Viewpoints of Military Law, Civil and Criminal

Robert Gerwig

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol48/iss3/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
# Viewpoints of Military Law, Civil and Criminal*

Robert Gerwig**

## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>511</td>
</tr>
<tr>
<td>I. Civil</td>
<td>514</td>
</tr>
<tr>
<td>A. Military Reservations</td>
<td>514</td>
</tr>
<tr>
<td>1. Authority, Ownership, and Jurisdiction</td>
<td>514</td>
</tr>
<tr>
<td>2. The Post Commander</td>
<td>518</td>
</tr>
<tr>
<td>a. General Management</td>
<td>518</td>
</tr>
<tr>
<td>b. Denial of Entry</td>
<td>518</td>
</tr>
<tr>
<td>c. Motor Vehicles</td>
<td>519</td>
</tr>
<tr>
<td>d. Public Quarters</td>
<td>520</td>
</tr>
<tr>
<td>e. Law Enforcement</td>
<td>520</td>
</tr>
<tr>
<td>f. Release of Information</td>
<td>521</td>
</tr>
<tr>
<td>g. &quot;Off Limits&quot; and Miscellaneous Matters</td>
<td>522</td>
</tr>
<tr>
<td>B. Administrative Discharges for Military Personnel</td>
<td>523</td>
</tr>
<tr>
<td>1. Enlisted Personnel</td>
<td>523</td>
</tr>
<tr>
<td>2. Minors</td>
<td>525</td>
</tr>
<tr>
<td>3. Officers</td>
<td>525</td>
</tr>
<tr>
<td>4. Conscientious Objectors</td>
<td>526</td>
</tr>
<tr>
<td>5. Limitations</td>
<td>527</td>
</tr>
<tr>
<td>6. Review Board</td>
<td>528</td>
</tr>
<tr>
<td>7. Judicial Observations</td>
<td>528</td>
</tr>
<tr>
<td>C. Civilian Personnel</td>
<td>530</td>
</tr>
<tr>
<td>1. Classification</td>
<td>530</td>
</tr>
<tr>
<td>2. Labor-management Relations</td>
<td>531</td>
</tr>
<tr>
<td>3. Executive Order 11491</td>
<td>532</td>
</tr>
<tr>
<td>4. Grievance and Appeal</td>
<td>533</td>
</tr>
<tr>
<td>5. Judicial Review</td>
<td>534</td>
</tr>
<tr>
<td>D. Investigations</td>
<td>536</td>
</tr>
<tr>
<td>1. General</td>
<td>536</td>
</tr>
<tr>
<td>2. Procedure</td>
<td>537</td>
</tr>
</tbody>
</table>

---

* Opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the Department of the Army or any government agency.

** Special Assistant to Staff Judge Advocate, Hq. Third U.S. Army, Fort McPherson, Georgia; admitted to practice in Georgia, United States District Court for the Northern District of Georgia, and United States Court of Military Appeals; B.B.A., University of Georgia, 1954; LL.B., Atlanta Law School, 1948; LL.M., John Marshall Law School, 1949. Acknowledgment is made of generous support and sage counsel of Colonel Winchester Kelso, Staff Judge Advocate, Hq. Third U.S. Army, Fort McPherson, Georgia, a Senior Judge and member United States Army Court of Military Review, 1968-71.
a. Respondent’s Privileges .................................................. 537
b. Evidence ........................................................................ 538
c. Administrative Review .................................................. 538

3. Particular Investigations .................................................... 539
   a. Reports of Survey ...................................................... 539
   b. Line of Duty .............................................................. 540

4. Article 138 and Other Statutory Procedures ....................... 541
   a. Article 138, UCMJ .................................................. 541
   b. Board for Correction of Military Records ..................... 542
   c. Administrative Procedure Act .................................. 542

E. Miscellaneous Organizations ............................................. 543
1. Nonappropriated Funds ................................................... 543
   a. General ................................................................. 543
   b. Administration ...................................................... 545
   c. Government Instrumentalities .................................. 545
   d. Taxes ..................................................................... 546
   e. Alcoholic Beverages ............................................... 546
   f. Tort Liability .......................................................... 547
   g. Contracts .............................................................. 547
2. Private Associations ....................................................... 548
   a. Statutory ............................................................... 548
   b. Other ..................................................................... 549
   c. Legal Aspects ........................................................ 549

F. Claims ............................................................................ 550
1. Against the United States ................................................ 550
   a. General ................................................................. 550
   b. Federal Tort Claims ................................................ 551
2. By the United States ....................................................... 553
   a. General ................................................................. 553
   b. Recovery of Medical Care Costs ............................... 554

G. Procurement .................................................................... 554
1. General ................................................................. 554
2. Remedies ................................................................. 555

II. Criminal .......................................................................... 557
A. Historical Perspective ................................................... 557
B. Jurisdiction .................................................................... 563
C. Anatomy of Military Justice ........................................... 568
   1. Pretrial Restraint .................................................... 568
   2. Nonjudicial Punishment ......................................... 569
   3. Summary Court-Martial ....................................... 570
   4. Special Court-Martial ........................................... 570
   5. General Court-Martial .......................................... 571
Introduction

Many lawyers have little or no professional contact with the armed forces. To some, occasionally serve a military client in the civil courts and perhaps may even represent clients before military agencies. On the other hand, a sizable number of attorneys spend a portion of their professional life as temporary members of the armed forces and gain considerable experience concerning military operations and problems which require application of authority commonly referred to as "military law," whether in military agencies or civil forums. Then there are also lawyers who serve substantial numbers of years as members of the "regular" or "reserve" (either in an active duty or inactive duty status), or those who are employed by the federal government in a civilian capacity, each of whom by his expertise qualifies in varying degree as a specialist in military law.

This discussion will provide an analysis of military law reflecting certain problem areas confronted by a modern commander in the United States Army who exercises general court-martial jurisdiction, pursuant to the Uniform Code of Military Justice (UCMJ). By applicable regulations, such a commander also is empowered to execute actions pursuant to authority other than that of the UCMJ. Normally such a commander will be a general officer, though not in every case.

The scope of "military law," as contemplated by the title, reflects a concept posed in terms broader than customary definitions. Such definitions usually embrace statutes expressly prescribed for the government of the military forces in the constitutional sense, plus customs and usages included within the body of

---

1 The concept of this paper derived in large measure from the Senior Officers' Legal Orientation [hereinafter cited as SOLO], a deskbook issued by the Judge Advocate General's School, U.S. Army, in 1971. Other basic source materials include Department of the Army Pamphlets No. 27-19, LEGAL GUIDE FOR COMMANDERS, Mar. 1, 1972; No. 27-164, MILITARY RESERVATIONS Oct. 8, 1965 [hereinafter cited as MILITARY RESERVATIONS]; and No. 27-187, MILITARY AFFAIRS, Dec. 28, 1966 [hereinafter cited as MILITARY AFFAIRS].

2 10 U.S.C. § 822 (1970) (art. 22 UCMJ). Though reference herein generally will be in the context of the United States Army or the Department of the Army, many situations will be common to the Departments of the Navy and the Air Force, as well.

3 See, e.g., U.S. CONST., art. I, § 8, which provides that Congress shall have the power to make rules and regulations for the government of the land and naval forces; and U.S. CONST. art. II, § 2, which provides that the President shall be Commander-in-Chief of the Army and Navy. The constitutional authority devolves upon the Secretary of Defense, the Joint Chiefs of Staff, the Secretary of the Army, and appropriate subordinate officials, as neither the Congress nor the President individually can engage in all Army transactions. See, e.g., 10 U.S.C. §§ 133, 141, 3012 (1970). The rationale of transmitted authority is illustrated by a case in which the Superintendent of the U.S. Military Academy executed authority expressly vested by statute in the President. Dunmar v. Ailes, 348 F.2d 51, 55 (D.C. Cir. 1965).
law administered by the military establishment. "Military law" in its broader sense is not neatly compiled and cataloged in legal indices under that title but may be located in any of the general classifications of law. A typical and recent example is found in the report of an action for injunctive and declaratory relief against a governor and members of a state national guard posing a significant issue of judicial review over executive determinations pertaining to military forces, where neither the style of the case nor typical "key number" captions, i.e., "Constitutional Law," "Courts," and "Homicide" (without careful reading of the accompanying headnoted material), would normally attract attention as precedent pertaining to fundamental problems of the military.⁴

For example, analysis of the Uniform Code of Military Justice may include application of principles dealing with habeas corpus rights or other extraordinary remedies which transcend the bounds of specific traditional military law. Moreover, the composition of the modern Army includes as an auxiliary component a substantial force of civilian employees who are not subject to UCMJ jurisdiction but are amenable to many statutes which do not reach military personnel and to some which do. There is also a complex of federal statutes, such as acts dealing with Assimilative Crimes, Posse Comitatus, claims (e.g., the Federal Tort Claims Act), and Freedom of Information, to name but a few which encompass military operations, and even state laws (pertaining, e.g., to wrongful death and injury, fish and game, and taxes), which may have a special impact upon military-civilian personnel or activities of the Army, though they are not necessarily rooted in historical military-legal traditions.

The modern Army commander therefore is well advised to become cognizant not only of traditional military law but of any laws (including applicable case law) which have a potential for affecting the discipline and administration of his personnel—both military and civilian—and other persons not connected with the military establishment who by their acts are brought within the scope of his supervision or who are affected by military operations.⁵ In this regard, the commander will depend largely on his legal staff to alert him to unexpected legal involvements.

The commander's legal staff is headed by the staff judge advocate (SJA) who, as a member of the Judge Advocate General's Corps of the Army,⁶ per-

---

⁴ Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972) (a case arising out of the Kent State disorders of May 1970).

⁵ Though loath deliberately to exclude any area of law having a substantial military connotation, the author omitted consideration of martial rule—a singular nonstatutory, transitory body of "law" of limited application, which depends entirely for its justification upon public necessity of the moment (DEP'T OF THE ARMY, FIELD MANUAL 19-15, CIVIL DISTURBANCES (1972)). Martial rule operates only as authorized by the executive branch when civil governmental agencies, including the courts, are unable to function freely, pending restoration of civil authority. Blackstone's blunt notation that martial law was "built upon no settled principles" and "is entirely arbitrary" (according to Sir Matthew Hale) may serve to place the subject in perspective. 1 W. BLACKSTONE, COMMENTARIES 413 (Cooley ed. 1899). For other distinctions between martial rule and military law, see Ex parte Milligan, 71 U.S. (4 Wall.) 2, 141-42 (1866); G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, ch. XVI 300n.1 (3d ed. 1915); W. WINTERROP, MILITARY LAW AND PRECEDENTS 47, 817 (2d ed. 1920); and Wurfel, MILITARY GOVERNMENT—The Supreme Court Speaks, 40 N.C.L. REV. 717 (1962). For a general bibliography of military law, see 10 AM. CRIM. L. REV. 175 (1971).

⁶ The early history of the Judge Advocate General's Corps is narrated in Fratcher,
forms largely as would a corporate counsel. However, in addition to performing general functions of a legal counsel for the commander covering the gamut of military law problems from investigatory proceedings to procurement and taxation, and especially in executing specific statutory responsibilities under the UCMJ, he also possesses authentic credentials as a member of the commander's staff, fully responsible and subject to him, in a true military sense, just as any other staff member. He may be confronted with problems which do not directly present legal issues but may reflect policy questions or other matters within the discretion of the commander thus permitting his broad participation in significant activities of the command, always to be considered in the light of his primary responsibility to ascertain immediate or potential legal implications. Beyond that, he is subject to the technical supervision of the Judge Advocate General who, at the highest echelons of the Army structure, serves as legal advisor of the Chief of Staff and members of the Army Staff and as military legal advisor to the Secretary of the Army. Subordinate to the staff judge advocate (usually a colonel or lieutenant colonel) are his deputy and junior members of the JAGC, plus civilian attorneys employed by the Department, and assorted administrative military and civilian personnel. Legal personnel are kept apprised of developments in military law by an internal educational program. In the Army, legal training centers around the Judge Advocate General's School on the campus of the University of Virginia at Charlottesville, which operates on a year-round basis, offering basic, advanced, and special resident instruction and which, in addition, maintains an active publications program.

Finally, a brief observation is warranted on the state of judicial review vis-à-vis the military. Legal proceedings challenging military authority historically were not enthusiastically embraced by courts in matters related to discretion lawfully committed to the military. More recently, traditional judicial forbearance...
has seemed to wane at least to the extent of requiring closer examination of the asserted basis for military action. Nevertheless, attacks on the validity of internal military transactions are not likely to invite intimate judicial scrutiny absent evidence either of substantial failure to adhere to prescribed regulatory procedures or significant abuse of discretion in the application of such procedures.

It is hoped that the following discussion will afford a measure of familiarity, especially for those whose professional military contacts are limited, with an area of jurisprudence that is assuming greater proportions than perhaps is supposed by many. Of even greater importance, however, is the possibility that the presentation will encourage, particularly among those already conversant with military law, more legal writing in greater depth than can be accomplished in this paper on the various subjects covered as well as the many facets of military law that could not be reached in this article.

I. Civil

A. Military Reservations

1. Authority, Ownership, and Jurisdiction

"Command" of a military installation (e.g., fort, reservation, camp, base, depot, arsenal, station, or activity) normally is the responsibility of the senior assigned officer. Such command is distinguishable from the unique disciplinary authority of an officer over troops in his charge. For the purposes of this chapter, the term refers more particularly to the commander's responsibility as a general manager of land, buildings and equipment, personnel, and related activities. In this capacity, his function is analogous to that of the governing official of a city or the superintendent of a large commercial plant or facility.

The nature of the post commander's authority is directly related to the extent that the federal government exercises "jurisdiction" over the land area involved. Jurisdiction, in this sense, refers to the congressional authority to legislate within such area, as distinguished from the power of Congress to legislate on subject matter and purpose predicated upon some specific grant in the constitution. Also jurisdiction, as used here, is distinguished from mere federal ownership of land.

The inherent power of a post commander to control entry upon a military post\textsuperscript{13} arises pursuant to earlier mentioned constitutional authority, as well as customs and usages essential to the mission and purposes of the military establish-

\textsuperscript{11} The trend can be traced to cases such as Burns v. Wilson, 346 U.S. 137 (1953) and Harmon v. Brucker, 355 U.S. 579 (1958).

\textsuperscript{12} Subjective factors recently suggested include: (1) nature and strength of challenge to military determination, (2) potential injury to plaintiff, (3) type and degree of anticipated interference with the military function, and (4) extent to which the exercise of military expertise or discretion is involved. Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971). For a recent instance where such discretion was not abused, see Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), cert. denied, sub nom. Cortright v. Froehlke, 405 U.S. 965 (1972).

\textsuperscript{13} See, e.g., 3 Op. ATT'Y GEN. 268 (1837); 9 Op. ATT'Y GEN. 106 (1857); Op. ATT'Y GEN. 476 (1860).
Though normally implemented by departmental policy and local rules, that power has in a number of instances been fortified by statute.\textsuperscript{14}

As inevitably will be true with other topics to be considered in the balance of this article, principles of constitutional and administrative law, together with many fields of substantive law (e.g., as to this chapter, real property law) are applicable to the law pertaining particularly to military reservations.

Acquisition of real property for military use is subject to the discretion of the Congress,\textsuperscript{15} and therefore must be authorized by statute.\textsuperscript{16} Similarly statutory authorization is required for military construction on acquired property, though not necessarily in specific terms for each project.

When the United States acquires title to land, the Government obtains the normal rights which appertain thereto as in the case of a private landowner. However, title runs to the United States rather than to the agency using it, though control rests with a particular department or agency. Large military sites usually are the result of acquisition of separate parcels or tracts from different owners, by different methods, at different times. As a consequence, applicable substantive legal principles can vary from tract to tract, though appearance may belie the heterogeneous nature of a given military site.

As indicated previously, "jurisdiction," as used here, refers to the power of the Congress to enact general legislation applying within the land area involved.\textsuperscript{17} Such jurisdiction may be exercised even over land the Government does not own, as in the case of privately owned land included in an area as to which a state cedes jurisdiction to the United States. Conversely, the federal government owns much land over which the United States exercises no jurisdiction. In such circumstances, the federal government is said to have only a proprietorial interest.

The three most commonly used jurisdictional terms as applied to the United States Government are summarized as follows:

a. \textit{Exclusive legislative jurisdiction}—The United States retains all authority to legislate, though a state may have retained the right to serve process concerning off-post activities and in addition may exercise authority pursuant to federal statutes permitting it to do so.\textsuperscript{18}

b. \textit{Concurrent legislative jurisdiction}—The state retains the right, concurrently with the United States, to exercise all authority to legislate.

c. \textit{Partial legislative jurisdiction}—The United States has been granted power to exercise only a portion of the state's authority.

\textsuperscript{14} Specific statutes will be cited in context, \textit{supra}, with the subjects to which they pertain.

\textsuperscript{15} Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886).


\textsuperscript{17} U.S. Const., art. I, § 8, cl. 17.

\textsuperscript{18} Federal legislative jurisdiction arises from the constitutional provision ascribing congressional power to legislate over the areas acquired from the States for the "Seat of the Government" and "Forts . . . and other needful Buildings." The absence of federal legislative jurisdiction does not mean that federal agencies are powerless to carry out in the area the functions assigned to them under the constitution and statutes, since authority exists independent of the power to legislate over federal areas. \textit{See} \textit{Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States} pt. II at 10-11 (1957).
Federal legislative jurisdiction arises from the constitutional provision which pertains to the “Seat of the Government” and other places acquired from the states for specified government purposes.¹⁹

Specific statutes provide directly for the punishment of major crimes committed in areas under federal exclusive jurisdiction²⁰ and indirectly by the Assimilative Crimes Act which makes the criminal law of a surrounding state applicable to federal areas therein as federal criminal law.²¹

In an early case, the Supreme Court held that the power of exclusive legislation in a specific area includes incidental powers necessary to the complete and effectual execution of the power of exclusive legislation and therefore the United States may punish a person, not a resident of the federal area, for concealment of his knowledge concerning a crime committed within the federal area.²²

An important judicial precedent in 1885 expanded the doctrine of federal legislative jurisdiction to include acquisition of federal jurisdiction by cession from the state and by reservation when a state is admitted to the Union, in addition to the constitutional method involving purchase with the consent of the state.²³ That case also recognized the right of the ceding state to reserve certain powers not inconsistent with free and effective use of the property for federal purposes. The right to attach such reservation also is applicable to consent statutes.²⁴ The cession doctrine also has been interpreted to permit consensual acquisition of federal legislative control over federal land originally acquired for purposes other than those enumerated under the provision for legislative jurisdiction in federal areas.²⁵

Formal acceptance of jurisdiction by the United States has been required by force of statute since 1 February 1940.²⁶ Inconsistencies between state consent and cession statutes may cause problems in determining the status of specific land parcels. In one illustrative case, the Supreme Court determined that the United States could elect whether to proceed under a state consent or cession statute²⁷ and, in another, jurisdiction was acquired on the theory that a subsequent state consent statute impliedly repealed an earlier cession law which included certain conditions which were not fulfilled in the particular transaction.²⁸

The concept of federal legislative jurisdiction over a federal enclave does not preclude readjustment of political boundaries affecting the federal area within the state, as in the case of annexation by a political subdivision of lands formally acquired by the federal government for military purposes.²⁹

¹⁹ U.S. Const., art. I, § 8, cl. 17.
²⁰ Various derivations of the Federal Crimes Act of 1790 now are codified in Title 18. Though mention of criminal statutes in a section devoted to civil law may seem misplaced, the succeeding criminal law portion (Part II) will deal essentially with military criminal law.
²² Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 191-92 (1821), and Military Reservations, supra note 1, at 23.
²³ Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885).
As indicated, when property is under exclusive, concurrent, or partial federal legislative jurisdiction, federal law will apply to the extent precluded by a state reservation of authority provided that the state law does not interfere unreasonably with a federal activity. Federal statutes have been enacted to adopt state principles as federal law or to apply state law as such in areas as to which federal legislative jurisdiction exists. Among such statutes are those pertaining to state laws concerning wrongful death and injury, fish and game, workmen's and unemployment compensation, quarantine and health, gasoline taxes, general sales and use taxes, income taxes, and taxation of leasehold interests in federal property.

