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JURISDICTION OF
COURTS-MARTIAL

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MILITARY JUSTICE

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CHAPTER I

SOURCES OF MILITARY JURISDICTION

1. GENERAL

The term jurisdiction has been defined many ways. Generally accepted is the statement that jurisdiction is "the authority, capacity, power or right to act." [1] For purposes of this text, the jurisdiction of a military agency is the authority, capacity, power or right of that agency to act judicially in a particular case. The sources of military jurisdiction may be divided under two headings:[2]

a. *Constitution,* and

b. *International Law.*

2. CONSTITUTIONAL PROVISIONS

Some of the pertinent provisions of the United States Constitution from which military judicial powers are derived are—

a. *Powers Granted to Congress.* Article I, Section 8, grants the following powers to Congress:

(1) To provide for the common defense (clause 1);

(2) To define offenses against the law of war and nations (clause 10);

(3) To declare war and make rules concerning capture on land and water (clause 11);

(4) To raise and support Armies (clause 12);

(5) To provide and maintain a Navy (clause 13);

(6) To make rules for the government and regulation of the land and naval forces (clause 14);

(7) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions (clause 15);

(8) To provide for organizing, arming, and disciplining the militia, and for such part of them as may be employed in the service of the United States (clause 16); and

(9) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof (clause 18).

b. *Powers Granted to the President.* Article II, Section 2, designates the President as Commander-in-Chief of the Army and Navy and of the militia when called into the actual service of the United States.[3] In addition to the implied authority arising from such position, the President may also be granted by Congress specific authority in particular phases of military jurisdiction. This authority is illustrated by Article 36 of the Uniform Code of Military Justice,[4] which authorizes the President to prescribe the rules of procedure, including modes of proof, to be used in military tribunals and by Article 56,[5] authorizing the establishment of maximum punishments.

c. *Miscellaneous Grants of Power.* The Constitution also provides that the United States shall guarantee every State a republican form of Government and shall protect each of them against invasion.[6]

d. *The Fifth Amendment, a Caveat.*

[1] BLACK, LAW DICTIONARY 991 (4th ed. 1951).

[2] Para. 1, Manual for Courts-Martial, United States, 1951 (Exec. Order 10214, Feb. 8, 1951, as amended) (hereinafter referred to as "the Manual," or "MCM, 1951").

[3] See Swaim v. United States, 165 U.S. 553 (1897).

[4] Uniform Code of Military Justice, Art. 36, 10 U.S.C. § 836 (1958). The Uniform Code of Military Justice, Arts. 1-140, 10 U.S.C. §§ 801-940 (1958), as amended, 10 U.S.C. §§ 802, 815, 858a, 923a, 936 (Supp. V, 1964), will hereinafter be referred to as "the Code," or "the Uniform Code," and cited as "UCMJ."

[5] UCMJ, Art. 56.

[6] Art. IV, § 4.

(1) *General.* The Fifth Amendment provides in part that "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces." This clause recognizes the authority for trial of cases in the "land and naval forces" without a grand jury proceeding. This clause was also asserted at one time to be a grant of authority to try persons not otherwise subject to military jurisdiction.[7] The United States Supreme Court has rejected this assertion in the *Toth* case.[8]

(2) *Meaning of "land or naval forces."*

(a) *Air Force.* It is clear that the term "land or naval forces" includes all of the Armed Forces. Although possibly not included in a strict and literal sense, the Air Force does come within the obvious purpose and intent of the exception; consequently, cases arising in the Air Force are not subject to the requirement of grand jury proceedings.[9]

(b) *Military commissions. Ex Parte Quirin*[10] involved a trial by military commission of saboteurs who landed on our shores during World War II. The Supreme Court held that such trials were not subject to the Fifth and Sixth Amendments. This conclusion was reached not on the basis of the exception for "cases arising in the land or naval forces," but because trials by military commissions of enemy belligerents for violation of the law of war have traditionally been without jury. Since the purpose of the Fifth Amendment was to insure jury trials only in those cases which had traditionally been tried by jury, that amendment did not confer the right to trial by jury upon enemy belligerents tried by military commissions for violations of the laws of war.

3. INTERNATIONAL LAW

a. *Law of War.* The law of war is merely a part of the broader field of international law and is a source of military jurisdiction.[11]

b. *Visiting Forces Doctrine.*

(1) *Manual provision.*[12] Paragraph 12 of the Manual provides, in pertinent part: "Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage remains in the visiting sovereign. This is an incident of sovereignty which may be waived by the visiting sovereign and is not a right of the individual concerned."

(2) *Source.* The visiting forces doctrine as expressed in the Manual is based upon *The Schooner Exchange v. McFaddon.*[13] In that case an armed French vessel had entered the port of Philadelphia to seek refuge from a storm. While the ship was there, a libel was instituted against it, claiming that the ship had been formerly owned by the libelants and that it had been forcibly and wrongfully seized by the French government. The Supreme Court dismissed the libel. Since this public armed ship of a foreign sovereign with whom we were at peace had entered an American port open for her reception, she must be considered as having come into American territory under an implied promise that, while here and acting in a friendly manner, she would be exempt from the jurisdiction of this country.

In reaching its decision, the Court used the following language—the famous dicta of *The Schooner Exchange*—which is the immediate source of the doctrine:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions . . . must be traced up to the consent of the nation itself. . . . This consent may be either express or implied. [In their intercourse with each other,] all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete

[7] *But see* WINTHROP, MILITARY LAW AND PRECEDENTS 48 (2d ed., 1920 Reprint, GPO) (hereinafter cited as "WINTHROP").

[8] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, at 14 n.5 (1955).

[9] ACM 4215, Naar, 2 CMR 739 (1951).

[10] 317 U.S. 1 (1942).

[11] See *Ex parte* Quirin, 317 U.S. 1 (1942).

[12] Para. 12, MCM, 1951.

[13] 11 U.S. (7 Cranch) 116 (1812).

jurisdiction within their respective territories which sovereignty confers.

. . . .

A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such a case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. . . . The grant of free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.[14]

(8) *Comment.* Although paragraph 12 of the Manual, quoted above, indicates that American troops *quartered* in a friendly foreign country are, under international law, immune from prosecution by local officials under the laws of that country, the existence of such a doctrine in international law is open to grave dispute. Note, for example, that *"The Schooner Exchange,"* [15] did not involve jurisdiction over members of the ship's crew who had committed offenses in this country. On the contrary, the issue was whether a friendly foreign warship was immune from attachment by one claiming to be its owner.[16] In addition, the *Exchange* case itself did not involve the quartering of military forces, but a purely temporary presence of the foreign vessel, nor does the dictum on its face apply to any extended quartering or stationing of troops.

Additional doubt is cast upon the doctrine's validity, in this respect, by the Supreme Court's decision in *Wilson v. Girard,*[17] a case that involved the problem of jurisdiction over troops stationed in a friendly nation in peacetime. Some language in the Court's opinion suggests that this problem is one of exclusive jurisdiction in the *receiving* state, except to the extent otherwise provided by agreement between the parties. In any event, the Court's decision indicates that if the "visiting forces" doctrine has any present validity in this situation, it is no more than a rule of customary international law that is displaced by any agreement between the parties on the subject.

The view now generally held is that, while it is possible to have an implied waiver of a receiving state's jurisdiction, the facts of the particular situation in peacetime usually preclude the finding of a clear waiver by implication. Such a waiver may more easily be found in relation to transiting troops, or in a combat situation. Otherwise, however, it is now generally thought that a partial waiver by implication may be found—with the receiving state retaining concurrent jurisdiction—so that the sending state may exercise disciplinary and court-martial authority over the members of its force.[18]

Nothing in the above discussion, of course, derogates from the concept that when military forces occupy a country under such circumstances and in such a manner that effective authority passes to the military force, then the members of the force are not subject to the local laws or courts unless they are expressly made subject thereto by a competent officer of the occupying force or occupation administration.[19]

To summarize, insofar as the Manual states that troops *quartered* in peacetime in a foreign country remain under the exclusive jurisdiction of the sending state, it does not reflect the current view of international law in the United States. Whatever the continued vitality of the doctrine, however, the problem is increasingly

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[14] *Id.* at 136, 139–40.

[15] *Supra* n.13.

[16] Schwartz, *International Law and the NATO Status of Forces Agreement,* 53 COLUM. L. REV. 1091 (1953), concludes that *there is no such clear-cut rule of immunity in international law.* This conclusion is based on a Memorandum prepared by the Attorney General of the United States, contained in 99 Cong. Rec. 9062–70 (14 July 1953). The Attorney General's view is that the NATO Status of Forces Agreement relinquishes no inherent rights of the United States forces abroad, but rather affords them more immunity in the NATO countries than they would have had without the Agreement (Schwartz, *supra* at 1111).

[17] 354 U.S. 524, 529 (1957).

[18] See generally, Restatement of the Foreign Relations Law of the United States, Proposed Official Draft §§ 54–60 (May 1962).

[19] See paras. 369, 374, FM 27–10, THE LAW OF LAND WARFARE (1956); DA Pam 27–161–2, II INTERNATIONAL LAW 169–170 (1962).

being mooted by express agreements on the subject between the United States and the countries in which its troops are stationed.

c. Express Agreements Concerning Jurisdiction.

(1) *General.* Wholly apart from customary international law, it is clear that the sending and receiving states may regulate their jurisdiction over criminal offenses by express agreement.[20] The United States has entered many such agreements in recent years. The first of these, whose provisions on criminal jurisdiction have served as a model for the others, is the Agreement between the members of the North Atlantic Treaty Organization concerning the Status of their Forces, popularly known as the "NATO SOFA."[21] This Agreement will serve as a convenient illustration of all such agreements to which the United States has become a party in recent years.

(2) *Summary of provisions.*

(a) *General.* Jurisdiction over certain offenses is exclusive in one state. Jurisdiction over other offenses is concurrent in both states; when jurisdiction is concurrent, the *primary right* to exercise that jurisdiction is vested in one or the other of the interested states.

(b) *Exclusive Jurisdiction.*

(*1*) *Sending state.* The military authorities of the sending state have exclusive jurisdiction over persons subject to military law of that state with respect to offenses, including offenses relating to its security, punishable by the law of the sending state, but *not* by the law of the receiving state.

(*2*) *Receiving state.* The receiving state has exclusive jurisdiction over members of such a force with respect to offenses, including offenses relating to the security of that state, punishable by its law but *not* by the law of the sending state.

(c) *Concurrent Jurisdiction.*

(*1*) *Sending state.* The military authorities of the sending state may exercise within the receiving state all criminal and disciplinary jurisdiction conferred upon them by the law of the sending state over all persons subject to the military law of that state.

(*2*) *Receiving state.* The receiving state has jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving state and punishable by the law of that state.

(*3*) *Primary right to exercise jurisdiction.* As indicated above, when jurisdiction is concurrent, the Agreement provides that a particular state has the *primary* right to exercise that jurisdiction in a particular case.

(A) *Sending state.* The sending state has the *primary* right to exercise jurisdiction over a member of a force or of a civilian component in relation to—

(i) Offenses solely against the property or security of that state;

(ii) Offenses solely against the person or property of another member of the force or civilian component of that state or of a dependent; and

(iii) Offenses arising out of any act or omission done in the performance of official duty.

(B) *Receiving state.* The receiving state has the *primary* right to exercise jurisdiction in the case of all other offenses.

(C) *Failure to exercise primary right.*

[20] *Wilson v. Girard, supra* n.17. Such an agreement, of course, does not confer on United States military courts any jurisdiction over persons or offenses not otherwise within their general jurisdiction. See United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W. Va. 1956), *rev'd sub nom.* Kinsella v. Krueger, 354 U.S. 1 (1957), in which the District Court suggested that the administrative agreement with Japan conferred jurisdiction, on the court-martial, over a United States civilian dependent accompanying the armed forces overseas in peacetime. The Supreme Court, however, held that since such jurisdiction was forbidden by the Constitution, it could not be acquired by treaty.

[21] Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, TIAS 2846, 4 U.S.T. & O.I.A. 1792 (signed at London, June 19, 1951, advice and consent of Senate obtained July 15, 1953, ratified by the President July 24, 1953, effective Aug. 23, 1953), hereinafter referred to as "NATO SOFA," or the "Agreement."

The Agreement's provisions on criminal jurisdiction, and various problems with respect thereto, are discussed in detail in SNEE & PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION (1957), and The Judge Advocate General's School, U.S. Army, I International Law 383-413 (1962). Other status of Forces Agreements are discussed briefly in *id.* at 413-20.

(i) *Notification.* If the state having the primary right decides not to exercise jurisdiction, it must notify authorities of the other state as soon as practicable.

(ii) *Waiver.* The state having the primary right shall give "sympathetic consideration" to a request from the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance.

(d) *Arrest.*

(*1*) *Assistance.* The authorities of both states shall assist each other in the arrest and handing over of persons subject to the Agreement.

(*2*) *Notification.* The receiving state shall promptly notify the sending state of the arrest of any person under the terms of the Agreement.

(e) *Jeopardy.* When an accused has been tried in accordance with the Agreement by one state and has been acquitted, or has been convicted and is serving, or has served his sentence, or has been pardoned, he may not be tried again for the same offense in the same territory by another state. However, this does not prevent the sending state from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by another state. Apparently this last provision means that an American soldier in France could be tried by court-martial for a strictly military offense, *e.g.*, service discrediting conduct in violation of Article 134, even though he had earlier been acquitted by French authorities of a charge of disorderly conduct arising out of the same circumstances.

(f) *Rights of accused tried by receiving state.* The Agreement provides the following rights to a person tried by the receiving state:

(*1*) To a prompt and speedy trial;

(*2*) To be informed, in advance of trial, of the specific charge against him;

(*3*) To be confronted with the witnesses against him;

(*4*) To have compulsory process for obtaining witnesses in his favor if they are within the jurisdiction of the receiving state;

(*5*) To have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing at that time in that state;

(*6*) To have the services of a competent interpreter, if he deems such services necessary; and

(*7*) To communicate with a representative of his government and, when the rules of court permit, to have such a representative present at his trial.

(3) *Statement of understanding.* Before ratifying the Agreement, the Senate adopted a Statement representing its understanding of the Agreement:[22]

(a) The Agreement did not diminish the right of the United States to exclude or remove security risks from this country;

(b) The criminal jurisdiction provision of Article VII was not to be considered as a precedent for future agreements;[23]

(c) The commanding officer of American troops is to insure that persons tried by receiving states be afforded the procedural safeguards of the United States Constitution, with diplomatic action to be taken if such safeguards are not provided; and

(d) At all times a representative of the United States is to attend the trial by a receiving state of a member of the armed forces and report any failure to provide the rights required by Article VII.

(4) *Implementation of Agreement.* The way in which the Status of Forces Agreement is being applied is illustrated by the following excerpt of a speech made by the Honorable Thruston B. Morton, then Assistant Secretary of State for Congressional Relations:[24]

[22] TIAS 2846 at 86, 99 Cong. Rec. 9088, discussed in SNEE & PYE, *op. cit. supra* n.21 at 117–19. Some miscellaneous problems with respect thereto are discussed in *id.*, App. II.

[23] Japanese agreements followed Article VII.

[24] 31 Dept. of State Bull., No. 788, 2 August 1954, at 157–158. See generally, SNEE & PYE, *op. cit. supra* n.21.

Those in this country who have opposed the Status of Forces Agreement have attempted to make capital out of the case of Private Richard Keefe, who was tried and convicted by a French court and sentenced to 5 years' imprisonment. One American newspaper represented Keefe's case as a tragedy traceable to the Status of Forces Agreement. The paper termed Keefe's offense as "some high jinks in the course of which he moved off in a taxi cab that did not belong to him."

Let me give you the facts of the Keefe case, and then you can form your own opinion. Private Keefe and a companion were in Orleans, without permission. They hired a cab driven by a 65-year-old Frenchman. After driving some miles, they assaulted the driver in what the newspaper, I suppose, would describe as merely a fit of youthful exuberance. They beat the old man, strangled him, and threw him out of the cab. They left him on the roadside in serious condition and drove on to Paris, where they abandoned the cab. They were arrested there several days later and charged with theft with violence. Now, let's put the shoe on the other foot. How would you feel if a French soldier doing the town here in Knoxville mugged and robbed a Knoxville cab driver? I think you'd want to see him stand trial before an American court.

In the opinion of the French Ministry of Justice, Keefe and his companion committed an offense serious enough to have warranted a charge of attempted murder accompanied by theft, which carries a penalty of capital punishment. The average sentence for French nationals convicted of the crime which Keefe and his companion were charged is in excess of 10 years. But Keefe's sentence was held to the minimum of 5 years—and not at hard labor. It is doubtful that he would have gotten off so lightly had he been given a general court-martial.

The lenient treatment given Keefe has been duplicated in many other instances. From August 23 to November 30, 1953, 22 members of the U.S. Armed Forces were tried in foreign courts. Ten of these were acquitted. Of the 12 convicted, 5 received suspended sentences and the other 7 received lighter sentences than they could have expected in U.S. military or civil courts.

So, instead of the dire predictions made by opponents of the agreement coming true, the reverse is the case. That, to me, is evidence that it is a fair agreement which is being fairly applied.

