior of sentinels thereafter committed. This suspension, however, applied only to these offenses when committed in any area controlled by the Commander-in-Chief, Far East.³⁶⁶ This limited suspension is still in effect. The automatic suspension of the Table provided for by the *Manual*³⁶⁷ "upon a declaration of war" applies to soliciting either desertion, mutiny, sedition, or misbehavior before the enemy,³⁶⁸ and to desertion,³⁶⁹ absence without leave,³⁷⁰ missing movement,³⁷¹ striking or wilfully disobeying an officer,³⁷² misbehavior of a sentinel³⁷³ and malingering.³⁷⁴ Since there has been no declaration of war after the Code became effective this provision has remained inoperative.

There can be no doubt that the maximum punishments prescribed by Congress in the punitive articles are jurisdictional and that any part of a sentence which is in excess thereof is void and unenforceable. This does not mean that the portion of an excessive sentence which is within the authorized maximum is void or unenforceable. This result is clearly contemplated by Congress in its legislative direction to the convening authority that he "shall approve only . . . such part or amount of the sentence as he finds correct in law and fact . . .,"³⁷⁵ and to the board of review that, "it shall affirm only . . . such part or amount of the sentence as it finds correct in law and fact. . . ."³⁷⁶

An academic problem arises as to the effect of the limits imposed by the Table of Maximum Punishments upon jurisdiction to punish. It seems clear that these limitations do not destroy it since by subsequent executive order, so providing, jurisdiction to punish may be exercised up to the maximum authorized by Congress. It is probably accurate to say that the provisions of the Table of Maximum Punishments impose binding limitations upon the *exercise* of jurisdiction to punish, as distinguished from destroying jurisdiction itself. This question would be reached for decision only in event all the military appellate tribunals should approve a sentence which, while within the maximum prescribed

³⁶⁶ Exec. Order No. 1049, 15 FED. REG. 5149 (1950).

³⁶⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, p. 217.

³⁶⁸ Art. 82, 50 U. S. C. § 676 (Supp. 1952).

³⁶⁹ Art. 85, 50 U. S. C. § 679 (Supp. 1952).

³⁷⁰ Art. 86, 50 U. S. C. § 680 (Supp. 1952).

³⁷¹ Art. 87, 50 U. S. C. § 681 (Supp. 1952).

³⁷² Art. 90, 50 U. S. C. § 684 (Supp. 1952).

³⁷³ Art. 113, 50 U. S. C. § 707 (Supp. 1952).

³⁷⁴ Art. 115, 50 U. S. C. § 709 (Supp. 1952).

³⁷⁵ Art. 64, 50 U. S. C. § 651 (Supp. 1952).

³⁷⁶ Art. 66(c), 50 U. S. C. § 653 (Supp. 1952). This comports with the rule in the federal civil courts that if the excess is separable from the residue the legal portion of the sentence will remain undisturbed. *McKinney v. Finletter*, 205 F. 2d 761 (10th Cir. 1953).

by Congress, was in excess of that authorized by the Table. On petition for habeas corpus it would then be necessary to determine whether the amount imposed in excess of the maximum prescribed by the Table was void for lack of jurisdiction. The Court of Military Appeals has clearly indicated that no case will be permitted to reach such a status, by its declaration that, "The general provisions of paragraph 127b (of the *Manual*) are limitations on punishment fully as much as are the specific limits set out in the Table of Maximum Punishments,"³⁷⁷ and by its further statement, "we disclaim any intent to classify these (rights) as jurisdictional . . . we can reverse for errors of law which materially prejudice the substantial rights of the accused. . . ."³⁷⁸ Relief would certainly be granted even if the error were held not to be jurisdictional.

B. *Limited Powers of Inferior Military Courts*

In dealing with problems of jurisdiction to sentence not only must resort be had to the punitive articles of the Code and the Table of Maximum Punishments of the *Manual*, but care must be exercised not to exceed the maximum punishment imposable by a summary or special court where their sentences are under consideration. Congress has provided:

"Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dismissal, dishonorable discharge or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months or forfeiture of pay in excess of two-thirds of one month's pay."³⁷⁹

Affirmatively stated, a summary court may sentence to confinement at hard labor for one month, or to forty-five days' hard labor without confinement, or restriction for two months, or to a proportional amount of the three.³⁸⁰ For example, ten days' confinement, plus fifteen days' hard labor without confinement, plus twenty days' restriction would be permissible. In addition to the above, the forfeiture of two-thirds of one month's pay, a reduction in grade and a reprimand could also be imposed. As to noncommissioned and petty officers of the first three

³⁷⁷ United States v. Murgaw (No. 1079), 8 CMR 169, 171 (U. S. C. M. A. 1953).

³⁷⁸ United States v. Clay (No. 49), 1 CMR 74, 78 (U. S. C. M. A. 1951). See also United States v. Davis (No. 29), 2 CMR 8, 13 (U. S. C. M. A. 1952).

³⁷⁹ Art. 20, 50 U. S. C. § 580 (Supp. 1952).

³⁸⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, p. 215; Table of Equivalent Punishments. These equivalents may be applied to enlisted accused by either a summary or special court so long as the sentence does not include a punitive discharge.

grades a summary court may not impose confinement, hard labor without confinement, nor reduction except to the next inferior grade.³⁸¹

As to special courts, Congress has declared that they may:

“ . . . under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.”³⁸²

So far as the Army is concerned, the exercise of the jurisdiction to impose a bad conduct discharge has been prohibited in special courts by the issuance of a regulation by the Secretary of the Army forbidding the use of reporters in special court-martial cases, except with prior authority of the Secretary.³⁸³ Such regulation is authorized by the *Manual* and was consistent with a recommendation made by the Court of Military Appeals and by The Judge Advocates General of the Army and Air Force, but from which The Judge Advocate General of the Navy and the General Counsel of the Treasury Department dissented.³⁸⁴ No such administrative limitation has been imposed on special courts by any of the services except the Army.

³⁸² *Id.* ¶ 126c(2), p. 208.

³⁸³ Art. 19, 50 U. S. C. § 579 (Supp. 1952). In *United States v. Bancroft* (No. 1139), 11 CMR 3 (U. S. C. M. A. 1953) a Marine sentry was tried by a special court-martial for sleeping on post during the Korean conflict. The officer exercising general court-martial authority had not declared the offense to be non-capital. The Court of Military Appeals found that the Korean conflict, though not predicated upon any formal declaration of war, did constitute “time of war” within the meaning of the phrase as used in Art. 113, 50 U. S. C. § 707 (Supp. 1952), authorizing a death sentence. Accordingly, it held the offense was capital and that a special court-martial had no jurisdiction to try it.