Many areas of law are not covered by specific statutes such as those mentioned. Such uncovered fields include contracts, sales, agency, probate and administration actions, guardianship, and domestic relations. Under such circumstances, complex problems may arise in attempts to ascertain what law is applicable.

Customarily when legislative power over an area is transferred to another sovereign, the laws of the previous sovereign in effect at the time of transfer continue in force until changed by the new government. However, in some cases it becomes extremely difficult to apply this principle, especially when the law of the other sovereign changes substantially over the years.

A somewhat analogous problem exists in the application of the Assimilative Crimes Act. An example of this kind of problem is found when the Act is used in connection with traffic offenses in a federal area, when the state law to be assimilated applies to "public highways" or similar state facilities.

Rights and benefits of state residents sometimes are difficult to translate in terms of residents of federal enclaves, though a succession of federal statutes and

---

30 Military Reservations, supra note 1, at 56. The latter proviso is based on the federal immunity or supremacy doctrine enunciated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819). The doctrine serves to protect federal land as well as federal activities (on and off federal land) from state control. See Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885). "Activities" extend to acts done within the scope of federal employment, thus precluding criminal sanctions for such acts. In re Neagle, 135 U.S. 1 (1890). In addition, federal statutes authorize removal to federal courts of state criminal prosecutions against federal personnel for acts within the performance of their duties, 28 U.S.C. §§ 1442, 1442a (1970).


39 Military Reservations, supra note 1, at 59. See use of habeas corpus by a federal court to return to a father two children removed by the mother (in violation of a North Carolina divorce decree) to Fort Knox, a federal military reservation as to which Kentucky had ceded jurisdiction to the United States, in Young v. Minton, 344 F. Supp. 423 (W.D.Ky. 1972).

41 This circumstance is considered in Military Reservations, supra note 1, at 59-62.
at least one recent Supreme Court decision on voting rights appear to be reversing an early view precluding extension of state laws into lands under exclusive federal legislative jurisdiction. In addition to suffrage matters, problems in this area extend to qualifications for holding office, relief benefits, education, and other matters involving questions of domicile.

Particular procedural problems may be encountered in determining the availability of a judicial forum for a cause of action arising in an area under exclusive federal jurisdiction. *Transitory* actions (e.g., contract matters) may be brought in any state court having jurisdiction over the adverse party, as well as in a federal court (since federal law will apply) if federal monetary jurisdictional requirements are met. On the other hand, *local* actions must be enforced in a court having physical jurisdiction over the person, *res*; or, in some instances, the place where the cause arose (e.g., *in rem* proceedings). Federal courts do not have jurisdiction in many types of local *in rem* actions. A state court accepting jurisdiction of an action arising in a federal enclave is limited in authority only insofar as its action would materially interfere with a federal function.

2. The Post Commander

a. General Management

The officer in charge of a military installation is more than a commander of troops committed to his charge and director of other personnel under his supervision. By virtue of his assignment he assumes general managerial responsibility for all government activity at the site. Except as to a few particular matters, his actions generally must find legal basis in departmental policy directives or customs and usages of the service, as implemented or modified by intermediate commanders and as construed by officials having responsibility therefor.

b. Denial of Entry

In this important aspect of post administration federal statutes fortify the long-recognized authority of a post commander to control the entry of persons upon, and exit from, an installation and the search of persons and their possessions. The thrust of the general and statutory authority provided the frame-

45 See MILITARY RESERVATIONS, supra note 1, at 48-53.
47 Authority in certain situations may be related to statutory provisions contained in the UCMJ, as when a commander exercising court-martial jurisdiction thereunder may, by reason of other directives, be authorized to discharge military personnel or perform other administrative acts.
48 The regulatory requirements are prescribed in applicable departmental regulations.
49 18 U.S.C. § 1382 (1970) makes punishable (1) entry upon a military site "for any purpose prohibited by law or lawful regulation" or (2) reentry after having been removed
work for the development and recent reaffirmation of a significant segment of military law affecting military reservations. In 1961 the Supreme Court affirmed summary exclusion from a military installation of a civilian employee for reasons of security. During the latter part of the ensuing decade, numerous attempts were made to challenge the post commander's authority by persons desiring to come upon military bases to articulate and demonstrate antiwar sentiments under the color of the constitutionally guaranteed freedoms of speech and assembly. Though some judicial determinations partially penetrated the limits of traditional military authority in the premises, the resulting litigation generally reemphasized judicial acknowledgment of the post commander's authority to take appropriate reasonable measures against intrusions inconsistent with the nature and purposes of a military installation.

As previously indicated, the post commander has broad responsibilities in control of the installation. He has a corollary power that has provoked some criticism but which has been upheld judicially relative to the search of individuals who enter his domain. The power to search an individual under military authority may be exercised only upon probable cause or because of military necessity. Beyond that a person who declines to permit search of his person or vehicle may be denied the right of entry to the premises. A search valid under military law is valid for purposes of prosecution in the civil courts. The courts have recognized the general proposition that military personnel as well as others who enter a military reservation surrender some of their individual rights so that military discipline and security may remain inviolate.

In particular, military precedents empower the commanding officer to authorize a search of either military or civilian quarters on post.

c. Motor Vehicles

The regulation of privately owned motor vehicle operations on post is an

51 See, e.g., Dash v. Commanding General, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971); Schneider v. Laird, 455 F.2d 345 (10th Cir.), cert. denied, 407 U.S. 914 (1972); Yahr v. Resor, 339 F. Supp. 964 (E.D.N.C. 1972). Late in the 1971-72 session, the Supreme Court summarily reversed, per curiam, a conviction under 18 U.S.C. § 1322 of prohibited reentry on a thoroughfare running through Fort Sam Houston, Texas, for the purpose of peaceful distribution of leaflets promoting an off-post antiwar rally. Flower v. United States, 407 U.S. 197 (1972). It appears that Flower probably will be limited to the factual circumstances of the case. Ten days later, the Court upheld the right of a privately owned shopping center to bar distribution of handbills unrelated to the center's operations. Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551 (1972). The subject is treated more fully in Gerwig, Military Reservations: Forts or Parks? 12 WM. & MARY L. REV. 51 (1970) and Gerwig, The Post Commander Goes to Court, 31 FED. B.J. 33 (1972). Cf., the rule for a public office building, e.g., the Pentagon, where building administrators were not permitted to discriminate in granting public use of the building's concourse between groups or persons favoring and opposing government policies. United States v. Growthers, No. 71-1313 (4th Cir. Mar. 20, 1972).
52 United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); United States v. Crowley, 9 F.2d 927 (N.D. Ga. 1922).
54 MILITARY RESERVATIONS, supra note 1, at 77.
area in which the post commander also exercises broad authority, extending from traffic rules to registration requirements for vehicles of personnel quartered or employed at or regularly visiting the site. Regulations may, in fact, condition registration upon liability insurance and safety requirements. Overall, reasonableness is the test that must characterize regulatory control of the motor vehicle traffic system.

d. Public Quarters

The post commander’s broad authority runs also to the management of government quarters, including assignment, termination, and lease under certain conditions. The measure here is the best interests of the service, which usually translates into conservation of public funds through maximum use of public housing. Quarters may be terminated under applicable regulations for misconduct of the military sponsor or dependents involving misuse or illegal use of quarters, or other misconduct, contrary to safety, health, and morals. The post commander’s broad control was evidenced recently when a federal district judge dismissed an action by a sergeant to prevent eviction of himself and his family from government housing after he had been directed to vacate the quarters because of misconduct on the part of a dependent minor stepson.55

e. Law Enforcement

In maintaining law and order, an installation commander’s authority to enforce military law against military personnel is unquestioned, vested as it is under the UCMJ. Conversely, the enforcement of nonmilitary criminal law poses problems at the very outset of state or federal jurisdiction. When exclusive federal jurisdiction exists, it is likely that only serious crimes will be prosecuted because of the need for active support by federal law enforcement officials, except insofar as minor offenses may be referred to a federal magistrate for disposition.56

The commander’s main police arm to enforce law and order is his military organization. However, the Posse Comitatus Act57 prohibits, except in cases expressly authorized by the Constitution or federal statutes, use of the Army in enforcement of either state or federal law. Although litigation under the Act is rare, at least one recent application, in bar of a claim against the government, attests to the statute’s viability.58 Normally, a person not subject to military law may be apprehended on post only for a felony or a misdemeanor amounting to a breach of the peace (under the theory of “citizen arrest,” subject to appli-
cable civil law). However, a commander may use such force as is necessary to protect a military reservation from occupation or injury by trespassers.69

f. Release of Information

Because he is the custodian of Army records, the post commander is one of several classes of officials empowered to furnish access to, or copies of, military records under his supervision, in accordance with applicable regulations pursuant to the Freedom of Information Act.60 The Act provides for compulsory disclosure of federal agency records (including those of the military departments) not included in classes of records specifically exempted from release. Major pertinent exemptions pertain to defense or foreign affairs where secrecy is required by executive order, internal agency personnel matters, materials exempted from disclosure by statute, internal memorandums unavailable to a party in litigation with the agency,61 personnel files whose disclosure might cause unwarranted invasion of privacy, and certain investigatory files. Consistent with the congressional purpose, Army policy provides that maximum information shall be made available upon request, subject to the statutory exemptions (though the exemptions are not to be employed "if no legitimate purpose exists" for withholding the requested information).62 The military administrative procedures contain provisions for appealing to departmental levels actions in which subordinate commanders have denied access.

The courts have not been unmindful of the interests of national defense.63 On the other hand, clear implications of the recent New York Times and Washington Post newspaper cases involving publication of the “Pentagon Papers” indicate that the Government bears a heavy burden in establishing an immediate grave danger to the national interest, at least for the purposes of restraining private publication of news based on classified information.64 Recently, however, an ex parte inspection by the judge was found to be unnecessary in order for a district court to grant the government’s motion for summary judgment upholding the classification of a portion of the Pentagon Papers.65

59 9 Op. Att’y Gen. 106 (1857); Peck, The Use of Force to Protect Government Property, 26 Military L. Rev. 81 (1964). Other early opinions indicated the view that if a federal official authorized to commit persons to federal custody were not accessible to the post commander, the latter could detain an offender but not for purposes of punishment and in any event only for such interval as might be necessary to effect disposition to federal civil authorities, e.g., Dio Ops JAG 146 (1901).


61 Purely factual material is generally discoverable under Federal Rules of Civil Procedure 26(b) and would not be protected from disclosure, as distinguished from advice, recommendations, opinions, and other subjective material. See, e.g., Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972).


64 New York Times Co. v. United States, 403 U.S. 713 (1971). The Act was not mentioned in the several opinions; in fact, the Chief Justice intimated the absence of any relevant statute.

Typical instances of matter released by the Army on an ad hoc basis (though potentially privileged under the Act’s exemption of certain investigatory files), include portions of a military aircraft accident file not containing testimony of manufacturers and their technicians (assuming security considerations do not preclude such disclosure), a criminal investigation file (except close-up photographs of a murder victim), military police traffic accident investigation forms (with a caveat for opinions or conclusions contained therein), summary of evidence from an inspector general’s report, report of investigation under article 32 of the UCMJ, and investigatory files for use in civil domestic relations proceedings.66

On the other hand, release of blood samples taken by service members from other service members for use of civilian law enforcement officials would violate the Posse Comitatus Act.67 However, records of blood and urine samples taken at an Army hospital for diagnosis and treatment were exempt from mandatory release provisions of the Freedom of Information Act, though release when required by state law or pursuant to court order was legally unobjectionable.68

g. “Off Limits” and Miscellaneous Matters

An important power of the post commander is his authority, subject to specific regulations, to declare “off-limits” to his personnel such off-post establishments as are regarded dangerous to the health, morals, and welfare of his troops. This power represents an extension of the commander’s authority beyond the premises of the reservation. Nevertheless, where “off-limits” policy signifies a standard of reasonableness, it has been staunchly upheld in the civil courts against the challenge of abuse of discretion.69 Other instances of the off-post impact of military authority usually implemented through post commanders are found in statutes authorizing measures to suppress prostitution70 and to regulate sale and use of intoxicating liquors.71

Other aspects of an installation commander’s power which entail legal implications include such matters as disposal and granting use of military real property72 and the investigation of on-post deaths and disposition of effects of deceased persons found in a federal enclave.73 Beyond these there are still other powers exercised by a post commander that relate primarily to administrative

72 MILITARY RESERVATIONS, supra note 1, at 100. Generally, the commander’s authority is limited to licenses of a minor character, such as permission to enter for bus and taxi service, for commercial deliveries, permission for government contractors for purposes consistent with contractual provisions and assignment of space for banking facilities and other private enterprises.
matters without significant regard for legislative jurisdiction or other factors germane to the land area involved, though their impact may have important legal connotations.

Aspects of installation management patently cover myriad circumstances which are not susceptible to convenient classification in a discussion of limited proportions. However, the propensity for spawning administrative regulations that inhere in governmental agencies provides, for the military departments, a voluminous library of remarkably assorted policy directives, regulations and other memoranda for those interested in isolating applicable policy on a given function germane to the operation of a military reservation.  

B. Administrative Discharge for Military Personnel

Personnel administration encompasses an important portion of military law and is probably the progenitor of more litigation against the United States than any other segment of the military environment. This should not be surprising, for the myriad aspects of personnel administration (which covers such matters as pay, promotion, reduction, leave, assignment or transfer, and retirement, to name but a few) produce an unmistakable personal impact. When that impact is adverse, reaction is apt to be sharp—and may well trigger legal action challenging validity of unfavorable orders. It is in the light of potential litigation that the subject of administrative discharges (distinguished from punitive discharges pursuant to court-martial proceedings under the UCMJ) will be isolated from the pervasive area of personnel administration, to illustrate a major subdivision of military law.

1. Enlisted personnel

It is required by statute that each lawfully inducted or enlisted member be given a discharge certificate upon his "discharge." If this occurs before a normal term of service expires, the discharge must be as prescribed by the Secretary of the Army, by sentence of a general or special court-martial, or as otherwise provided by law. Detailed procedures are published in departmental regulations.


And, for consideration of early cases pertaining to pollution and other impact on navigable waters, see DEP'T OF THE ARMY, PAMPHLET 27-164 paras. 111-12 (1961).
conduct of a lesser nature may provide a basis under secretarial authority for administrative discharge characterized, according to the circumstances, as (1) honorable, (2) general—under honorable conditions, and (3) undesirable—under conditions other than honorable. Discharges under conditions other than honorable may be directed only by commanders exercising general court-martial jurisdiction, while other forms of discharge customarily are issued by commanders exercising special court-martial authority. Undesirable discharges may result in the loss of otherwise potential veterans' benefits under federal or state law and may have an unfavorable impact on potential civil employment. Judicial reaction has been less than unanimous in assessing the derogatory implications of general and undesirable discharges, varying from clearly "stigmatizing" to no connotation of dishonor in a general discharge (which expressly recites that it is under honorable conditions).

Misconduct for these purposes may be evidenced by frequent minor offenses (including acts violative of civil authority), sexual perversion, drug abuse, shirking of duty, failure to pay valid debts or to support dependents, and inservice homosexual acts. In addition, regulations authorize discharge for misconduct based on evidence of conviction (or adjudication as a juvenile offender) by a civil court for specified offenses. Further, a discharge may be granted for fraudulent enlistment, or in lieu of trial by court-martial for an offense warranting a punitive (bad conduct or dishonorable) discharge pursuant to the UCMJ.

Discharge also is authorized (but only under the classification of honorable or general) for unsuitability (usually cases of inaptitude), hardship and dependency conditions at home when other temporary measures are not appropriate, convenience of the Government, conscientious objection, and minority.

Ordinarily an enlisted respondent is entitled to resist involuntary discharge action by electing to appear before a board of officers. This option does not apply to proceedings in lieu of trial, nor does he have the right personally to appear before a board if in civil confinement. Correlative rights include entitlement to advice by a military lawyer, representation by military counsel, employment by him of civilian counsel, as well as customary rights of respondents

---


80 Recent special policies barred discharges under less than honorable conditions for persons volunteering for treatment of drug problems.

81 Such discharge is not a denial of due process, Davis v. Secretary of the Army, 440 F.2d 817 (5th Cir. 1971).

82 This provision contemplates preliminary advice pertaining to his overall rights.

83 Legal counsel is furnished only if reasonably available; if not a lawyer, counsel must be an experienced officer of mature judgment, fully aware of his responsibilities, cf. Gastall v. Resor, 334 F. Supp. 271 (D. Mass. 1971).
before military boards to challenge board members for cause, to call witnesses, to submit evidence, and to remain silent or to testify as desired. However, the failure of an administrative discharge board to observe strict rules of evidence does not necessarily deny due process. 84

2. Minors

Provision is made for discharge because of minority in the light of statutory provisions which bar enlistment of males less than 17 years of age (females, 18) or less than 18 (females, 21) without written consent of parents or guardian, if any, 85 and involuntary induction below the age of 181/2. 86 A minor who is discovered enlisted or voluntarily inducted under the specified age limits and who has not attained the statutory age is not discharged (because such enlistment is void) but is released from military control by reason of minority. A person who enlisted or was voluntarily inducted without parental or guardian consent when such consent was required will be discharged upon timely application of the parent or guardian and presentation of satisfactory evidence of the date of his birth. A nonconsenting parent may request discharge (when there is no evidence of legal separation or divorce from the consenting spouse). 87 And, a minor who enlisted at 17 without consent must be discharged if his parents request his release before his 18th birthday even though he attains age 18 before discharge is accomplished. 88 Where the request by parents for release of a member who enlisted between 17 and 18 without consent is not made until after commission of a serious court-martial offense, the offending member may be retained in service for disposition under the UCMJ. 89

3. Officers

Numerous statutes govern the discharge of officers required to show cause for retention because of either lack of proficiency or moral or professional dereliction (including acts or behavior inconsistent with interests of national security). 90 Grounds relating to substandard performance may not, before a single board, be joined with allegations relating to moral or professional dereliction. 91 Under implementing regulations, the officer exercising general court-martial jurisdiction has primary responsibility for the initial file which is forwarded to a depart-

84 Cf. Pickell v. Reed, 446 F.2d 898 (9th Cir. 1971). For a recent consideration of proposed legislative reform, see Lane, Evidence and the Administrative Discharge Board, 55 MILITARY L. REV. 95 (1972).
86 50 U.S.C. App. § 454(a) (1970); Army Reg. 635-200, ch. 7.
91 Op JAGA 1968/3589, 68-12 Judge Advocate Legal Service 17.
mental selection board. If the officer is required to show cause for retention, the case is referred to the major commander concerned for processing, who will convene a board of inquiry when such proceedings are not waived. If the board recommends elimination, the convening authority returns the file to the Department along with his recommendation regarding review by another board and final action by the Secretary. Military lawyers are assigned (as nonvoting members) to such boards in the capacities of (1) legal advisor to the board, (2) recorder of the board, and (3) respondent's counsel. Respondent also may retain civilian counsel at his own expense, have access to all evidence referred to the board (except as may be inconsistent with security matters), and avail himself of the usual entitlements of respondents before military boards.