4. EXERCISE OF MILITARY JURISDICTION

a. *General.* Paragraph 2 of the Manual classifies the instances of the exercise of military jurisdiction into four categories, the first three of which were enumerated by Chief Justice Chase in his concurring opinion in *Ex Parte Milligan,*[25] and a fourth which was unrecognized in that case. They are—

(1) Jurisdiction exercised by a belligerent occupying enemy territory (military government),[26]

(2) Jurisdiction exercised by a government temporarily governing the civil population of a locality through its military forces, without the authority of written law, as necessity may require (martial law),

(3) Jurisdiction exercised by a government in the execution of that branch of municipal law which regulates its military establishment (military law), and

(4) Jurisdiction exercised by a government with respect to offenses against the law of war.

b. *Military government.* Military government is the exercise of supreme authority by an armed force over the lands, property, and inhabitants of occupied territory.

[25] 71 U.S. (4 Wall.) 2 (1867).

[26] Para. 2, MCM, 1951, used the term 'military government.' The use of this term has been minimized in Army practice and the term 'civil affairs' is now used to refer generally to all relationships between the military and the civilian population. See *Dictionary of United States Army Terms,* AR 320–5, at 84 (28 February 1963) ("civil affairs").

(1) *General.* Being an incident of war, military occupation confers upon the invading force the means of exercising some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. Thus the military force must exercise certain judicial powers.

(2) *Illustrative cases.*

(a) *Madsen v. Kinsella:*[27] a military government court established by the United States High Commissioner for Germany, enforcing German law, has jurisdiction to try the dependent wife of an Army officer for the murder of her spouse. The exercise of judicial power by the occupant arises from the occupant's right to protect his forces, and from his duty, under international law, to maintain law and order in occupied territory.

(b) *Mechanics' and Traders' Bank v. Union Bank:*[28] defendant bank had sued plaintiff bank in a provost court established by the Federal Military Governor of Louisiana, and had recovered a money judgment which was paid under protest. Upon termination of military government, plaintiff sued in the Louisiana courts to recover the sum paid under protest. Plaintiff contended that the establishment of provost courts violated Article III of the Constitution, which vests judicial powers in the Supreme Court and inferior Federal courts. *Held:*

> [It was held in a prior case that during the Civil War when] . . . portions of the insurgent territory were occupied by the national forces, it was within the constitutional authority of the President, as Commander-in-Chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States.
>
> . . .
>
> Thus it has been determined that the power to establish by military authority, courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the national forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors.[29]

(c) *Bennett v. Davis:*[30] petitioner in a habeas corpus proceeding challenged the jurisdiction of the court-martial on the ground that Austria was a sovereign nation and therefore had exclusive jurisdiction over the offense charged. The offense was committed on 21 December 1954. At that time, Austria was occupied by military forces of the Allied and Associated Powers as a part of conquered German territory, and remained so until the Austrian State Treaty became effective on 27 July 1955. The court held that "in the absence of an executive agreement providing otherwise, i.e., see Wilson v. Girard, 354 U.S. 524, 77 S. Ct. 1409, 1 L Ed 2d 1544, crimes committed in occupied foreign countries by members of United States Armed Forces are subject to military law and within exclusive jurisdiction of constituted military tribunals." [31]

c. *Martial Law.* In the United States, martial law—also termed martial rule—is "the exercise of the military power which resides in the Executive Branch of the Government to preserve order, and insure the public safety in domestic territory in time of emergency, when civil government agencies are unable to function or their functioning would itself threaten the public safety. Martial law depends for its justification upon public necessity. Necessity gives rise to its creation, necessity justifies its exercise, and necessity limits its duration. The extent of the military force used and the actual measures taken, consequently, will depend upon the actual threat to order and public safety which exists at the time." [32] A prominent distinction between military government and martial rule is that military government is generally exercised in the territory of, or territory formerly occupied by, a hostile belligerent and is subject to restraints imposed by the international law of belligerent occupation. Martial rule is invoked only in domestic territory, the local government

[27] 343 U.S. 341 (1951).
[28] 89 U.S. 276 (1875).
[29] 89 U.S. at 295–96.
[30] 267 F.2d 15 (10th Cir. 1959).
[31] 267 F.2d at 18.
[32] Para. 10, AR 500–50 (25 February 1964).

and inhabitants of which are not treated or recognized as belligerents. Martial rule over United States territory is governed solely by the domestic law of the United States. Only in those instances when civilian courts are not open and functioning may military tribunals be utilized. This principle was firmly established in *Ex Parte Milligan*,[33] in which a military commission convened by the commanding general of the military district of Indiana had tried Milligan, a long-time resident of Indiana and a citizen of the United States. Milligan was convicted of, *inter alia*, conspiracy against the United States, and sentenced to death. In a habeas corpus proceeding, the Supreme Court—noting that "no graver question was ever considered by this court"—set aside the conviction, and held that military tribunals trying United States citizens in unoccupied domestic territory were without jurisdiction when civilian courts were open and functioning. The court stated:

> It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power.[34]

d. *Military Law.* Military law is the jurisdiction exercised by the military establishment over its own members, and those directly connected with it under certain conditions, to promote good order and discipline. Military law is simply that body of Federal statutes enacted by Congress—as implemented by regulations of the President and the armed services, and interpreted by the courts—governing the organization and operation of the armed services in peace and war. This system obviously requires that the military forces exercise judicial powers.

e. *Law of War.* Military judicial powers may, under certain circumstances, be exercised under the law of war:

(1) In *Ex Parte Milligan*[35] the Supreme Court, in addition to holding that the military commission was without jurisdiction on the basis of martial law, held that the tribunal could derive no jurisdiction from the law of war since Milligan was a citizen of a state in which the regular courts were open and their processes unobstructed.

(2) In *Ex Parte Quirin*,[36] the petitioners had been trained at a German sabotage school subsequent to the declaration of war between the United States and Germany. In June 1942 they were landed in this country by submarines during the hours of darkness. Although the saboteurs were wearing military uniforms when they landed, all subsequently changed to civilian clothes and buried their uniforms. They were later apprehended by the Federal Bureau of Investigation and were being tried by a military commission appointed by the President, for violation of the law of war and certain Articles of War. All sought a writ of habeas corpus, attacking the jurisdiction of the military commission. One of the petitioners claimed to be an American citizen, and therefore entitled to the rights afforded by the Constitution. The Supreme Court held that the military commission had jurisdiction to try the petitioners. Military commissions have historically had authority to try violators of the law of war. The Court restricted the *Milligan* case to its particular facts, noting that Milligan had never become an enemy belligerent. Since the petitioners were enemy belligerents, they were subject to the law of war and could be tried by a military commission for violations thereof.[37]

(3) War crimes cases, including violations of international conventions, may be tried by

[33] *Supra* n.25.
[34] *Id.* at 127.
[35] *Supra* n.25.
[36] 317 U.S. 1 (1942).
[37] See also *In re* Yamashita, 327 U.S. 1 (1946).

international military tribunals as well as by the military tribunal of a single nation. An international military tribunal is merely the joint exercise, by the States which establish the tribunal, of a right which each of them was entitled to exercise separately in accordance with international law. For example, the Nuremburg Tribunal was established pursuant to an agreement entered into by the United States, the United Kingdom, France and Soviet Russia. [38]

5. AGENCIES THROUGH WHICH MILITARY JUDICIAL POWER IS EXERCISED

Paragraph 2 of the Manual for Courts-Martial, United States, 1951, states that military judicial powers are normally exercised through military commissions and provost courts, courts-martial, certain commanding officers, and courts of inquiry.

a. *Military Commissions.* The military commission is the tribunal which has been developed in the practice of the armed forces of the United States for the trial of persons not members of the armed forces[39] who are charged with offenses against the law of war or, in places subject to military government or martial rule, with offenses against the local law or against the regulations of military authorities. Such commissions or courts are usually appointed by theater commanders or subordinate commanders with delegated authority. They may be appointed by any field commander or commander competent to appoint a general court-martial.[40] Winthrop called the military commission "the exclusively war-court." [41]

(1) *Authority and composition.* The uniform Code of Military Justice specifically recognizes the jurisdiction of military commissions with respect to offenders or offenses that by statute or by the law of war may be tried by such commissions,[42] and expressly makes triable by military commissions and general courts-martial the offenses of aiding the enemy[43] and spying.[44] The military commission is *usually* composed of five officers, and is a court of "unlimited" jurisdiction. It may impose any lawful penalty, including death. Subject to applicable rules of international law and to regulations prescribed by the President or other competent authority, military commissions are guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial.[45]

(2) *Historical background.*

(a) *Mexican War.* The use of military commissions was inaugurated by General Scott in 1847 during our occupation of Mexico. It was employed primarily to try Mexican nationals for serious civilian type offenses and offenses against the occupying forces.

Generally, Scott also convened "councils of war," apparently a reversion to the terminology of the 17th century to avoid the jurisdictional and procedural limitations of the 19th century legislation. Only a few trials were held, for violations of the law of war. As Winthrop noted, this term "has not since reappeared in our law or practice." [46]

(b) *Civil War.* Winthrop estimated that over two thousand cases were tried by military commissions during the Civil War and the period of Reconstruction. Although in a number of opinions digested in *Digest of Opinions of The Judge Advocate General of the Army,* 1868, the view is expressed that "the same principles" apply to military commissions as to courts-martial, an extract from the official report of the Bureau of Military Justice to the Secretary of War, dated 13 November 1865,[47] suggests that substantial differences in principles and procedure yet prevailed.

(c) *Reconstruction period.* The first of the Reconstruction Laws[48] authorized the general officer commanding each of the five dis-

[38] 2 OPPENHEIM, INTERNATIONAL LAW § 577 (8th ed., Lauterpacht, 1955).

[39] Members of the "armed forces" include those captured members of the enemy's forces who are entitled to prisoner of war status under the 1949 Geneva Prisoner of War Convention. See para. 15a(3), *infra.*

[40] *In re Yamashita, supra,* n. 37.

[41] WINTHROP at 831.

[42] UCMJ, Art. 21.

[43] UCMJ, Art. 104.

[44] UCMJ, Art. 106.

[45] Para. 2, MCM, 1951.

[46] WINTHROP at 832–838.

[47] Dig. Ops. JAG 1868, at 223–224.

[48] Act of 2 March 1867, "An Act to provide for the more efficient government of the rebel States," § 3, 14 Stat. 428. See WINTHROP at 848, for text of statute.

tricts into which the South was divided to try offenders by either "local civil tribunals" or "military commissions or tribunals." The President and the Attorney General (in political opposition to Congress) attempted to limit the exercise of these and other powers, but Congress retaliated by expressly enlarging them. Winthrop says that generally trial was had by state courts and that "trial by military commission under the Reconstruction Laws were in all not much over two hundred in number." [49]

(d) *World War II.*

(*1*) During and following World War II, enemy belligerents were tried by military commissions for violations of the law of war under rules of evidence much less stringent than those prescribed for trials under the Articles of War. For example, in appointing the military commission to try the captured German saboteurs in 1942, the President of the United States set forth the following criterion for determining the admissibility of evidence:

> Such evidence shall be admitted as would, in the opinion of the president of the commission, have probative value to a reasonable man. . . .[50]

The relaxation of the rules of evidence in this case was approved by the Supreme Court.[51]

(*2*) In the case, *In re Yamashita*,[52] the accused, a Japanese general, was convicted by military commission of a violation of the law of war. Pursuant to the orders appointing the commission, it considered depositions, affidavits, hearsay, and opinion evidence. The petitioner contended that the introduction of such evidence was a violation of the Articles of War. The Supreme Court held that the Articles of War and the rules of evidence prescribed pursuant thereto were not applicable to the trial of an enemy. The Court pointed out that Article of War 2, enumerating those persons subject to the Articles, did not include enemy combatants.[53] The Court stated: ". . . Congress gave sanction . . . to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply in such trials. Being of the latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried . . . was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War . . . were not applicable to the petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command." [54] The petitioner further claimed that the Geneva Convention of 1929 entitled him to be tried by the same rules of evidence as used in trials of members of the armed forces of the United States. Article 63 of that Convention provided:

> Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the Detaining Power.

The Supreme Court concluded that Article 63 applied only to offenses committed while a prisoner of war, and not to violations of the law of war committed while a combatant, that is, it applied only to post-capture and not to pre-capture offenses. Consequently, the laxity of the rules of evidence as applied by the military commission did not violate the Geneva Convention of 1929.

(3) *Limitations Imposed by International Law.* Paragraph 2 of the Manual incorporates the concept that military commissions will be

[49] WINTHROP at 838 n.89.
[50] 7 Fed. Reg. 5103.
[51] *Ex parte* Quirin, 317 U.S. 1 (1942).
[52] 327 U.S. 1 (1946).
[53] *But see* Art. 2(9), UCMJ, and para. 5a(3), *infra*.
[54] 327 U.S. 1 at 20.

bound by "any applicable rule of international law." Although not the sole source of applicable international law, the Geneva Conventions of 1949, where applicable, are the primary source of provisions of international law outlining procedures before a military commission. Under these Conventions certain stricter procedural requirements are specified for persons who qualify as prisoners of war under Article 4 of the 1949 Geneva Prisoner of War Convention. Article 85 of that Convention provides: "Prisoners of war, prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." The proceedings at the Diplomatic Conference clearly reflect that this provision was intended to apply to pre-capture offenses, as well as subsequent offenses, thereby obviating the holding of the Yamashita case.[55] Among the "benefits" conferred by the Convention is Article 102, which provides:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present chapter have been observed.

While paragraph 178, FM 27–10, *The Law of Land Warfare*, implies that a prisoner of war may be tried by a military commission if the procedural safeguards applicable in a United States court-martial proceeding are applied, this conclusion is questionable as Article 102 provides for trial by the "same courts." In any event, prisoners of war are subject to court-martial jurisdiction under Article 2(9) of the Uniform Code of Military Justice and it would appear they should be tried by court-martial in all instances.[56]

The 1949 Geneva Civilian Convention, where applicable, imposes certain minimal standards upon military commissions.[57] For example, if an accused protected by this Convention has to meet a charge for which punishment may be death or imprisonment for two years or more, notice concerning the particulars of the case must be given to the Protecting Power, a neutral nation appointed to safeguard the interests of a belligerent under the provisions of the Convention. The accused is also entitled, in addition to other matters, to qualified counsel and the right to petition against the finding and the sentence to higher United States authority. Generally speaking, where this Convention is applicable, a United States military commission does not try ordinary criminal offenses against the local law when the local courts are functioning.[58] Consequently, when this Convention is applicable, military commissions are primarily concerned with offenses against the laws of war and enactments of the United States military authorities.

b. *Courts-Martial.* The court-martial is the most commonly used agency for the exercise of military jurisdiction.

c. *Commanding Officers.* Article 15 of the Code provides that, for minor offenses, commanding officers may impose certain limited forms of nonjudicial punishment upon personnel within their command, without resort to a trial by court-martial. By using Article 15, the commanding officer becomes another agency through which military jurisdiction may be exercised.

d. *Courts of Inquiry.* Article 135 of the Code, authorizes the appointment of courts of inquiry "to investigate any matter." A court of inquiry is a formal, fact-finding tribunal and constitutes another agency through which military jurisdiction may be exercised.

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[55] See III COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413–427. Pictet ed. 1960).

[56] As it is not discussed elsewhere in this Pamphlet, it should be noted that the 1949 Geneva Prisoner of War Convention explicitly provides for certain procedural safeguards for prisoners of war, *e.g.*, prohibition of double prosecution for the same act (Art. 86), prohibition of *ex post facto* laws (Art. 99), prohibition of compulsory self-incrimination (Art. 99), right to qualified counsel (Arts. 99, 105), right of appeal (Art. 106), the right to a speedy trial (Art. 103), provision for compulsory attendance of witnesses (Art. 105), and before sentence is adjudged, the court-martial must be informed that the prisoner of war, not being a United States national, is not bound to it by any duty of allegiance (Arts. 87, 100). See also other applicable procedural requirements in Arts. 82–108 of this Convention.

[57] See, in particular, Arts. 52, 64–78, 117–126, 1949 Geneva Civilian Convention.

[58] Art. 64 of the 1949 Geneva Civilian Convention provides that the penal laws of an occupied territory shall remain in force, unless suspended for security reasons or because they are in conflict with the Convention.

CHAPTER II

NATURE OF COURT-MARTIAL JURISDICTION

1. NATURE OF COURT-MARTIAL JURISDICTION

a. *Source.* Courts-martial are not a part of the judiciary of the United States nor are they included among the "inferior courts" which Congress may establish under Article III, Section 1, of the United States Constitution. Court-martial jurisdiction is, however, derived from the Constitution, based principally upon the authorization to Congress "to make Rules for the Government and Regulation of the land and naval Forces." [1] Note that although strict compliance with the creative statutes of Congress is necessary, the proceedings of a court-martial are "void only by a failure to comply with those provisions which constitute 'indispensable prerequisites' to the exercise of court-martial jurisdiction." [2]

b. *Penal Character.* Court-martial jurisdiction is entirely penal or disciplinary in character. A court-martial may not adjudge a civil-type remedy such as the payment of damages or the collection of a private debt. Courts-martial are authorized to consider only criminal, as distinguished from civil, cases.

Note, however, the exceptional authority of summary courts-martial to administer oaths,[3] to act as quasi-administrator of the effects of deceased service personnel,[4] and to conduct an inquest.[5]

c. *Place of Commission of Offense.*

(1) *General.* The jurisdiction of courts-martial does not ordinarily depend upon where the offense was committed.[6] Unlike the federal courts, courts-martial are not required by Article III and the Sixth Amendment to try the accused in the place where the crime was committed.[7] While civilian practitioners are concerned with this jurisdictional factor, military lawyers are concerned with "status" as a jurisdictional problem.