In *United States v. Whitman* (No. 2168), 11 CMR 179, 181 (U. S. C. M. A. 1953) the record of trial in a navy special court case was in part a narrative summary and in part a verbatim account. The court said: “The punitive discharge . . . cannot stand without the support of a verbatim record. This portion of the sentence is, therefore, illegal.”

Where a special court-martial imposed a sentence for bad conduct discharge, reduction in grade, and restriction to limits for three months and the convening authority suspended the bad conduct discharge, the Court has held it was proper to impose restriction as a less severe type of restraint than confinement and this without regard to the Table of Equivalent Punishments which is inapplicable where a punitive discharge is imposed. *United States v. Benson* (No. 2482), 12 CMR 107 (U. S. C. M. A. 1953).

³⁸³ Army Special Regulation 22-145-1 (1950), as amended by C-1 (March 6, 1952).

³⁸⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶7, p. 12; ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, 1952, p. 4.

C. Miscellaneous Limitations on Punishments

General courts are subject to no limitation on punishment except those contained in the punitive articles and the Table of Maximum Punishments.^{384a} One further exception is that where a convening authority has directed that a non-mandatory capital case be treated as not capital to permit the use of depositions by the prosecution a death penalty may not be imposed.³⁸⁵

No military court upon a rehearing or a new trial may impose a sentence more severe than that originally adjudged by a lawful court in the same case unless the sentence prescribed for the offense is mandatory.³⁸⁶ This restriction of course goes far beyond any principle or requirement of constitutional due process.³⁸⁷

^{384a} Subject to certain limitations imposed by the *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951* ¶ 127c, § B, p. 228, a general court may, in addition to other authorized punishments, impose a fine. In *United States v. De Angelis* (No. 995), 12 CMR 54 (U. S. C. M. A. 1953) the accused officer, convicted of larceny, was sentenced to dismissal, total forfeitures, confinement at hard labor for five years (the maximum confinement authorized by the Table of Maximum Punishments), and a fine of \$10,000," or further confinement until the fine is paid, but not exceeding two more years." Confronted with this interesting situation the Court stated the problem and disposed of it as follows: "The sole question is, whether the additional confinement provided in the event the accused fails to pay the imposed fine is excessive. . . . The provision for further confinement was not made as punishment for the offense, but merely as a means of coercing the collection of the fine imposed. While the accused may suffer further imprisonment as a result of this provision, it must be remembered that 'he carries the keys of his prison in his own pocket.' In *re Nevitt*, 177 F. 448, 461."

Loss of promotion rights is not an authorized punishment, at least for Army and Air Force personnel. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 126i, p. 212. The inclusion in an Air Force sentence of a provision that the accused "not be considered for promotion" for twenty-four months is "illegal." *United States v. Taylor* (ACM 6458), ___ CMR ___ (1953).

³⁸⁵ Art. 49(f), 50 U. S. C. § 624 (Supp. 1952). See, *United States v. Gann* (No. 1425), 11 CMR 12 (U. S. C. M. A. 1953).

³⁸⁶ Art. 63(b), 50 U. S. C. § 650 (Supp. 1952) and *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 109g(2), p. 179. See discussion preceding note 399, *post*, p. 68.

The same rule applies to action taken on a sentence by a convening authority. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 88a, p. 147. Thus in *United States v. White* (ACM S-7152), ___ CMR ___ (1953) where a special court, as part of its sentence, imposed a forfeiture of sixty-five dollars per month for fifty-six days and the convening authority, as to this part of the sentence, approved a forfeiture of fifty-eight dollars per month for two months, the Board of Review held that, although the forfeiture approved was less than that adjudged, the increase in its duration increased the punishment and only a forfeiture of fifty-eight dollars per month for one month and twenty-six days was approved. In *United States v. O'Shea* (No. 3629), 12 CMR 190 (U.S.C.M.A. 1953) it was held that a convening authority may properly reduce a sentence of confinement to hard labor for three months to sixty days restriction. Accord, *United States v. Austin* (No. 3627), 12 CMR 189 (U.S.C.M.A. 1953).

The same prohibition against increasing a sentence also applies to a proceeding in revision before the original court-martial. Art. 62(b) (2), 50 U.S.C. § 649 (Supp. 1952). See, however, *United States v. Bates* (CM 365561), ___ CMR ___ (1953), a bigamy conviction in which the sentence announced by the court was dishonorable discharge, total forfeitures and confinement at hard labor for "not to exceed six months." The next day the court, on its own motion, convened in revision proceedings, the president stating that the previous announcement did not "correctly reflect the sentence that was determined." The court then closed, reopened, and announced the sentence as dishonorable discharge, total forfeitures and confinement at hard labor "for six months." Held: ". . . the correct announcement of the

Executive Order No. 10214 promulgating the 1951 *Manual* expressly provided,

“That the maximum punishment for an offense committed prior to May 31, 1951, shall not exceed the applicable limit in effect at the time of the commission of such offense.”³⁸⁸

The Court of Military Appeals has had occasion to apply this rule. Lieutenant Colonel Downard was charged under Article of War 95³⁸⁹ with conduct unbecoming an officer and a gentleman which involved assaulting and cursing his wife in the vicinity of the Fort Monroe Officers' Club. The acts involved occurred prior to May 31, 1951, but the case was tried thereafter. The mandatory penalty upon conviction prescribed by Article of War 95 was dismissal, whereas the successor Article 133³⁹⁰ prescribed that punishment shall be as a court-martial may direct. The law officer instructed that dismissal was mandatory and the court imposed that sentence. The Court of Military Appeals reversed, held this instruction constituted prejudicial error, and stated that a proper instruction would have been that the court might assess punishment at its discretion, not in excess of dismissal. It pointed out that anything in excess of dismissal would constitute an ex post facto application of the new Code, but that the accused was entitled to the benefit of the possibility of a lesser sentence under it.³⁹¹ Jurisdiction was not directly involved since under proper instruction the court could have imposed dismissal.

Another case raising essentially the same issue was that of Private Murgaw who was, after May 31, 1951, tried and convicted of a desertion committed before the effective date of the Code.³⁹² Under the previous law a general court could impose up to twelve months' confinement without also adjudging a punitive discharge,³⁹³ whereas the present *Manual* prohibited confinement in excess of six months unless the sentence also included a punitive discharge.³⁹⁴ In answer to a question by the court the law officer advised that a sentence of confinement in excess of six months could not be given without also imposing a punitive discharge. The court imposed a bad conduct discharge twelve months' confinement and partial forfeitures for twelve months. The convening authority not only suspended the discharge but ultimately completely remitted it as

sentence in revision proceedings was not a modification of the sentence originally determined nor an increase in the punishment.”