4. Conscientious objectors

Excused by statutory provision from service in the armed forces are those persons who are conscientiously opposed to participation in war in any form "by reason of religious training and belief." Under a Supreme Court interpretation, the statutory requirement now seems to be capable of fulfillment by asserted conscientious objection predicated on moral, ethical, or religious beliefs which embrace war in any form. A cognizable "religious belief" under the statute can be "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." The burden of proof initially is on the registrant to establish a prima facie case of entitlement to the exemption. However, the burden then shifts, under the familiar Estep basis-in-fact test established in 1946 by which the Government must cite some affirmative factual basis to justify its position. Although the rule may be simply stated, it nevertheless poses the inevitable problem of what really constitutes adequate basis in fact, e.g., does application of the rule rest on particular findings by administrative officials, or on the record as a whole?

Under this statutory-judicial background, it has been determined that while sincere beliefs founded on basic tenets of a "religion" are judicially acceptable, objection to a particular war (though religious and sincere), as against war in general, will not meet the prescribed statutory test. As for a registrant whose antivar beliefs crystallize after receiving his induction notice he may be assigned

---

96 Examples of "no-basis" include Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970) and Hammond v. Lenfast, 398 F.2d 705 (2d Cir. 1968), while an adequate basis for the government position was shown in Speer v. Hedrick, 419 F.2d 804 (9th Cir. 1969), and Silverthorne v. Laird, 341 F. Supp. 443 (W.D. Tex.), aff'd, 460 F.2d 1175 (5th Cir. 1972). "Depth of conviction" or "depth and maturity of views" tests applied by the military were regarded as implicit findings of insincerity and were recently rejected in favor of the tests stated in text. Kemp v. Bradley, 457 F.2d 627 (8th Cir. 1972).
98 As, e.g., in Clay v. United States, 403 U.S. 698 (1971).
duties which conflict not more than minimally with his asserted beliefs while awaiting a hearing under Army procedures and during the pendency of decision. In a somewhat different setting, the pendency of court-martial proceedings against a soldier whose application for discharge had previously been denied did not bar his application for habeas corpus challenging the validity of the military determination concerning his claim of conscientious objection.

With regard to administrative procedure, a military review board’s failure to follow what the court construed as procedure required by departmental regulations was held to constitute denial of military due process. In another case, a hearing officer prescribed by departmental conscientious objector procedures who was not “knowledgeable in policy and procedures” relative to the subject matter lacked required objectivity and therefore the court sent the case back to the Army for corrective action.

On the other hand, a military tribunal determined that an accused before a court-martial could not interpose as a defense in his trial evidence that his request for discharge as a conscientious objector was erroneously denied, though the court did not decide whether it could afford relief upon direct application.

5. Limitations

Under applicable regulations and subject to certain exceptions relating to new evidence or subsequent misconduct, and without departmental approval, no person may be considered for elimination because of conduct which was previously considered in a prior administrative or judicial proceeding and disposed of in a manner indicating that discharge is not warranted. Regulations also provide that no convening authority will direct discharge if a board recommends retention, nor will he authorize the issuance of a discharge less favorable than that recommended by the board, though he may direct retention when discharge is recommended or he may issue a discharge more favorable than that recommended. In addition, regulations authorize the convening authority, if he detects substantial defects in the proceedings of a board, to take the following actions:

(1) Direct retention.

(2) Return the case to the same board (a) if it has failed to make findings or recommendations required by the applicable regulations, or (b) if apparent procedural errors or omissions in the record may be corrected without reconsideration of the findings and recommendations of the board.

(3) Set aside the findings and recommendations and refer the case to a new board for rehearing, if the board committed an error which

101 Parisi v. Davidson, 405 U.S. 34 (1972). He was charged under the UCMJ with failure to obey orders requiring his transfer to Vietnam, id. at 36.
102 Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971).
103 Donham v. Resor, 436 F.2d 751 (2d Cir. 1971).
materially prejudiced a substantial right of the respondent. In such case, no member of the new board shall have served on the prior board, nor may the convening authority approve any portion of the findings and recommendations of the new board less favorable to the member than the action of the first board.

6. Review Board

Although no provision is made for direct appeal from determinations made in accordance with the applicable regulations in discharge cases, the Army Discharge Review Board (ADRB) is a statutory body¹⁰⁵ empowered to review administrative discharges or dismissals. The ADRB established in 1944 was intended to insure that former members of the armed forces would not be deprived unjustly of any veterans’ benefit because of a discharge improperly or inequitably given.

The Board may review, on its own motion or upon application either by the former members of by his representative within fifteen years, the discharge or dismissal of a former members of all discharge actions other than that of a general court-martial. The Board may change the type and nature of a discharge or dismissal, but it has no power to change the date on a discharge, to revoke a discharge, or to reinstate any person in the military service. The Board’s actions are based on equitable standards under implementing regulations, in the absence of congressional direction in this regard. Action of the board is subject, under the statute, to review by the Secretary of the Army. It is also subject to judicial review.¹⁰⁹

7. Judicial Observations

A brief, random selection of additional miscellaneous judicial observations is offered, conceding that they merely illustrate a sampling of some types of questions which have been raised in litigation involving administrative discharge procedures and that they do not purport to reflect resolution of the indicated as well as many other issues that have been raised in literally countless cases.

Erroneous discharge. Notwithstanding the general rule that a discharge issued by competent authority, though administratively erroneous, normally is valid and irrevocable, the reactivation of a reservist discharged through error did not deny due process and equal protection.¹⁰⁷

¹⁰⁵ 10 U.S.C. § 1553 (1970). Also see subsequent consideration of the broad power of the Army Board for Correction of Military Records, including discharges, ante in text preceding note 184. The Navy and Air Force have similar boards.
Judicial review. To gain a judicial stay of discharge proceedings, a petitioner normally must establish (1) irreparable injury to himself unless stay is granted; (2) absence of substantial harm to other interested parties; (3) absence of harm to the public interest; and (4) a likelihood that he will prevail on the merits of his appeal.\(^{108}\)

Recommendations. The recommendation of a psychiatrist that a soldier be discharged as unsuitable was merely advisory since discharge was discretionary under the applicable regulations.\(^{109}\)

Regulations. With the issue in court, an effort by the Army to comply with a previously disregarded provision of regulation pertaining to application for hardship discharge was ineffective on motion to dismiss, and the case on appeal was remanded to the trial court for de novo consideration.\(^{110}\)

Repellent requests. A department should not be put to a fully detailed process, as a new request, of every letter a petitioner for discharge files urging error in decision on prior request for discharge.\(^{111}\)

Waiver. Where a discharged serviceman had been faced with a legitimate choice between facing court-martial for fraudulent enlistment or accepting undesirable discharge, the existence of choice negatived any argument that he was coerced into signing the discharge request and waiver of hearing and counsel.\(^{112}\)

Witnesses. The presence of witnesses is not required solely for confrontation purposes where the petitioner seeking temporary injunction and declaratory judgment was aware of the evidence that would be presented at discharge hearing and did not request such witnesses to appear, nor seek additional statements from them.\(^{113}\) On motion of defendant Secretary for dismissal or for summary judgment, it was held that the failure of the Air Force to produce the plaintiff’s commander before a board did not deprive him of a fair and impartial hearing, though the statement of the commander was admitted and considered, where the plaintiff was fully notified of all charges and statements against him, failed to make any effort in his own behalf to obtain either the commander’s presence or his statement, and failed to request that Air Force make such effort until some five months after he was fully notified of the charges against him.\(^{114}\)


\(^{109}\) Silverthorne v. Laird, 341 F. Supp. 443, 446 (W.D. Tex.), aff’d, 460 F.2d 1175 (5th Cir. 1972).

\(^{110}\) Cuadra v. Resor, 437 F.2d 1211 (9th Cir. 1970).

\(^{111}\) Minaasian v. Engle, 400 F.2d 137 (9th Cir. 1968).

\(^{112}\) Haines v. United States, 453 F.2d 233, 237 (3d Cir. 1971).


\(^{114}\) Denton v. Seamans, 315 F. Supp. 279 (N.D. Cal. 1970). A number of legislative reforms have been submitted to provide new or amended administrative discharge procedures. The Department of Defense has expressed views generally favoring H.R. 10422, 92d Cong., 1st Sess., introduced 6 October 1971, by Rep. Bennett (Fla.), Committee on Armed Services. His bill would, inter alia, prohibit discharge under other than honorable conditions if the member concerned were not permitted (under pertinent secretarial rules) to confront adverse witnesses, did not have legal counsel, and if a legal advisor did not sit as a nonvoting member of the board hearing his case. The bill provides for appeal to a board of review established by the Judge Advocate General concerned.
C. Civilian Personnel

Despite its essential military function, the Department of the Army employs a large number of civilians (second only to the Postal Service among the federal agencies), and, of course, the other military departments also employ civilians on a large scale. The civilian personnel management system is distinct from that pertaining to military personnel. Unlike the centralized control of military personnel, authority and responsibility in large measure have been delegated to installation commanders for civilian personnel management.

There are other basic differences between military and civilian personnel systems. All military personnel have a specific title and pay, each taking his title and rate with him as he moves from one assignment to another. On the civilian side, the title and grade are identified with the job and not the individual, who must qualify for any job which he fills. Mobility is a prime requisite for management of military personnel (a factor of extreme importance in litigation challenging the validity of military assignments), whereas the civilian works in the location of his choice and any subsequent move normally is at his volition. This relative continuity contributes to desired flexibility for the military. Essentially, civilians are employed to perform functions which do not require military personnel for reasons of law, training, security, discipline, rotation, or combat readiness, or which do not entail unusual working conditions normally incompatible with civilian employment. Civilian employment historically has permitted release of military personnel for duties which can best be performed by personnel having the requisite military background. Military supervisors must work closely with staff civilian personnel officers to insure thorough understanding of regulations which govern civilian personnel and conversely to preclude improper application of rules intended solely for military personnel.115

1. Classification

The "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services (i.e., armed forces, commissioned corps of the Public Health Service, and the Environmental Science Services Administration).116 Civilian employees of the Department of the Army are covered by regulations of the Civil Service Commission, as well as by Army Civilian Personnel Regulations. The Commission is the presidential arm for the administration of the "competitive service" (also referred to as classified civil service or classified service), a term which embraces all civil service positions or classified service not excepted by statute or positions to which appointments are made by nomination for confirmation by the Senate unless included by statute.117 Civilian personnel fall under several headings:

**Classified employees.** In this group are those whose pay is determined by

---

115 SOLO, supra note 1, Civil Law, pt. B, at 40.
reference to the General Schedule (e.g., a “GS-7” is an employee paid at the grade 7 level), established by Congress for classified positions. Each grade in turn is broken down into ten “steps” of increased pay, available to an incumbent after completion of prescribed conditions of employment at an “acceptable level of competence.” In addition, employees are eligible for accelerated advancement upon demonstration of “high quality” performance.

**Excepted employees.** These are persons who are excepted from competitive examination, though like others in the civil service they also must meet prescribed qualifications for employment. In most respects, they are treated as employees classified under the General Schedule.

**Wage board employees.** These are employees paid according to prevailing wages in their particular skill in the local geographic area where they are employed.

**Nonappropriated fund employees.** These are employees of a particular nonappropriated fund (e.g., Officers Open Mess, Exchange, etc.) established under departmental procedures. They are not regarded as employees of the United States but, especially in more recent times, have become entitled by regulations to working conditions comparable to their associates who are paid out of funds appropriated by Congress for their hire.

As in the case of military personnel administration, civilian management is a subject of many interrelated topics, most of which are handled by personnel experts. To illustrate only a few of the obvious issues involved in personnel practices which have erupted into visible litigation, references will be made later to selected judicial precedents arising out of adverse personnel actions.

2. Labor-management relations

Experience of the armed forces with collective bargaining began in the early 1800’s at shipyards and arsenals. It was not until the end of the 19th century, however, that the War Department issued an order for certain commanders to deal with grievance committees and to refer unresolved matters to the Department. By the Lloyd-LaFollette Act of 1912 the right of federal (postal) employees to organize was first recognized. President John F. Kennedy’s Executive Order 10988 issued in 1962 for the first time formally established government-wide policy favoring employee-management cooperation in the federal service. Under that policy, employees became entitled to form, join, and assist

---

124 Postal personnel are now employed by the United States Postal Service, an independent establishment of the executive branch, 39 U.S.C. § 201 (1970), and their union activities generally are equated to that of the private sector.
125 Exec. Order No. 10988, 3 C.F.R. 521 (Comp. 1959-63) was issued pursuant to presidential authority to prescribe regulations for admission into the civil service and for the conduct of employees in the executive branch, 5 U.S.C. §§ 3301, 7301 (1970).
any employee organization or to refrain therefrom. Within six years, more than half of all federal civilian employees were represented by labor organizations with exclusive bargaining rights. Union representation has continued to increase since that time.

In addition to establishing a general government-wide policy favoring labor-management cooperation in the federal service, including the recognition of employee organizations as bargaining representatives, EO 10988 retained certain rights for management while limiting the rights of employees to strike or discriminate, and specifically authorized advisory arbitration as the final step in a negotiated grievance procedure. Excluded from exclusive bargaining units under the Order were managerial executives, employees engaged in nonclerical personnel work, rating supervisors of other members of the unit, and persons engaged in intelligence and investigative functions.

3. Executive Order 11491

Organizational rights and the privilege of negotiating on employment terms were strengthened by the issuance of a subsequent superseding order by President Richard M. Nixon on 29 October 1969. Under EO 11491, the entire program of employee-management relations was placed under the supervision of a Federal Labor Relations Council. A high-level governmental panel also was created to assist agency officials and union representatives to resolve negotiation impasses. Membership in a labor organization continues to be voluntary for employees. In accordance with principles established in the private sector, the federal program authorizes establishment of a representation unit on a plant, installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees. Also, guards may not be mixed with nonguard employees. Professional employees are given the option to express their preference concerning their inclusion in a unit of nonprofessionals.

A union that has shown by secret ballot election that it represents a majority of the employees has the exclusive right to confer with agency officials and to enter into agreements covering the employees. Negotiable matters include those personnel policies and practices affecting employment conditions within the administrative discretion of the agency officials, which do not concern the agency mission, organization, budget, assignment of personnel, the technology of performing its work, or its internal security. A union agreement may provide for the consideration of employee grievances, subject to requirements of the Civil

126 The courts have declined to entertain actions arising under the order. Nat'l Ass'n of Int. Rev. Employees v. Dillon, 356 F.2d 811 (D.C. Cir. 1966); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965); Morris v. Steele, 253 F. Supp. 769 (D. Mass. 1966); though they have occasionally entertained jurisdiction where a constitutional issue was raised, Nat'l Ass'n of Gov't Employees v. White, 418 F.2d 1126 (D.C. Cir. 1969); or where civil service laws are violated, Am. Fed'n of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970).

127 SOLO, supra note 1, Civil Law, pt. 5, at 50.

Service Commission. Employees are specifically denied the right to strike and may not join a union which asserts that right. 129

4. Grievance and Appeal

Under the departmental grievance and appeal system, 130 employees may request review of dissatisfactions concerning working conditions and relationships, or employment status, including adverse actions, except as to matters beyond the responsibility of the department. In practice, certain other matters also are excluded from the system, in favor of remedies under other controlling regulations. Such grievances are to be distinguished from those governed by procedures negotiated in a union agreement under EO 11491.

Grievances are handled on a relatively informal basis, though they are subject initially to review by the Civilian Appellate Review Agency (CARA), whose decisions on procedural matters are binding, and then by a major commander if the immediate commander does not agree with the CARA examiner’s recommendations.

Appeal from adverse actions (e.g., removal, suspension, reduction in rank or pay) involves a hearing if considered necessary by the examiner. 131 If, at any stage of an inquiry, the examiner establishes the existence of a regulatory or procedural defect which requires reversal in the processing of the appeal, he will discontinue the proceedings and forward the case to the activity commander indicating that the action appealed should be reversed. Such a finding is binding upon the commander.

Hearings generally are not open to the public or the press. 132 The employee is entitled to representation, whether by an employee of the federal government (who may use reasonable official time without loss of pay; but this provision does not apply when repeated representation would interfere with the performance of regular duties) or not, but in any event arrangements for representation must be made by the employee.

Hearings are conducted in a manner intended to encourage frank but orderly presentation of all relevant facts, through sworn testimony and exhibits, subject to cross-examination. Although subpoena powers are not available, the appellant may request the agency to produce witnesses. 133 Proceedings are recorded and transcribed verbatim. Any information which has a bearing on matters in issue may be presented by the parties without regard to rules of evidence before a court, provided the source of the information is identified.

---


130 5 C.F.R. pt. 771 (1972); Dep’t of the Army, Civilian Personnel Regulation 700, June 7, 1971.

131 In at least one circumstance, the waiver of a hearing (coupled with an appellant’s protest of innocence) did not relieve the agency from holding a hearing if such procedure would lead to better understanding of the issues and more equitable action. Connelly v. Nitze, 401 F.2d 416 (D.C. Cir. 1968).

132 See 5 C.F.R. §§ 772.305 (1972). In one case, however, the court believed that an employee is constitutionally entitled to have an open hearing, if he desires. Fitzgerald v. Hampton, 329 F. Supp. 997 (D.D.C. 1971).

133 If he fails to make such request, he is not likely to be heard to allege lack of confrontation. Goldwasser v. Brown, 417 F.2d 1169, 1174 (D.C. Cir. 1969).
The task of evaluating the record ultimately rests with the official responsible for the final decision. In the absence of a finding by the examiner of either a regulatory or procedural defect, the commander is required to issue a written decision. If he determines that the examiner's recommendations are unacceptable, he will transmit the file, with a specific statement of the basis for his determination, to the appropriate superior headquarters. The employee has a right to request review by the Secretary, whose decision is not subject to further administrative review.

5. Judicial Review

As in the case of the military, the courts have recently evinced more interest in reviewing cases involving the government's application of personnel policies. As late as 1957, a court of appeals asserted that employee removal and discipline are entirely matters of agency discretion and so long as there is substantial compliance with applicable procedures the administrative determination is not reviewable as to the wisdom or good judgment of the department exercising its discretion. By 1969, the pendulum seemingly had swung so far that another court of appeals could reverse a district court (which had sustained a dismissal for failure of the employee to care for official documents and to fail to report a proffered bribe), stating that the lower court had not discharged its statutory duty to review the administrative record and that review was not limited to determining whether statutory procedural requirements had been satisfied. On the other hand, in another case, it was assumed that the applicable statutes and regulations provide all essential administrative due process, something quite apart from judicial due process. This seems to mean that the personnel involved, because of their federal employee status, are not guaranteed (as to matters bearing on that relation) the full panoply of constitutional due process but that they are entitled to basic concepts of fair play nonetheless. Another circuit adheres to the doctrine that it is not empowered to reverse agency action unless the decision is arbitrary, unreasonable, capricious, or unsupported by substantial evidence. The Court of Claims has said that agency findings will not be disturbed in absence of procedural illegality, misconstruction of governing law,
or "other vital error," and in commenting on its role in review, a district court said, "The most the court can do is to insure that the administrative agency does not arbitrarily or capriciously place undue reliance on inherently unreliable evidence."