(2) *Exceptions.*

(a) *"Crimes and offenses not capital."* The "Crimes and offenses not capital" clause of Article 134 authorizes the trial by court-martial of violations of applicable federal statutes.[8] When the federal statute is of limited geographical aplication, such as the District of Columbia Code, the offense must have been committed within the geographical area to which the particular statute applies in order to be cognizable under this clause of Article 134. Note, however, that even in such case the accused need not necessarily be *tried* in that geographical area.

(b) *Law of war.* A court-martial also has jurisdiction to try any person who by the law of war is subject to trial by a military tribunal.[9] In such a case the court-martial generally sits in the country where the offense is committed, and if the person being tried is a protected person under the 1949 Geneva Civilian Convention, the court-martial must sit in the occupied country.[10]

d. *Court's Leaving Geographical Command of the Convening Authority.* The jurisdiction of a court-martial does not depend upon where the court sits. This rule was applied in *Durant,*[11]

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[1] U.S. Constitution, Art. 1, § 8.
[2] United States v. Vanderpool, 4 USCMA 561, 16 CMR 135 (1954).
[3] UCMJ, Art. 136.
[4] 10 U.S.C. § 4712 (1958).
[5] 10 U.S.C. § 4711 (1958).
[6] UCMJ, Art. 5.
[7] United States v. Gravitt, 5 USCMA 249, 17 CMR 249 (1954); ACM 7761, Schreiber, 16 CMR 689 (1954).
[8] UCMJ, Art. 134.
[9] UCMJ, Art. 18. See also para. 14, MCM, 1951.
[10] Art. 66, 1949 Geneva Civilian Convention. *Cf. Ex parte* Quirin, 317 U.S. 1 (1942), which indicates (and Waberski, 31 Op. Atty. Gen. 356 (1919), which inferentially indicates) that military commissions trying offenders for violations of the law of war may sit in the United States.
[11] CM 324285, Durant, 73 BR 49 (1947).

a case which involved the theft of the Hesse crown jewels. In that case the defense contended that the court lost jurisdiction by leaving Germany and convening temporarily in Washington, D.C. The board of review held that the court's leaving the command of the convening authority did not deprive it of its jurisdiction.[12]

e. *Transfer of Court Members.* If members of a court-martial are transferred out of the command of the convening authority, after a case has been referred for trial to the court, the court is not thereby deprived of jurisdiction. In such case, it still derives its jurisdiction from the original convening authority, who may thereafter act as reviewing authority in the case.[13]

f. *Accused a Member of Another Command.* It is not essential that the accused be a member of the command of the convening authority in order for a court appointed by such authority to have jurisdiction over him. Thus, if he is a member of the Army, he may be tried by a court appointed by any competent Army authority.[14] Note that this is not a question of the exercise of reciprocal jurisdiction by one armed force over a member of another.

g. *Absence of Accused.* A court-martial does not lose its jurisdiction over an accused who voluntarily and without authority absents himself from the trial after the arraignment but prior to findings or sentence. The accused has waived his right to confrontation and to offer evidence in his behalf.[15]

2. FINALITY OF COURT-MARTIAL JUDGMENTS

a. *The Codal Provisions.* The Code provides[16] that the proceedings, findings and sentences of courts-martial as approved, reviewed or affirmed under the Code shall be final and conclusive, and that orders publishing such proceedings and all action taken pursuant to these proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject to—

(1) Action upon a petition for a new trial;[17]

(2) Action by the Secretary of a Department to—

(a) Remit or suspend any part of the unexecuted portion of any sentence, other than a sentence approved by the President; or

(b) Substitute an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.[18]

(3) The constitutional authority of the President to exercise clemency.

b. *Review of Court-Martial Proceedings in Federal Courts.* Congress in enacting Article 76 clearly intended that so far as Federal judicial review is concerned, court-martial proceedings are final and conclusive, "[s]ubject only to a petition for writ of habeas corpus in Federal court." [19]

The restrictions on the review of court-martial convictions by the courts are well stated in *In re Yamashita:*[20]

> . . . military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. . . . They are tribunals whose determinations are reviewable by military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it had granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty." 20 U.S.C. 451, 452

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[12] *Accord,* Durant v. Hiatt, 81 F. Supp. 948 (D.C. Ga. 1948), *aff'd,* 177 F.2d 873 (5th Cir. 1948).

[13] CM 316193, Holstein, 65 BR 271 (1947).

[14] CM 227239, Wyatt, 15 BR 217, 255 (1943).

[15] Para. 11c, MCM, 1951. See United States v. Houghtaling, 2 USCMA 230, 8 CMR 30 (1953).

[16] UCMJ, Art. 76.

[17] UCMJ, Art. 73.

[18] UCMJ, Art. 74.

[19] See H.R. Rep. No. 491, 81st Cong., 1st Sess., p. 35; S. Rep. No. 486, 81st Cong., 1st Sess., p. 32. See also 5 U.S.C. § 1001(a), which specifically excludes courts-martial from the operation of the Administrative Procedure Act. See also discussion at Chapter III, Section 1, *infra.*

[20] 327 U.S. 1, 8 (1946).

The Supreme Court reiterated this principle in *Hiatt v. Brown*[21] *and in Burns v. Wilson*[22] wherein it stated:

> 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. . . . Congress has provided that these determinations are "final" and "binding" upon all courts.

In *Goldstein v. Johnson*,[23] which involved a collateral attack upon a court-martial conviction under the declaratory judgment statute, it was stated, "It is equally well settled that in the absence of physical confinement the courts cannot interfere with nor in any way review, court-martial procedings." Likewise in *Alley v. Chief, Finance Center*,[24] in which plaintiff sought an order invalidating his court-martial conviction, the court, citing the finality provision of Article 76, Uniform Code of Military Justice, stated that it was without authority to reconsider the decisions of military appellate tribunals.

The only reported departure from this well-established principle occurred in 1958 when the United States District Court for the District of Columbia in *Jackson v. McElroy*,[25] undertook to re-examine a court-martial proceeding on a petition for a declaratory judgment. The court based its assertion of jurisdiction on the authority of *Harmon v. Brucker*[26] in the following passage: "Nor, in view of the recent case of *Harmon v. Brucker*, indicating a negative answer need we pause to debate the old question of whether habeas corpus is the only proceeding in which it is competent to raise the question of jurisdiction."[27] However, the question involved in *Harmon v. Brucker* did not relate to judicial review of a court-martial proceeding; rather, the issue considered there was the propriety of judicial review of an administrative action by the Secretary of the Army in issuing other-than-honorable discharges to the plaintiffs based on their pre-induction activities. The Supreme Court held that the District Court had jurisdiction to determine whether the Secretary had exceeded his powers and to grant judicial relief if he had done so. The court specifically refused to state whether any constitutional issues were involved.[28] Therefore, the *Jackson v. McElroy* decision is clearly in error in relying on *Harmon v. Brucker*, which did not in any manner hold or indicate that the Federal courts have jurisdiction to review the findings or sentences of courts-martial.

c. *Correction of Military Records.*

(1) *10 U.S.C. § 1552.* This statute provides that the "Secretary of a military department, under procedures established by him . . . and acting through boards of civilians . . . may correct any military record of that department when he considers it necessary to correct an error or remove an injustice." Pursuant to this authority, Army Regulations have been promulgated establishing the Army Board for Correction of Military Records and setting forth the procedures to be followed in making application, and in the consideration of applications, for the correction of military records by the Secretary of the Army acting through the Board.[29]

(2) *Construction.* This statute reflects the desire of Congress to free itself from the burden of correcting military records by private bills and provides a method for accomplishing the same result by administrative action. While the statute extends to court-martial proceedings, it does not permit the reopening of the

[21] 339 U.S. 103 (1950).
[22] 344 U.S. 137, 140, 142 (1953).
[23] 184 F.2d 342, 343 (D.C. Cir. 1956).
[24] 167 F. Supp. 303 (S.D. Ind. 1958).
[25] 163 F. Supp. 257 (D. D.C. 1958).
[26] 355 U.S. 579 (1958).
[27] 163 F. Supp. at 259.
[28] 355 U.S. at 581.
[29] AR 15-185 (8 January 1962). The Board frequently requests the opinion of The Judge Advocate General on questions of law arising in cases pending before it.

proceedings, findings, and sentences of courts-martial so as to disturb the conclusiveness of such proceedings, findings, and sentences. Thus, the Army Board for Correction of Military Records, being an administrative body not included in the court-martial system, may not question the validity of court-martial proceedings nor recommend that they be declared null and void. However, if the Board determines that an injustice has occurred in a particular case, it may afford some relief by recommending to the Secretary that he change the results of the sentence by appropriately correcting all military records, except those pertaining to the court-martial and subsequent appellate proceedings.[80]

[80] 40 Op. Atty. Gen. 504 (1947); 41 Op. Atty. Gen. 8 (1949); JAGA 1956/5599, 9 July 1956 (unpublished).

CHAPTER III

HABEAS CORPUS

1. INTRODUCTION

The federal courts have recognized in a long line of cases that military courts are not judicial courts under Article III of the Constitution, and absent express statutory provision are not part of the judiciary of the United States. Accordingly, their judgments are not subject to review by direct appeal, writ of error, or certiorari.[1] In the leading case of *Dynes v. Hooper*,[2] the Supreme Court said:

> . . . When [a sentence of a court-martial has been] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the Statute for its exercise.
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> . . . With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.[3]

Dynes v. Hoover was decided by a Court dominated by Chief Justice Taney, whose views restricting the power of federal courts generally, and specifically their authority to review the actions of legislative tribunals, were often evidenced.[4]

Possibly Congress could provide by statute for direct review of court-martial judgments by the federal courts—for instance, by appeal of certiorari from the Court of Military Appeals to the Supreme Court. In this connection, it should be recalled that Winthrop did not base the independence of courts-martial on any constitutional doctrine of separation of powers;

> . . . the court-martial being no part of the Judiciary of the nation, *and no statute having placed it in legal relation therewith,* its proceedings are not subject to be directly reviewed by any federal court, either by certiorari, writ of error, or otherwise. . . .[5]

As previously indicated,[6] habeas corpus has historically constituted the primary means of collateral review of findings and sentences of courts-martial. There appears to be a growing tendency, however, to attempt to invoke[7] other remedies[8] with varying degrees of success.[9] The scope of such review is very limited, in any event.[10] Perhaps the best general characterization of these "collateral remedies" is as

[1] See *Ex parte* Vallandigham, 8 U.S. (1 Wall.) 243 (1868); WINTHROP at 50.

[2] 61 U.S. (20 How.) 65 (1858).

[3] *Id.* at 81, 82.

[4] See, *e.g.*, United States v. Gordon, 69 U.S. (2 Wall.) 561 (1865); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[5] WINTHROP at 50 (emphasis added). But see Gordon v. United States, 117 U.S. 698 (1864) and United States v. Williams, 289 U.S. 553, 564 (1933).

[6] See Chapter II, paragraph 2b, *supra*.

[7] See Dynes v. Hoover, *supra* n.2; Martin v. Mott, 25 U.S. (12 Wheat) 19 (1827); United States v. Brown, 206 U.S. 240 (1907).

[8] Hooper v. United States, 326 F.2d 982 (Ct. Cl.) (1964); Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

[9] Jackson v. McElroy, 163 F. Supp. 257 (D. D.C. 1958).

[10] See *In re* Yamashita, 327 U.S. 1 (1946) (petition entertained, but relief denied on merits); Smith v. Whitney, 116 U.S. 167 (1886).

follows: whenever the action of a court-martial is drawn in question in the federal courts, in any justifiable controversy within their general jurisdiction (in which a judicially enforceable remedy is sought), such courts may review the fundamental validity of the court-martial conviction to a limited extent.[11] Both the scope of such collateral review[12] and the general policy considerations limiting its exercise[13] would seem to be the same, no matter how the issue is raised in the federal courts. Habeas corpus, however, is normally available, and has in practice become the primary form of action in which any collateral judicial review of court-martial convictions takes place. For this reason, only habeas will be discussed in this Chapter, with the understanding that the law herein developed on both the scope of review and the general policy limitations on review would probably be the same no matter how the issue arises in the federal courts.

2. THE WRIT OF HABEAS CORPUS

a. *Definition.* "A writ directed to the person detaining another, and commanding him to produce the body of the prisoner, (or person detained) with the day and cause of his caption and detention, . . . to do, submit to, and receive whatsoever the judge or court awarding the writ shall consider in that behalf." [14]

b. *Purpose.* The "great writ of liberty" is, it has repeatedly been said, unconcerned with the guilt or innocence of the prisoner. Its function is to terminate "unlawful" confinement. In determining whether military confinement is lawful, the Manual states that "the single inquiry, the test, is jurisdiction—whether the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers in the sentence adjudged." [15]

3. NATURE OF "RESTRAINT" REQUIRED TO SUSTAIN HABEAS CORPUS

a. *General.* Before proceeding to a discussion of the jurisdiction of various courts to entertain the petition and the scope of inquiry into the legality of the restraint, it is necessary to consider for a moment, in view of the nature of the writ, what interference with personal liberty will constitute "restraint" for the purpose of the writ. A satisfactory all-inclusive definition of the term would be most difficult to frame. The statute conferring jurisdiction on specific federal courts and judges to grant the writ [16] speaks simply of "prisoners in custody."

b. *Moral Restraint Insufficient.* One general rule may be discovered in the cases, although the particular facts are probably of controlling importance in each case. The general rule, as followed in the Manual, is that mere moral restraint, as distinguished from physical confinement, is generally insufficient to warrant issuance of the writ.[17]

(1) *Arrests.* In *Wales v. Whitney,*[18] the Medical Director of the Navy had been placed in arrest pending trial by court-martial and had been ordered to restrict himself to the limits of the city of Washington. In denying his petition for a writ of habeas corpus, the court said:

> In the case of a man in the military service or naval service, where he is . . . always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some

[11] Burns v. Wilson, 346 U.S. 137 (1953); *Ex parte* Reed, 100 U.S. 13 (1897).

[12] Compare all cases cited *supra* n.7.

[13] One example of such a consideration is the requirement that the individual exhaust all available military judicial remedies before any federal court will review the issue. See *infra* para. 4a. This is obviously a wise general rule that prevents unnecessary friction between the civilian and military judiciary, and promotes the orderly administration of military justice. By contrast, the requirement that the individual presently be "in custody," see *infra* para. 8, is clearly a special rule—the jurisdictional fact essential to obtain a writ of habeas corpus. The former is a general function of the relation between the civilian and military systems, while the latter is peculiar to the form of action concerned.

It is quite possible, of course, that a general policy limitation may effectively preclude certain forms of action in the federal courts. For instance, the requirement of exhaustion of remedies, *supra*, would seem to preclude any form of anticipatory affirmative relief in the federal courts, in all but an extraordinarily clear case. See Hooper v. Hartman, 163 F. Supp. 437 (S.D. Cal. 1958) (seeking mandamus, prohibition, declaratory judgment, and injunction by three-judge federal court—all in an attempt to *prevent* trial by court-martial), *aff'd*, 274 F.2d 429 (9th Cir. 1959) (construing decision below as based on failure to exhaust military remedies). Compare Wales v. Whitney, 114 U.S. 564 (1884) (habeas corpus before trial; denied—decision nominally based on petitioner's present freedom from "custody").

[14] BLACK, LAW DICTIONARY 837 (4th ed., 1951).

[15] Para. 214c, MCM, 1951.

[16] 28 U.S.C. § 2241 (1958).

[17] Para. 214, MCM, 1951.

[18] 114 U.S. 564 (1885).

unusual restraint upon his liberty of personal movement exists to justify the issue of the writ. . . . Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it.[19]

(2) *Parole.* Although there are apparently no cases in which the validity of a military parole has been tested by habeas corpus, the Supreme Court has held that parole "restricts a petitioner's freedom enough to support a petition for habeas corpus." [20] The Court's opinion said:

[The] writ [of habeas corpus] always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy, its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute.[21]

c. *Involuntary Military Service.*

(1) *Induction.* A person illegally inducted into the military service may generally obtain his release by writ of habeas corpus without any additional restraint being imposed upon him. The implicit threat and ability to use physical measures is conceived to be sufficient restraint.

(a) The Supreme Court in dicta in *Gibson v. United States,*[22] observed:

It has been clearly established that the remedy by way of habeas corpus is open to the wrongfully inducted member of the armed forces to secure his release.

(b) In later decisions,[23] the Supreme Court discussed the right to habeas corpus in wrongful induction cases without adverting to any requirement of restraint other than mere subjection to military law.