³⁸⁷ See *Palko v. Connecticut*, 302 U. S. 319, 322 (1937).

³⁸⁸ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, p. IX.

³⁸⁹ 41 STAT. 806 (1920).

³⁹⁰ 50 U. S. C. § 727 (Supp. 1952).

³⁹¹ *United States v. Downard* (No. 266), 3 CMR 80 (U. S. C. M. A. 1952).

³⁹² *United States v. Murgaw* (No. 1079), 8 CMR 169 (U. S. C. M. A. 1953).

³⁹³ *MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1949*, ¶ 117b.

³⁹⁴ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127b, p. 214.

well as most of the confinement and forfeiture. The Court held remission of the discharge did not render the issue moot, since if improperly imposed the accused was entitled to have that fact affirmatively appear upon his service record. It then decided that the provision of the current *Manual* was more stringent than its predecessor and, therefore, the law officer should have instructed that confinement up to twelve months could be imposed without a punitive discharge. With one judge dissenting, the Court then proceeded to cure the prejudicial error by setting the bad conduct discharge aside. Again jurisdiction was not reached since the sentence imposed by the court was permissible had it been properly instructed.

In the case of Electrician's Mate Second Class Flood, a Navy general court sitting under the Code sentenced the accused to a bad conduct discharge, confinement for ten months, forfeiture of ten months' pay and reduction to electrician's mate third class, having found him guilty of absence without leave for a period commencing before the Code was effective. The Court applied the rule that the sentence could not be greater than that authorized by the current *Manual* and held that so much of the sentence as extended to confinement and forfeitures in excess of six months was "illegal."³⁹⁵ Here the Court was dealing with a clearly excessive sentence but simply characterized it as "illegal." As before noted, it makes little practical difference whether the Court treats such excess as jurisdictional or simply as prejudicial error so long as it grants relief. In this same case it was held that since Navy regulations permitted only one grade reductions where confinement was not in excess of three months and required reduction to the lowest enlisted grade where longer confinement was imposed the confinement must be further reduced to not to exceed three months since the sentence imposed had reduced accused only one grade. This result points up the necessity for care by courts in imposing sentences all parts of which are consistent, since any ambiguity will be resolved against the government and in favor of the accused. Judge Latimer dissented and agreed with the view taken by the Board of Review that the portion of the sentence reducing the accused only one grade should be treated as a nullity.

D. *Excessive Punishments Resulting from Other Errors of Law*

Since all concerned with the functioning of the military justice system are alert to prevent the imposition of unauthorized punishments it is not surprising that practically all cases reaching the Court of Military Appeals involving excessive sentences result from some collateral error of law which caused the court, the convening authority and the Board of Review to believe the sentence imposed was lawful. A number of such

³⁹⁵ *United States v. Flood* (No. 377), 6 CMR 114 (U. S. C. M. A. 1952) citing *United States v. Emerson* (No. 77), 1 CMR 43 (U. S. C. M. A. 1951) and *United States v. Brasher* (No. 499), 6 CMR 50 (U. S. C. M. A. 1952).

cases has arisen under what may be termed "the military habitual criminal act." This phrase, however, is misleading in that it is only as to relatively minor offenses that the proof of prior offenses increases permissible punishments. This authorization stems not from the Code but from Section B of the Table of Maximum Punishments which relaxes its other limitations so that:

"If an accused is found guilty of an offense or offenses for none of which dishonorable or bad conduct discharge is authorized, proof of two or more previous convictions will authorize bad conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than three months, confinement at hard labor for three months. In such a case no forfeiture shall be imposed for any period in excess of the period of confinement so adjudged."³⁰⁶

The Navy has made considerable use of this provision in imposing bad conduct discharges. In a number of these cases the data as to the prior convictions was simply read to the court by trial counsel and the records themselves were neither marked for identification nor offered in evidence. The Court of Military Appeals held this state of the record did not constitute proof of prior convictions, found sentences imposed in reliance thereon excessive and remanded for rehearings.³⁰⁷ The Court said, "That an excessive sentence is prejudicial is apparent,"³⁰⁸ thus treating the problem as one of prejudicial error rather than jurisdiction.

A variant of the above situation arose in the trial of Fireman Apprentice Chapman for being absent without leave for twenty days. Of the three prior convictions admitted in evidence two, due to technical defects, were inadmissible. Upon rehearing the prior convictions were

³⁰⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, p. 228. Under this provision a summary court is authorized to sentence an accused to not to exceed thirty days confinement at hard labor upon a showing of two previous convictions when the maximum punishment for the offense of which the accused was convicted is less than thirty days. Letter, JAGJ 1953/3857 (5 May 1953).

To constitute an admissible "prior conviction" both the date of commission and the date of conviction must precede the date of commission of the offense being tried in the proceeding in which it is offered. *United States v. Henson* (ACM S-6725), 11 CMR ___ (1953). See also, *United States v. O'Shana* (ACM S-2859), 6 CMR 816 (1952). The court approved section B in *United States v. Prescott* (No. 812), 6 CMR 122 (U. S. C. M. A. 1952).

³⁰⁷ *United States v. Carter* (No. 159), 2 CMR 14 (U. S. C. M. A. 1952); *United States v. Zimmerman* (No. 261), 2 CMR 66 (U. S. C. M. A. 1952); *United States v. Trimiari* (No. 413), 2 CMR 169 (U. S. C. M. A. 1952); *United States v. Schabel* (No. 440), 3 CMR 9 (U. S. C. M. A. 1952); *United States v. Adams* (No. 452), 3 CMR 9 (U. S. C. M. A. 1952); *United States v. Hand* (No. 450), 3 CMR 35 (U. S. C. M. A. 1952); *United States v. Pruchniewski* (No. 489), 3 CMR 62 (U. S. C. M. A. 1952); *United States v. Deweese* (No. 633), 3 CMR 134 (U. S. C. M. A. 1952); *United States v. Townsend* (No. 597), 4 CMR 33 (U. S. C. M. A. 1952). See *United States v. Parker* (No. 731), 13 CMR ___ (U. S. C. M. A. 1953). *United States v. Kautz* (CM 362116), ___ CMR ___ (1953) holds falsely altering a military pass to be an offense under Article 134.