Although there is no guarantee of job retention pending the outcome of an administrative appeal, particular circumstances may warrant interim injunctive relief. In this connection though the rule precluding review prior to exhaustion by the appellant of appropriate administrative remedies generally is applicable, if the prescribed procedure is clearly inadequate to prevent irreparable injury, or when there is a clear and unambiguous statutory violation, the courts are not likely to defer consideration.

An area of the administrative process that is peculiarly susceptible to pitfalls which may not be carefully regarded in the tension which attends the onset of a serious adverse action but which, in the calm aftermath of review, frequently discloses prejudicial error is the initial notice by which the individual is informed of the contemplated action and the reason therefor. The precise content of the notice inevitably will vary with the nature of the circumstances. Nevertheless, lack of specificity in setting forth the particulars of the charge generally will result at some level in the administrative process or upon judicial review in a voiding of the action for improper procedure.

Some additional recent examples of issues highlighted on judicial review include: back pay and setoff of other earnings, bias, conflict of interest (as to attorney representing Government), conviction by civil court (violation of city ordinance), defamation, discrimination, hearsay evidence, homosexuality, immoral conduct, incompetence, minor charge (remaining general deficiency and also including prejudicial material extraneous to the issue).

139 Bielec v. United States, 456 F.2d 690 (Ct. Cl. 1972); Lech v. United States, 409 F.2d 252 (Ct. Cl. 1969).
140 Carr v. United States, 337 F. Supp. 1172, 1177 (N.D. Cal. 1972). In that case, the court also indicated that circumstantial evidence may constitute substantial evidence.
141 Frommhagen v. Klein, 456 F.2d 1391 (9th Cir. 1972).
144 See Burkett v. United States, 402 F.2d 1002 (Ct. Cl. 1968), for example of a notice generally deficient and also including prejudicial material extraneous to the issue.
145 Floyd v. Resor, 409 F.2d 714 (5th Cir. 1969).
146 Issue of personal prejudice remedied for consideration by trial commissioner, notwithstanding operating level decision was approved by a commander three levels higher.
147 Reynolds v. United States, 454 F.2d 1368 (Ct. Cl. 1972).
148 Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967).
149 Vigil v. Post Office, 406 F.2d 921 (10th Cir. 1969).
151 Oplettree v. McNamara, 449 F.2d 93 (6th Cir. 1971).
152 Richardson v. Perales, 402 U.S. 389 (1971); Rei1 v. United States, 456 F.2d 777 (Ct. Cl. 1972); Marlowe v. United States Immigration and Naturalization Service, 457 F.2d 1314 (9th Cir. 1972); Koval v. United States, 412 F.2d 867 (Ct. Cl. 1969); Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969); Brown v. Macy, 340 F.2d 115 (5th Cir. 1965).
D. Investigations

1. General

A military commander often is faced with the need to obtain credible information upon which to exercise his powers under applicable statutes, regulations or established customs and usages of the service. He may have to determine the cause of death or injury sustained by personnel under his supervision, damage to military property in his custody, liability for loss of funds or equipment, or to confirm initial reports of incidents which may, in turn, require specific inquiries or other action under pertinent laws or regulations. Such investigations are useful in the prompt collection, assembly, and preservation of evidence for subsequent analysis and consideration by the commander. The investigative process may be informal or formal, culminating in oral or written reports, as determined by the commander, subject to governing directives. The commander may direct a single individual or a group, usually designated as a board, to conduct the inquiry.

In the absence of other governing directives, such investigative bodies derive their power from the appointing authority and can act only within the limits of the powers delegated to them. Specific rules cannot be prescribed to cover all situations. However, using ingenuity and imagination, the investigator's prime objective is to gather all pertinent facts, reporting them accurately and concisely. Customary investigative techniques may include, as appropriate to the type of investigation, examining the site of the incident, interviewing witnesses, making sketches and photographs, compiling applicable references, and ultimately (subject to applicable directives and instructions) submitting a report embodying findings and recommendations for consideration by the appointing authority.

Directives or orders may require an investigation without prescribing specific procedural guidance. In such cases, a general Army Regulation, AR 15-6, offers elementary guidance intended to apply whenever other specific procedural requirements do not exist.
An effort will be made in the following paragraphs to set forth some of the generally pertinent procedural rules, with the caveat that proceedings in a particular case may be subject to express statutory or administrative requirements. In the absence of such governing provisions, the procedures generally are subject to the AR 15-6 rules and pertinent official construction of those procedures, including opinions of legal advisors at the appropriate command levels.

2. Procedure

a. Respondent's Privileges

A respondent in an investigative proceedings is one whose conduct, status, efficiency, character, fitness, pecuniary liability, or rights are under official scrutiny. An individual may be regarded as a respondent at the outset of the investigation or at any later stage in the proceedings when it appears that he has a direct interest in the subject of the investigations, e.g., when tentative findings or recommendations reflect questionable or unsatisfactory conduct, inefficiency, or unfitness, or when his pecuniary responsibility may be affected.

A respondent usually is entitled to have counsel, either military or civilian, and any military person or civilian employee requested will be appointed as counsel if reasonably available. In appropriate cases he may be entitled to a hearing before a board of impartial officers and permitted to challenge members for cause. Ordinarily, he is entitled to be present at the hearing, to examine all documentary evidence referred with the case not subject to security requirements, to present evidence in his own behalf, to cross-examine adverse witnesses, and to submit a brief.

The procedure of military investigators or boards reflects a relaxation of formal judicial procedure and is somewhat akin to that of civilian administrative agencies, where optional privileges are determined by balancing the interests of the party against the requirements of administrative expediency within limits established as a minimum for administrative due process. Although formal, technical rules may be disregarded where they would be administratively burdensome, such determinations may not be arbitrary or capricious. The respondent must be judged upon substantial, credible evidence after having been permitted to present his side of the case. Generally, a respondent will be entitled to indicated privileges when it would be otherwise manifestly unfair to proceed against him.


165 See Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971) (discussion of respondent's rights under AR 15-6).


167 For a judicial compilation of standards generally applicable to administrative decisions,
b. Evidence

AR 15-6 contemplates a mutually complete and impartial presentation of evidence by both sides so as to provide an adequate basis for appropriate action by the appointing authority. Whenever possible, the highest quality of evidence obtainable and available will be considered. Findings must be supported by substantial evidence, i.e., such evidence as a reasonable mind can accept as adequate to support a conclusion. Unless stipulated by all parties, evidence bearing upon the results, taking, or refusal of polygraph tests is inadmissible. Except for these considerations, an investigating officer or board of officers is not bound by the traditional rules of evidence. Any oral or written matter, including hearsay, which is deemed relevant and material may be received in evidence.

c. Administrative Review

The findings and recommendations of a board, not made conclusive by law or regulation, are advisory only. The appointing authority may therefore, unless circumscribed by governing law or regulations, approve, modify, set aside, or wholly disregard the findings and recommendations of an investigative proceeding. Also the appointing or review authority who takes final action may modify or set aside his own previous action unless such new action is deemed to be legally beyond his authority. Although in certain cases there may be no right to appeal from the action taken, the appointing or reviewing authority may, as an exercise of discretion, receive and act upon any request in the nature of an appeal or petition for a new hearing. Also, regulations which provide in general terms for “appeal” from adverse administrative determinations without specifying hearings and correlative rights (such as, e.g., assistance of counsel, right of confrontation and cross-examination) do not necessarily deny legal process.

In general, the proceedings of boards of officers are legally insufficient where a jurisdictional defect appears, when the respondent’s rights have been substantially prejudiced by a procedural error, or when there is insufficient substantial evidence to support the findings or recommendations. Among possible


169 The possibility of drawing inconsistent conclusions from the evidence does not preclude a particular finding from being supported by substantial evidence. Consolo v. Federal Maritime Comm’n, 383 U.S. 607, 620 (1966).


171 Ansted v. Resor, 437 F.2d 1020 (7th Cir.), cert. denied, 404 U.S. 827 (1971) (affirming decision that plaintiff who challenged validity of involuntary order to active duty had not been denied due process under military procedures).

172 Where no harm or prejudice resulted from violation of prescribed regulations, administrative proceedings may not be invalidated. United States ex rel. Hermes v. McNulty, 432 F.2d 1182, 1188 (7th Cir. 1970). See United States v. Primous, 420 F.2d 33, 35 (7th Cir. 1970). Where several procedural errors were alleged but none had such fundamental substance as would produce a likelihood of success on appeal, nevertheless the cumulative effect thereof may result in fundamental error. Crawford v. Davis, 249 F. Supp. 943, 948 (E.D. Pa.), cert. denied, 383 U.S. 921 (1966).
jurisdictional defects is an improper appointing authority or an improper composition of the board.

Where specific regulations do not otherwise prescribe, the following rules apply when the proceedings are found to be legally insufficient for the indicated reasons:

a. Jurisdictional defect: Proceedings are a nullity and the matter may be considered anew by a board whose voting composition includes none of the voting members of the old board.

b. Procedural error: Except as limited by the following provision, the matter may be considered anew by a board, as in the preceding case.

c. Insufficient evidence: If necessary additional evidence is available, the investigation is returned to the same board for completion after which the report is again reviewed for legal sufficiency; otherwise further action is not appropriate.

3. Particular Investigations

a. Reports of Survey

Members and employees of the Army are not absolute insurers of Army property entrusted to their care. Their liability for loss or damage to such property derives from negligent or otherwise wrongful conduct respecting its use or custody, determined primarily through the report of survey system.\textsuperscript{174} Under former rules, users of Army property were exposed to broad risks of liability, but since 1963 rules constituting grounds of pecuniary liability have been simplified and less stringent. As a result liability is conditioned on more aggravated misconduct than before and distinctions between officers and enlisted personnel no longer exist under the general rules.\textsuperscript{175}

Current rules provide:

1. Individuals having supervisory responsibility will be charged with any loss caused by their willful misconduct or gross negligence.

2. Individuals having personal responsibility will be charged for any loss caused by their negligence or misconduct. Personal responsibility extends only to property converted to personal use without authority and arms and equipment held for exclusive personal use (not including motor vehicles, typewriters, and tool sets).

3. Individuals may be charged for loss of property not in their personal custody or under their supervisory control where such loss was occasioned by their willful misconduct or gross negligence.

\textsuperscript{173} MILITARY AFFAIRS, supra note 1, at para. 12.12.

\textsuperscript{174} Though not designated by statutory law, the survey system is recognized as an administrative determination for the purposes of 37 U.S.C. § 1007(c) (1970), at least as to enlisted personnel. Somewhat narrow statutory terms provide for involuntary loss of pay for officers. There are also separate rules for involuntary deduction of civilian pay to satisfy findings of pecuniary liability.

\textsuperscript{175} SOLO, supra note 1, at 112-17.
4. Individuals who occupy assigned government quarters or have been issued government property for use in family quarters, will be charged (except for loss from fair wear and tear or act of God) with loss resulting to such quarters or property due to the occupant's simple negligence or an act of another where the evidence shows that the occupant failed to exercise a reasonable degree of care. Willful damage to Army property results in liability under any of the rules and negligence of any character must be related to the damage by proximate cause.

b. Line of Duty (LOD)

LOD investigations are conducted to determine whether disease or injury of a member of the military was incurred while he was conducting himself as a member of the Army. Such determinations, in turn, may affect obligations or entitlement to rights and benefits under statutes administered by the Army, Veterans Administration, or other government agencies. Investigations are conducted according to AR 15-6 procedures, as supplemented or modified by the rules governing LOD investigations. The appointing authority normally is the special court-martial authority (usually the commander of a battalion or comparable size unit) over the unit to which the individual is assigned or of that completing the investigation. The next reviewing level is that of the general court-martial jurisdiction (usually installation or division commander), while (in the United States) numbered continental Army commanders and certain higher level commanders are authorized to take final action. Appeals not sustained by the final approving authority are forwarded for action at the department level. Determinations are predicated upon the following basic policy: Injury or disease is presumed to have been incurred in LOD and not because of the member's own misconduct unless there is substantial evidence that the injury or disease was—

(1) Proximately caused by the intentional misconduct or willful gross neglect of the individual;
(2) Incurred or contracted during a period of unauthorized absence;
(3) Incurred or contracted while neither on active duty nor engaged in authorized training in an active or reserve duty status and was not aggravated by the service.

Mere violation of military regulations, orders, or instructions, or of civil or criminal laws, in the absence of further showing of misconduct therewith, establishes no more than simple negligence (which does not constitute misconduct for LOD purposes).

176 For a compilation of statutes involved, see Comment, "... In the Line of His Duty," 50 MILITARY L. REV. 117 (1970), which emphasizes the gradual liberalization of line of duty criteria and includes selected digests of recent opinions reflecting illustrative factual situations. The applicable Army regulation is Army Reg. 600-33 (1971).
177 Army Reg. 600-33 para. 2-1 (1971).
If, after reasonable investigation, facts are substantially unknown or irreconcilable conflict, the basic presumption favoring line of duty and against misconduct must prevail. Authorized findings include (1) "In line of duty," (2) "Not in line of duty—not due to misconduct," and (3) "Not in line of duty—due to own misconduct"; no deviations are permitted.

4. Article 138 and Other Statutory Procedures

a. Article 138, UCMJ

Article 138, UCMJ, continues provision of long standing for procedure by which a member of the armed forces could complain to a superior commander for redress if he believed himself wronged by his commanding officer. Under the present article, the complaint is forwarded to the commander exercising general court-martial jurisdiction over the officer against whom it is made. That commander is required to "examine into the complaint and take proper measures for redressing the wrong," after which the records are forwarded to the department for final disposition.

Pertinent regulations provide that upon receipt of a complaint submitted under the article, the officer exercising general court-martial jurisdiction over the respondent will either grant the redress requested (or if he lacks authority to grant the redress requested, investigate the complaint and forward the complaint, investigation, and specific recommendations to the jurisdiction having authority) or:

a. Delay consideration of the complaint pending consideration of another appeal likely to result in clarification of the issue or redress of the alleged wrong; or

b. Conduct an informal inquiry, or order an investigation under AR 15-6; or

c. Return the correspondence to the complainant informing him that the complaint is not within the scope of the statute.

Upon completion of his inquiry into the complaint and action thereon (approval or denial of the requested redress), the officer exercising general court-martial jurisdiction forwards the file, including the action taken thereon and a statement of the reasons therefor, to the Judge Advocate General, Department of the Army.

Appropriate review of the treatment accorded the complaint depends largely on the depth of the inquiry conducted into the complaint by the general court-

180 Under Army Reg. 27-14 (1972), art. 138 may not be used as the basis of a collateral attack against the findings or sentence of a court-martial or nonjudicial punishment imposed pursuant to art. 15, UCMJ.
martial authority. Since the thrust of most complaints will be that the commander abused his discretion, mere conclusions that the complaint was not justified would not supply a sufficient basis upon which to make final disposition of the case. Therefore, the inquiry should identify and develop the factors which influenced the commander’s decision.\(^{181}\)

b. Board for Correction of Military Records (ABCMR)

A statutory board of extraordinary powers is the Army Board for Correction of Military Records established in 1946, to relieve the Congress of the many private bills submitted annually on behalf of members and former members of the armed forces petitioning for action not compatible with existing military records.\(^{182}\)

As indicated, the ABCMR was intended to provide relief in cases where Congress previously acted and therefore it was empowered to do what Congress could have done.\(^{183}\) Any type of military record may be corrected, including discharges, efficiency records, and records of trial.\(^{184}\) Although the statutory language implies the existence of a record to be corrected, it has been observed that the Board may create a record if this is necessary in order to remove an injustice.\(^{185}\) Statutory limitations require only that the Board’s action must affect a military record and that such action must correct an error or remove an injustice. The Board decides what is error and may substitute its own judgment for that of any official or board which made a previous determination of the matter. Investigation and action by the Board is authorized only upon the application of the individual concerned within 3 years of the latter’s discovery of the alleged error or injustice (though the Board may excuse late filing in the interest of justice). The Secretary may overrule the Board, but only if the findings and recommendations are not supported by the record.\(^{186}\) Corrections made by the Secretary pursuant to Board recommendations are “final and conclusive on all officers of the Government” except when procured by fraud. Normally, they will not be reviewed by the courts in the absence of a showing based on evidence already in the record that the action was arbitrary or capricious,\(^{187}\) though it is clear that judicial review is not precluded.\(^{188}\)

c. Administrative Procedure Act (APA)

Although the APA\(^ {189}\) has been said to be generally applicable to the military


\(^{184}\) See MILITARY AFFAIRS, supra note 1, at para. 13.7.

\(^{185}\) Op JAGA 1953/1741, 3 DIG Ops, Records § 16.5.

\(^{186}\) E.g., Nelson v. Miller, 373 F.2d 474, 478 (3d Cir. 1967).

\(^{187}\) E.g., Sanford v. United States, 399 F.2d 693 (9th Cir. 1968).

\(^{188}\) Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

\(^{189}\) Scattered in various sections of title 5, United States Code.
and civil functions of the Army, significant portions of the act concerning rule making, adjudication, hearings, decisions, and hearing examiners are regarded by the military as inapplicable to the Army's military functions.

APA includes a section on "ancillary matters," which deals with rights of appearance and representation by counsel, the conduct of investigations, issuance of subpoenas on behalf of parties to agency proceedings, and notice of denials of applications made to an agency. The provision contains no specific "military functions" exception and appears to be applicable to the Army. In addition, sections dealing with judicial review appear to be generally applicable to the Army, though there is less than unanimity as to their effect on the Army in specific circumstances. At least one military commentator cites legislative history for the argument that while certain war and defense functions were to be exempt, this was not the intent for other functions. More recently in an action by an environmental group involving the Secretary of Transportation, a court of appeals determined that the issuance of a permit by the U.S. Corps of Engineers to allow dredge and fill for a proposed riverfront expressway could be set aside under the APA.

E. Miscellaneous Organizations

1. Nonappropriated Funds

a. General

Existing at military installations are certain miscellaneous organizations whose operations are not funded by congressional appropriations—hence their generic designation as "nonappropriated funds," or nonappropriated fund (NAF) activities. Customarily, they consist of exchanges (formerly post exchanges), open messes, and similar quasi-military organizations, established for

193 Id. at § 556.
194 Id. at § 557.
195 Id. at § 3105.
198 Id. at §§ 701-706.
the purpose of contributing to the morale and comfort of military personnel and their families. Considered in the aggregate, they constitute the nonappropriated fund "system."

Within the resources of that system, such organizations are to a considerable extent self-supporting. Their principal income arises from the revenue-producing operations of exchanges, which may be supplemented by special income of the individual activity itself. In addition, they receive assistance in varying degree, either in manpower, physical facilities, or financial support, from monies which have been appropriated by Congress and allocated in accordance with departmental policy. Incidental support based on congressional appropriations is not regarded as affecting the basic nature of NAF activities.203

Historically, nonappropriated funds are traced to nongovernmental sources for subsistence, quarters, and other forms of personal maintenance support for troops, under some form of official control, initially instituted to overcome obvious disadvantages of solicitation by unscrupulous "camp followers." Thus British Articles of War of the 17th and 18th centuries regulated private civilian suppliers—traders known variously as sutlers and victuallers—of liquor, victuals, and other incidentals in their private transactions with the troops; Continental Army and early American Articles contained similar provisions.204 Under applicable regulations, the independent vendor operated under a concession from the military authorities which permitted him to sell his wares and credit sales against the pay of his military customers. He was then reimbursed by the paymaster, less a charge based on the average number of personnel assigned to the unit during the pay period. Those charges (supplemented by fines collected from traders for breach of Articles of War) provided a separate financial basis for early troop morale and recreational purposes. That system evolved into unit (e.g., company), welfare, and library funds, followed by consolidated officer and noncommissioned officer messes.205

By 1866 sutlers had fallen into disrepute, and they were replaced, first by trading posts, and then by canteens which were later redesignated as post exchanges. By 1895, post exchanges operated at all military posts.206 Today the Exchange Service is a highly organized activity paralleling complex civilian merchandising enterprises. Despite its vast expansion, the Exchange Service retains the characteristics and basic nature of a NAF. On a lesser scale, messes (formerly essentially food dispensing facilities) have grown into clubs catering various recreational and morale services in addition to food. By contrast, the company fund and similar NAF activities have undergone only slight modifications and continue to supply services on a relatively small scale.