(2) *Expiration of term of service.* Mere subjection to military law is sufficient "restraint" to support a petition for a writ of habeas corpus where the petitioner alleges he is being wrongfully held in the service after expiration of his required term of service.[24]

d. *Enlistment by a Minor.*

(1) Ordinarily a parent who has not consented to the enlistment of his minor child under the age of 18 may have the assistance of a writ of habeas corpus to secure the discharge (or release) of such minor.[25]

(2) In addition, a minor child himself may obtain his release where his enlistment was absolutely void as prohibited by statute and he has not entered upon a "constructive enlistment" by continuing to serve after he attained the necessary age for enlistment.[26]

(3) It has been suggested that this right to employ habeas corpus to secure the release of a minor child rests upon the general right of a parent to the custody of his minor child rather than on a rationalization of the restraints involved in his military service.[27]

4. MISCELLANEOUS LIMITATIONS ON HABEAS CORPUS

a. *Exhaustion of Remedies.*

(1) *General rule.* Habeas corpus, being an extraordinary remedy, will not lie where the law has provided another remedy that is presently available to the prisoner.[28]

(a) *Statutory provision:* 28 U.S.C. § 2255 provides for a motion to vacate, set aside or correct the sentence imposed by a federal

[19] 114 U.S. 564, 571–72.
[20] Jones v. Cunningham, 371 U.S. 236 (1963).
[21] 371 U.S. 236, 243.
[22] 329 U.S. 338, 359–60 (1946).
[23] Estep v. United States, 327 U.S. 114, 124 n.17 (1946); Orloff v. Willoughby, 354 U.S. 83, 94 (1953).
[24] See Miley v. Lovett *et al.*, 193 F.2d 712, 713 (4th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).
[25] *Ex parte* Bakley *et ux*, 148 Fed. 56 (E.D. Va. 1906), *aff'd sub. nom.* Dillingham v. Bakley, 152 Fed. 1022 (4th Cir. 1907); United States v. Overton, 9 USCMA 684, 26 CMR 464 (1958). *But see* United States v. Bean, 13 USCMA 203, 32 CMR 203 (1962).
[26] *Compare* Hoskins v. Pell, 239 Fed. 279 (5th Cir. 1917), *with Ex parte* Beaver, 271 Fed. 498 (N.D. Ohio 1921). See also Barrett v. Looney, 158 F. Supp. 224 (D.C. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir. 1958), for opposite result when prisoner has entered upon a constructive enlistment.
[27] See United States *ex rel.* Goodman v. Hearn, 153 F.2d 186 (5th Cir. 1946).
[28] Fay v. Noia, 372 U.S. 391 (1963).

court; permits the motion to be made at any time; provides for an appeal from the order entered on the motion; and directs that an "application for a writ of habeas corpus in behalf of a prisoner . . . shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." [29]

(b) In *Meyers v. Welch*,[30] the Circuit Court held the prisoner had no right to relief by habeas corpus until he had appealed the order of the trial court denying the motion to vacate sentence.

(c) The provisions of 28 U.S.C. § 2255 are not, however, applicable to a prisoner convicted by court-martial. In *Swisher v. United States*,[31] the court stated "Clearly this Court is without jurisdiction to grant any relief to the petitioner under the provisions of Section 2255, Title 28 U.S.C.A.". Swisher had been convicted by a general court-martial convened at Fort Jackson, South Carolina.

(2) *Military rule.*

(a) Article of War 53 (Petition for New Trial) was the first Congressional attempt "to stem the flow" of habeas corpus petitions in military cases. Article of War 53, a section of the Elston Act, became effective 1 February 1949, and was relied on to dismiss summarily applications for habeas corpus, *pending before the act became effective*, in which petitions under AW 53 had not been filed.[32]

The Supreme Court's decisions in *Whelchel v. McDonald*[33] and *Gusik v. Schilder*[34] established that a prisoner having been denied relief under AW 53 could still apply for relief by habeas corpus to test the jurisdiction of the trial forum.

(b) *The Uniform Code:* When the Uniform Code of Military Justice was drafted, the question of providing for an extraordinary remedy arose. It was felt that for cases arising under the Code, the appellate review required by the Code was so substantially improved that the broad relief of AW 53 was not required.[35]

Accordingly, a new provision was enacted, authorizing a "new trial" only on narrow grounds of newly discovered evidence or fraud on the court.[36] It would seem that a prisoner might allege a number of deficiencies in the proceedings which would not qualify as newly discovered evidence or fraud on the court. In such a case, we might expect the court to hold it unnecessary for him to file a petition under Article 73. In *Bokoros v. Kearney*,[37] however, the district judge said:

> It is now well established that if a procedure is available in the military establishment by which a person detained by reason of a military judgement can obtain relief from such judgment, if he is entitled to be relieved from the effects of such judgment, such person must follow such procedure and exhaust the remedies provided . . . [or] the federal civil courts will refuse to interfere . . . Petitioner has filed no such petition for new trial [under Article 73, UCMJ] and has wholly failed to allege or show good cause for failing to file such a petition for new trial.[38]

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[29] This provision was held to be constitutional in Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949).

[30] 179 F.2d 707 (4th Cir. 1950).

[31] E.D. S.C., 22 May 1968 (unpublished).

[32] Case No. 3530, Browell v. Johnson (D.D.C., 14 June 1949); Whelchel v. McDonald, 176 F.2d 260 (2d Cir. 1949); Hiatt v. Burchfield, Hiatt v. Fugate, Hiatt v. Jackson, 179 F.2d 679-680 (5th Cir. 1950); McMahon v. Hunter, 179 F.2d 661 (10th Cir. 1950); Hunter v. Beets, 180 F.2d 100 (10th Cir. 1950); Schilder v. Gusik, 180 F.2d 662 (6th Cir. 1950).

[33] 340 U.S. 122 (1950).

[34] 340 U.S. 128 (1950).

[35] Hearings before Subcommittee of House Armed Services Committee on HR 2498, 81st Cong., 1st Sess. 1210-17.

[36] UCMJ, Art. 73.

[37] 144 F. Supp. 221 (E.D. Texas 1956).

[38] See also *In re* Taylor, 160 F. Supp. 932 (W.D. Mo. 1958), in which the petitioner's case had not been reviewed by a board of review. The court, citing *Gusik v. Schilder*, *supra* n.34, and Burns v. Wilson, 346 137 (1953), said:

> It is only after a military prisoner has exhausted military remedies available to him under [the Uniform Code of Military Justice], to have a military decision reviewed, that the same is open to reevaluation on due process of law considerations by a United States District Court.

But see Williams v. Heritage, 323 F.2d 731 (5th Cir. 1963), where the court stated "we do not dispose of this appeal upon the claimed failure to exhaust military remedies. The relief available under Article 67 must be sought within '30 days from the time of the decision of a board of review,' and that available under Article 73 'within one year after approval by the convening authority of a court-martial sentence'. . . . Inasmuch as these remedies are no longer available to appellant, it appears that the recently decided case of *Fay v. Noia*, 1963, 372 U.S. 391, 434-435 governs in principle and that prior failure to seek military review is no longer necessarily a bar to habeas corpus relief otherwise available."

(c) In *Burns v. Wilson,*[39] the Supreme Court referred to its decision in *Gusik*[40] as holding that the exhausting of military remedies, and the resultant "finality" of the military judgment "does not displace the civil court's jurisdiction over an application for habeas corpus." But, the court continued, citing *Whelchel,*[41] "these provisions 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 this writ simply to re-evaluate the evidence." [42]

(d) A number of Courts of Appeals and District Courts later reaffirmed the requirement for exhaustion of remedies.[43] Note, however, Judge Holtzoff's conclusion in *Guagliardo v. McElroy*[44] that in *Toth v. Quarles*[45] and *Reid v. Covert,*[46] the Supreme Court overruled *sub silentio* so much of the *Gusik*[47] case as required the exhaustion of remedies. Although conceding that the issue was not commented on by the Supreme Court in either case, he believes it would not be "appropriate" to assume the Court had "overlooked" the fact that neither Toth nor Covert had exhausted their military remedies.[48]

(e) *Relief by the Army Board for Correction of Military Records:* The functions of this board are discussed in paragraph 8c, Chapter II, *supra.* The recent case of *Ogden v. Zuckert,*[49] held that the failure of the plaintiff to resort to the Correction Board did not deprive the court of jurisdiction of his action for a declaratory judgment that he should be retained on the permanent retired list rather than being discharged. Since an application to ABCMR is a permissive administrative remedy, the principle of that case would clearly be applicable to habeas corpus proceedings.

b. *Jurisdiction over Petitioner.* The jurisdiction of federal district courts to grant writs of habeas corpus "within their jurisdictions" is territorial unless expressly enlarged by statute.[50] Even though both petitioner and custodian are within the state, if they are outside the territorial limits of the district, the court lacks jurisdiction.[51]

A difficult question arises as to what process, if any, a person may employ to assert federal rights, when he is confined in an area not subject to the jurisdiction of *any* district court. This question was expressly left open by the opinion in *Ahrens v. Clark.*[52] In *Johnson v. Eisentrager,*[53] the question seemed to be squarely raised. Petitioners there were 21 German nationals who had been convicted of war crimes by a military commission in China, and then transported to Germany to serve their sentences. Service of writs of habeas corpus was made on officials of the Defense establishment who were in the District of Columbia, but who were able to exercise direction and control over the jailer in Germany. The Supreme Court held that habeas would not lie in such a case, in which the prisoners had at no time been within the territorial jurisdiction of the federal courts.

Subsequently, however, the Supreme Court has decided (on the merits) several cases in which petitioners were confined outside the United States. In *Burns v. Wilson,*[54] the petitioners were confined in Japan, and in *United States ex rel. Toth v. Quarles,*[55] the accused had been taken to Korea after being apprehended in Pittsburgh. In *Burns,* the majority completely ignored the problem concerning the

[39] 346 U.S. 137 (1953).
[40] *Supra* n.34.
[41] *Supra* n.33.
[42] 346 U.S. at 142.
[43] See, e.g., Osborne v. Swope, 226 F.2d 908 (4th Cir. 1955); *In re* Varney, 141 F. Supp. 190 (S.D. Cal. 1956).
[44] 158 F. Supp. 171 (D.D.C. 1958).
[45] 350 U.S. 11 (1956).
[46] 354 U.S. 1 (1957).
[47] *Supra* n.34.
[48] For a more detailed discussion of the requirement for the exhaustion of military remedies, see Kuenzel, *Federal Court Jurisdiction Over Courts-Martial,* 1 Washburn L.J. 25, 58–64 (1960). Note that *Toth* and *Covert* involved civilians whom the Supreme Court found not to be subject constitutionally to court-martial jurisdiction.
[49] 298 F.2d 312 (D.C. Cir. 1961).
[50] 28 U.S.C. § 2241 (1958); Ahrens v. Clark, 335 U.S. 188 (1958); United States v. Hayman, 342 U.S. 205 (1952). See Carbo v. United States, 364 U.S. 611 (1961), in which the Supreme Court affirmed a judgment holding that a federal district court in California had jurisdiction to issue a writ of habeas corpus *ad prosequendum* directing that a New York prison official deliver the petitioner, a prisoner in New York, to California for trial on an indictment pending in the California district court.
[51] United States *ex rel.* Corsetti v. Commanding Officer of Camp Upton, United States Army, 3 F.R.D. 360 (E.D. N.Y. 1944).
[52] *Supra* n.50.
[53] 339 U.S. 763 (1950).
[54] *Supra* n.39.
[55] 350 U.S. 11 (1955).

locus of the petitioner,[56] while in *Toth*, the government conceded the district court's jurisdiction to entertain the petition. The district court opinion put it this way:

> The Court had some doubt as to its power to issue a writ of habeas corpus that would be effective in a foreign country in respect to a citizen of the United States. However, both the United States Attorney and the legal representative of the Air Force, who is present in court, admit such jurisdiction exists, and its existence was assumed without discussion by the Supreme Court of the United States in *Burns v. Wilson*.[57]

Again, in *Wilson v. Girard*,[58] the petitioner was confined in Japan, but the Court passed on the merits of the case.

Thus, if *Johnson v. Eisentrager* is read as denying authority to issue habeas when the petitioner is confined extraterritorially, then it cannot be reconciled with the Court's subsequent decisions in *Burns, Toth*, and *Girard*. It seems likely, therefore, that *Johnson* is to be regarded as based upon the lack of standing of an enemy alien belligerent to invoke the protective processes of the courts of the United States, or to claim particular substantive rights under the United States Constitution.[59]

The District of Columbia Circuit has so read the *Johnson* case, and has continued to uphold the issuance of writs of habeas against officials of the government in the District, when the petitioner is confined outside the United States.[60]

c. *Jurisdiction over Custodian.* A federal court will not issue a writ of habeas corpus unless the person who has custody of the petitioner is within reach of its process.[61]

Neither will a federal court test the legality of confinement pursuant to conviction by an international military tribunal.[62]

A federal court will not inquire into the legality of confinement in a foreign prison because of a conviction by a foreign tribunal.[63]

5. JURISDICTION TO ENTERTAIN THE PETITION

a. *State Courts.* A state court has no power to inquire into the legality of restraint upon a person held by United States military authorities.[64] In *Tarble's Case*,[65] an alleged minor held in the custody of a recruiting officer of the United States pursuant to an enlistment which was without the consent of a minor's father, was granted a writ by the Wisconsin Court and ordered discharged. Since the United States Supreme Court's reversal of that action in 1871 there has apparently been no case reaching the Supreme Court where a state court has attempted to assert jurisdiction.

The Code[66] authorizes certain state officers to apprehend deserters from the armed forces. The Manual[67] provides that any deserter so apprehended is in custody by authority of the United States. Accordingly, a writ of habeas corpus in a state court to such an officer, holding a deserter for delivery to United States Military authorities, would not lie.

b. *Foreign Courts.* According to the United view, as expressed in the *Manual for Courts-Martial*, a foreign court or judge has no authority to inquire into the legality of restraint upon any person held by United States military authority.[68] Colonel Wurfel asserted that the first occasions for a foreign court to be pe-

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[56] See Mr. Justice Frankfurter's opinion, 346 U.S. 844 at 851, 852.

[57] 113 F. Supp. 380, 381 (D.C. D.C. 1953).

[58] 354 U.S. 524 (1957).

[59] See *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942). Alternatively, or in combination with the above, *Johnson* may have rested upon the older theory that the limitations upon governmental power expressed in the Constitution somehow ceased to apply when the government acted extraterritorially. This view has since been discredited, at least in relation to citizens abroad. See Reid v. Covert, 351 U.S. 470 (1956), *rev'd on reconsideration*, 354 U.S. 1 (1957). The logic of this change would seem to extend to aliens as well. In this connection, it is perhaps worth noting that, of the Court that decided *Johnson*, only two members now remain—Justices Black and Douglas—and they dissented in *Johnson*.

[60] See, *e.g.*, Day v. Wilson, 247 F.2d 60 (D.C. Cir. 1957); Coxart v. Wilson, 286 F.2d 732 (D.C. Cir. 1956), *vacated as moot*, 352 U.S. 884 (1956).

[61] United States *ex rel.* Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1955). See Hauck v. Hiatt, 50 F. Supp. 534 (D.C. S.C. 1943); United States v. Martin, 8 F.R.D. 89 (D.C. S.C.) *aff'd*, 168 F.2d 1003 (4th Cir.), *cert. denied*, 335 U.S. 872 (1948).

[62] Koko Hirota v. MacArthur, 338 U.S. 197 (1948).

[63] See United States *ex rel.* Keefe v. Dulles, *supra* n.61.

[64] Tarble v. United States, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[65] Tarble v. United States, *supra* n.64.

[66] UCMJ, Art. 8.

[67] Para. 215, MCM, 1951.

[68] Para. 216, *id. But cf.* Barton, *Immunity from Supervisory Jurisdiction*, 26 Brit. Y.B., Int'l L. 380 (1949).

titioned to exercise habeas corpus inquire over American courts-martial sentences occurred in the Philippine Republic following its independence on July 4, 1946.[69] He notes that a policy decision was made "in Washington" not to plead sovereign immunity.[70]

c. *Federal Courts.* In *Ex parte Reed,*[71] a Navy paymaster's clerk, convicted of malfeasance by a Naval court-martial convened on board the USS Essex at Rio de Janeiro, was denied a writ of habeas corpus by the Circuit Court of the United States for the District of Massachusetts. In denying Reed's petition for certiorari the Court borrowed language and principles from *Dynes v. Hoover.*[72] "[T]he exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court." Immediately thereafter, however, the Court observed: "[W]e do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. . . . Every act of a court beyond its jurisdiction is void. . . . [But a] writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void."

The United States Code[73] expressly authorizes "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction" to grant writs of habeas corpus. Subsection (b) authorized the transfer of an application to the appropriate district court for hearing and determination. Subsection (c) limits as follows the situations in which habeas corpus will be granted:

(1) The petitioner is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or committed in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He is a citizen of a foreign state and domiciled therein and is in custody for an act done or committed under color of some authority of that state, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

6. THE SCOPE OF INQUIRY IN MILITARY HABEAS CORPUS CASES

a. *The Problem.* To what extent are the proceedings of court-martial subject to review in the civil courts? Congress appears to have given an unambiguous answer to this question. Subject to certain exceptions not here pertinent, the Code provides that such "proceedings, findings, and sentences . . . are final and conclusive" and "orders publishing the [same] and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States."[74]

Congress has never conferred on the federal courts a power to review on direct appeal, writ of error, or certiorari, the proceedings of a court-martial.[75] But note that there does not appear to be any constitutional objection to its doing so. In *Swain v. United States,*[76] the Court observed that the duty and obligation to review military proceedings "has [not] been confided by the laws of the United States" to the civil courts. And Colonel Winthrop did not base the independence of courts-martial on any constitutional doctrine of separation of powers but upon the circumstance that

> the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relation therewith, its proceedings are not subject to be directly reviewed by any federal court, either by certiorari, writ of error, or otherwise. . . .[77]

[69] Wurfel, *Military Habeas Corpus,* 49 MICH. L. REV. 493 and 699 (1951).
[70] Apparently the policy soon changed because the assertion of immunity is contained in paragraph 186, MCM, 1949.
[71] 100 U.S. 13 (1897).
[72] 61 U.S. (20 How.) 65 (1858).
[73] 28 U.S.C. § 2241 (1958).
[74] Art. 76, UCMJ.
[75] See *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863).
[76] 165 U.S. 553 (1897).
[77] WINTHROP at 50.