³⁰⁸ *United States v. Carter* (No. 159), 2 CMR 14, 20 (U. S. C. M. A. 1952).

proved by competent evidence and the sentence imposed was a bad conduct discharge, confinement for three months and forfeiture of \$36.00 per month for three months. Accused contended before the Board of Review that since sixty days' confinement was the maximum sentence properly imposable by the first court this could not be exceeded by the rehearing sentence. The Judge Advocate General of the Navy certified this question and the Court upheld the sentence announcing that where error extends to sentence only, the second court is not restricted by the error affecting the sentence of the first.³⁹⁹

Due to the express provision in Section B of the Table of Maximum Punishments that where prior convictions are necessary to the imposition of a bad conduct discharge "no forfeiture shall be imposed for any period in excess of the period of confinement so adjudged,"⁴⁰⁰ the Court of Military Appeals held that a sentence imposed by a Navy special court for a two-day absence without leave of a \$36.00 forfeiture and a suspended bad conduct discharge, but without confinement, was as to the forfeiture "excessive and therefore illegal."⁴⁰¹ The Court approved the suspended bad conduct discharge but did not make clear whether under these circumstances it would approve a forfeiture of two days' pay for each day of absence as provided by Paragraph 127c of the *Manual*. In civil life police court fines are not safeguarded with such elaborate appellate procedures. Perhaps it is cases of this kind which have evoked the recommendation of the Court of Military Appeals that the power to impose bad conduct discharges be denied to special courts-martial.⁴⁰²

Another provision of the Table of Maximum Punishments which has presented sentencing problems is the requirement that:

"If an offense not listed in the table is included in an offense which is listed and is also closely related to some other listed offense, the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment."⁴⁰³

³⁹⁹ *United States v. Chapman* (No. 1001), 7 CMR 14 (U. S. C. M. A. 1953). Pursuant to Article 44(b) until a prior conviction has been finally approved on appeal or review it is prejudicial error to offer it in evidence in another case. *United States v. Drummon* (ACM 5243), 5 CMR 400, 403, 404 (1952) and *United States v. Engle* (No. 1971), 11 CMR 41, 45 (U. S. C. M. A. 1953).

⁴⁰⁰ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127c, p. 228.

⁴⁰¹ *United States v. Watkins* (No. 834), 8 CMR 87 (U. S. C. M. A. 1953).

⁴⁰² *ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, 1952*, p. 4.

⁴⁰³ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127c, p. 214. The closely related" rule was applied where a specification under Article 134 alleged the accused "... a married man, did ... wrongfully cohabit with ... a woman not his wife." The law officer instructed that the sentence might be the same as that authorized for adultery. In rejecting a contention that the sentence could be no greater than that for a simple disorder under Article 134, the Board of Review held: "... if the offense here charged is not adultery, then it is so similar that the offense designated in the Table of Maximum Punishments by that name should control the punishment." *United States v. Bailey* (CM 365023), ___ CMR ___ (1953).

Army Private Beach, a unit mail clerk, pleaded guilty to negligently permitting some three hundred pieces of mail to accumulate over a period of eight months without delivering it in violation of general Article 134.⁴⁰⁴ The Board of Review approved a sentence of dishonorable discharge, total forfeitures and confinement for two years. On certification by The Judge Advocate General of the Army, the Court of Military Appeals⁴⁰⁵ rejected the contention of the government that this offense was punishable as lesser included to that of obstructing the mail, which under the Table would authorize a dishonorable discharge and five years' confinement,⁴⁰⁶ and found instead that this offense was "closely related" to a dereliction in performance of duty under Article 92.⁴⁰⁷ Since this latter offense was punishable by a maximum sentence of only three months' confinement and forfeiture of two-thirds pay for three months⁴⁰⁸ the Court held that portion of the sentence imposed in excess of these limits to be "illegal."

The opposite conclusion was reached in applying the "closely related" rule to the case of Marine Private Stewart who had pleaded guilty to desertion in violation of Article 8 of Articles for the Government of the Navy.⁴⁰⁹ A Board of Review found the specification as worded stated only a desertion from "command" to the prejudice of good order and discipline and not desertion "from the Naval service." The absence had been for nearly three years and the sentence imposed was a dishonorable discharge and three years' confinement, the maximum authorized by the Table for a desertion terminated by apprehension.⁴¹⁰ Accused contended that his offense, as approved by the Board of Review, was "closely related" to simple absence without leave, the maximum punishment for which is dishonorable discharge and six months' confinement.⁴¹¹ The Court of Military Appeals affirmed the sentence and said:

"Patently, his absence from command for almost three years is hardly *closely* related to mere absence without leave. Thus, having concluded that the offense alleged here is at least included within desertion of a type other than to avoid hazardous duty or to shirk important service, and that it is not 'closely related' to another enumerated offense, the punishment for the former must govern."⁴¹²

⁴⁰⁴ 50 U. S. C. § 728 (Supp. 1952).

⁴⁰⁵ *United States v. Beach* (No. 1036), 7 CMR 48 (U. S. C. M. A. 1953).

⁴⁰⁶ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127c, p. 226.

⁴⁰⁷ 50 U. S. C. § 686 (Supp. 1952).

⁴⁰⁸ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127c, p. 221.

⁴⁰⁹ 34 U. S. C. § 1200 (1946).

⁴¹⁰ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 127c, p. 220.

⁴¹¹ *Ibid.*

⁴¹² *United States v. Stewart* (No. 679), 8 CMR 121 (U. S. C. M. A. 1953). A similar problem is presented by footnote 5 to the Table of Maximum Punishments at page 221 of the *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*. It provides that the punishment prescribed for failure to obey a lawful general order

In the case of Corporal Grossman the question presented was what maximum controls where the offense proved by the evidence is more serious than the one charged in the specification. There the accused was charged, in addition to other offenses, with drunken driving under Article 111⁴¹³ with no allegation of personal injury resulting therefrom. The evidence in fact established such injury. The maximum provided by the Table for drunken driving resulting in personal injury is dishonorable discharge and one year's confinement but for drunk driving alone is bad conduct discharge and six months' confinement. Here the Court of Military Appeals found it was prejudicial error for the law officer to have instructed that the larger penalty might be imposed and said: "A sentence is limited by the facts alleged in the specification. . . ." ⁴¹⁴

A final example of excessive sentencing resulting from error of law as to another point occurred in the case of Private Cooper who, with his co-accused, was charged, among other things, with the offense of robbery and assault with intent to commit robbery. The evidence established that these two separate specifications each pertained to the same robbery but the law officer in effect instructed that each might be considered as separate offenses for sentencing purposes. The *Manual* provisions state that:

"The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. . . . An accused may not be punished for both a principal offense and for an offense included therein. . . ." ⁴¹⁵

The Court of Military Appeals declared the instruction as given was prejudicial error, and opined:

"does not apply in those cases wherein the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in this table." Pursuant thereto it has been held that carrying a concealed weapon in violation of a post regulation though prosecuted under Article 92, cannot be punished more severely than is authorized under Article 134 for the offense of carrying a concealed weapon. *United States v. Amato* (CM 360145), 9 CMR 416 (1953). *Accord*, *United States v. McGovern* (CM 363388), 10 CMR — (1953); *United States v. Yunque-Burgos* (CM 362134), 10 CMR — (1953).