203 MILITARY AFFAIRS, supra note 1, at 152-53.
205 Messes received as their principal source of revenue savings accrued from economical use of issued rations.
b. Administration

NAF activities are established under secretarial authority, though their existence is recognized in various statutory provisions affecting certain limited aspects of their operations.\(^{207}\) They are familiarly known as government instrumentalities and are generally regarded as entitled to the privileges and immunities of the United States, though they have been described as “an anomaly of the law”\(^{208}\) and have been variously treated by courts and governmental agencies according to particular circumstances. Departmental regulations preclude accrual by members of any proprietary interest in the assets controlled by the fund in which they hold membership or whose services they use.

Organizationaly, the funds are established at various command levels and normally are directed by councils or similar governing bodies under the management of a qualified custodian and subject to control of commanders as prescribed by applicable regulations. They fall loosely into three classes: revenue-producing (exchanges, motion picture services, publications, restaurants), welfare (designed to finance recreational, educational, and related activities, typified by military unit funds), and sundry or association funds. The latter type encompasses such diverse activities as messing, billeting, and recreational facilities, including flying and parachute clubs, as well as fish and wildlife groups.

Subject to command supervision as indicated, they tend to operate as separate units somewhat insulated from the normal military administrative pattern, though clearly not completely isolated from traditional aspects of military discipline. In such matters as bank deposits, insurance, and contracts, the name of the fund is used rather than that of the United States or the sponsoring military organization. Their activities ordinarily are conducted by civilian personnel paid from nonappropriated funds\(^{209}\) though there are limited circumstances under which military personnel and civilians paid by appropriated funds may be utilized. In addition, enlisted personnel may be employed by such funds when they are not required to perform assigned military duties (\textit{i.e.}, when “off duty”).\(^{210}\)

c. Government Instrumentalities

The legal concept of nonappropriated funds, as suggested, may pose certain difficulties when they become involved in litigation.\(^{211}\) In considering the Exchange Service, prototype of nonappropriated funds, the Supreme Court concluded that exchanges are “integral parts of the War Department, share in ful-


\(^{209}\) \textit{See} text following note 122 supra.

\(^{210}\) Military personnel so employed may assume official military status under circumstances requiring positive action to preserve order in a military environment, United States v. Brooks 44 C.M.R. 873 (A.C.M.R. 1971).

\(^{211}\) \textit{E.g.}, Swift-Train Company v. United States, 443 F.2d 1140 (5th Cir. 1971) and Pulaski Cab Company v. United States, 157 F. Supp. 955 (Ct. Cl. 1958).
filling the duties intrusted to it, and partake of whatever immunities it may have under the Constitution and the federal statutes," though "[t]he government assumes none of the financial obligations of the exchange."\(^{212}\) Regulations governing the administration of nonappropriated funds uniformly apply the "immunity" doctrine to the fund operations.\(^{213}\)

d. **Taxes**

1. Federal. Nonappropriated funds are required by regulation to withhold federal income and to deduct federal employment taxes. Additionally, they are subject to various federal occupational taxes on wholesale and retail beer and liquor sales.

2. State and foreign. Under the doctrine of governmental immunity established in *McCullough v. Maryland*,\(^{214}\) as extended to exchange activities pursuant to *Standard Oil of California v. Johnson*,\(^{215}\) NAF activities are regarded as immune from state and local taxes, except as such immunity is waived by Congress.\(^{216}\) State income taxes are withheld pursuant to appropriate agreements with the states. Foreign taxes are not paid unless provided for by federal treaty or executive agreement.\(^{217}\)

e. **Alcoholic Beverages**

Pursuant to statute and Department of Defense (DOD) directive\(^{218}\) comprehensive regulations control the sale and use of alcoholic beverages on military installations. Open messes normally provide facilities (which include package store adjuncts) for the sale of liquor to authorized patrons. Military policy prescribes cooperation with duly constituted civil regulatory agencies without conceding a legal obligation to submit to state control.\(^{219}\) Liquor transactions can generate complicated legal issues, depending upon the origin of shipment (within or without the state), the nature of federal jurisdiction vis-à-vis state authority, and reasonableness of regulatory procedures, to mention but a few potentials for controversy. The Supreme Court has upheld reasonable state regulatory provisions even as to shipments in interstate commerce, to prevent unlawful diversion of liquor.\(^{220}\)

A district court recently epitomized the fundamental legal issue in such cases as one which requires the judiciary to harmonize the constitutional grant to

\(^{212}\) And therefore were entitled to an exemption provided for the United States "or any department thereof," by a California motor fuel tax statute. *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *cf.*, *Paul v. United States*, 371 U.S. 245 (1963), holding in part that state milk regulations applied to sales from certain nonappropriated funds.

\(^{213}\) *E.g.*, Army Reg. 230-1 paras. 1-3a, 1-48, changes 1 & 3 (1968).

\(^{214}\) 17 U.S. (4 Wheat.) 159 (1819).

\(^{215}\) 316 U.S. 481 (1942).


\(^{217}\) Army Reg. 230-1 para. 1-49, change 3 (1968).

\(^{218}\) 50 U.S.C. App. § 473 (1970); DOD Dir. 1330.15, 4 May 1964.

\(^{219}\) At least, not without appropriate consideration at high departmental levels.

\(^{220}\) *Carter v. Virginia*, 321 U.S. 131 (1944). *See Military Affairs*, *supra* note 1, at 93-95 for additional issues and cases. *See also* *Johnson v. Yellow Cab Co.*, 321 U.S. 383 (1944); *Maynard & Child, Inc. v. Shearer*, 290 S.W.2d 790 (Ky. 1956).
Congress (to make rules for governing the armed services and to legislate regarding lands purchased for military purposes) with the XXI amendment's prohibition against transporting or importing intoxicating liquors into a state for delivery or use therein in violation of state law.\textsuperscript{221} In that case, the court decided, \textit{inter alia}, that the constitutional grants were diminished by the amendment as to packaged liquor transactions made on federal enclaves for unrestricted use and consumption thereof \textit{outside} a military base.

\textbf{f. Tort Liability}

Statutory compensation\textsuperscript{222} is applicable as an exclusive remedy for injuries received in the course of employment\textsuperscript{223} and the Government is thereby relieved of liability from suit by nonappropriated fund employees for such injuries.

After early efforts to challenge application of the Federal Tort Claims Act to nonappropriated funds\textsuperscript{224} the Government acceded to the force of judicial views in \textit{United States v. Holcombe}\textsuperscript{225} and other cases to the effect that a nonappropriated fund is a "federal agency" for FTCA purposes. Even prior to \textit{Holcombe}, Army NAF activities were directed to cancel public liability insurance in favor of a self-insurer program financed by the NAF system.

A peculiar facet of NAF tort litigation highlighted two decisions which denied government liability for flying club incidents. In both cases, suit was brought by plaintiffs injured by planes piloted by "members" of the respective clubs, and two appellate courts agreed that the members were not employees within the contemplation of the FTCA.\textsuperscript{226} Mere status of membership, however, may not be determinative, as the operative facts may show a member also as an employee under particular circumstances.\textsuperscript{227}

Army policy pertaining to claims caused by NAF activities is broader than FTCA coverage, as the applicable regulations provide for administrative settlement of all tort claims caused by NAF activities. Thus the tort of a mere "member" (as opposed to an employee), excluded by FTCA, may be covered by the NAF plan.

\textbf{g. Contracts}

As in the area of tort law, government counsel were able to persuade the courts that nonappropriated funds are not equivalent to the United States but

\textsuperscript{224} For analysis of the early administrative determinations and judicial decisions involved, see Gerwig, \textit{Federal Tort Liability for Nonappropriated Fund Activities}, 10 MILITARY L. REV. 204 (1960) and, for a more recent survey, Dahlinger, \textit{Tort Liability of Nonappropriated Fund Activities}, 50 MILITARY L. REV. 33 (1970).
\textsuperscript{225} 277 F.2d 143 (4th Cir. 1960), followed in Rizzuto v. United States, 298 F.2d 748 (10th Cir. 1961). \textit{See also} Dahlinger, \textit{supra} note 224, at 51 n. 80 for additional cases. Cf., Gradall v. United States, 329 F.2d 960 (Cl. Ct. 1963).
\textsuperscript{226} Brucker v. United States, 338 F.2d 427 (9th Cir. 1964), \textit{cert. denied}, 381 U.S. 937 (1965); United States v. Hainline, 315 F.2d 153 (10th Cir. 1963).
\textsuperscript{227} \textit{See} Dahlinger, \textit{supra} note 224, at 56.
are nonetheless entitled to sovereign immunity from suit based on contractual rights and obligations. Though such ambivalence ultimately was rejected in the tort cases, the judiciary generally has accommodated the rationale for contract liability, albeit somewhat reluctantly. Regulations permit administrative settlement of contract disputes, but (except as to exchange contracts, ante) judicial review is not expressly provided for.

Lack of certain judicial remedy for any contract obligation not payable out of appropriated funds led to consideration and passage in 1970 of an amendment to the Tucker Act which granted federal court jurisdiction over contract claims against exchange activities. The proposed legislation contemplated inclusion of all NAF activities. Analysis of the intended coverage, however, disclosed some problems lurking behind the facade of NAF agencies: (1) Since many NAF organizations are not actually self-supporting, judgment costs in some cases would be imposed on the taxpayers; (2) serious definitional questions might unduly expand reasonable limits of government liability; and (3) limited data concerning all nonappropriated funds made undesirable specific legislation for what is viewed by some as a veritable unexplored branch of government operations. Under the circumstances, limiting amendments produced the expansion of jurisdiction over contract claims only for exchange-type activities, presumably because of their relative organizational visibility backed up by reasonable financial responsibility.

2. Private Associations

a. Statutory

Still another species of miscellaneous organizations found on military installations (some regularly, others from time to time or occasionally) are private associations. Among such are those which have no true legal kinship to the military, though they may be composed (in part or in whole) of military personnel on active duty or retired or veterans of the armed forces or their families and may perform morale, recreational, or welfare missions at or near military sites. Because they may be authorized space, logistical support and other privileges, in varying degrees, which seem to impart an aura of military affiliation, they may be mistakenly regarded as part of the military establishment.

Classic examples of such bodies include societies such as the American National Red Cross, Boy Scouts of America, Big Brothers of America, Civil Air Patrol, Disabled American Veterans, and the American Legion. They, including


others, are chartered under Title 36 of the United States Code but congressional control normally consists essentially of incorporation and periodic reporting requirements. Similarly, if they are accorded space and other administrative and logistical support at a military installation, official supervision over private associations is limited to consent for presence (to include any conditions attached to the giving of such consent). Such entities normally cannot subject the United States to legal liability for their activities.

b. Other

Other groups frequently existing either by virtue of incorporation or informal organization include community service groups such as chambers of commerce and similar business associations, Kiwanis, Lions, and Rotary, as well as civic and church alliances, all of which may become involved, on a consensual basis, with the military. Like the earlier groups mentioned, they are neither de facto nor de jure components of the military establishment, even when conducting permissive activities on a military base.

Still another subdivision of the miscellaneous unofficial groups (normally not incorporated) consists of what might be regarded as quasi-military associations. Such informal organizations include wives’ clubs, hunting and fishing clubs, youth groups, thrift shops, nursery services, and benevolent or charitable funds. Characteristically, they offer auxiliary services or benefits to the military community and are managed by military or civilian personnel and their dependents (frequently on a volunteer or no-pay basis), although “outside” persons may be employed, depending on the available resources and scope of operations. The actions of an individual on behalf of private associations must not impinge upon or conflict with his official capacity, if any, as an officer, employee, or agent of the Government.

c. Legal Aspects

If a nonappropriated fund is an anomaly at law, then the private association operating on a military post is at least another degree removed from easy legal identification. A good example of the problem of classification is found in *Scott v. United States.*231 There the Government was sued because of an alleged tort of a hunt club permitted by a post commander to use some land for its purposes in a remote part of the post.232 The suit was predicated upon pleadings identifying the club as a nonappropriated fund and government instrumentality. The district court did not quibble with the plaintiff’s designation of the club as an NAF activity but it rejected the notion that the club, which was organized as a private association, could be classified as a government instrumentality, and therefore found no basis for a suit under the FTCA.233

232 The club was composed of military personnel and their families who owned horses and were interested in equestrian activities.
233 Under applicable regulations, private associations clearly are not within the compass of organizations designated as nonappropriated funds.
Whatever the corporate genesis of the private association, the primary distinction between nonappropriated fund and private associations—absence of military command control—becomes blurred unless the day-to-day operations of the private group are in fact determined by persons acting in a nonmilitary capacity.\textsuperscript{234}

F. Claims

The size and complexity of the United States Army and of its operations inevitably require an extensive claims system. Military personnel by their individual actions and some military functions by their very nature cause a great variety of injuries to others or to their property. Similarly, military personnel and property are frequently injured or damaged by the conduct of others. Some military claims functions are peculiar to the armed forces; others are discharged in common with all other federal departments and agencies. For the Army, the system is headed by the Secretary, under various statutes which empower him to promulgate regulations and to designate subordinate officials to exercise administrative settlement authority.\textsuperscript{235}

1. Against the United States

a. General

Statutory coverage is provided, \textit{inter alia}, for personnel claims and recovery actions against third parties,\textsuperscript{236} claims incident to use of government vehicles,\textsuperscript{237} military and national guard claims,\textsuperscript{238} foreign claims,\textsuperscript{239} maritime claims,\textsuperscript{240} and advance payment,\textsuperscript{241} in addition to other miscellaneous claims.\textsuperscript{242} Comparison of the subject matter of the respective statutes sometimes indicates possible overlapping, but implementing regulations purport to clarify the precedence of specific procedures. Thus if a claim appears to be cognizable under more than one statute, administrative procedures require settlement under only one, which results in preemption as to any others.\textsuperscript{243}

\textsuperscript{234} In a nonfederal situation, activities of a private association composed of policemen were so entwined with a city police department which employed them that it was found to be acting under "color of law" for purposes of a statute barring discriminatory practices, Adams v. Miami Police Benevolent Assn., 454 F.2d 1315 (5th Cir. 1971), \textit{pet. for certiorari filed}, 40 U.S.L.W. 3523; cf. Brummitt v. United States, 329 F.2d 966 (Ct. Cl. 1964), ("officers club" was held not to be an NAF because of absence of fiscal control by the military command element involved).


\textsuperscript{237} Noncompensation cases, 10 U.S.C. § 2737 (1970).


\textsuperscript{242} Cases considered under the various statutes are collected in CLAIMS, \textit{supra} note 235.

\textsuperscript{243} CLAIMS, \textit{supra} note 235, at para. 1.3.
b. Federal Tort Claims

Reference to the Federal Tort Claims Act (FTCA) is included to reflect some issues recently considered in the active area of tort litigation. Though all examples do not involve military cases, their application to military situations may be relevant under the FTCA requirement that the Government’s liability is determined in accordance with the “law of the place.” Since 1966, suit under the Act has been precluded unless a claim first shall have been presented to the agency concerned and been finally denied.

(1) Absolute liability.

A recent Supreme Court decision under the Act, by a 6-2 split, rejected the theory that the Government may be liable under the doctrine of absolute liability, notwithstanding that the law of the state involved, e.g., law which renders a person who creates a sonic boom absolutely liable for any injuries caused thereby. In so doing, the Supreme Court reinforced Dalehite v. United States (Texas City disaster case of 1953 which Justice Stewart described as “severely criticized”) by recalling its lesson that “regardless of State law characterization,” the Act precludes liability in the absence of negligence or other forms of misfeasance or nonfeasance.

(2) Administrative claim; prerequisite.

The statutory requirement that an administrative claim be filed before a civil action is brought against the United States applies even when the plaintiff instituted original suit in a state court against the federal employee, which suit was removed to a federal district court under 28 U.S.C. § 2679(b).

(3) Air traffic control.

Under local law, the proximate cause of the crash of a plane was the pilot’s negligence, which superseded failure of the flight service station operator to give weather information.

(4) Contribution.

The United States could not in an action against it for injuries caused by

250 Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970).
251 Black v. United States, 441 F.2d 741 (5th Cir. 1971).
ROTC personnel during a state university football game recover contribution from the state as a joint tortfeasor, since the right of contribution under the local law was derivative of the state's liability to the injured party. Therefore under the doctrine of sovereign immunity, the state could not be held liable to the injured party.²⁵²

(5) Damages.
A child struck by a government truck could, under the applicable state law and FTCA, recover damages for pain and suffering, even though the Government had previously reimbursed her parents for medical expenses.²⁵³

(6) Incident to service.

(a) Dependents' nonderivative action.

The *Feres* incident-to-service doctrine barred suit by the wife and children of a deceased serviceman for damages resulting from loss of their husband and father caused by alleged malpractice of military physicians and hospital predicated upon local law authorizing a separate and independent cause of action.²⁵⁴

(b) Travel in private car.

Recovery for death of a serviceman injured in an accident while traveling in a private automobile between bases under military group travel orders was barred since he was acting in the line of his duty, incident to his military service.²⁵⁵

(7) Limitation of action, notice.

The statutory bar of actions begun more than six months after agency mailed notice of denial of administrative claim precluded suit filed more than six months after notice of denial was mailed to plaintiff's attorney, even though the attorney had since died and neither he nor the plaintiff received actual notice.²⁵⁶

(8) Scope of employment.

(a) Deviation.

The United States could not be held liable for injuries sustained by service-
man's infant daughter as result of his negligence in automobile accident during trip from California to Tennessee (pursuant to transfer orders), where the accident occurred in Colorado, 300 miles north of direct east-west route, it being serviceman's independent and personal motive to use such route to visit Las Vegas and then relatives in Philadelphia.\(^\text{257}\)

(b) Personal use of government vehicle.

A federally employed VISTA worker assisting migrant workers in southeastern Oklahoma and having 24-hour use of a government car was not acting within the scope of her employment when, after being granted leave, she was involved in an automobile collision while driving the car to catch a plane for a vacation at her home in the East.\(^\text{258}\)

2. By the United States

a. General

The subject of "Government Claims" is a two-sided concept that encompasses prosecution of claims as well as defense thereof. The Constitution provides that the Congress has the right to dispose of property belonging to the United States.\(^\text{259}\) The right of the United States to assert a cause of action for tortious damage to its property rights long ago was recognized by the Supreme Court.\(^\text{260}\)

Until recently, administrative settlement of claims owed to the Government could be effected by the agencies generally only by way of collection in full. Any settlement less than the actual amount of the claims would have reflected a disposition of a portion of the Government's cause of action, an action requiring congressional authority. General inflexibility of federal claims collection practices led to enactment in 1966 of the Federal Claims Collection Act.\(^\text{261}\) Under that grant of authority, heads of agencies (and their designees) are permitted to compromise claims in favor of the United States not exceeding $20,000 or to cause collection action to be terminated or suspended, pursuant to joint standards of the Attorney General and the Comptroller General.\(^\text{262}\) A recently enacted statute of limitation normally requires actions for money damages founded on tort to be brought within three years, though the period extends to six years in some cases.\(^\text{263}\)

\(^{257}\) McSwain v. United States, 422 F.2d 1086 (3d Cir. 1970). J. Adams noted the judicial dilemma facing federal judges arising from the rule that liability is required to be determined by the law of respondent superior of the state in which the act or omission occurs, Williams v. United States, 350 U.S. 857 (1956): "there cannot be a state case directly in point"; and that, as a practical matter, the problem has been resolved by the dubious formula of applying "the most analogous state law." 422 F.2d at 1088.