However, traditionally, the proceedings of courts-martial have been subjected to a variety of collateral attacks in the federal courts. These include action in trespass,[78] replevin,[79] suit in the Court of Claims for pay forfeited,[80] and writs of habeas corpus.

b. *The Traditional Test.* The writ of habeas corpus has repeatedly been said to be unconcerned with the guilt or innocence of the prisoners. Its function is to terminate "unlawful" confinement. In determining whether the confinement is lawful, the pertinent provision of the current *Manual* states that "the single inquiry, the test, is jurisdiction—whether the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers in the sentence adjudged." [81]

That there was substantial authority for that statement is clear. In *Dynes v. Hoover,*[82] the Supreme Court said:

> . . . When [a sentence of a court-martial has been] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the Statute for its exercise.

In *Ex parte Reed,*[83] the Court said:

> Every act of a court beyond its jurisdiction is void. . . . [But a] writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void.[84]

c. *The Changing Concept in Civilian Habeas Corpus Cases.* The trend has been to expand the scope of consideration in civilian habeas corpus cases. For instance, the Supreme Court has held the following to constitute denials of fundamental rights guaranteed by the United States Constitution (and, accordingly, reviewable on habeas corpus):

(1) The court and jury were subject to mob domination;[85]

(2) The prosecution knowingly used perjured testimony;[86]

(3) The defendant did not intelligently waive counsel in a prosecution before a federal court;[87]

(4) The defendant's plea of guilty was coerced;[88]

(5) The defendant did not intelligently waive the right to trial by jury in a prosecution before a federal court;[89]

(6) The defendant was denied the right to consult with counsel.[90]

In *Johnson v. Zerbst,*[91] which involved an attack on a federal court conviction through habeas corpus, the Supreme Court said:

> If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life and liberty. A court's jurisdiction at the beginning of the trial may be lost "in the course of the proceedings" due to failure to complete the court . . . by providing Counsel for an accused. . . . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. A judgment of conviction pronounced

[78] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).
[79] Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).
[80] Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).
[81] Para. 214c, MCM, 1951.
[82] *Supra* n.78, at 82.
[83] 100 U.S. 13, 23 (1897).
[84] See also Grafton v. United States, 206 U.S. 333 (1907); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 COLUM. L. REV. 40 (1960); Kuenzel, *Federal Court Jurisdiction over Courts-Martial,* 1 WASHBURN L.J. 25 (1960); Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals,* 10 OHIO ST. L.J. 271 (1949); Wurfel, *Military Habeas Corpus,* 49 MICH. L. REV. 493 and 600 (1951); 15 ALR 387.
[85] Moore v. Dempsey, 261 U.S. 86 (1923).
[86] Mooney v. Holohan, 294 U.S. 103 (1935).
[87] Johnson v. Zerbst, 304 U.S. 458 (1938).
[88] Waley v. Johnston, 316 U.S. 101 (1942).
[89] United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943).
[90] Hawk v. Olsen, 326 U.S. 271 (1945); House v. Mayo, 324 U.S. 42 (1945).
[91] 304 U.S. 458 at 468 (1938).

by a court without jurisdiction is void, and one imprisoned thereunder may obtain his release by habeas corpus.

In *Waley v. Johnston*,[92] the United States Supreme Court described the role of the habeas corpus proceeding in the civilian criminal case:

> The issue here [a coerced plea of guilty] was appropriately raised by the habeas corpus petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. *It extends also to those exceptional cases where the conviction has been with disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.*

Finally, in the recent case of *Fay v. Noia*,[93] the Court dug deep into legal history and concluded that habeas never was limited strictly to matters of jurisdiction:

> Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court. Bushell's Case is again in point. Chief Justice Vaughan did not base his decision on the theory that the Court of Oyer and Terminer had no jurisdition to commit persons for contempt, but on the plain denial of due process, violative of Magna Charta, of a court's imprisoning the jury because it disagreed with the verdict. . . . Thus, at the time that the Suspension Clause was written into our Federal Constitution and the first Judiciary Act was passed conferring habeas corpus jurisdiction upon the federal judiciary, there was respectable authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law.

The Court generalized its view of history as follows:

> And so, although almost 300 years have elapsed since Bushell's Case, changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable should not be allowed to obscure the basic continuity in the conception of the writ as the remedy for such imprisonments.[94]

d. *The Changing Concept in Military Cases.*

(1) *The Supreme Court.* The expanding inquiry in the civilian cases might have been expected to have some incidental effect upon the military cases, but prior to 1950 the Supreme Court generally limited the scope of inquiry to the traditional test.[95]

Illustrative cases.

(a) *Wade v. Hunter*.[96] In the petitioner's trial by court-martial, the law member had granted a continuance to allow the prosecution time to secure other witnesses. A week later the convening authority withdrew the charges and transmitted them to the Commanding General of Third Army with recommendations for a trial by a different court-martial. The convening authority's reason for this action was that, because of the tactical situation of his command, the distance between the residence of the witnesses and personnel of the court-martial made the completion of the trial within a reasonable time impossible.

The Commanding General of the Third Army in turn transmitted the charges to the Commanding General of the Fifteenth Army, which was then situated in the vicinity where the

[92] 316 U.S. 101, 104-105 (1942) (emphasis added).

[93] 372 U.S. 391 at 404, 405 (1963).

[94] 372 U.S. at 414. A similar formulation may be found in the Court's opinion at 423: "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void."

[95] *But see* Shapiro v. United States, *supra* n.80, in which the plaintiff recovered back pay that he had lost because of a court-martial sentence. Prior to his court-martial conviction, the plaintiff had been given no time to confer with counsel in the preparation of his defense. The Court of Claims found this denial of basic rights deprived the court-martial of jurisdiction. See Begalke v. United States, 286 F.2d 606 (Ct. Cl. 1961); Narum v. United States, 287 F.2d 897 (Ct. Cl. 1961).

[96] 336 U.S. 684 (1949).

alleged offense had been committed. The petitioner's plea in bar of former jeopardy was overruled, and he was convicted and sentenced by a court-martial convened by the Fifteenth Army Commanding General.[97]

The majority opinion of the Supreme Court apparently assumes that the Fifth Amendment's double jeopardy provision does apply to a military accused, although there was no direct holding that the Fifth Amendment is applicable. The Court decided only that, assuming it was applicable, there had been no former jeopardy which would bar a second trial for the same offense.

Three dissenting justices said that the Fifth Amendment provision did apply and that it was not to be "eroded away" by "plausible-appearing exceptions," such as the exigencies of the tactical situation of an advancing army.

(b) *Humphrey v. Smith.*[98] The accused was convicted by a general court-martial for rape. On habeas corpus, he contended that the lack of a lawful, impartial pre-trial investigation deprived the court-martial of jurisdiction, thus making his conviction void.

Held: The pre-trial investigation procedure is not an "indispensable prerequisite" to the exercise of court-martial jurisdiction. The failure to conduct pre-trial investigations does not deprive the court-martial of jurisdiction. Congress did not intend that a conviction resulting from a *fairly conducted trial* should be nullified because of how the pre-trial investigation was conducted. Where the conviction results from a *fairly conducted trial,* it cannot be invalidated by irregularities in the pre-trial investigation.[99]

(c) *Hiatt v. Brown.*[100] The accused was convicted of murder by a general court-martial. Both the federal district court [101] and the Court of Appeals[102] concluded that the court-martial was improperly constituted and lacked jurisdiction of the offense. The Court of Appeals further held that the accused had been deprived of due process of law under the Fifth Amendment.

The court-martial appointing order named a trial judge advocate, two assistant trial judge advocates, defense counsel, two assistant defense counsels, the law member, and twelve officers to be members of the court. The only member of this group, assigned from The Judge Advocate General's Department, was a captain who was named as an assistant trial judge advocate. During the trial, the JAGD captain was absent on verbal orders of the convening authority.

The lower courts had interpreted Article of War 8 [103] as making the presence of qualified law members from The Judge Advocate General's Department a "jurisdictional prerequisite" to the validity of a court-martial proceeding.

Held: The Supreme Court reversed the lower federal courts. The Court said that the "availability" of personnel to be assigned as law member is a matter intended by Congress to be within the sound discretion of the appointing authority. This exercise of discretion may be reviewed by the federal courts only if there was a gross abuse of that discretion.

On the claim of violation of due process, the Court of Appeals was in error to extend its review to such matters as the sufficiency of evidence, and the competence of the defense counsel and the law member. The Court said:

> It is well settled that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . . The single inquiry, the test, is jurisdiction." Re Grimley 137 U.S. 147 (1890). In this case, the court-

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[97] The district court ordered his release, holding that the former jeopardy plea should have been sustained. 72 F. Supp. 755 (D.Kan. 1947). The Court of Appeals reversed. 169 F.2d 978 (10th Cir. 1948).

[98] 336 U.S. 695 (1949).

[99] Justices Murphy, Douglas, and Rutledge dissented. They thought that noncompliance with the pre-trial procedure requirements should open a court-martial conviction to attack by habeas corpus. 336 U.S. 695, 701.

[100] 339 U.S. 103 (1950).

[101] 81 F. Supp. 647 (N.D. Ga. 1948).

[102] 175 F.2d 273 (5th Cir. 1949).

[103] "The Authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of The Judge Advocate General's Department, except that when an officer of that department is not available for the purpose, the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member." 41 Stat. 788. Compare this section with Art. 26, UCMJ. See also Art. 27(b), UCMJ.

martial had jurisdiction of the person 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 decision.

COMMENT: The *Brown* decision represented the highwater mark in the line of cases in which prisoners, convicted by court-martial, sought relief by habeas corpus. This decision seemed to bar the door to any expansion upon the traditional scope of inquiry upon habeas corpus by a military prisoner. It might be noted that this decision was handed down during the Spring of 1950, when Congress was passing the Uniform Code of Military Justice. The drafters of the Manual [104] incorporated the holding in *Brown* into the provision defining the scope of inquiry in military habeas corpus cases.[105]

(d) *Whelchel v. McDonald.*[106] The accused was convicted by a general court-martial of rape. He petitioned in the federal court for a writ of habeas corpus, alleging that the court-martial was deprived of jurisdiction by reason of the treatment of the insanity issue raised by evidence offered by the accused.

Held: The law governing court-martial procedure demands:

> . . . that there be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts.

Consequently, the petition for habeas corpus was properly denied.

(e) *Burns v. Wilson.*[107] This case, at least on its face, presented the Court with an opportunity to pass on the question of whether the principle set forth in *Johnson v. Zerbst* [108] would be applied to collateral review of court-martial convictions. The petitioners had been convicted by separate general courts-martial of rape and murder and sentenced to death. All appellate remedies available in military tribunals had been exhausted, and the President had confirmed the death sentences. The petitioners alleged that they had been denied due process of law in the court-martial proceedings. The petitioners claimed "that coerced confessions had been extorted from them; that they had been denied counsel of their choice . . . that the military authorities . . . had suppressed evidence favorable to them, procured perjured testimony against them and otherwise interfered with the preparation of their defenses." They also charged that the "trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fairplay." [109]

Held: [110] The petition for habeas corpus was properly dismissed. The case did involve a question of the denial to the petitioners of "basic rights guaranteed by the Constitution." The Vinson opinion contains the following general principles:

(*1*) "[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." [111]

(*2*) The statutory provision that final court-martial judgments shall be binding on federal courts[112] does not preclude a civil court's

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[104] Leg. & Legis. Basis, MCM, 1951 at 8–9.
[105] Para. 214c, MCM, 1951.
[106] 340 U.S. 122 (1950).
[107] 346 U.S. 137 (1953).
[108] *Supra* n.87.
[109] The district court dismissed the petitions for habeas corpus without receiving any evidence on the petitioners' allegations. The court was satisfied that the courts-martial had jurisdiction over the persons, and over the offenses, as well as jurisdiction to impose the sentences adjudged. 104 F. Supp. 310 (D.C. D.C. 1952). The Court of Appeals affirmed, but only after broadening the scope of inquiry by reviewing the petitioners' allegations on the merits. 202 F.2d 335 (D.C. Cir. 1952). The Supreme Court granted certiorari.
[110] There were four opinions written in this case, none of which was concurred in by a majority of the Court. Chief Justice Vinson, announcing the judgment of the Court, was joined by Justices Reed, Burton and Clark. Mr. Justice Jackson concurred only in the result, with no written opinion. Mr. Justice Minton, in a separate opinion, concurred in the affirmance of the judgments. Mr. Justice Frankfurter believed that the case needed to be reargued, while Justices Black and Douglas dissented from Court's decision.
[111] 346 U.S. 137, 138. The opinion cites *Hiatt v. Brown, supra* n.91. Mr. Justice Frankfurter disagrees with this statement, finding it "demonstrably incorrect." Burns v. Wilson, 346 U.S. 844 (1953) (Mem.) (Separate opinion of Mr. Justice Frankfurter.)
[112] Art. 76, UCMJ.

jurisdiction to consider the habeas corpus application of a military prisoner. "But these provisions do mean that when a military decision has dealt fully and fairly with an allegation, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." [113]

(3) The opinion goes on:

> Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness . . .[114]
>
> . . . .
>
> It is the limited function of the civil courts to determine whether the military have given fair consideration to the petitioner's claims.[115]

Mr. Justin Minton, concurring, thought that the sole function of the civil courts in dealing with a military prisoner's application for habeas corpus was to see that the military court had jurisdiction, and, once this had been done, the civil court could not determine whether the military court had committed error in the exercise of that jurisdiction.

Mr. Justice Frankfurter wanted further argument, but on the question of the scope inquiry, he said:

> 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. . . .[116]

Mr. Justice Douglas, joined by Mr. Justice Black, dissented, stating the view that, when a military reviewing agency has not fairly and conscientiously applied the standards of due process to the review of a decision of a military court, the civil courts should entertain a petition for habeas corpus. The dissenters further believed that the undisputed facts in this case indicated a failure by the military reviewing agency to apply the principles of due process.[117]

(f) *Jackson vs. Taylor;*[118] *Fowler v. Wilkinson.*[119] These cases, which involved a question of habeas corpus jurisdiction over prisoners under court-martial sentence, reached the Supreme Court in 1957. Three soldiers, Fowler, DeCoster and Jackson, had been convicted by a general court-martial for unpremeditated murder and attempted rape and sentenced to life imprisonment, which was the maximum punishment imposable, but no instruction had been given by the law officer on the maximum punishment for attempted rape. While upholding the attempted rape findings, the Board of Review set aside the murder conviction and reduced the sentence to a dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. This was the maximum sentence imposable for attempted rape.[120] The Court of Military Appeals denied petitions for further review.[121]

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[113] 346 U.S. 137, 142.

[114] *Ibid.*

[115] 346 U.S. 137, 144. This opinion also points out that the Court of Appeals "may have erred" in reweighing items of evidence that were in the record of trial by court-martial. 346 U.S. 137, 146.

[116] 346 U.S. 137, 148. Mr. Justice Frankfurter further explains his position and traces the case development of this problem area in his separate opinion on the petition for rehearing. Burns v. Wilson, 346 U.S. 844 (1953) (Mem.).

[117] Note that of those members who voted to affirm, only Mr. Justice Clark remains on the Court, while both dissenters are still serving. For speculation as to the result of another *Burns* case, see Pearl, *The Applicability of the Bill of Rights to a Court-Martial Proceeding*, 50 J. CRIM. L., C.&P.S. 559–565 (March–April, 1960).

[118] 353 U.S. 569 (1957).

[119] 353 U.S. 583 (1957).

[120] United States v. Fowler, *et al*, 2 CMR 336 (1951).

[121] United States v. Fowler, *et al*, 8 CMR 151 (1952).

DeCoster's petition for habeas corpus with an Indiana federal district court was dismissed. On appeal, the court ordered the district court to grant the writ of habeas corpus and discharge the petitioner. Although recognizing court-martial jurisdiction over DeCoster and the offenses, the court felt the military authorities "did not fully and fairly deal with him." [122] The court said that the action of the Board of Review in imposing the twenty year sentence could in effect be characterized as the original imposition of a sentence, which was beyond the Board's statutory authority.

Jackson then petitioned a Pennsylvania federal district court, but the Pennsylvania court refused to follow the *DeCoster* decision, saying that "the power to correct a sentence . . . must lie somewhere in the military system, and the Court of Military Appeals has made the determination where that power lies. It does not involve a lack of jurisdiction or want of power within the military system which would justify this court in interfering therein." [123] The Court of Appeals upheld the district court on appeal, pointing out that the petitioner claimed no deprivation of his constitutional rights and since the district reached the correct result, there was no need to decide whether the same conclusion could be reached by denying habeas corpus as a remedy.[124] It may be noted that the Court of Appeals refrained from commenting on whether the court below had exceeded the scope of its right to review a military case.

Fowler successfully petitioned for a writ of habeas corpus in a federal district court in Georgia, but the judgment granting the petition for the writ was reversed by the Court of Appeals.[125]

While the government did not petition for review in the *DeCoster* case, the Supreme Court granted certiorari in both the *Jackson* and *Fowler* cases.[126] The Supreme Court affirmed the courts of appeals in both cases, concluding in *Jackson v. Taylor*[127] that the board of review was acting as authorized by Congress in reducing the sentence. Four justices dissented,[128] basing the dissent on the reasoning in *DeCoster v. Madigan*.[129] The Court pointed out that the petitioner claimed no deprivation of constitutional rights, and that this decision is " to settle an important question in the administration of the Uniform Code [of Military Justice]," [130]

In the companion case, *Fowler v. Wilkinson*,[131] the petitioner claimed the sentence was "arbitrarily severe." In answer to this contention the Court said:

> [T]his Court exerts "no supervisory power over the courts which enforce military law; 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." If there is injustice in the sentence imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion. That power is placed by the Congress in the hands of those entrusted with the administration of military justice, or if clemency is in order, the Executive. As long ago as 1902 this Court recognized that it was a salutary rule that the sentences of courts-martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed.[132]

(2) *The lower federal courts.* Subsequent cases decided by lower federal courts seem to indicate that the distinction between military and civilian habeas corpus proceedings will likely be preserved, although the courts disagree

[122] DeCoster v. Madigan, 223 F.2d 906 (7th Cir. 1953).