⁴¹³ 50 U. S. C. § 705 (Supp. 1952).

⁴¹⁴ *United States v. Grossman* (No. 796), 9 CMR 36 (U. S. C. M. A. 1953).

⁴¹⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 76a(6), p. 123. It has been held that absence without leave upon a change of station from Brooklyn, New York to Newport, Rhode Island, which conduct also violated an express lawful order of a commanding officer to report to Newport, constituted two separate offenses for sentencing purposes. *United States v. Larney* (No. 775), 10 CMR — (U. S. C. M. A. 1953). Likewise the offenses of making a forged instrument and uttering that same forged instrument, even though occurring substantially in one transaction, are separate and the maximum punishment may be imposed for each. *United States v. Parr* (ACM 6326), 10 CMR — (1953). The offenses of desertion with intent to remain away permanently and desertion with intent to avoid important service embody separate and distinct elements, each requires proof of a fact not required in the other, and the maximum punishment may be imposed for each when the two arise out of one transaction. *United States v. Greer* (CM 366411), — CMR — (1953).

"Where, as here, the assault with intent to commit a robbery constitutes the force and violence laying (*sic*) at the core of the robbery charge, the former certainly is a lesser crime included within the latter. . . . The maximum punishment for each is . . . ten years. . . . This is the maximum which might be adjudged in this case under the two specifications here in question."⁴¹⁶

E. *Cruel and Unusual Punishment*

Article 55 of the Code, in part, provides that "cruel or unusual punishment, shall not be adjudged by any court-martial. . . ."⁴¹⁷ However, Article 15(a)(2)(F) thereof expressly permits,

"if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days."⁴¹⁸

The *Manual* purported to prohibit Army and Air Force courts from imposing bread and water punishment and to authorize Navy and Coast Guard courts to adjudge confinement on bread and water for not to exceed thirty days,⁴¹⁹ in keeping with unbroken Navy practice. In the case of Marine Private Wappler, shore-based at Camp Pendleton, California, a special court in an absence without leave and missing movement case, as part of its sentence included a bad conduct discharge and thirty-day confinement on bread and water with a full ration every third day. This set the stage for one of the more spectacular decisions rendered by the Court of Military Appeals. It held confinement on bread and water was cruel and unusual punishment prohibited by Article 55 and that accordingly that part of the sentence "was illegal and void."⁴²⁰ It further held that since confinement on bread and water was included in the Table of Equivalent Punishments⁴²¹ it could in no event be imposed as part of a sentence which also included a punitive discharge. The Court stated:

"Although we do not believe that the proscription against punishments of this nature contained in the Constitution's Eighth Amendment—if applicable—would bar the punishment adjudged here, it is to be noted that the Amendment does not necessarily define the limits of 'cruel and unusual' as used by Congress in Article 55. Use of the phrase by Congress, therefore, raises a problem of *legislative* rather than constitutional construction. Certainly Congress intended to confer as much protection as that af-

⁴¹⁶ *United States v. Cooper* (No. 708), 8 CMR 133, 138 (U. S. C. M. A. 1953).

⁴¹⁷ 50 U. S. C. § 636 (Supp. 1952). ⁴¹⁸ 50 U. S. C. § 571 (Supp. 1952).

⁴¹⁹ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 126a, p. 206. Medical certificate, that serious injury to health would not result, was required, and a full ration could not be deprived for more than three consecutive days.

⁴²⁰ *United States v. Wappler* (No. 1457), 9 CMR 23 (U. S. C. M. A. 1953).

⁴²¹ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, ¶ 125, p. 215.

forded by the Eighth Amendment. . . . we believe it intended to grant protection covering even wider limits. Accordingly, we think Article 55 quite broad enough to bar confinement on bread and water, except to the extent permitted by Article 15.

“ . . .

“In the interest of clarity, a summary of our views is perhaps required. They are simply these: (1) No court-martial—Navy or otherwise—may adjudge confinement on bread and water for personnel other than those ‘attached to or embarked in a vessel,’ but (2) a court-martial of any service may impose confinement on bread and water in cases involving personnel ‘attached to or embarked in a vessel’ for a ‘period not to exceed three consecutive days.’ To the extent to which paragraphs 125 and 127c of the *Manual* are in conflict with this construction of the Code, they are without sanction of law and must fall.

“ . . . where punitive discharge is imposed, the court may not additionally sentence the accused to confinement on bread and water even though the latter course may otherwise be open to it under the view we have taken earlier in this opinion.

“ . . . The instant case . . . is quite unlike *United States v. Flood*. . . . Here the bread and water confinement aspect of the sentence was void *in toto*. Striking it thus leaves the punitive discharge effective in an entirely legal sentence, and certainly places the accused in no worse position than when the sentence left the court-martial.”⁴²²

This decision no doubt came as a considerable shock to many a ward room. Something which for over one hundred and seventy-five years had not been “cruel and unusual,” suddenly became so. Though some old salts may view the decision as an evidence of effete decadence its practical impact upon Navy discipline is likely to be minuscule. Comparable, would be the removal of most of a small benign wart from an inconspicuous portion of the anatomy of a healthy individual. After such minor surgery the patient might look a trifle better but his general health would not be affected one way or the other.

A curious consequence of the *Wappler* decision was promptly emphasized in the case of Seaman Apprentice Wyatt who was tried aboard the U. S. S. *Bon Homme Richard* and sentenced to a bad conduct discharge, twenty days’ solitary confinement on bread and water and forfeitures for four months. The Court held since the accused was attached to a vessel three days of confinement on bread and water was proper, but that this punishment and a bad conduct discharge could not be approved in the same sentence. It then proceeded to declair “void” all

⁴²² *United States v. Wappler* (No. 1457), 9 CMR 23, 27 (U. S. C. M. A. 1953).

that portion of the sentence in excess of three days on bread and water.⁴²³ Some may feel that somewhere between *Wappler* and *Wyatt* logic and common sense parted company.