\(^{259}\) U.S. Const., art IV, § 3.


\(^{262}\) 4 C.F.R. § 101 et seq. (1972); Army Reg. 27-41 (1972).

b. *Recovery of Medical Care Costs*

Under the Medical Care Recovery Act, 264 whenever the United States is authorized or required by law to furnish medical care because of injuries suffered by a person *under circumstances creating a tort liability upon some third person*, the United States may recover from the third person the costs of the care furnished. Recovery may be accomplished by an independent action at law, by intervention in an action brought by or for the benefit of the victim, or by settlement or compromise. 265 The Act reflected delayed congressional response to a clear invitation by the Supreme Court for the Congress to enact remedial legislation to delineate the Government’s right of recovery. 266

The statutory “circumstances” posited by the Act in practice depend upon interpretation of applicable state law. For example, a recent appellate decision affirmed a trial court’s summary judgment, under which intrafamilial and interspousal immunity laws were deemed to bar recovery by the Government for medical expenses paid on behalf of a member of the Armed Forces and his children who were injured by his wife’s negligent driving. 267 In a slightly different context, another circuit reversed a district court’s dismissal of the Government’s action against a husband in the military and his insurer to recover the cost of medical care furnished to a wife who was injured by the negligent driving of her husband. Notwithstanding the district court’s view that a wife’s claim for medical care expenses under Louisiana law (unlike her claim for personal injuries) is a community claim, which must be brought by the husband, the Court of Appeals ruled the Government’s right to be independent and not merely that of a subrogee. 268

Because it is limited to the prosecution of tort claims under the Act, the Government could not recover from a workmen’s compensation insurer for the value of hospital and medical services furnished by the Veterans Administration to a veteran who made no assignment to the VA. 269

G. *Procurement*

1. General

The law of contracts pertaining to military procurement is inextricably interwoven with complex government appropriation processes. Government policies affecting small business or labor surplus firms, domestic products, labor standards, equal opportunity requirements, or environmental protection may be directly influenced by government procurement expenditures. 270 Manifestly, ref-

---

265 SOLO, *supra* note 1, at 100.
266 United States v. Standard Oil Co., 332 U.S. 301 (1947), denying a preexisting right of the Government (absent appropriate congressional provision) to effect recovery of medical costs resulting from third-party tort injuries inflicted upon military personnel.
270 For an example of litigation arising out of governmental policies requiring employment
erence to government procurement here can reflect little more than a fleeting glimpse of some of the myriad problems in this area of the law. While fundamental contract law principles remain inherent in government contract-procurement transactions, particular statutory and regulatory requirements add a special dimension to the relevant law. As a consequence consideration of military contracts involves multitudinous boiler-plate clauses which present difficulties normally not encountered in ordinary commercial contract matters.271

Generally, the legal effect of a government contract is governed by federal law,272 giving due regard to local interests and institutions.273 State law may be applied when the federal interest in the particular controversy is not overriding.274

Although a wide variety of types of contracts are required by the complexity and scope of government procurement operations, basic forms involve variations of either fixed price or cost reimbursement contractual arrangements. Fixed price type contracts frequently provide for adjustable prices based on an identified contingency, while cost reimbursement contracts may provide for payment of only a portion of the contractor’s allowable costs. Other modifications entail particular incentives to stimulate better products or service or to reduce time required for compliance.

2. Remedies

Formal advertising entails solicitation of bids by the Government, submission of sealed bids by qualified suppliers, public opening at a set hour and recording of bids by the Government, and award “to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States.”275 Although the procedure emphasizes formal practices and rigid adherence to the rules, courts will intervene to correct procedural irregularities only when its “invalidity is clear,”276 or upon a showing of flagrant disregard for the regularity of contracting procedures.277 And, in any event, a contracting officer278 has no authority to enter into contracts which are prejudicial to the


271 Even when the boiler plate is omitted, the Armed Services Procurement Regulations, having the force of law in many (if not most) situations, may be construed to incorporate a regulatory provision into a contract that makes no specific reference thereto. G. L. Christian and Assoc. v. United States, 312 F.2d 418 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963). For recent consideration of the problem as it relates to government warranties and disclaimers, see Tracy, Warranty and Disclaimer in Government Personal Property Sales Contracts, 56 Military L. Rev. 107 (1972).


278 Essentially, the person executing the contract on behalf of the Government.

interest of the United States. Negotiation, on the other hand, embodies the essence of bargaining for the best terms available to the Government. Negotiation is permitted, however, only in special circumstances including national emergencies and public exigencies.

Mistakes in bidding provide an unending source of litigation, notwithstanding the general rule that a contractor must bear the consequences of a unilateral mistake, unless the contracting officer knew or should have known of the existence of the mistake when the bid was accepted.

For many years, the statutory requirements of competitive bidding were construed to exist for the benefit of the United States, not for bidders. In 1970, however, an unsuccessful bidder was granted standing to sue the Government, though more recently another court reverted to the earlier rule reflecting a bidder's lack of direct legal interest in the Government's procurement process.

A standard disputes procedure is provided in all government contracts under which the contracting officer is authorized to decide a dispute raised by the contractor. Such decision is final unless "fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Unless intermediate appeal is provided by contract, appeals are submitted to the secretary of the department. The Armed Services Board of Contract Appeals is authorized to act as the secretarial representative for the determination of appeals under the disputes clause. The Board's jurisdiction is limited to remedies under specific contract provisions and does not extend to a controversy over broad aspects of contract violation. The Government has on occasion asserted a right to obtain judicial review coextensive with that of the contractor. In resolving that issue, the Supreme Court decided that no government agency (including the Justice Department and the General Accounting Office) may challenge or block, absent fraud or bad faith, an award to a contractor made under the terms of the disputes clause, including disposition by the agency appeals board.

Before seeking judicial relief, a contractor must pursue the disputes clause remedy, unless it is clearly inadequate or unavailable. Under the latter circumstances, jurisdiction is vested in the United States Court of Claims under the Tucker Act. That court has evinced a strong penchant to consider evidence de novo in contrast to the usual federal district courts' policy to limit

---

281 Allied Contractors, Inc. v. United States, 310 F.2d 945 (Ct. Cl. 1962).
284 Gary Aircraft Corp. v. United States, 342 F. Supp. 473 (W.D. Tex. 1972), expressly declining to follow Scanwell, Id. at 477.
review to the administrative record. Notwithstanding the Supreme Court’s con-
firmance of the latter practice,289 the Court of Claims has continued, in certain
 circumstanc
to give de novo consideration.290 Apparently clarification of the
scope of review must await additional judicial or legislative developments.

It is clear that the disputes clause does not extend to breach of contract
claims not redressable under other clauses of the contract.291 Such a test has
been described as “very difficult” to apply in court292 because it depends upon
adjustment clauses employed by the agency, together with the procurement
policy and practice of the agency in applying those clauses, and whether the
agency remedy is fully equivalent to the judicial remedy it purports to replace,
under the Bianchi rule.293

Finally, a reminder of the anomalous legal status of nonappropriated
funds294 is reflected by a bidder’s protest to the General Accounting Office
(GAO) concerning an award by a general welfare fund for construction of
temporary lodging quarters. The invitation for bids indicated that the welfare
fund was a government instrumentality but that no appropriated funds would
become due or be paid to the contractor. The GAO ruled that it could not
make an authoritative decision in the matter since the contract did not involve
expenditure of appropriated funds and therefore is not subject to its audit
authority.295

II. Criminal*

A. Historical Perspective

The military criminal law system (the Uniform Code of Military Justice
since 1950) rarely is without its critics. Indeed, contemporary legal literature
abounds with a clamor of charges alleging abuses within the armed forces as
amounting to abridgment of constitutional rights of military personnel, espe-
cially in the lower ranks.296

290 E.g., Commerce Ind’l. Co. v. United States, 338 F.2d 81 (Ct. Cl. 1964), Kaiser Indus.
Corp. v. United States, 340 F.2d 322 (Ct. Cl. 1965), Wingate Constr. Co. v. United States,
164 Ct. Cl. 131 (1964); cf., Morrison Knudsen Co. v. United States, 345 F.2d 833 (Ct. Cl.
1965).
294 See text accompanying note 208 supra.
295 2 THE ARMY LAWYER, Mar., 1972, at 22.
* Valuable research assistance was furnished for this Part by Cpt. Arnold A. Vickery,
JAGC, U. S. Army.
296 The volunteer army of critics is extensive. A few examples are given to suggest the
tenor of criticism against the authority of the armed forces generally and the UCMJ in
particular: BARNES, PAWNS: THE PLIGHT OF THE CITIZEN SOLDIER (1972); M. McCArTHY,
MEDINA (1972); NATIONAL LAWYERS GUILD, MILITARY COUNSELING MANUAL: A GUIDE
to MILITARY LAW AND PROCEDURE FOR GI’S (1970); FRIEDMAN & NEUBORN, UNQUESTIONING
OBEDIENCE TO THE PRESIDENT (1972); R. RIVKIN: GI RIGHTS AND ARMY JUSTICE: THE
DRAFTEE’S GUIDE TO MILITARY LIFE AND LAW (1970); R. SHERILL, MILITARY JUSTICE IS TO
JUSTICE AS MILITARY MUSIC IS TO MUSIC (1970); Military Justice on Trial, NEWSWEEK,
Aug. 31, 1970 (cover story); SCARUPA, HOW JUST IS MILITARY JUSTICE? BALTIMORE SUN,
Apr. 23, 1972; Remcho, MILITARY JURIES: CONSTITUTIONAL ANALYSIS AND THE NEED FOR REFORM, 47 IND. L.
193 (1972); Note, Dissenting Servicemen and the First Amendment, 58 Geo. L.J. 534 (1970);
... the basic reason for this outpouring of articles is to be found in the sensational claims concerning alleged severity of court-martial sentences and inefficiency and injustice of military courts. By the close of the war, military justice had become a matter of public controversy. Most of the lay writing and some of the legal writing on the subject was ill-informed and prejudiced. There is no doubt, however, that these writings were the basic cause of much of the congressional and legal furor which followed. Prompted by a variety of reasons, and not always clearly aware of the problems of command discipline, some of the writers took a hostile approach.

The quoted commentary, seemingly a timely reflection of the current scene, was published almost twenty years ago and pertained to a surge of periodical literature in the field of military law during and after World War II. In retrospect, it serves to substantiate Thomas Carlyle's proposition that the present is the "sum-total of the whole Past." This is not to suggest that constructive criticism is neither necessary nor proper. But complaint and indictment must be tempered with thoughtful analysis and reasoned judgment, based on reliable factual information, if improved procedures are to be developed in the light of relevant perspective. Significant aspects of that perspective may be illuminated by reference to the record of the past.

Reform of military justice policy historically can be expected to follow expansion of military forces occasioned by large-scale combat. In that regard, however, change in military law tends to parallel the dynamics of law in general which seek to accomplish orderly accommodation of changing societal objectives. One needs only to reread the dusty ordinances of a 12th-century British monarch to be reminded of punishments for the military generally acceptable under early notions of summary criminal justice, yet which clearly would be intolerable under contemporary penal philosophy.

The keystone for the separate system of criminal law in the military is, of course, the constitutional provision under which the Congress was vested with the power "To make Rules for the Government and Regulation of the land and naval Forces." Under that authority, the Congress in 1950 enacted


E.g., "Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If any one shall be convicted . . . of having drawn out a knife with which to strike another . . . he shall lose his hand." Ordinance of Richard I—A.D. 1190, to govern military personnel engaged in the Holy Land crusade, reprinted in W. WINTHROP, supra note 5, at 905. Still earlier precedent is found in the scourges, stonings, and death penalties without trial prescribed in the ancient Book of Leviticus, as well as even older provision for mutilations and enforced suicides under the Egyptian legal system. 1 J. Wigmore, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 42 (1928). The Supreme Court recently reviewed forms of punishment sanctioned by society from the beginning of civilization in considering modern constitutional implications of the traditional death penalty. Furman v. Georgia, 408 U.S. 258 (1972). 300 U.S. Const., art. I, § 8, cl. 14. Cognate provisions include, from art. I, § 8, the
a single "Uniform Code of Military Justice" (UCMJ) for the armed forces, consisting of the Army, the Navy (including the Marine Corps), the Air Force, and (except when operating as a part of the Navy) the Coast Guard.

When the UCMJ was enacted, the nation was approaching its 175th anniversary. But regulations for the government of the separate armed forces had been continuously in force even prior to the Declaration of Independence. Actually, our system of military jurisprudence has been traced to the earliest days of feudal law introduced by the Teutons to the Romans in the first century B.C., from whence it was carried into Europe and, in particular, to England in 1066 by William the Conqueror. The American military code also claims its heritage from French, German, Dutch, Swedish, and Russian sources, as well. In 1689 the English Parliament entered the field of military law with the British Mutiny Act, in contrast to previous British military rules, which were proclaimed exclusively by the authority of the king and normally operated only during wartime conditions. That Act, in turn, was followed by a series of successive mutiny acts, as well as British Articles, enacted by Parliament leaving no doubt that our military code is predicated upon a history of military criminal law which originated separate and apart from, and in addition to, the common law, equity, canon, and admiralty systems of law.

The "original" American Articles of War, consisting of fifty-three provisions, were adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775, for observance by Massachusetts troops, the colonial congress having seriously considered "... the duty [owed] ... to the King" in anticipation of having "to prevent or repel" attempts by Great Britain to force compliance with "cruel and oppressive Acts of the British Parliament. ..."

On June 30, the second Continental Congress, after resolving on June 14 that a military force be raised to "march and join the Army near Boston," adopted a set of articles numbering sixty-nine, prefaced by a preamble reciting congressional power to declare war and to make rules for captures on land and water (cl. 11), to raise and support armies and to provide and maintain a navy (cl. 12, 13), to organize and call the militia (cl. 15, 16); and, from art. II, § 2, cl. 1, the President's role as Commander in Chief of the Army and Navy and, from Section 3, his power to commission all officers. The UCMJ is implemented by regulations published in the Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MOM, 1969 (Rev.)] published as Executive Order 11476, June 19, 1969. Each of the services, in turn, has issued supplementary departmental regulatory provisions governing the administration of military justice.

301 10 U.S.C. §§ 801-940 (1970). For legislative history, see S. REP. No. 486, 81st Cong., 2d Sess. (1949); H.R. REP. No. 491, 81st Cong., 2d Sess. (1949). The UCMJ expressly repealed the Articles of War and the Articles for the Government of the Navy. Perhaps the outstanding feature of the UCMJ was its provision for a Court of Military Appeals—now the United States Court of Military Appeals, 10 U.S.C. § 867 (1970), as the court of last resort in the system of military criminal law. As a "civilian" court (consisting of three judges appointed from civilian life by the President, upon advice and consent of the Senate, for fifteen years), it reflected the traditional American concept of civilian control over the military and also a special effort to combat the specter of military "command control," which loomed large in the consideration of post-World War II reforms.

302 The early statutory history of military law is related in detail in W. AYCOCK AND S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE, 3-9 (1955), which cites additional sources, including W. Winthrop, supra note 5. For example, celebrated war articles were issued in 1378 (by the French), 1487 (Germans), 1532 (Charles V), 1590 (Netherlands), 1651 and 1665 (Louis XIV), 1691 (Gustavus Adolphus), 1715 (Peter the Great), and 1768 (Maria Theresa).


304 W. Winthrop, supra note 5, at 947.
the causes which had induced "His Majesty's most faithful subjects" in the colonies to assume a defensive attitude. The articles, based in part on the Massachusetts provisions, though more nearly in accord with the British Articles of 1774, were drafted by a committee appointed on June 14 consisting of George Washington and four others "to prepare rules and regulations for the government of the Army." Washington was appointed General of the Army on June 15. Sixteen articles were added on November 7, 1775.

Modifications of the 1775 articles suggested by General Washington were submitted by his judge advocate, Col. William Tudor, to a congressional committee appointed to prepare a new military code. The Continental Congress enacted the articles on September 20, 1776, which were notable in that they referred to the respective Armies of the United States while no mention was made of the British Crown. That act completed the transformation of the British military system into an American institution. Moreover, John Marshall, who, at twenty-two, became the Army Deputy Judge Advocate in 1777, helped shape the American military law a decade before the establishment of the United States Supreme Court and twenty years before he would become Chief Justice of the United States.

The articles of 1776 were amended in 1777 and again in 1786. After the adoption of the Constitution, the first Congress, recognizing the existing military establishment, provided that the troops should be governed "by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established." Except for minor amendments, they were not revised until after the Civil War and some of the Indian Wars, in 1874, though no fundamental changes were effected. Aside from the elimination of some obsolete material in 1916, one qualified observer offers evidence that the British articles of 1774 had been assimilated into the American system of military criminal law without much alteration in substance. Another revision occurred in 1920.

---

305 Id., 21, 953.
306 Davis, supra note 5, at 341.
307 It may be noted that three members of the five-man committee (Adams, Jefferson, and Livingston) also served on the committee responsible for drafting the Declaration of Independence.
308 W. Winthrop, supra note 5, at 961.
310 Davis, supra note 5, at 342.
311 Act of Sept. 29, 1789, ch. XXV § 4, 1 Stat. 96.
312 Acts of the Congress of the Confederate States of America pertaining to military courts and extending jurisdiction to offenses then cognizable "under the Rules and Articles of war and the customs of war," together with subsequent amendments thereto, appear in W. Winthrop, supra note 5, at 1006-1009.
313 W. Winthrop, supra note 5, app. XIII. One commentator observes that the 1874 Articles reflected an attempt to draw "patches" applied to the existing Articles during the war years into the framework of the Military Code as permanent legislation. Hansen, Judicial Functions for the Commander, 41 MILITARY L. REV. 1, 13 (1968).
315 The late Prof. Edmund C. Morgan, Jr., chairman of the Committee of the Secretary of Defense which drafted the UCMJ, credited the observation to Major General E. H. Crowder, a former Judge Advocate General of the Army, in connection with congressional hearings which led to the 1916 changes. Prof. Morgan also noted that the Articles for the Government of the Navy covering substantially the same period of time reflected the fundamental theory and substance of the British naval articles of 1749 (from which John Adams formulated the early American naval articles). Morgan, The Background of the Uniform Code of Military
reflecting changes considered desirable as a result of World War I experiences and, with minor amendments in 1937 and 1942, the 1920 articles governed the Army throughout World War II. Final amendments to those articles, prior to the consolidation of military criminal laws for all the armed services in the UCMJ occurred in 1948, based upon World War II experience and recommendations of the Vanderbilt Committee.317

The need for a separate system of military criminal law was recognized centuries ago. It may be helpful to summarize the traditional rationale for such a system to permit appraisal of its relevance to the contemporary scene.