[123] Jackson v. Humphrey, 135 F. Supp. 776, 780 (M.D. Pa. 1955).

[124] Jackson v. Taylor, 234 F.2d 611 (3d Cir. 1956).

[125] Wilkinson v. Fowler, 234 F.2d 615 (5th Cir. 1956).

[126] 353 U.S. 569, 572 n.2.

[127] *Supra* n.118.

[128] 353 U.S. 569, 581.

[129] *Supra* n.122.

[130] 353 U.S. 569, 572.

[131] *Supra* n.119.

[132] Citing Carter v. McClaughry, 183 U.S. 365, 401 (1902).

on the extent to which the distinction remains valid.

Illustrative cases.

(a) In *Colepaugh v. Looney*,[133] the Court of Appeals affirmed the judgment of the district court discharging a writ of habeas corpus for a prisoner who claimed U.S. citizenship but was confined at Leavenworth, following convicition by a military commission of violating the law of war, of spying, and of conspiracy to commit these offenses. Colepaugh claimed the commission lacked jurisdiction of the alleged offenses and that he was entitled to trial in the civil courts.

The court said:

> [T]he charges and specifications before us clearly state an offense of unlawful belligerency, contrary to the established and judicially recognized law of war—an offense within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn. And, the petitioner's citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war.
>
> With this, judicial inquiry should end.[134]

(b) In *Thomas v. Davis*,[135] the plaintiff appealed from a judgment of the district court discharging the writ and dismissing the petition. He was confined under sentence of death imposed by court-martial and ordered executed by the President.[136] Thomas argued a violation of due process had occurred in that (1) a tape recorded confession was secured involuntarily and (2) the confession was played in court and the trial counsel in summation told the court-martial "it had heard Thomas' own words of how he had killed these four persons." The court held that review was limited to the traditional test of jurisdiction, plus the slight expansion under the *Burns* decision to test whether an accused's claims had received "full and fair consideration" in the military appellate system. It quoted from *Burns* that it had no power—"to re-examine and re-weigh evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus."

(c) In *In re Taylor*,[137] a National Guardsman called to active duty for six months was convicted by general court-martial of two violations of Article 86, UCMJ. While confined under sentence he petitioned for habeas corpus. The court granted a show cause hearing to discover whether, "there was a clear lack of jurisdiction in the Army to court-martial petitioner for the offenses charged against him subsequent to July 12, 1957, [so as to] present 'a rare case, with exceptional circumstances of peculiar urgency'[138] which would authorize the Court to entertain jurisdiction herein and issue a writ of habeas corpus in petitioner's behalf." The court, after the hearing, concluded "the court-martial . . . had jurisdiction" of the charge against the petitioner. "That being true, we have no power to review petitioner's conviction thereon, regardless of any other matters occurring at his court-martial."[139]

(d) In *Day v. McElroy*,[140] the court affirmed in a per curiam decision the district court's dismissal of the prisoner's petition for a writ of habeas corpus. This was a capital, premeditated murder case. Judge Fahy, concurring, observed that "a curious question" existed as to the adequacy of the law officer's instruction. He concluded, however, that—

> The inadequacy which existed was not so grave as to have deprived appellant of due process of law or of any other constitutional right, or to have deprived the court-martial of jurisdiction. This civil court accordingly cannot on collateral attack disturb the judgment of the military judicial authorities. See *Burns v. Wilson*, 346 U.S. 137.[141]

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[133] 235 F. 2d 429 (10th Cir. 1956).

[134] 235 F.2d at 432.

[135] 249 F.2d 232 (10th Cir. 1957).

[136] United States v. Thomas, 6 USCMA 92, 19 CMR 218 (1955).

[137] 160 F. Supp. 982 (W.D. Mo. 1958).

[138] The quoted language is from United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17 (1925).

[139] The court cited Gusik v. Schilder, 340 U.S. 128 (1950) and *Thomas v. Davis, supra* n.134.

[140] 255 F.2d 179 (D.C. Cir. 1958).

[141] *Ibid.*

(e) In *Bokoros v. Kearny,*[142] a prisoner convicted, among other things, of several acts of sodomy, petitioned for a writ of habeas corpus, asserting a number of irregularities in his trial, including insufficiency of the evidence to establish his guilt, that his confession was obtained by trickery and intimidation, that the pretrial investigation was not made in accordance with Article 32, and that he was not permitted to request a discharge in lieu of trial.

The Court said:

> [T]he limited function of a federal civil court is to determine whether the military have given fair consideration to each of these claims and if it is determined that the matters complained of in the application for habeas corpus were either presented to and given fair consideration by the military courts or that the convicted person had an opportunity to present said matters to a military court but did not do so, judgment of the military court will not be disturbed by the civil court.

(f) In *Burns v. Looney,*[143] the petitioner complained that testimony of his wife was used against him over his objection. The petitioner had been convicted of the rape of his minor daughter. The District Court held that the court had no jurisdiction to order petitioner's release on the basis of error in excluding or admitting evidence. The court noted possible exceptions in the event military proceedings were so unjudicial as to amount to a denial of due process or where the military courts have refused to follow or have defied the Supreme Court.

(g) In *Bennett v. Davis*[144] a soldier was convicted in Austria of rape and attempted premeditated murder. His sentence to death was affirmed by the Court of Military Appeals,[145] confirmed and ordered executed by the President. On petition for a writ of habeas corpus he alleged that he had received inadequate representation at the trial and on appeal, that an involuntary confession had been used against him, that he had been tried in a hostile atmosphere which included prejudice against his race, and that Austria was a sovereign nation with exclusive jurisdiction over the offenses. The Court of Appeals said:

> It is now settled beyond doubt that the scope of inquiry in habeas corpus cases of this kind is limited to whether the court-martial had jurisdiction of the person and the offense charged; and whether in the exercise of that jurisdiction, the accused was accorded due process of law as contemplated and vouchsafed by the Uniform Code of Military Justice. We inquire only to determine whether competent military tribunals gave fair and full consideration to all of the procedural safeguards deemed essential to a fair trial under military law.[146]

It further held that the district court had "rightly held that the petitioner was thus precluded from presenting any of these issues in this collateral proceeding" when they had not been raised in the military proceedings.

(h) In *Sweet v. Taylor,*[147] which involved a soldier convicted in Italy of murder and sentenced to life imprisonment, the court summed up the problem this way:

> It must be conceded that the scope of review of a court of law of a military trial and conviction therein is a limited one. It is sometimes stated that if the military reviewing authorities have considered and decided the constitutional questions sought to be raised in a habeas corpus case, then the matter is at an end, and the civil court is without jurisdiction. In the court's view, that statement is too broad. In Burns v. Wilson, 346 U.S. 137, it is stated 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." However, if a careful examination of the record compels a conclusion that there is no evidence to sustain

[142] 144 F. Supp. 221 (E. D. Tex. 1956).
[143] D.C. Kansas No. 2699 H.D., 13 April 1959.
[144] 267 F.2d 15 (10th Cir. 1959).
[145] 7 USCMA 97, 21 CMR 223 (1956).
[146] 267 F.2d at 17. The opinion cited *Burns v. Wilson, supra* n. 107, and *Thomas v. Davis, supra* n.135.
[147] 178 F. Supp. 456 (D. Kan. 1959).

the judgment or that in fact petitioner was not represented by an attorney or that it must be said that basic constitutional rights were violated, it would seem that a civil court would have jurisdiction to grant relief because under such circumstances it cannot be said that the reviewing military authorities fairly considered these questions.[148]

(i) In *Williams v. Heritage*,[149] the court said:

> With respect to the District Court's dismissal for lack of power to inquire into the military proceedings, the latest word from the Supreme Court [*Fowler v. Wilkinson*] sustains the decision of the trial court, and even the prior *short-lived more liberal view* [*Burns v. Wilson*] would not allow a contrary result [emphasis added].
>
> . . .
>
> The only inquiry which a civil court may make in a habeas corpus proceeding is whether the court-martial had jurisdiction over the person and over the subject matter of the offense. It is obvious that such jurisdiction was present in this case. The now restricted *Burns* intimation that the civilian courts have the power to test whether the military court "dealt fully and fairly with an allegation raised. . . ." *Burns, supra,* at page 142, would give no comfort here, for there is no showing or allegation whatever that the court-marital did not do so. Appellant claims only that the court-martial is bound by the opinions of the psychiatrists. That, we hold, is not the law. Failure to follow the advice of the experts is neither *per se* a denial of constitutional rights nor even error which may be corrected upon direct review, in either a military or civil case. [150]
>
> It must be remembered that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." *Burns, supra,* at 139. We cannot broaden it here. We are bound by what the Supreme Court has decided, not by what we may think is the trend of its decisions away from what it has actually decided.

(j) In the recent case of *Swisher v. United States*,[151] the court held that the question whether a fair determination by the military tribunal had been made as to the issue of military capacity to stand trial could not be resolved on the record before it. The Government had argued that this issue could have been raised throughout the military court system and, therefore, should not be heard in a Federal court [at the court-martial, defense counsel had stipulated that the appellant was mentally competent to stand trial]. The habeas corpus proceeding was remanded to the District Court for further proceedings. Whether the Court of Appeals means that the Federal court may, as a general rule, re-view and evaluate the evidence as to mental competency of a military defendant remains to be seen.

e. *Conclusion.* It is clear that the Supreme Court decisions—particularly *Burns v. Wilson*[152] when coupled with *Jackson v. Taylor*[153] and *Fowler v. Wilkinson*[154]—have generated considerable confusion among the lower federal courts as to whether the traditionally narrow scope of review in military habeas cases is now to be broadened, and if so, to what extent. Some courts have adhered to the traditional test, others have applied a liberal test, others have vigorously asserted the continued validity of the traditional test while in fact applying what seems to be a more liberal approach, and still others have come to rest on the traditional view seemingly after satisfying themselves that there was no merit to the particular petitioner's assertions of fundamental error. This confusion will no doubt continue until the Supreme Court makes some clear pronouncement in the area.

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148 178 F. Supp. 456, 458.

149 323 F.2d 731 (5th Cir. 1963) (certiorari has been denied).

150 It will be noted that in the language above, the court actually reaches and decides the merits of petitioner's claims, despite its protestations of lack of authority to do so.

151 326 F.2d 97 (8th Cir. 1964).

152 346 U.S. 137 (1953); discussed *supra* n's 107–117, and accompanying text.

153 353 U.S. 569 (1957).

154 353 U.S. 588 (1957). Both *Jackson* and *Fowler*, which were companion cases, are discussed *supra* n's 118–131, and accompanying text.

What the Court will do is not clear. Its make-up has changed considerably since the decision in *Fowler v. Wilkinson, supra,* and its newer more liberal approach has affected many areas of the law concerning constitutional protections of the individual.[155] Whether the Court will similarly view the problems of military habeas remains to be seen. The likelihood is that it will, but the extent of the liberalization cannot be predicted.

[155] See, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel), *overruling* Betts v. Brady, 316 U.S. 455 (1942); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949). Compare Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel); Murphy v. New York Harbor Waterfront Comm'n, 378 U.S. 52 (1964) (privilege against self-incrimination); Malloy v. Hogan, 378 U.S. 1 (1964) (same); Downum v. United States, 372 U.S. 734 (1963) (double jeopardy); Fay v. Noia, 372 U.S. 391 (1963) (habeas corpus).

CHAPTER IV

AUTHORITY TO CONVENE COURTS-MARTIAL

1. THE NATURE OF THE AUTHORITY TO CONVENE COURTS-MARTIAL

a. *General.* Although originally the court-martial was simply "an instrumentality of command" whose judgements were inchoate until acted upon by the commander, it is now equally clear that courts-martial have been given what Colonel Winthrop called "independent discretion" to such a degree as to remove them from the influence or control of the commander. Perhaps the last vestige of this ancient relationship is the authority remaining in specified classes of commanders to appoint one or more of the three types of court-martial.

b. *An Attribute of Command.* The power to convene courts-martial is an attribute of command. It is independent of the commander's rank and is retained by him as long as he continues in command. He may lawfully be directed not to exercise this power or right; but unless he becomes ineligible, a court-martial appointed by him is a valid tribunal and its judgments, when affirmed as required by law, may be enforced.

c. *The President's Power.* In addition to the statutory authority conferred upon the President, by the Uniform Code of Military Justice,[1] the Supreme Court has recognized in the President as Commander-in-Chief of the Army an inherent power to appoint courts-martial.[2]

d. *Devolution of Command.*

(1) *Army regulations.* Army regulations govern the devolution of command.[3] The regulations[4] provide that in the event of the death, disability, or temporary absence of the commander, the next senior regularly assigned commissioned officer present for duty and not ineligible will assume command.[5]

(2) *Judicial interpretations.* The problem most frequently met is not *who* assumes command but *when* his command devolved on the subordinate. This problem is complicated by the prohibition against delegating the power to act as convening authority.[6]

(a) *Physical presence not controlling.* The mere physical presence of the commander within the territorial limits of his command does not preclude command devolving upon the next senior when the commander is not, and cannot be, in full and effective control of his organization by reason of his other duties.

Illustrative cases.

(*1*) In *United States v. Bunting,*[7] the Court of Military Appeals found that when Admiral C. Turner Joy was appointed senior U.S. delegate at the armistice negotiations in Korea and entered upon those duties (within the geographic limits of Naval forces, Far East) his command of NFFE devolved upon Admiral Oftsie who had appointed the court-martial in Bunting's case.

(*2*) In *United States v. Williams,*[8] the charges were approved for trial over the signature block of the deputy corps commander. At that time the corps commander was in Seoul as acting deputy army commander. The accused contended this was an attempted illegal delegation. The Court held that in the temporary absence of the corps commander, the next senior, who happened to be the deputy corps com-

[1] Arts. 4, 22, 23, and 24, UCMJ.
[2] Swaim v. United States, 165 U.S. 553 (1897).
[3] AR 600–20, Personnel—General, Army Command Policy and Procedure (8 July 1962).
[4] Para. 15, AR 600–20, *supra* n.3.
[5] See para. 23, AR 600–20, *supra* n.3, for restrictions and ineligibility of an officer to assume command.
[6] Para. 6a(5), MCM, 1951.
[7] 4 USCMA 84, 15 CMR 84 (1954).
[8] 6 USCMA 248, 19 CMR 369 (1955).

mander, possessed authority to act in every respect as the corps commander. In fact, the Court pointed out he could have lawfully referred the charges to a court-martial.

(b) *Delegation not authorized.* The power to convene courts-martial may not be delegated.[9] This prohibition has been construed to require that the convening authority must personally select the members of the court-martial, select the type of court-martial by which a particular case is to be tried, and take action on the record.

In *United States v. Haimson,*[10] it was urged that the convening authority had not personally selected the members of the court-martial. This issue arose when the Government, in obtaining information to rebut a claim that the convening authority had become an accuser in the case by transmitting detailed written instructions, over his command line, to the trial counsel, adduced the additional information that in fact the convening authority had no personal information about the case and had not personally selected the members of the court, which had been appointed over his command line. The Court concluded that it would not permit the Government to pierce the command line but held, assuming the trial directives to have been prepared by the convening authority, that officer was not an accuser. The contention of the accused that the members of the court were not personally selected was disposed of by a one-sentence reference to their holding with respect to the "finality" of the command line on the first question. There was no recognition of the fact that here it would have been to the benefit of the accused to permit him to pierce the command line. In the earlier *Bunting*[11] case the Court had questioned the correctness of the established service rule that the appointment of court-members was non-delegable.

Subsequently, in *United States v. Allen,*[12] an excessively large court had been appointed and the staff judge advocate either failed to notify, or excused, about half of the members. The Court held that in the absence of express authority from the convening authority to do so, the staff judge advocate could not properly excuse these members. In dicta in separate opinions two judges agreed that the power to appoint court members is non-delegable and must be exercised personally by the convening authority.

In *United States v. Greenwalt,*[13] the accused contended that the convening authority had been misled by inaccurate statements in the pre-trial advice. The Government attempted to defend on the ground that the convening authority had not been misled because he never saw the advice, having delegated to his staff judge advocate the authority to refer cases to trial by general court-martial.[14] The Court cited its decisions in *Bunting,*[15] and *Williams,*[16] as concluding that the power to refer could not be delegated. The Court held that "any such delegation as the convening authority asserts in his letter he attempted would be patently illegal, and result in the conclusion that these charges were never properly referred for trial."

Although this conclusion would seem to require a finding that the court-martial lacked jurisdiction, the Court ordered a "rehearing" in the case. The result is complicated because this issue is reached in this case only by "piercing the command line" which the Court asserts it will not permit a "Government official" to do. The Court purports to "pass this question" to reach the issue discussed above. The result is further obscured by the fact that the Court first discussed the incorrect advice, examined the record for and found specific prejudice to this accused, and concluded that "reversal would be in order if this were the true factual situation."