F. *Permissible Punishment for a Violation of the Law of War*

The Court of Military Appeals has had occasion to pass upon the extent of punishment that may be imposed by a general court-martial while in the exercise of its derivative jurisdiction under Article 18⁴²⁴ to punish violations of the law of war. American civilian Schultz was tried and convicted for the offense of negligent homicide in occupied Japan and sentenced to one year of confinement and \$1,000 fine. The conviction was upheld since the conduct of the accused was a violation of the Penal Code of Japan which in turn, by virtue of an order of the Supreme Commander of the Allied Powers in the Far East, was a violation of the law of war. Accused contended, since the maximum sentence authorized by the Japanese Penal Code for this offense was a fine of \$140 at the prevailing rate of exchange, that to the extent the sentence imposed exceeded this amount it was illegal. The Court approved the sentence and said:

“ . . . SCAP Circular No. 17 . . . provides that a military commission in Japan may impose any sentence up to death, including fines in any amount or imprisonment up to life. . . . Under the law of war, General MacArthur had the power . . . to determine punishment policies for military tribunals. The sentence here does not exceed the limitations set out by him. . . . The sentence is therefore legal.”⁴²⁵

This case simply recognized the well-established rule of international law that any violation of the law of war may, so far as jurisdiction is concerned, be punished by death by a military commission.⁴²⁶ This result, in the proper setting of Article 18,⁴²⁷ is undoubtedly correct. It is hardly necessary to add that this law of war rule would never be invoked to support the punishment jurisdiction of a general court-martial when proceeding under any other article.

G. *The Approach of the Court of Military Appeals to Problems of Jurisdiction to Punish*

The Court has defined what agencies in the military justice system may take what action with regard to sentences. Thus it has held that a court-martial may not suspend a sentence; that such action may be

⁴²³ *United States v. Wyatt* (No. 1140) 10 CMR ___ (U. S. C. M. A. 1953).

⁴²⁴ 50 U. S. C. § 578 (Supp. 1952).

⁴²⁵ *United States v. Schultz* (No. 394), 4 CMR 104, 122 (U. S. C. M. A. 1952).

⁴²⁶ *Ex parte Quirin*, 317 U. S. 1 (1942); WAR DEPARTMENT FIELD MANUAL 27-10, Rules of Land Warfare ¶ 357, p. 89 (1940).

⁴²⁷ 50 U. S. C. § 578 (Supp. 1952).

taken by a convening authority;^{427a} that a Board of Review, although it may entirely remit, may not suspend, a punitive discharge;⁴²⁸ and that Boards of Review have power, in a proper case, to commute a death sentence to life imprisonment and a dishonorable discharge.⁴²⁹ It has repeatedly held that under Article 67(d) the Court itself "shall take action only with respect to matters of law,"⁴³⁰ and so may not modify sentences, but may return cases for rehearings or remand them to Boards of Review for appropriate sentence action consistent with directions as to matters of law given by the Court. This method of remand has been used even in dealing with void sentences.⁴³¹

The Court of Military Appeals does not speak of jurisdiction in dealing with excessive punishments but uses instead the prejudicial error approach and talks of "illegal" sentences. Since the vast preponderance of questioned punishments exceed only the Table of Maximum Punishments limits and not the maximums prescribed by Congress in the punitive articles, it is in such cases technically correct for the Court to refrain from considering the problem as jurisdictional. In *Wappler*, where the Court found the "imposed confinement on bread and water, was illegal and void," it characterized a jurisdictional defect without using the word.

It seems clear that a punishment in excess of that authorized by Congress would, as to the excess, be treated by the United States Supreme Court as jurisdictional.⁴³²

VI. CAN DUE PROCESS CONSIDERATIONS BECOME JURISDICTIONAL?

There remains the interesting question whether procedural errors committed in trials before military courts can ever, either individually or collectively, reach the stature of a jurisdictional factor. On direct appeal within the military justice system it is unnecessary to decide this point since long before procedural error could conceivably be sufficiently aggravated to become jurisdictional it would certainly be "materially prejudicial to the substantial rights of the accused," and for this reason would require reversal by either a Board of Review or the Court of Military Appeals. Within the framework of the Congressional limitation imposed upon it, that "A finding or sentence of a court-martial shall not

^{427a} *United States v. Marshall* (No. 1670), 8 CMR 142 (U. S. C. M. A. 1953). A convening authority may also disapprove a sentence and order a rehearing. *United States v. Freeman* (No. 1650), 11 CMR 71 (U. S. C. M. A. 1953).

⁴²⁸ *United States v. Simmons* (No. 940), 6 CMR 105 (U. S. C. M. A. 1952).

⁴²⁹ *United States v. Bigger* (No. 456), 8 CMR 97 (U. S. C. M. A. 1953).

⁴³⁰ 50 U. S. C. § 654 (Supp. 1952).

⁴³¹ *United States v. Wappler* (No. 1457), 9 CMR 23 (U. S. C. M. A. 1953); *United States v. Wyatt* (No. 1140), 10 CMR ___ (U. S. C. M. A. 1953).

⁴³² *United States v. Reed*, 100 U. S. 13, 23 (1879); *Ex parte Lange*, 18 Wall. 163 (U. S. 1873).

be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused,"⁴³³ the Court of Military Appeals has in substance said that as it conceives military due process, certain procedural omissions or commissions will *per se* constitute "error materially prejudicial to the substantial rights of the accused."⁴³⁴ This, of course, is quite a different thing from treating such procedural error as divesting a court-martial of jurisdiction. Reversal for prejudicial error fully protects the rights of the accused without ever reaching an issue of jurisdiction and the Court of Military Appeals has gone to some pains to point out that it distinguishes due process from jurisdiction.⁴³⁵

In collateral attack by habeas corpus procedural errors may not be considered,⁴³⁶ nor may the evidence be reviewed to ascertain the guilt or innocence of the accused.⁴³⁷ The inquiry has always been limited to whether the military court had jurisdiction.⁴³⁸ Traditionally this inquiry has been confined to the four fundamental questions previously examined in this article. In recent years petitioners' counsel in military cases have repeatedly urged, by analogy to federal court habeas corpus review of criminal cases arising in state jurisdictions, that procedural error may be so gross as to deprive an accused of due process as guaranteed by the Fifth Amendment and, thus, become a jurisdictional defect which may be reached and remedied by habeas corpus. In a few instances inferior federal courts have tried, without success, to approve this concept.⁴³⁹ If accepted, the next question raised is: "What kind of due process does the Constitution provide for those subject to military law, and what violates it?" The answer the Supreme Court has always

⁴³³ Article 59, 50 U. S. C. § 646 (Supp. 1952).

⁴³⁴ *United States v. Clay* (No. 49), 1 CMR 74, 78 (U. S. C. A. 1951). For a discussion of the views of the Court of Military Appeals regarding military due process see Wurfel, *Military Due Process, What Is It?* 6 VAND L. REV. 251 (1953). In its most recent consideration of due process the court affirmed a death sentence murder case saying, "the accused was convicted without there being any error which materially prejudiced his substantial rights." *United States v. Vigneault* (No. 2432), 12 CMR 3, 14 (U. S. C. M. A. 1953).