Though discipline is not a popular subject, it is a necessary ingredient of organization and the extent to which it must be developed depends upon particular institutional objectives to be achieved. For example, if every soldier, sailor, or airman could, at his own whim, modify or curtail any aspect of his training or combat tasks, or, indeed, could quit the service at his option, it is obvious that no effective fighting force could be maintained. In addition, characteristic mobility of military elements precludes reasonable use of civilian judicial procedures to cope with violations of the military code. Finally, there is need for a uniform system of law applicable to all servicemen everywhere—a system patently unavailable in the civilian community, especially in areas outside the territorial boundaries of the United States.318

It should be remembered also that action under the UCMJ is only one of the procedures available to a military commander in handling disciplinary problems. Commanders, by instinct, training, and doctrine, are capable of using primary attributes of leadership—whether psychological or administrative—to motivate their personnel. High-principled leadership can inspire personal loyalty and pride of accomplishment, despite difficulties inherent in specific military tasks and missions. It is only when “all else fails” that the commander,
by necessity, may find it necessary to consider disciplinary powers under the UCMJ. Even then, he is not completely free to exercise discretion. For the size of a modern army and its influence upon the civilian community expose the commander to the reaction of external agencies to a degree hitherto unimaginable in the annals of military administration. Public reaction, including legal challenge, must be reckoned with, not as a necessary deterrent to proper exercise of discretion, but as a forcible reminder that decisions will be closely scrutinized for rigid adherence to applicable law and policy.  

This, then—in broad terms—presents a background of tradition and environment against which a few selected aspects of the disciplinary system now embodied in the UCMJ will be examined briefly. To that background is added the reminder (frequently overlooked by strident critics of the system) that official figures tend to place alleged aggravated court-martial activity in a relatively reasonable focus. For example, Army general courts-martial during recent years have occurred at a rate of less than .20 per 1000 men per month, which equates to about one general court-martial for 5000 men per month. To sharpen the picture still more, a city of 5000 adults which could anticipate but one trial per month in its court of general criminal jurisdiction should, it seems,  


320 Despite the "uniform" nature of the statutory structure, as in the case of some "civil" determinations and proceedings mentioned in Part I, departmental rules and customs of the respective services may produce something less than the anticipated uniformity contemplated by the lawmakers.  

321 Statistics issued by the Office of the Army Judge Advocate General show the following fluctuations in the monthly average disciplinary rate per 1,000 between 1967-1972: general court-martial, .12-.20; special court-martial, 1.33-3.42; summary court-martial, .60-1.16; art. 15, 14.6-20.56. The corrected rates for Jan.-Mar. 1972 were: general, .18; special (BCD), .08, (non-BCD), 1.20; summary 1.12; art. 15, 19.78. Reported in various issues of Judge Advocate Legal Service and The Army Lawyer.  

As indicated previously, criticism of the military criminal law system is not a new phenomenon, but the extent and force of current disparagement have not been disregarded by the military. A text designed particularly for use by Army senior commanders suggests that present criticisms have focused not so much on legal procedures and structure as upon the human frailties of officers who serve as convening authorities and court members. SOLO, supra note 1, Criminal Law, pt. B, at 9. A persistent critical theme argues that the average commander is not qualified to discharge judicial functions assigned to him and that court members are not really impartial, i.e., they are likely to believe that the command desires a conviction and, in effect, that charges really would not have been referred for trial unless the accused had done something wrong. These arguments are by no means new, nor are they necessarily true in most cases. Nevertheless, even if largely unsupported by credible evidence, the arguments generate popular support and therefore detract from the system's potential effectiveness; hence, the new handbook, designed to assist senior commanders in recognizing that the appearance of evil can be overcome only by studied familiarity with and astute adherence to prescribed procedures based upon appropriate legal counsel.  

For a view that reforms within the court-martial system long preceded similar modifications in the civil courts (in respect to exclusion of evidence obtained by unreasonable search or by wiretapping, provision of counsel without cost to accused, warning requirement for military investigations, effective pretrial discovery, etc.), see remarks of Sen. Sam J. Ervin, Jr. of North Carolina, in the U.S. Senate, June 25, 1969. 115 CONG. REC. 17266 (1969) reprinted in 69-20 JUDGE ADVOCATE LEGAL SERVICE 28.
be considered as having furnished prima facie evidence of a reasonable community morality.

B. Jurisdiction

As with any judicial body, a primary problem in the review of a court-martial proceeding is the jurisdiction of the court (here a court convened by military authority) to exercise lawful powers in respect to the accused and to the offense of which he stands charged. Congress for many years has placed a stamp of "finality" upon court-martial proceedings executed in all respects in accordance with provisions of the former Articles of War and today's revised articles of the UCMJ. The statutory machinery therefore insulates legally sufficient proceedings from needless litigation. Nevertheless, federal courts will permit collateral inquiry into court-martial proceedings for the general purpose of testing questions of "jurisdiction," normally by way of habeas corpus and not by appeal but usually (though more recently not necessarily) after the petitioner has exhausted pertinent remedies within the court-martial system. Such questions customarily involve validity of the court-martial itself, as well as its powers over the person, the offense, or the sentence, and are most likely to be closely examined for adherence by the military to prescribed conditions.

The exercise of judicial review thus brings the military criminal law system within the traditional concept of civilian control and at the same time contemplates a reasonable accommodation of the military system within the judiciary, so that constitutional issues can be aired to permit full and fair consideration of the accused's claims. Through this facility of the law, the Supreme Court has, from time to time, restricted military authority assumed under the congressional grant. That the imposition of these restrictions normally results in bold headline news tends to attest to the relatively low ratio that judicial intrusions bear to the general incidence of court-martial proceedings.

1. Of the court-martial

As has been seen, courts-martial derive their authority from the constitutional power of the Congress to govern the armed forces. They are recognized also in the exception relating to "cases arising in the land and naval forces" provided by fifth amendment grand jury requirements and are an essential attribute of command. The jurisdiction of courts-martial extends only to penal matters (not, e.g., to payment of damages or to collection of private debts) and

325 For a discussion of exhaustion of remedies, see Weckstein, Federal Court Review, at 54-74. Recently the Supreme Court denied the Army's right to dispose of military charges against a soldier whose habeas corpus petition challenged the Army's refusal to release him as a conscientious objector (subsequent to which he was charged with refusal to obey an order to enplane for Vietnam), since the subject matter of his petition was independent of the military criminal proceedings. Parisi v. Davidson, 405 U.S. 34 (1972). Cf., Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683 (1969).
326 See Burns v. Wilson, 346 U.S. 137, 142 (1953).
normally it does not depend on the location of the offense. Moreover, its juris-
diction applies only when charges are properly referred to the court by its con-
vining authority. An individual cannot invoke court-martial jurisdiction by
his demand to be tried (except in lieu of proposed nonjudicial punishment, pur-
suant to article 15, UCMJ).

Whether a court-martial is duly constituted will depend essentially on
whether it was convened by a lawfully competent official and whether member-
ship of the court-martial consists of persons in number and competency as
required by law. For its judgments to be valid, the court-martial also must be
shown to have jurisdiction over the person accused and the offense charged.327

The provision in the Military Justice Act of 1968 allowing an accused to
elect to be tried by a military judge alone at a general or special court-martial
requires the accused's request to be "in writing."328 That requirement cannot be
legally met, according to the Court of Military Appeals, by an accused's oral
request at the trial subsequent to the judge's explanation of the accused's right
to request that mode of procedure, even where the judge during the colloquy
invited the accused to make known his choice.329 Nor is the requirement met
where the written request was alleged to be "lost" and a written request dated
prior to the commencement of the trial was later submitted and attached to the
record.330

2. Of the person

Article 2332 defines twelve classes of persons subject to the Code, principally
conditions fulfilled by military personnel on active duty. However, jurisdiction
also is extended to include cadets and midshipmen, members of reserve and
retired components under specified conditions, prisoners under court-martial
sentence, prisoners of war, personnel of certain other agencies serving with the
armed forces and, in time of war, others accompanying an armed force in the
field.

In a series of related cases, the Supreme Court ruled that court-martial
jurisdiction under the UCMJ does not apply to the following:

a. Persons lawfully separated from the military service, even if the off-
fense charged was committed while the offender was on active
duty.332

327 MCM, 1969 (Rev.), supra note 5, para. 8. Courts-martial also are limited in their
power to impose specific punishments, according to their classification, i.e., summary, special,
and general. See, e.g., 10 U.S.C. §§ 818-20, 856 (1970) (UCMJ arts. 18, 19, 20, and 56);
MCM, 1969 (Rev.), supra note 5, ch. XXV (esp. the Table of Maximum Punishments, para. 127c).
dice where written request for trial by judge followed testimony of one witness).
b. Civilian dependents of military personnel who accompany their spon-
sors on peacetime overseas tours.\textsuperscript{333}

In dealing with the issue of civilian dependents, the Court concluded that
the test for jurisdiction of the person is one of status, \textit{i.e.}, whether the accused
is a person who can be regarded as falling within the term "land and naval
Forces."\textsuperscript{334}

3. Of the offense

The jurisdictional test of status subsequently was significantly expanded
in \textit{O'Callahan v. Parker}\textsuperscript{335} to require, in addition, that the offense must be "ser-
vie connected." Under that test, the Court denied authority of a court-martial
to try a soldier for attempted rape, housebreaking, and assault with attempt
to rape. The soldier, in civilian attire while on pass from his post in Hawaii,
had broken into a Honolulu hotel room, assaulted a girl, and attempted to rape
her. The Court's decision left for later cases to fill in the interstices of the service
connection test and also to determine whether the newly formulated rule should
be applied retrospectively.

The off-post no-military connection rationale quickly produced reversals
by the Court of Military Appeals of court-martial conviction in two cases of
serious crimes committed by military personnel, one involving female victims not
associated with the military,\textsuperscript{336} and the second involving civilian owned property
and civilian victims, committed in civilian communities.\textsuperscript{337} In another case,
court-martial jurisdiction was affirmed for the offense of sodomy committed in
government quarters within the confines of a naval base but was denied as to
offenses with the same individual which transpired off post.\textsuperscript{338}

Within a month of \textit{O'Callahan}, the United States Court of Appeals for
the District of Columbia construed "the spirit of \textit{O'Callahan}" to preclude ex-
pansive application of article 2(10) (making subject to UGMJ in time of war,
persons serving with or accompanying an armed force in the field) and thus
denied court-martial power over a civilian merchant seaman charged by the
military with premeditated murder in a bar in Da Nang, Vietnam, while his

\textsuperscript{333} Reid v. Covert, 354 U.S. 1 (1957) (involving a capital offense); Kinsella v. United
States \textit{ex rel.} Singleton, 361 U.S. 234 (1960) (a noncapital offense); \textit{accord}, McElroy v. Guagi-


\textsuperscript{335} 395 U.S. 258 (1969). This case had perhaps the heaviest impact on military criminal
jurisdiction by eliminating from its reach nonservice connected offenses even though com-
mited by military personnel, provided they are cognizable in a civilian court and were com-
mitted while off duty, off post, and out of uniform. \textit{See Rice, O'Callahan v. Parker: Court-
Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman,} 51 MILITARY

similar to \textit{O'Callahan}). The reversal in this case was reported to be worth $50,000 in back

appropriation of an automobile, robbing a gasoline station, and resisting arrest).

ship was in the harbor off-loading fuel for use by the armed forces. And, jurisdiction was denied for court-martial of off-base possession (not use) of marijuana “within the peripheries of the civilian United States.”

Military jurisdiction was affirmed in two federal circuits where a substantial portion of the offense occurred on post, though related transactions took place in the civilian community, and off post where offenses were of broad and strong military connotation and had lasting and pervasive effect. Offenses in foreign countries were held to be subject to military jurisdiction by reference to *O'Callahan* in several instances.

Because the use of marijuana and narcotics by military persons on or off a military base has special military significance, the Court of Military Appeals upheld military jurisdiction over specifications alleging such offenses but it would not extend that rationale to include jurisdiction over importation and transportation of marijuana absent proof of circumstances relating the alleged acts “specially to the military.”

The Court of Military Appeals successively established certain other positive factors to supply requisite nexus between offense and military service. Those factors include offenses committed (1) on a military reservation, (2) petty in nature (since no constitutional requirement for indictment or jury trial is involved), (3) involving a serviceman as victim, (4) even if the accused was not aware of the victim's military identity, and (5) where the accused uses his military status to perpetrate a crime.

Not surprisingly, *O'Callahan* inspired much professional comment, as observed by the Supreme Court when it considered *Relford v. Commandant*, after granting certiorari “limited to the retroactivity and scope of *O'Callahan* ...” *Relford*, a soldier at Fort Dix (whose court-martial conviction had become “final” more than five years prior to *O'Callahan*) was convicted of raping and kidnapping two women on a military post—one, the daughter of a soldier; the second, the wife of an airman who was driving from her home on...
base to the post exchange, where she worked as a waitress. Noting its ad hoc consideration of the circumstances in *O'Callahan*, the Court identified a number of factors which distinguished Relford's case from *O'Callahan*, particularly stressing military interest in the security of persons and of property on the military enclave, as well as the military commander's authority and responsibility to maintain order in his command, and the adverse effects a crime on a military base has upon the post, its personnel, and its mission and operations.

For these and other specified reasons, a unanimous Court held that a serviceman's crime against the person of an individual upon the base or against property on the base is "service connected" within the meaning of *O'Callahan* and that, therefore, Relford's offenses were subject to court-martial jurisdiction. Since court-martial jurisdiction was found to apply, the Court declined to consider the question of *O'Callahan*'s retrospectivity, leaving that issue for resolution in litigation where it would be solely dispositive.

The surge of cases purporting to construe perceptible limits of the rule of service connection seems to be dwindling, though the issue continues to be litigated. Arguments grounded on the *O'Callahan* premise have not defeated court-martial jurisdiction where the offenses were committed partially on and partially off a military base, or in places outside the United States where they could not be prosecuted in a federal court. But, the sale of marijuana and LSD off base in a civilian community to a civilian is not triable by a court-martial. Lastly, opportunity for the Supreme Court to confront the issue of *O'Callahan*'s possible retrospective application has been provided by a split among the circuits.

352 The offense was there committed by a serviceman (1) on pass and (2) off post (3) in a place not under military control (4) within U.S. territorial limits (5) in peacetime under circumstances unrelated to war powers (6) with no connection between the accused's military duties and the crime, (7) the victim not engaged in duty relating to the military, (8) with a civilian court available for prosecution, (9) in the absence of any flaunting of military authority, (10) threat to a military post, or (11) violation of military property and, significantly, (12) it was in the nature of offenses traditionally prosecuted in civilian courts. 401 U.S. at 365-66.

353 The offenses were committed on a military enclave and the security of the victims, both properly on the post, was threatened and their persons violated, and in both cases their cars were forcefully and unlawfully entered. 401 U.S. at 366.


355 *Inter alia*, that *O'Callahan* should not be interpreted as confining court-martial jurisdiction to the "purely military offenses that have no counterpart in nonmilitary criminal law." 401 U.S. at 368-69.

356 401 U.S. at 370.


358 Harkcom v. Parker, 439 F.2d 265 (3d Cir. 1971) (attempted rape began on military reservation and continued off base); Swisher v. Moseley, 442 F.2d 1351 (10th Cir. 1971) (interstate transportation of vehicle stolen on post, where state line crossing occurred off post); United States v. Bonavita, No. 24,537, (C.M.A. May 19, 1972) digested in Juno Advocate Legal Service 5 (concealment by an accused on post of a car stolen from a civilian off post).


4. As to the sentence

A general court may impose any punishment authorized by the Code, subject to limitations imposed by the President. A special court may impose no more than six months' confinement at hard labor, certain forfeitures of pay and, under limited circumstances, a bad conduct discharge. A summary court-martial (which is authorized to try only enlisted personnel) may not adjudge punishment greater than confinement for a month and certain restrictions and forfeitures of pay.\(^1\)

A special limitation was recently required by the Supreme Court's pronouncement in *Argersinger v. Hamlin*,\(^2\) prohibiting any sentence to imprisonment for a defendant not represented by counsel. Pursuant to that decision, the Army Judge Advocate General issued instructions forbidding a sentence to confinement for any offense if the accused was not represented by a lawyer, together with necessary guidance to effect appropriate corrective action in the case of all confinements not conforming to the *Argersinger* rule adjudged by a court-martial subsequent to the Supreme Court's ruling.

C. Anatomy of Military Justice

Examination of the military justice structure will perforce be circumscribed by the limited dimensions of this paper but a few selected aspects are considered to suggest the basic framework within which military commanders determine appropriate disposition of those relatively few members of the military establishment whose wayward acts may require application of measures authorized by the UCMJ.\(^3\)

1. Pretrial Restraint

The UCMJ furnishes a commander various policy options when he is confronted with a disciplinary problem.\(^4\) At the outset, if he contemplates pro-

---


\(^3\) 364 Despite publicity and complaints lodged against military justice, an overwhelming majority of personnel complete their service—obligated or voluntary, enlisted or commissioned—with no semblance of a criminal charge made against them. See note 26 supra.

\(^4\) Presumably, previous consideration will have been given a wide assortment of administrative actions usually available to him before resort to the UCMJ, including change of duties, transfer to another unit or (with appropriate concurrences) command warnings or reprimands, withholding of privileges, to mention but some nonpunitive type measures.
ceeding under UCMJ, normally he will have to determine whether physical restraint is required and, if so, in what degree (i.e., withdrawal of pass and leave privileges, restriction to specified areas, arrest, or confinement), pending final disposition of the initial report of alleged misconduct. In the military, arrest is a moral restraint limiting personal liberty pending disposition of the indicated offense, distinguishable from arrest in quarters as punishment, as well as from the act of apprehension when a person is taken into custody, or from restriction to specified areas, a less severe form of pretrial restraint.\textsuperscript{366}

No restraint is \textit{required} by law. Thus the determination to impose restraint \textit{vel non} involves analysis of the pertinent circumstances—including potential consequences of inappropriate restraint—in relation to the incident under consideration. Confinement can be justified only when it is necessary to insure the accused’s presence at the trial, if the alleged offense is serious (murder, rape, robbery, etc.), or if there exists a reasonable possibility that violence may be committed by or against the accused.\textsuperscript{367} During prolonged investigation, the nature of any restraint imposed should be reexamined at appropriate intervals with a view toward termination or modification, since restraint of any kind must be justified if lack of speedy trial is alleged by the accused. Many commands have instituted a procedure under which a seasoned judge advocate visits major confinement facilities in the status of a “magistrate” to assist the commander in determining whether continued confinement is warranted. The program was commended by the Court of Military Appeals as a device to reduce occasions for the contention that an accused has been denied opportunity to consult with counsel.\textsuperscript{368}

Pretrial restraints, especially confinement, ultimately may be considered in connection with sentencing in the event of conviction, and allowances therefor usually are made. Even more significant, the nature of pretrial confinement may constitute “prior punishment” in violation of article 13.\textsuperscript{369}

Regardless of pretrial limitations imposed, the accused is entitled to prompt and specific information concerning the nature of charges against him,\textsuperscript{370} since it is unlawful to delay trial unreasonably.\textsuperscript{371} Practically, each day of delay adds to the merit of an accused’s motion to dismiss charges for lack of speedy trial.\textsuperscript{372}

2. Nonjudicial Punishment

Least stringent of the UCMJ instrumentalities for punishment is the article 15 procedure for nonjudicial punishment.\textsuperscript{373} Such punishment may be imposed only by a commander recognized by his superiors as chiefly responsible for dis-
cipline in a particular unit (i.e., the company commander, not the platoon commander or a company executive or other staff assistant). The offense must be cognizable under the UCMJ, since the accused may reject article 15 punishment and demand trial by court-martial, and it must be of a minor nature (ordinarily not such an offense which, if tried by general court-martial, could be punished by dishonorable discharge or confinement at hard labor for more than a year). Normally, article 15 punishment will bar subsequent trial for the same offense. If a competent authority determines that the offense was not minor, the accused may be tried by court-martial for the same offense. The accused is entitled to consult with a judge advocate concerning the proposed disciplinary action and may submit any matters which he may have in defense, or in extenuation and mitigation.