Again in *United States v. Roberts,*[17] the Court was confronted with the problem of an attempted delegation of power to refer cases to trial. Judge Ferguson for a unanimous court discussed the history of Article 34, again cited

[9] See United States v. Bunting, *supra* n.7.
[10] 5 USMCA 208, 17 CMR 208 (1954).
[11] *Supra* n.7.
[12] 5 USCMA 626, 18 CMR 250 (1955).
[13] 6 USCMA 569, 20 CMR 285 (1955).
[14] See para. 56, AR 810-10 (20 Sep. 1961).
[15] *Supra* n.7.
[16] *Supra* n.8.
[17] 7 USCMA 822, 22 CMR 112 (1956).

the *Bunting* and *Williams* cases, and concluded: "It is clear that the power to refer charges for trial cannot be delegated."

In testing the effect of this error, Judge Ferguson quoted from an article by Judge Latimer[18] comparing this personal pre-trial action of the convening authority to the grand jury indictment. He noted that "[w]ithout an indictment a trial on a criminal charge is a nullity. He concluded that the first reference to trial in this case was "void." The second and third references were likewise void because the general who purportedly made them, in a sworn affidavit, conceded he had not personally acted but had delegated authority to his staff judge advocate. The Court earlier referred to this circumstance as raising "a question involving jurisdiction." Yet the Court returned the record to The Judge Advocate General "for a rehearing."

It should be noted that the Court has been talking more in terms of the convening authority personally deciding to refer a specific case to trial by a certain *class* of court-martial than in terms of reference to a particular court-martial. The *Greenwalt* decision is not mentioned in *Roberts*. It is also interesting to observe the unheralded demise of Judge Latimer's reservation in *Greenwalt* to the effect that in a case where no reasonable possibility of prejudice is shown by the record (because the case would be referred to trial by general court-martial by any reasonable person) ratification in the form of subsequent approval of the proceedings by the convening authority may purge the error.[19] In *Roberts*, the accused was charged with a wartime desertion lasting eleven years and the Court does not suggest that there are any mitigating or extenuating circumstances which might have induced a convening authority to make any different disposition of the case. Yet, the case is reversed. The answer seems to be that on re-examination, after Judge Ferguson replaced the late Judge Brosman, the Court discovered that the

> drafters of the Code saw fit to unequivocally require that persons in the armed forces be tried only on charges referred by the convening authority.[20]

Thus, apparently, although this reasoning is not spelled out in *Roberts*, this error falls within those failures to comply with the Congressional mandate which deprive an accused of military due process and hence constitute an exception to the Article 59*a* requirement for demonstrable prejudice.[21]

2. STATUTORY AUTHORITY

a. *Officers Having Authority to Convene General Courts-Martial.* The Code[22] empowers the following to convene general courts-martial:[23]

(1) The President;

(2) The Secretary of the Army;

(3) The Commanding Officer of—
- (a) A Territorial Department;
- (b) An Army Group,
- (c) An Army,
- (d) An Army Corps,
- (e) A Division, or
- (f) A Separate Brigade; and

(4) Such other commanding officers as may be designated by the Secretary of the Army or empowered by the President.

It is under this latter provision that the commanding officers of certain posts, camps, and other installations are authorized to appoint general courts-martial:

(a) *Announcement of authority.* When a commanding officer is empowered to convene general courts-martial by authority granted him by the President or by the Secretary of the Army, such authority is customarily announced in Department of the Army General Orders.

(b) *Citing appointing order.* When a commanding officer is designated by the Secretary of the Army or empowered by the President to convene general courts-martial, the

[18] Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure*, 29 TEMP. L.Q. 1 (1955).
[19] See United States v. Emerson, 1 USCMA 43, 1 CMR 43 (1951).
[20] 22 CMR 822, 827.
[21] See United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).
[22] Article 22, UCMJ.
[23] Certain Navy and Air Force convening authorities are omitted.

court-martial appointing order will cite such authorization.[24]

Note, however, jurisdiction is a matter of fact and not of pleading. The Government may augment the record whenever jurisdiction is attacked. In *Givens v. Zerbst*,[25] a camp commander, empowered by the President to convene general courts-martial, did not cite such authority in the appointing order nor was it reflected elsewhere in the record. On petition for writ of habeas corpus, the Government was allowed to show such authority and the petition was dismissed.[26]

b. *Officers Having Authority to Convene Special Courts-Martial.* The Code[27] empowers the following to convene special courts-martial:[28]

(1) Any person who may convene a general court-martial;

(2) The commanding officer of a—

(a) District,
(b) Garrison,
(c) Fort,
(d) Camp,
(e) Station, or

(3) The commanding officer of a—

(a) Brigade,
(b) Regiment,
(c) *Detached* battalion or corresponding unit of the Army;

(4) The commanding officer of any *separate* or *detached* command or group of detached units of any of the armed forces placed under a single commander for that purpose; and

(5) Any other commanding officer when empowered by the Secretary of the Army. As in the case of general courts-martial, such authorization by the Secretary of the Army will be shown in the order appointing the court.

c. *Officers Having Authority to Convene Summary Courts-Martial.* The Code[29] empowers the following to convene summary courts-martial:[30]

(1) Any person who may convene a general or special court-martial;

(2) The commanding officer of a *detached* company, or other detachment of the Army;

(3) In the Navy and Coast Guard, an officer in charge; and

(4) The commanding officer of any other command when empowered by the Secretary of the Army. Once again, if the commander is empowered by the Secretary of the Army to convene summary courts-martial, such authorization will be shown in the order appointing the court.

d. *Meaning of "Detached" or "Separate."* Note that, in connection with the convening of special and summary courts-martial, among the convening authorities were included the commanding officers of certain "separate" and "detached" units. These words are used in the Code in a disciplinary rather than a physical or tactical sense. Thus, a battalion, company, or other unit is "separate" or "detached" when it is isolated or removed from the immediate disciplinary control of a superior in such a manner, and under such circumstances, that the unit's commander is the one looked to by superior authority as the officer responsible for the administration of discipline in the unit.

e. *Action to be Taken When Officer is Not Authorized to Convene a Court.*

(1) *Manual provision.* The Manual[31] provides that when trial by a special or general court-martial is determined appropriate and the summary court-martial authority is not empowered to appoint such a court, he will forward the charges and necessary allied papers, ordinarily through the chain of command, to the officer exercising the appropriate type of court-martial jurisdiction.

(2) *Illustrative cases.*

(a) In *United States v. Pease*,[32] the commanding officer of the accused was without

[24] Para. 5a(2), and App. 4a, n.5, MCM, 1951; para. 59b AR 310-10 20 Sep. 1961.
[25] 255 U.S. 11 (1921).
[26] See also Leg. & Legis. Basis, MCM, 1951 at 5; and Dig. Ops. JAG 1868, at 255.
[27] UCMJ, Art. 23.
[28] Certain Navy and Air Force convening authorities are omitted.
[29] UCMJ, Art. 24.
[30] Certain Navy and Air Force convening authorities are omitted.
[31] Para. 33i, MCM, 1951.
[32] 3 USCMA 291, 12 CMR 47 (1953).

authority to convene special courts-martial. Consequently, the accused was transferred to a neighboring jurisdiction whose commanding officer, although inferior in rank to the accused's original commanding officer, had power to convene such courts. The accused contended that the court lacked jurisdiction as the convening authority was inferior in rank to, and not in the chain of command of, the accused's original commanding officer.

Held: Paragraph 33*i* of the Manual is merely permissive and not mandatory. Thus, in a case such as the present, where the commanding officer of the accused is not an accuser, there is no requirement that charges be forwarded through the chain of command to a superior officer. In such case, arrangements for the trial of the accused may be made in any appropriate manner, such as transferring him to the command of an officer authorized to convene an appropriate court-martial.

(b) In *Day v. Wilson*,[33] the accused contested the jurisdiction of the court-martial because the case was tranferred from Eighth Army to I Corps for trial. He also objected because this was accomplished without the personal action of the Eighth Army commander. The District Court found this to be "routine administrative" disposition and reasonable under the geographical circumstances.

3. LIMITATIONS ON THE POWER OF THE CONVENING AUTHORITY

a. *Reservation of Power by Superior Authority.*

(1) *Background.* Historically, the British Articles did not authorize a superior commander to prohibit the exercise by a subordinate commander of the power to appoint courts-martial.[34] The first American Articles of War of 1775 did not expressly authorize the appointment of general courts-martial, but did authorize the "commissioned officers of every regiment . . . by the appointment of their colonel or commanding officer" to hold regimental courts-martial.[35] By Article 2 of the American Articles of 1786, authority was expressly given to "the general or officer commanding the troops" to appoint general courts-martial.[36] By Article 3, "[e]very officer commanding a regiment or corps" was given authority to appoint regimental or corps court-martial.[37] These provisions were retained in the Articles of War of 1806.[38] Article of War 86 directed the commanding officer of any post or detachment at which there were not sufficient officers to form a general court-martial to forward the case to the commanding officer of the department (an area command) who was to order a court to be assembled at the nearest convenient place and the accused and witnesses were to be transported thereto.[39]

(2) *First statutory provision.* The Articles of War of 1874[40] authorized "[a]ny general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department [to] appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; . . ." Article of War 73 authorized division and separate brigade commanders to appoint general courts-martial in time of war; but provided further that "when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander."

The portion of the Digest of Opinions of The Judge Advocate General, 1868,[41] annotating the concept "Accuser or Prosecutor," indicates that an objection to trail on this ground "calls in question not merely the jurisdiction of the court, but its existence as a legally organized tribunal. . . ."

Winthrop observed that "the constituting of a court-martial in contravention of the prohibition of the Article [AW 72] necessarily nullifies its proceeding *ab initio*. . . ."[42]

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[33] 155 F. Supp. 469 (D.C. D.C. 1957).
[34] WINTHROP at 908–952.
[35] See WINTHROP at 956.
[36] WINTHROP at 972.
[37] *Ibid.*
[38] Article of War 65 and 66, in WINTHROP at 982.
[39] *Ibid.*
[40] Article of War 72.
[41] Dig. Ops. JAG, 1868, at 50–51.
[42] WINTHROP at 63.

(3) *Limitation on power to appoint inferior courts-martial.* By an Act of 2 March 1913, Congress amended Article of War 81, relating to special courts-martial, to read in pertinent part:

> but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; . . . .[43] (37 Stat. 723).

No similar amendment was made to Article of War 72 relating to general courts-martial, and the Manual for Courts-Martial, U. S. Army, 1917,[44] said only:

> When any superior authority deems it desirable, he may appoint a special court-martial for any part of his command.[45]

(a) In discussing a similar provision in Article of War 10, relating to summary courts-martial, the 1917 Manual provided:

> A summary court-martial may *in any case* be appointed by superior authority when by the latter deemed desirable.[46]

In the same section on summary courts-martial, the following paragraph appeared:

> Power of brigade commanders.—A brigade commander is responsible for the instruction, tactical efficiency, and preparedness for war service of his brigade. (A.R. 194) If the brigade is serving at one garrison or post he has, by virtue of his power as such garrison or post commander, authority to retain within himself the appointing power of all summary courts within his command, but if he does not exercise the authority which is vested in him by statute he allows the appointing power, including the power of review, to pass to regimental (and detachment) commanders. (Digest, p. 580, XVI, E, 7.) If the brigade is acting as a tactical unit in the field, he may as superior authority, appoint summary courts-martial for his command whenever he deems it desirable, but such authority will ordinarily be exercised by the regimental commanders.[47]

(b) The Digest of Opinions of The Judge Advocate General of the Army, 1912-1940, reports no opinions expressed on the construction of the pertinent portions of Articles of War 9 and 10.

(c) The Manual for Courts-Martial, U.S. Army, 1928, in discussing Article 9, said:

> The subordinate commander may exercise the power to appoint special courts-martial for his command unless a competent superior deems it "desirable" to reserve that power to himself and so notifies the subordinate.[48]

(4) *Limitation on power to appoint general courts-martial.*

(a) *The Elston Act.* Among the amendments to the Articles of War made by the Elston Act in 1949, was included an amendment to Article 8, relating to general courts-martial, which added the phrase:

> and may in any case be appointed by superior authority when by the latter deemed desirable.

The Manual for Courts-Martial, U.S. Army, 1949, in discussing this Article said:

> When any commander authorized to appoint general courts-martial is the accuser or the prosecutor in a case the court shall be appointed by competent superior authority. He may appoint the court to try any case in a subordinate command if he so desires. Thus if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to appoint general courts-martial properly may appoint courts for the trial of cases arising in a subordinate command.[49]

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[43] 37 Stat. 723 (1913).

[44] MCM, U.S. Army, 1917, was based on the Articles of War of 1916 which re-enacted old Article 72 as Article 8, and old Article 81 as new Article 9.

[45] Para. 21, MCM, U.S. Army, 1917 at 12.

[46] Para. 25, MCM, U.S. Army, 1917 at 18 (emphasis in original).

[47] Para. 29, MCM, U.S. Army, 1917 at 14.

[48] Para. 5b, MCM, U.S. Army, 1928 at 5. In speaking of the appointment of summary courts-martial, the Manual said the principles stated in para 5b were applicable. Para. 5c, MCM, U.S. Army, 1928.

[49] Para. 5a, MCM, U.S. Army, 1949.

However, in discussing the identical provision in Article of War 9, relating to special courts-martial, the 1949 Manual said:

> The power of the battalion commander to appoint such courts is subject to the power of the division commander to reserve to himself the right to appoint special courts-martial for any or all subordinate units and detachments in his command. However, a subordinate commander may exercise his power to appoint special courts-martial unless a competent superior commander reserves that power to himself and so notifies the subordinate.[50]

(b) *The Uniform Code of Military Justice.*

(*1*) The Code substantially re-enacted the Elston Act provision, as follows:

> If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.[51]

(*2*) The Manual, in discussing this provision, says:

> A superior competent authority may convene the court to try any other case in a subordinate command if he so desires (Art. 22*b*). Thus, if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to convene general courts-martial properly may convene courts-martial for the trial of cases arising in a subordinate command.[52]

(*3*) In discussing the identical provision in Article 23(*b*) relating to special courts-martial, the 1951 Manual says:

> . . . .
>
> (2) The principles stated in 5*a*(2) to 5*a* (6), inclusive, apply to special courts-martial. See Article 23*b* as to accusers.
>
> . . . .
>
> (4) A subordinate commander may exercise his power to appoint special courts-martial unless a competent superior reserves that power to himself and so notifies the subordinate.[53]

(*4*) In construing this provision, (in conjunction with a Sec Nav policy against exercise of disciplinary powers by "guest" commanders) as applied to the situation of a separate Marine organization aboard a Naval vessel, The Judge Advocate General of the Navy concluded that the commanding officer of the Naval vessel had power to try a case arising in the Marine organization. He also observed that the Marine commander was "authorized by law to exercise disciplinary authority," and that the Sec Nav directive "does not, however, modify or suspend authority conferred upon officers to convene courts-martial." [54]

(*5*) In an opinion defining the disciplinary powers of the commander of an isolated detachment in Turkey, The Judge Advocate General of the Air Force concluded that the commander was:

> empowered to convene special and summary courts-martial and may do so unless superior competent authority reserves to himself the right to appoint such courts-martial.[55]

(5) *Effect of trial forbidden by orders.* Understandably the question of the legal effect of a trial by a court-martial which superior authority has ordered not convened, is not often litigated. In *Tallent,*[56] the accused had been convicted by summary court-martial of statutory rape and sentenced to restriction to camp for thirty days. The sentence was approved and suspended on 24 February 1944. On 10 March 1944 the convening authority was informed by the area commander (subsequently the convening authority of the general court-martial which tried accused) that the specification failed to state an offense and that the proceedings were null and void. He was instructed to issue a special order announcing this conclusion, which he did. At the general court-martial

[50] Para. 5*b*, MCM, U.S. Army, 1949 at 5.
[51] UCMJ, Art. 22(b).
[52] Para. 5*a*(3), MCM, 1951.
[53] Para. 5*b*, MCM, 1951.
[54] Op. JAG 1953/168, 12 Aug. 1953, *in* 3 Dig. Ops., "Courts-Martial" § 4.1 (1953–54).
[55] Op. JAGAF 1954/17, 27 Oct. 1954, *in* 4 Dig. Ops., "Courts-Martial" § 4.1 (1954–55).
[56] CM ETO 2550, Tallent, 7 BR (ETO) 141 (1944), 4 Bull. JAG 49 (1945).

the accused unsuccessfully pleaded double jeopardy.

The Board of Review reversed the conviction on the ground that the summary court-martial proceedings were complete on 24 February 1944, the specification alleged an offense, and the accused over his objection and contrary to Article of War 40 was tried twice for the same offense. There is no suggestion in the opinion that the Government argued that the first trial was a nullity because the convening authority had been ordered not to convene the court. However, in the last sentence of its decision, the board observed that:

> [a]lthough the commanding officer was directed not to try cases of statutory rape by inferior court-martial, such direction could not deprive the summary court-martial of the jurisdiction conferred by statute.

Although the Court of Military Appeals has not passed directly on the point, the decisions in *United States v. Gray*,[57] and *United States v. Hangsleben*,[58] involving the legal effect of confinement imposed contrary to orders or in a place not authorized, indicate the answer may not be as simple as the unsupported assertion in *Tallent* suggests.

The argument has been made that an accused could not avail himself of an order issued not for his benefit but in the interest of supervising military justice within the command. In *Goins*,[59] the accused was convicted upon his plea of two offenses of sodomy with other enlisted men. The Board of Review interpreted the pertinent Army regulations to require that the convening authority give individual consideration in each case to the possibility of administratively discharging the accused. It found no such consideration had been given here and ordered a rehearing. It held:[60]

> Whether the regulation was intended to confer "benefits" on this accused (or others similarly situated) is, we think, beside the point; the issue is whether his case was carefully and fairly considered, on an individual basis and in the light of all reasonably available information.