⁴³⁵ *United States v. Davis* (No. 29), 2 CMR 8, 13 (U. S. C. M. A. 1952); *United States v. Bartholomew* (No. 166), 3 CMR 41, 45 (U. S. C. M. A. 1952).

⁴³⁶ *Hiatt v. Brown*, 339 U. S. 103, 111, *rehearing denied*, 339 U. S. 939 (1950).

⁴³⁷ *Ex parte Quirin*, 317 U. S. 1, 25 (1942); *Humphrey v. Smith*, 336 U. S. 695, 696, *rehearing denied*, 337 U. S. 934 (1949); *Whelchel v. McDonald*, 176 F. 2d 260, 262 (5th Cir. 1949), *aff'd*, 340 U. S. 122 (1950), *rehearing denied*, 340 U. S. 923 (1951).

⁴³⁸ *Hiatt v. Brown*, 339 U. S. 103, 111, *rehearing denied*, 339 U. S. 939 (1950); *In re Grimley*, 137 U. S. 147 (1890); *Ex parte Reed*, 100 U. S. 13, 23 (1879).

⁴³⁹ *Smith v. Hiatt*, 170 F. 2d 61 (3d Cir. 1948), *rev'd sub nom. Humphrey v. Smith*, 336 U. S. 695, *rehearing denied*, 337 U. S. 934 (1949); *Hiatt v. Brown*, 175 F. 2d 273 (5th Cir. 1949), *rev'd*, 339 U. S. 103, *rehearing denied*, 339 U. S. 939 (1950); *Innes v. Hiatt*, 141 F. 2d 664, 666 (3d Cir. 1944); *Schita v. King*, 133 F. 2d 283 (8th Cir. 1943), second appeal, 139 F. 2d 971 (8th Cir. 1944), *cert. denied sub nom. Schita v. Pescor*, 322 U. S. 761, *rehearing denied*, 323 U. S. 810 (1944). In both *Innes* and *Schita* the courts found due process had not been violated.

given to this is, "To those in the military or naval service of the United States the military law is due process."⁴⁴⁰

The Supreme Court in recent years has had at least three different opportunities in military cases to put at rest this 'due process contention, but has not dealt with it conclusively. In both *Humphrey v. Smith*⁴⁴¹ and *Hiatt v. Brown*,⁴⁴² the Supreme Court reversed the courts of appeal; set forth an array of alleged procedural errors; held that they did not deprive the accused of due process although the courts of appeal had so found; and denied habeas corpus relief. In *Burns v. Wilson*,⁴⁴³ the high Court again set forth some six specific allegations of procedural error which petitioners contended constituted a denial of due process; found that all these assignments of error had been passed upon and rejected by the military tribunals during the course of the appellate review of the case within the system of military courts; concluded that these same issues should not be reviewed by a civil federal court; and affirmed the orders of the district and circuit courts denying habeas corpus relief. In arriving at this result the Court split four ways. Six judges concurred in the denial of relief although only Justices Reed, Burton, and Clark joined in the opinion of the Court written by Chief Justice Vinson.⁴⁴⁴ Justice Minton wrote a separate concurring opinion adhering to the

⁴⁴⁰ *Creary v. Weeks*, 259 U. S. 336, 344 (1922); *French v. Weeks*, 259 U. S. 326, 335 (1922); *Reeves v. Ainsworth*, 219 U. S. 296, 304 (1911).

⁴⁴¹ 336 U. S. 695, *rehearing denied*, 337 U. S. 934 (1949).

⁴⁴² 339 U. S. 103, *rehearing denied*, 339 U. S. 939 (1950).

⁴⁴³ 346 U. S. 137 (1953), *rehearing denied*, 74 S. Ct. 3 (1953).

⁴⁴⁴ *Id.* at 139. The opinion of the court in part, read:

"... But, in military habeas corpus the inquiry, the scope of matters open for review has always been more narrow than in civil cases. *Hiatt v. Brown*, 339 U. S. 103 (1950). Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law.

"Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

"Indeed, Congress has taken great care both to define the rights of those subject to military law, and to provide a complete system of review within the military system to secure those rights. . . .

"The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U. S. 128 (1950). But these pro-

traditional view of the Court that the sole test is jurisdiction.⁴⁴⁵ Justice Jackson concurred in the result reached by the Court. Justice Frankfurter cast no vote, feeling the case should be set down for reargument, but even so, wrote an opinion to the effect that 'due process in military courts is quite different from due process in civil courts.'⁴⁴⁶ Justices Black and Douglas dissented, asserting that the 5th Amendment due process clause is applicable and probably had been violated by the improper admission in evidence of a questioned confession. Earnest lawyers who have wrestled with the problem, while they will not find in this performance of the Court an absolute to which to cling, should draw solace from this striking testimonial to the highly divisive propensity of the legal enigma presented by the effort to isolate, identify and define the concept of due process applied to military law.

visions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. *Whechel v. McDonald*, 340 U. S. 122 (1950).

"These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process—to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the application for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. *Whelchel v. McDonald*, *supra*. We think they have.

"Petitioners have failed to show that this military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the District Court precisely what they failed to prove in the military court. We think, under the circumstances, that due regard for the limitations on a civil court's power to grant such relief precludes such action. We think that although the Court of Appeals may have erred in reweighing each item of evidence in the trial record, it certainly did not err in holding there was no need for a further hearing in the District Court. Accordingly its judgment must be affirmed."

⁴⁴⁶ The forthright approach of Justice Minton is the one which the Supreme Court has heretofore consistently taken in military habeas corpus cases and possesses the old fashioned virtue of clarity. In part, in his separate concurring opinion at 147, he said:

"... Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law. If the court is thus established, its action is not reviewable here. Such military court's jurisdiction is exclusive but for the exceptions contained in the statute, and the civil courts are not mentioned in the exceptions. 64 STAT. 115, 50 U. S. C. (Supp. V) Sec. 581.

"If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress. We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction.

"The rule was clearly stated in the early case of *In re Grimley*, 137 U. S. 147, 150, . . .

"... The single inquiry, the test, is jurisdiction."