As noted above, the record here indicates that this was not done. Even though the accused here has no legal "right" *not* to be tried for acts in violation of the Code, he was, we think entitled to the same consideration on the merits which is given others similarly situated.

b. *Accuser Disqualified.*

(1) *General.* When the convening authority of a general or special court-martial is the accuser, he cannot appoint the court to try the particular case, but must refer the charges to superior competent authority.[61]

(2) *Who is an accuser? the ground rules.*

(a) *Code provision.* The Code [62] provides that an accuser is:

(*1*) One who signs and swears to the charges;

(*2*) One who directs that charges nominally be signed and sworn by another; or

(*3*) Any other person who has more than a mere official interest in the prosecution of the accused.

(b) *Manual provision.* Paragraph 5*a*(4) of the Manual provides that the person who signs and swears to charges is always an accuser; whether a commander who convened the court is the accuser in other cases is a question of fact. Action by a commander which is merely official and in the ordinary line of duty cannot be regarded as sufficient to disqualify him.[63] Yet, though his observable actions may be entirely official, and routine, if the convening authority is so closely connected to the offense that a reasonable person would conclude that he had a personal interest, he is disqualified to convene the court-martial—more from a desire to elevate military trials above suspicion than from speculation that a prejudicial animus exists in fact.[64]

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[57] 6 USCMA 615, 20 CMR 331 (1956).
[58] 8 USCMA 320, 24 CMR 180 (1957).
[59] CM 398383, Goins, 23 CMR 542 (1957).
[60] Citing only United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955) and United States v. Laurie, 6 USCMA 478, 20 CMR 194 (1955), companion cases involving an explicit refusal to consider suspending or remitting a punitive discharge on post-trial review.
[61] UCMJ, Arts. 22(b), 23(b).
[62] UCMJ, Art. 1(11).
[63] United States v. Jewson, 1 USCMA 652, 5 CMR 80 (1952).
[64] United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1951).

(3) *Convening authority as accuser because victim of offense.*

(a) In *United States v. Gordon*,[65] the accused was originally charged with burglary of one general officer's house and the attempted burglary of a house occupied by the convening authority. Subsequent to the appointment of the general court-martial which tried the accused, the charge of attempted burglary of the house occupied by the convening authority was dismissed.

Held: The convening authority was an "accuser" and therefore disqualified to appoint the court-martial, even though the charge involving his home was subsequently dismissed. The Court stated that the test to be applied was whether a reasonable person would impute to the convening authority a personal feeling or interest in the outcome of the litigation. Because of the original charge of attempted burglary of his house, and the close connection between the two offenses, the convening authority was deemed to have more than an official interest in the trial.

(b) *United States v. Moseley.*[66] The accused was charged with larceny, housebreaking, and absence without leave. The house broken into was occupied by the convening authority and the property stolen was taken from that house and belonged to the son of the convening authority. This absence without leave commenced simultaneously with the commission of the other two offenses and was financed by proceeds of the larceny.

Held: The convening authority was an accuser and therefore disqualified to appoint the court-martial to try the accused. Because he or his family was the victim of the offenses of housebreaking and larceny, the convening authority had more than an official interest in the prosecution and he was in fact the accuser. The board did not reach the question of whether the court-martial would have had jurisdiction over an entirely unrelated offense, as it found the AWOL to have been inextricably bound to the other offenses.

(c) *United States v. Bergin.*[67] The accused was charged with larceny from a consolidated non-appropriated welfare fund, of which he was the custodian. The convening authority, as Commanding General of the post, was the officer ultimately responsible for the proper administration of all non-appropriated welfare funds and he was responsible for insuring the protection of such non-appropriated funds. Further, he was protected from such responsibility by an indemnity bond securing him against loss of such funds through larceny or other dishonesty by the custodian. In claiming for the loss against such bond, the convening authority had to conclude that the funds had been stolen by the accused.

Held: The convening authority was the accuser, and, as such, was ineligible to appoint the court-martial to try the accused. Although he did not sign the charges he had a personal interest in the prosecution of the case and had already concluded, in the claim against the indemnity bond, that the accused had committed the offense with which he was charged. In this case the convening authority was the victim of the accused's manipulations and certainly had a personal interest in the outcome of the case.

(4) *Convening authority as accuser by virtue of violation of a direct order issued by him.*

(a) In *United States v. Marsh*,[68] the accused was tried for willful disobedience of an order of a superior officer in violation of Article 90 and for desertion in violation of Article 85 of the Code. He was convicted of the willful disobedience and of absence without leave. The evidence indicated that the accused surrendered to military authorities in Georgia after having failed to proceed to Fort Lawton, Washington, for overseas shipment. In Georgia, he was given a special order directing him to proceed to Fort Lawton and was also given "a direct order" which contained the further statement that failure to obey would subject the accused to trial by court-martial. Both orders were issued "by command of" the convening authority.

[65] *Supra* n.64.

[66] CM 84127, Moseley, 2 CMR 268 (1951).

[67] ACM 4674, Bergin, 7 CMR 501 (1952).

[68] 3 USCMA 48, 11 CMR 48 (1953).

Held: The convening authority was an accuser in this case. The Court stated:

> It is clear from the facts in this record that the accused violated a direct order [of the convening authority] and that the latter had a personal interest in seeing his orders were obeyed. Military discipline and order is based upon obedience to superiors and every commander jealously, but rightly, requires compliance and frowns on disobedience. For that and other reasons we cannot say that a superior officer would be entirely impartial in selecting a court to try a given case where the accused was charged with willful disobedience of the order.[69]

The Court also reversed the findings of guilty of absence without leave. Since this offense and the willful disobedience grew out of one transaction the court-martial was disqualified to try both of them.

(b) In *United States v. Keith,*[70] the accused was charged with failure to obey a lawful order in violation of Article 92 of the Code. Following an absence without leave, the accused was apprehended and returned to military control in South Carolina. He was given a written order directing him to proceed to California, which order was issued by the convening authority. The order advised the accused of the route he must follow and also informed him that deviation from a schedule constituted an offense which was punishable as a court-martial should direct.

Held: The convening authority was not an accuser in this case and was therefore competent to appoint the court-martial for the trial of the accused. The Court distinguished the *Marsh* case on the following basis:

> Here, the accused is charged with failure to obey an order in violation of Article 92; there is no issue of willful disobedience and there is no evidence that the willful flaunting of the authority of a superior officer was conceived as part of a plan to aggravate the nature of the crime; the order involved was little more than the usual impersonal travel order directing the accused to proceed to a certain station; conceding the order contained an additional threat of prosecution, it was required for administrative purposes; any interest in using his official position as a leverage to increase the punishment and thereby compel compliance with his order by the subordinate cannot be charged against this superior officer; and, the overall plan did not place the commanding general in a situation where his own personal and direct order to a subordinate could be willfully challenged.[71]

Based on these facts, the Court concluded that the convening authority had only an official interest in the prosecution of the accused. The orders violated were merely routine travel orders and not "direct orders" of the convening authority.[72]

(5) *Convening authority as accuser by virtue of being a witness for the prosecution.*

(a) Even though the word "accuser" in this context is a term of art which has acquired a broader meaning than general usage would give it, it is not so broad as to include every officer who testifies for the prosecution. The question actually raised might better be stated as

> Is every witness for the prosecution precluded from reviewing and taking action on the record of trial?

(b) An extreme example of defense contentions in this area occurred in *United States v. Gunterman.*[73] There the accused was convicted of absence without leave in a trial by special court-martial. A morning report extract showing the inception of the unauthorized absence was authenticated by the former commanding officer of the accused. The special court which tried the accused was convened by the authenticator's successor in command. The Board of Review held that the convening authority was not disqualified to convene the court

[69] 3 USCMA 48, 52, 11 CMR 48, 52.
[70] 3 USCMA 579, 13 CMR 135 (1953).
[71] 3 USCMA 579, 581, 13 CMR 135, 137.
[72] *Accord,* United States v. Teel, 4 USCMA 39, 15 CMR 39 (1954); United States v. Noonan, 4 USCMA 297, 15 CMR 297 (1954).
[73] ACM S–7440, Gunterman, 13 CMR 668 (1953).

by virtue of being an accuser. Although the former commanding officer may have been disqualified, by virtue of having a personal interest in the proceedings, his disability did not devolve upon his successor in command. Accordingly, the convening of the court was proper.

(c) In *United States v. McClenny,*[74] the accused was tried for AWOL. Extracts from the accused's service record and from the Unit Diary of his organization were introduced in evidence to prove the unauthorized absence. The service record extracts were authenticated by a certain officer "by direction of" the convening authority. The Unit Diary entries were authenticated by the convening authority himself. The substance of the entries in both places was the same. However, the defense presented evidence which questioned the accuracy of the entries in the service record and Unit Diary. It was contended that the convening authority was an accuser, because he was a witness for the prosecution, and further was disqualified to act as reviewing authority.

Held: The convening authority was a witness for the prosecution clearly as to the Unit Diary extracts and assumed to be a witness as to the service record extracts. However, a convening authority does not retroactively become an accuser when he appears at the trial as a witness against the accused. His status as an accuser must be determined as of the time he convenes the court. Consideration may be given to testimony which he gives at the trial to determine whether he had a personal interest in the outcome of the case at the time he convened the court. If his testimony does not show such interest, and there is no other evidence from which to infer such interest, his authority to convene the court is unassailable. The Court concluded that the evidence showed that the convening authority had no such personal interest as to constitute him an accuser. However, the Court went on to hold that the convening authority could not, in this particular case, act as reviewing authority since he would have to review and evaluate the conflicting evidence which would put him in a position of questioning his own official acts.

(d) In *United States v. Taylor,*[75] certain entries in the accused's service record, which were admitted as evidence of his unauthorized absence, were signed by the officer who later acted as the convening authority. The accuracy of the records was unquestioned, and the accused admitted the absence in his testimony.

Held: Applying the reasoning of *McClenny,* the Court held that the fact that the convening authority was a witness against the accused did not constitute him an accuser. Further, in view of the unquestioned nature of the entries and the accused's admission, there is no basis for imputing a personal interest in the outcome of the review on the part of the reviewing officer.

(6) *Convening authority as accuser by virtue of prior connection with the case.*

(a) *Connection with the pretrial investigation and charges.*

(*1*) In *United States v. Hammork,*[76] the accused was convicted of larceny and of making a false official statement. The incident giving rise to these offenses had previously been investigated by an inspector general. Subsequently, the convening authority interviewed the accused and secured an admission that the accused's statement to the inspector general was false in part. Before charges were preferred, the accused submitted his resignation for the good of the service in lieu of the trial; the convening authority recommended acceptance, but the Department of the Army rejected the resignation. Thereupon the accused was tried and convicted by a general court-martial appointed by the convening authority.

Held: The convening authority was an accuser in this case since his interest was other than an official interest in the prosecution of the accused. The convening authority not only had personal knowledge that the accused had committed some of the offenses for which he was tried, but had obtained this information by eliciting admissions from the accused during a personal interview. The pos-

[74] 5 USCMA 507, 18 CMR 131 (1955), *overruling* ACM 5455, Huff, 10 CMR 736 (1953).
[75] 5 USCMA 528, 18 CMR 147 (1955).
[76] CM 365821, Hammork, 13 CMR 385 (1953).

session and manner of acquisition of this personal knowledge made the convening authority "so closely connected to some of the offenses for which accused was subsequently tried 'that a reasonable person would conclude that he had a personal interest in the matter.' "

(2) In *United States v. Jewson,*[77] the Commanding General, Fifth Army, had ordered his Inspector General to investigate an incident at a camp located within his Army area. He had transmitted that officer's report to the Army Staff Judge Advocate with directions that appropriate charges be prepared. An assistant staff judge advocate examined the file and preferred charges over his own signature. The accused contended the Commanding General, Fifth Army was disqualified to convene the court-martial which tried these charges. The Court found only an official interest and that the assistant staff judge advocate was not merely a nominal accuser.

(3) In *United States v. Grow,*[78] the accused, a major general, was convicted of dereliction of duty by virtue of an infraction of security regulations. At a time when he was an attache in Moscow, his personal diary which contained comments about highly classified matters, was photostated and publicized by the Communists for propaganda purposes. The Deputy Chief of Staff had directed an investigation into the matter which served as a basis for the signing of charges by an officer in the Office of the Judge Advocate General. The charges and specifications prepared were considered in a conference attended by the Deputy Chief of Staff and other staff officers and were specifically approved by the Chief of Staff and the Secretary of the Army before being sent to the Commanding General, Second Army, for appropriate action. The latter officer convened a general court-martial which tried the accused. The accused contended that the Secretary of the Army and the Chief of Staff were accusers and that, as the convening authority was inferior in rank and command to such accusers, he lacked the power to appoint a general court-martial.

Held: The Secretary of the Army and the Chief of Staff were not accusers in this case since their action was merely official. Because of the rank of the accused and the serious nature of the charges the decision to proceed with or prohibit disciplinary measures could be made only at the highest military level. Because of the absence of other than an official interest, the Secretary of the Army and the Chief of Staff were not accusers and the court was properly appointed by the convening authority.

(4) In *United States v. Shepherd,*[79] the Court reversed Captain Shepherd's conviction because of the admission of irrelevant evidence of other unrelated offenses. Judge Latimer and Judge Ferguson, concurring in the result only, found that the convening authority had such a personal interest in the weight reduction program, to which were related the false official report offenses of which Shepherd was convicted, that he was disqualified to convene the court.

(b) *Connection with the prosecution.*

(1) Colonel Winthrop early warned that an officer would disqualify himself,

> if, influenced by hostile feelings, or by a conviction that the accused is guilty and that his offense demands to be promptly and efficiently dealt with, he proposes, upon assembling the court, actively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution [or to appear] himself as prosecuting witness. . . .[80]

(2) In *United States v. Haimson,*[81] an indorsement, addressed to the trial counsel of the court which tried the accused, was signed over the command line of the convening authority. The indorsement advised trial counsel that he should make a brief opening statement, what witnesses should be called, what testimony should be elicited from them, what documents were available as evidence, that certain witnesses might refuse to testify and claim the privilege against self-incrimination, that he

[77] 1 USCMA 652, 5 CMR 80 (1952).
[78] 3 USCMA 77, 11 CMR 77 (1953).
[79] 9 USCMA 90, 25 CMR 352, (1958).
[80] WINTHROP at 63.
[81] 5 USCMA 208, 17 CMR 208 (1954).

should submit requests for instructions, and that if the accused were found guilty and presented evidence in mitigation trial counsel could properly indicate factors in aggravation. A sworn statement by an assistant staff judge advocate stated that the instructions to trial counsel were prepared under his direction as standard operating procedure, approved by the staff judge advocate, and forwarded to the adjutant general's office where it was signed by an assistant adjutant general. It was contended that such instructions signed over the command line of the convening authority constituted him an accuser.

Held: The indorsement constituted a directive of the convening authority, notwithstanding its manner of preparation or signing without his knowledge. It is improper to go behind the command line in an attempt to disassociate the convening authority from an indorsement issued in his name. However, the indorsement did not constitute him the accuser. The presence of the command line does not, itself, indicate a personal interest. It is rather the substance of the communication which is controlling. There was nothing in the content of the indorsement to suggest that the convening authority or the members of his staff predetermined the accused's guilt or innocence, nor was there anything which reflected a personal interest on the part of the convening authority in the outcome of the trial.

(3) Referral to superior competent authority.

(A) *Code provisions.* With respect to both general [82] and special [83] courts-martial, the Code provides that when the normal convening authority is an accuser, "the court shall be convened by superior competent authority."

(B) *Manual provision.* The Manual [84] provides: "When any commander who would normally convene the general court-martial is the accuser in a case, he shall refer the charges to a superior competent authority who will convene the court or designate another competent convening authority to exercise jurisdiction."

(C) *Illustrative case.* What is meant by the term "superior competent authority" has been the subject of considerable judicial discussion. In *United States v. LaGrange,*[85] the accused were convicted by special court-martial of violations of their ship's regulations. The charges were signed by the commanding officer of their ship, a *captain* in rank. Since he was the accuser, he forwarded the papers to his superior who submitted them for trial by special court-martial to another subordinate command, the commanding officer of which was a *commander* in rank. This commander was the convening authority for the court which tried the accused.

Held: The convening authority did not have authority to appoint the court-martial. The Court considered the provisions of the Code and Manual quoted above and concluded that the Code provision required that, when the normal convening authority is the accuser, the Court must be convened by an officer superior to such accuser. The words "another competent convening authority" as used in the Manual must be interpreted, in the light of the Code, to mean an authority who is senior to the accused. The purpose of the provision in the Code is to prevent command influence. The Court said that, if an officer junior to the accuser were competent to convene a court-martial, it would be difficult to establish that his acts were wholly free from influence by the superior accuser.[86]

(7) *Summary courts-martial.* According to the Manual,[87] an accuser is *not* disqualified from appointing a summary court-martial. In such

[82] UCMJ, Art. 22(b).
[83] UCMJ, Art. 23(b).
[84] Para. 5*a*(3), MCM, 1951.
[85] 1 USCMA 342, 3 CMR 76 (1952).
[86] *Accord,* ACM S-3083, Burnette, 5 CMR 522 (1952). *But see* ACM S-19504, Avery, 30 CMR 885 (1960), in which the convening authority, although junior in rank to an accuser, was nevertheless held qualified to convene the special court-martial because he was superior in command.
[87] Para. 5*c*, MCM, 1951.