⁴⁴⁶ *Id.* at 148. Justice Frankfurter, in part, wrote:

"... if imprisonment is the result of a denial of due process, it may be challenged no matter under what authority of the Government it was brought about. Congress itself in the exercise of the war power 'is subject to application of constitutional limitations.' *Hamilton v. Kentucky Distilleries Co.*,

From the *Burns* case, a new rule seems to emerge for military cases. It is that federal civil courts in habeas corpus may look only to determine whether a military petitioner has received full and fair consideration of his contentions by the appellate tribunals of the military justice system. If so, the civil courts are closed to him, not only for direct appeal but for collateral habeas corpus relief as well. This rule seems to shift the inquiry along from, "Was the accused accorded due process by the court-martial?" to "Was the accused accorded a full and fair hearing by military justice appellate agencies either on appeal or on separate motion for a new trial?" It appears to infer that if the answer to the last question were "no," then habeas corpus relief might be granted even though jurisdiction were not involved. The rule certainly neither states nor infers that due process considerations are jurisdictional. The same Court has clearly ruled that all remedies within the military system must first be completely exhausted as a prerequisite to seeking habeas corpus relief in the civil courts.⁴⁴⁷ This, of necessity, means a petitioner must have been heard *in extenso* by all military appellate tribunals before he may even seek a hearing in the federal civil courts. Since error in decision cannot be reached by habeas corpus,⁴⁴⁸ it would follow that only provable wilful dishonesty of decision, either committed or approved, by the Court of Military Appeals, or its refusal to consider at all a case properly submitted to it under its appellate jurisdiction, would fit the test of a failure to afford the petitioner a full and fair consideration of his con-

251 U. S. 146, 156. It is therefore not freed from the requirements of due process of the Fifth Amendment. But there is no table of weights and measures for ascertaining what constitutes due process. Indeed, it was common ground, in the majority and dissenting opinion below, that due process, in the language of Judge Bazelon, is not 'the same in a military setting as it is in a civil setting.' 202 Fed. at page 352.

"I cannot agree that the only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy, although in a debatable situation we should no doubt attach more weight to the conclusions reached on controversial facts by military appellate courts than those reached by the highest court of a State.

"... I believe this case should be set down for reargument."

This "opinion," not backed by a vote in the case either way, is something of a legal oddity. To borrow partially from the words of Justice Frankfurter, "there is no table of weights and measures for ascertaining" its legal effect. It does make clear that the Justice feels that military due process and civilian due process are not by any means the same commodity.

See, however, the further views of Justice Frankfurter expressed when the Supreme Court denied a petition for rehearing in the *Burns* case, 74 S. Ct. 3 (1953).

⁴⁴⁷ *Gusik v. Schilder*, 340 U. S. 128 (1950); *Whelchel v. McDonald*, 340 U. S. 122 (1950), *rehearing denied*, 340 U. S. 923 (1951). Followed in *McKinney v. Finletter*, 205 F. 2d 761 (10th Cir. 1953).

⁴⁴⁸ See notes 436 and 437 *supra*.

tentions by the appellate tribunals of the military justice system. While conceivable, such conduct is improbable almost to the point of impossibility. More within the realm of possibility would be a failure to pass upon a material issue raised in a case. However, in view of the vigorous activities of assigned appellate defense counsel in all cases this, too, is most unlikely. The rule, very properly, makes narrow the way and straight the course of the military petitioner seeking habeas corpus in the civil courts.

In any non-capital case not certified to it by a Judge Advocate General the Court of Military Appeals is authorized by law to deny the petition of an accused for a hearing by that court.⁴⁴⁹ This petition jurisdiction of the Court of Military Appeals is analogous to the certiorari jurisdiction of the Supreme Court and is carefully exercised.⁴⁵⁰ In testing to determine whether the military had in a certain case given full and fair consideration to the contentions of the military habeas corpus petitioner, what, if any, significance the Supreme Court may attach to the fact that a petition for hearing was denied by the Court of Military Appeals, must await the pronouncement of the high Court itself.⁴⁵¹

It remains to be seen whether the Supreme Court, since the *Burns* case, would hold that a petitioner, who was not at all within the jurisdiction of military courts but whose case had been, on the jurisdictional issue, fully and fairly, but erroneously, decided against him by the Court of Military Appeals, was thereby wholly debarred from civil court relief. It is highly unlikely this case will arise. If it should, the Supreme Court probably would approve federal civil court habeas corpus intervention under its traditional doctrine, espoused in the *Burns* case by Justice Minton, that "the single . . . test, is jurisdiction."⁴⁵²

The Court of Military Appeals has said that due process considerations are not jurisdictional in nature.⁴⁵³ The Supreme Court has adamantly refrained from saying that due process compliance in a military case is an element of jurisdiction. It is significant that in the only recent case in which the Supreme Court approved civil court habeas corpus relief for a military petitioner the clear ground was lack of jurisdiction of the person and due process was not an issue.⁴⁵⁴ It seems safe to

⁴⁴⁹ Article 67 (b), (c), 50 U. S. C. § 654 (Supp. 1952).

⁴⁵⁰ For authoritative accounts of the process by which the Court of Military Appeals exercises its petition jurisdiction see Latimer, "*Good Cause*" in *Petitions for Review*, 6 VAND. L. REV. 163-168 (1953) and Walker and Niebank, *The Court of Military Appeals—Its History, Organization and Operations*, 6 VAND. L. REV. 228, 232 (1953).

⁴⁵¹ Such pronouncement is not likely to be either brief or simple, if it should follow the lead of the 118 page Supreme Court decision setting forth the effect of its own previous denial of certiorari upon habeas corpus litigation by civilian prisoners. *Brown v. Allen*, 344 U. S. 443 (1953). This problem evoked no less than five separate opinions from the Justices.

⁴⁵² See note 445 *supra*.

⁴⁵³ See note 435 *supra*.

⁴⁵⁴ *Hershberg v. Cooke*, 336 U. S. 210 (1949). The same was true in *Billings v. Truesdale*, 321 U. S. 542 (1944).

conclude that the according of civil due process is not, *per se*, an essential element of military jurisdiction. This is not meant to imply that courts-martial do not scrupulously adhere to all of the provisions of the Uniform Code of Military Justice which is the military "Law of the Land." They, in fact, earnestly endeavor to do just that. Where errors occur, in the exercise of granted jurisdiction, which materially prejudice the substantial rights of an accused,⁴⁵⁵ they are corrected by the military appellate tribunals by granting rehearings, new trials, or other appropriate relief.

VII. CONCLUSIONS

The purpose of this paper has been to define the limits of courts-martial jurisdiction. That jurisdiction derives from strict compliance with the expressed will of Congress in constituting courts-martial. It extends only to those persons specified by Congress, and then only as to offenses affirmatively denounced by Congress. Jurisdiction to sentence is confined to the limits imposed by Congress and the exercise thereof is further restricted administratively. Other factors may be productive of reversible error, subject to correction by appellate military courts, but they are not jurisdictional.

The principles are clear. Their applications are frequently productive of substantial legal complications. Possibly those newly approaching military law may profit from this statement of its jurisdictional principles.

⁴⁵⁵ Article 59(a), 50 U. S. C. § 646 (Supp. 1952).