The extent of punishment imposable under article 15 is related to the status of the accused (i.e., whether an enlisted man, and, if enlisted, his grade), as well as to the commander (i.e., whether a general officer or commander exercising general court-martial jurisdiction, field grade, or company grade officer). For example, a company grade commander may not effect forfeiture of pay of an officer at all, and only 7 days' pay in the case of enlisted personnel. A general officer may restrict a subordinate officer for 60 days and forfeit half of one month of the latter's pay for two months; similar authority is given a field grade officer over enlisted men.

Punishment imposed is appealable through the proper organizational channel to the next superior commander by an accused who believes his punishment "unjust or disproportionate to the offense."

3. Summary Court-Martial

If the accused is an enlisted person, his case may be referred to a summary court-martial, composed of one commissioned officer, normally convened by a battalion commander for noncapital offenses.\(^374\) Because of its limited punishment power, the summary court is intended to hear cases involving relatively minor offenses. The accused is not entitled to representation by detailed military counsel, though he may retain civilian counsel at his own expense, and he may not be tried by a summary court if he objects. The hearing is conducted in a relatively informal procedure,\(^375\) an abbreviated record of which is forwarded to the convening authority and subsequently to the SJA at the supervisory general court-martial jurisdiction (usually at division level) for review.\(^376\)

4. Special Court-Martial

The middle forum in the court-martial system is the special court-martial,

\(^374\) The reference to noncapital cases (and, anywhere else herein relating to the military code's prescription for a death penalty) may have become academic in view of the strictures against capital punishment pronounced in Furman v. George, 408 U.S. 238 (1972).
\(^375\) MCM, 1969, (Rev.), supra note 5, para. 79d.
\(^376\) 10 U.S.C. \$ 865 (1970) (UCMJ art. 65); MCM, 1969 (Rev.), supra note 300, paras. 79e, 85b.
consisting of at least three members. In addition, a military judge normally will
be assigned to the court to serve as presiding officer and to rule on questions of
law. However, the accused may elect to be tried by the military judge alone,
or he may choose trial by a panel including enlisted personnel (in which case at
least a third of the membership of the court must be enlisted). Trial and defense
counsel are detailed for each special court-martial. Although the trial counsel
need not be a lawyer, the accused is entitled to representation by a lawyer. A
"Bad Conduct Discharge" (BCD) special court-martial differs from the standard
special court in that it has the power to award a BCD. Certain formalities must
be met before that power can be exercised: Both a military judge and qualified
defense counsel must be detailed, a verbatim record is kept, and the court-martial
must be convened by a commander exercising general court-martial jurisdiction.

A convening authority who does not exercise general court-martial juris-
diction must forward the record of proceedings, including the sentence as ap-
proved by him, for review by the officer who has general court-martial jurisdic-
tion over the command.

5. General Court-Martial

The highest trial court in the military system is the general court-martial,
convened only by the President or the secretary concerned and commanders
specified in article 22 and others designated by the secretaries. Cases are heard
by that court only after the convening authority has had the benefit of formal
pretrial advice submitted by the SJA. The general court-martial consists of a
military judge and at least five court members, typically commissioned officers. As
in the case of the special court-martial, the accused may elect trial before the
military judge alone or he may demand enlisted membership on the court. Trial
and defense counsel (both members of the JAGC) are detailed for each general
court-martial, but the accused is free to choose his own civilian counsel at no
expense to the Government.

A charge may not be referred to a general court-martial for trial until a
thorough and impartial investigation thereof is made to inquire into the truth
of the matters set forth in the charge. The accused and his counsel are en-
titled to be present during the investigation, and a recommendation by the in-
vestigating officer that the case be disposed of by reference to a general court-
martial for trial must be made in the nature of a formal report to the officer
directing the investigation. The investigation "operates as a discovery
proceeding for the accused and stands as a bulwark against baseless charges." United

If a military judge is not available, the senior member present presides, but the
court may not adjudge a bad conduct discharge in the absence of justification by the convening
authority for holding the trial without a military judge and appearance by qualified counsel

Unless such counsel is not available because of military exigencies.

The recommendations are advisory, however.

377 If a military judge is not available, the senior member present presides, but the
court may not adjudge a bad conduct discharge in the absence of justification by the convening
authority for holding the trial without a military judge and appearance by qualified counsel

378 Unless such counsel is not available because of military exigencies.


proceeding for the accused and stands as a bulwark against baseless charges." United
382 The recommendations are advisory, however.
nature and the manner in which it is conducted, this aspect of military law imposes upon the Government "to a degree unmatched in the civilian community," the obligation to disclose to the accused prior to trial all matters within its knowledge which bear significantly upon his guilt or innocence.\(^{383}\)

The record of trial by a general court-martial is reviewed by the SJA before action may be taken thereon by the convening authority. Sentences to dishonorable or bad-conduct discharge, or confinement for one year or more, may not be executed unless affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals. Sentences, to dismissal of an officer, cadet, or midshipman require, in addition, approval by the secretary or his designee. Sentences extending to death or involving a general or flag officer may not be executed until affirmed by a Court of Military Review and the Court of Military Appeals and approved by the President.\(^{384}\)

6. Disposition Other Than By Trial

An important option open to the commander is reflected by his authority to approve a discharge in lieu of court-martial ("for the good of the service"), upon request of an accused whose conduct has made him triable for an offense which could lead to either a bad conduct or dishonorable discharge.\(^{385}\) Use of this authority is appropriate when administrative burdens of courts-martial and confinement are not warranted or because of minimal rehabilitative effect punishment might have (including lack of benefit to the Army or to society), as in the case of individuals having chronic disciplinary problems or who would otherwise qualify for administrative discharge by reason of misconduct or unfitness if court-martial action were not initiated.

Another obvious option exercisable by the commander is to dismiss the charges when preliminary investigation discloses that the charges are trivial or unfounded or, for other appropriate reasons, warrant dismissal.

7. Limitations Upon the Convening Authority

Criticism of the military justice system reflects a curious but understandable dichotomy of interests. Thus complaints that the commander wields disproportionate control over various judicial aspects of the system\(^{386}\) are countered by the belief of many commanders that "technical" requirements of military law frequently impinge on essential command prerogatives.

Since the commander exercises significant independent discretion when considering options available to him in many phases and aspects of a court-

385 See, e.g., Army Reg. 635-200, change 36, ch. 10 (1972); and see consideration of administrative discharges for misconduct or unfitness in Part I, supra.
386 For analysis of command responsibilities, see Hansen, Judicial Functions for the Commander, 41 MILITARY L. REV. 1 (1968).
martial proceeding, he is vulnerable to allegations of abuse of authority to effect discipline according to his personal desires. Just as the magnitude of the discipline problem in the armed forces tends to become exaggerated in outcries of critics whose indignation frequently stems from a particular case, so do broad indictments of abusive command control tend to exceed the circumstances prompting accusations of interference with the court-martial process.

The Code purports to insulate court-martial personnel and administration from improper command influence to assure a fair trial for an accused. A few instances may serve to illustrate the general standard of neutrality required of commanders in actions directly affecting the fate of an accused.

Policy instructions purporting to circumscribe prerogatives of court-martial members are impermissible. Thus a pretrial lecture stressing the deterrent function of a court-martial respecting command disciplinary problems was prejudicial as was a posted notice communicating command policy regarding petty thievery. Similar effect was ascribed to command communications expressing discontent with court-martial sentences and arguments of trial counsel.

Similar difficulties have been encountered in the appointment of court-martial panels. For example, a preponderance of law enforcement personnel or a selection practice suggesting possible racial discrimination was held to exceed permissible bounds of discretion.

**D. Miscellaneous Recent Issues**

1. **Warnings**

In the military, as in the civilian community, interrogation of a suspect is of critical importance in a criminal investigation. Constitutional due process for a civilian suspect under the doctrine of *Miranda v. Arizona* contemplates "full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice," pursuant to the fifth amendment's mandate.

The military guarantee against self-incrimination is contained in article 31, UCMJ. In fact, long-settled practice in the military against interrogation of a suspect without adequate warning (i.e., the right not to make a statement and that any statement might be used against the suspect in a criminal proceeding)
and the right to consult counsel during interrogation was cited by the Supreme Court in enunciating the *Miranda* rule.\(^{397}\) The article is reinforced by an exclusionary rule and military practice forbidding admission of evidence inconsistent with article 31 and *Miranda*.\(^{398}\) The military has received emphatic guidance from the department level to give warnings, even if there be doubt that the facts may require article 31 advice, especially under circumstances requiring some volition of action on the part of a suspect rather than mere passive resistance to observation.\(^{399}\)

Although there may be circumstances when all the aspects of the *Miranda* doctrine may not be applicable (e.g., when the suspect is not under substantial restraint of personal liberty), nevertheless, Army policy has decreed that *Miranda* warnings will be applied whenever the broader article 31 caution is required.\(^{400}\) The terms of article 31 applicable to a “person suspected of an offense” have been interpreted so as to make it clear that if the investigator is in possession of information permitting a “reasonable” inference that the individual concerned had committed an offense, the latter is entitled to the article 31-\*Miranda\* notice.\(^{401}\) Patently, the problem will require ad hoc determinations in the light of specific facts and circumstances.

Though the warning is not prerequisite to a valid search, it is clear that admissibility of any statement made during the search will depend upon adequate admonition under article 31.\(^ {402}\) The warning is likewise required where surrender of stolen items is intended to be directed by the investigator.\(^ {403}\)

On the other hand, the warning need not precede questioning merely for purposes of identification (without any basis for suspicion that an offense was committed by the subject of the interrogation).\(^ {404}\) Nor need a doctor give a warning prior to questioning an individual for diagnostic and treatment purposes.\(^ {405}\) The self-incrimination privilege therefore would not normally bar testimony of a psychiatrist as to the accused’s sanity.\(^ {406}\) The warning requirement is not applicable to wholly voluntary statements made by someone clearly not suspected of an offense,\(^ {407}\) or by one knowledgeable of his rights even in the face of an allegedly defective warning.\(^ {408}\) And, after adequate warning by an investigator concerning the accused’s right to counsel at an interview, following which the accused knowingly consented to proceed without his counsel, an ac-

---

399 SOLO, *supra* note 1, at 74.
400 67-9 JUDGE ADVOCATE LEGAL SERVICE 6.
cused cannot later be heard to complain about the admission of his pretrial statement made in the absence of counsel.\footnote{United States v. Estep, 19 U.S.C.M.A. 201, 41 C.M.R. 201 (1970).}

In a somewhat different context, the same result was reached, notwithstanding circumstances which precluded the accused from knowing that a counsel had been appointed to represent him in subsequent deposition proceedings. Though accused argued that had he known of the designation of counsel, even for limited representation, he would not have consented to an interrogation and would not have waived the right to consult his counsel, it was concluded that an effective waiver had been made by the accused, permitting consideration of his pretrial statement.\footnote{United States v. Flack, 20 U.S.C.M.A. 201, 43 C.M.R. 41 (1970).}

In still another variation, pretrial confinement (or its equivalent) alone is not necessarily a critical stage of the accusatory process (\textit{Miranda}) so as to entitle an accused to the assistance and advice of counsel.\footnote{United States v. Bielecki, 21 U.S.C.M.A. 450, 45 C.M.R. 225 (1972).} And, whether questioning amounts to custodial interrogation usually will depend not necessarily on formal imposition of custody over a suspect but rather whether he has been deprived of his freedom of action in any significant way.\footnote{United States v. Tempia, 16 U.S.C.M.A. 629, 635, 37 C.M.R. 249, 255 (1967) (citing \textit{Miranda}).} Nonetheless, an individual may be entitled to a warning even in a chance meeting with an interrogator who suspected him of an offense.\footnote{United States v. Harvey, 21 U.S.C.M.A. 39, 44 C.M.R. 93 (1971).} Moreover, the warning must be applied to all offenses which might reasonably be suspected by the investigator.\footnote{United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971).}

Notwithstanding decision of the United States Supreme Court to permit, for impeachment purposes, the use of a pretrial statement following deficient warning,\footnote{United States v. Johnson, 20 U.S.C.M.A. 320, 324, 43 C.M.R. 160, 164 (1971) (warning referred to alleged desertion but not to acts which investigator claimed he did not know were illegal).} the Court of Military Appeals has continued the \textit{Miranda} bar under such circumstances in view of the Manual’s prohibition against any adverse use of an improperly taken statement.\footnote{Harris v. New York, 401 U.S. 222 (1971).} Although the consequences of pretrial statements subsequently found to have been made in the absence of proper warning clearly may not be admitted \textit{adversely} to the accused, the converse is not so, and therefore an accused may be heard in his effort to counteract the earlier statement.\footnote{United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971).}

Supplementary advice to an article 31 warning to the effect, “If we are wrong in suspecting you, you do not have the right to remain silent,” so varied or qualified the article 31 notice as to make prejudicially unclear the existence of the right in that case.\footnote{United States v. Jordan, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971).} As explained in a subsequent case, a suspect’s right to remain silent does not depend upon whether he is innocent or guilty; it depends on whether he is a suspect.\footnote{United States v. Peebles, 21 U.S.C.M.A. 466, 467, 45 C.M.R. 240, 241 (1972) (citing \textit{Hundley}).}
NOTRE DAME LAWYER

2. Search and Seizure

The fourth amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches. It further provides that warrants shall issue only upon "probable cause, supported by Oath... and particularly describing the place to be searched, and the persons or things to be seized." The standard of proof applicable to establish probable cause also is one of reasonableness.\(^{420}\)

The Court of Military Appeals has said that "the reasonableness of the officer's conduct not the label placed upon it by the officer or the court below... dictates the result"; thus, "[t]he constitutionality of a particular search depends upon the facts and circumstances—the total atmosphere of the case."\(^{421}\) In addition, the Manual provides that "[p]robable cause [to] search exists when there is reason to believe that... the objects sought... are located in the place or on the person to be searched."\(^{422}\)

A search or examination of an individual's person or property to obtain certain items of criminal goods\(^{423}\) or evidence of a crime in the military must be distinguished from an "inspection," i.e., an examination of an individual's person or property to determine the military readiness or fitness of the person, organization or equipment examined. In the latter case, the inspector is not looking for illegal items, and criminal evidence found during the course of a lawful inspection is admissible against an accused in subsequent proceedings.\(^{424}\)

Notwithstanding the simply stated tests, the law of search and seizure has been changing, influenced by emerging problems in criminal justice and by an apparent expanding propensity for intrusive efforts on the part of law enforcement agencies.\(^{425}\)

Fourth amendment rights are enforced in the military by exclusionary rules of evidence patterned after civilian practice. Thus admission into evidence of the product of an unlawful search is precluded, under the rule of \textit{Mapp},\(^{426}\) as delineated in the Manual.\(^{427}\)

Historically, military search practice was based on the commander's authority over places and persons subject to his military control. One commentator has suggested that a 1971 Supreme Court decision may affect the traditional concept.\(^{428}\) However, the advent of the military judge has prompted a new practice under which Army military judges have been authorized to search warrants upon

\(^{422}\) MCM, 1969 (Rev.), supra note 300, para. 152.
\(^{423}\) Contraband (e.g., narcotic drugs), instrumentalities of a crime (e.g., weapons), or fruits of a crime (e.g., stolen articles). Earlier technical distinctions between criminal goods and "mere evidence" have been eliminated, United States v. Whisenhant, 17 U.S.C.M.A. 117, 121, 37 C.M.R. 381, 385 (1967), in the light of Warden v. Hayden, 387 U.S. 294 (1967).
\(^{427}\) MCM, 1969 (Rev.), supra note 300, para. 152; in fact, the military practice preceded \textit{Mapp}.
\(^{428}\) McNeill, \textit{Recent Trends in Search and Seizure}, supra note 425, at 96, referring to Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which a state law enforcement official was disqualified from issuing a warrant in case he was investigating.
probable cause as to military persons or military property within the judicial circuit to which the judges are assigned. The procedure requires the request for a warrant to be supported by an affidavit setting forth facts for consideration by the judge. If application is based on data furnished by an informer, the supporting evidence must establish the credibility of the informer and the reliability of his information.

A 1969 Supreme Court decision limiting warrantless searches incident to arrest to the person and areas within the immediate control of the arresting officer has been held to apply in the military, but only prospectively. Several decisions have negatived admissibility of evidence seized in an area removed from the place of arrest under circumstances not providing a sufficient basis upon which to assume that the contraband would be found at that place. Also a written form purporting to authorize search of both premises and person but from which the word "person" had been stricken was insufficient to authorize a search of the accused's person. On the other hand, search of an accused and his locker in his squad bay was found reasonable, and compliance with a proper order of a commander to search the accused, relayed down the chain of command and executed in orderly manner, also was held to be reasonable.

A search made with the consent of the accused is lawful, if consent is established by "clear and convincing evidence," and warrantless searches are judicially recognized if incident to efforts to prevent the removal of criminal goods.

3. Pretrial Agreements

Until comparatively recently, plea bargaining by means of a pretrial agreement has been a somewhat less than well-publicized fact of life for the civilian criminal bar. In the military, however, the practice has been a relatively well-recognized practical method for achieving prompt justice, at least since special procedures were instituted about fifteen years ago. In fact, pretrial agreements had been employed in military trials since 1953, though not without some "reservations" by the Court of Military Appeals.

429 Army Reg. 27-10, change 8 (1971). The authority of military judges to issue warrants is in addition to the authority of commanders to authorize searches.
439 Based upon JAGA 1957/3748, disseminated by DA message 525595, 8 May 1957, to SJAs setting forth conditions governing acceptance by the convening authority of offers to plead guilty for a consideration. For a Navy viewpoint, see Della Maria, Negotiating and Drafting the Pretrial Agreement, 25 JAGJ. 117 (1971).
Under the usual practice in the armed services, an offer to plead guilty for a
consideration must be made in the form of a written proposal, initiated at the
instance of the accused, for approval by the convening authority. Essentially,
the accused agrees to plead guilty in return for approval by the convening author-
ity of a stated maximum sentence.\textsuperscript{441} The prime effect of the agreement is to
change the legal maximum sentence from that prescribed in the Manual to the
terms provided in the agreement,\textsuperscript{442} though the agreement does not preclude the
court-martial from imposing the maximum sentence provided by law,\textsuperscript{443} subject
to corrective action by the convening authority consistent with the terms of the
agreement. Just what the agreement provides for in this respect may be disputed
by the parties.\textsuperscript{444} This, in turn, may precipitate issues concerning providency of
the plea under the Care doctrine\textsuperscript{445} in the event the provisions are not free from
ambiguity.

Whether the convening authority remains bound to the agreement in the
event of misconduct by the accused occurring after the bargain has been nego-
tiated usually will depend upon provision made for terminating the agreement
in the event of such contingency.\textsuperscript{446}

Efforts to require the accused to include waivers of rights assertable on
review (such as lack of speedy trial or denial of due process) despite the plea of
guilty may invalidate the purported agreement.\textsuperscript{447} Moreover, an unwritten
"understanding" by the defense counsel not to raise such an issue (e.g., former
jeopardy) in return for a recommendation to the SJA that a proffered pretrial
agreement be accepted is contrary to public policy, where the accused was un-
aware of the promise.\textsuperscript{448}

Examination by a military judge of the contents of a pretrial agreement
(to establish providency of accused's plea) is not prejudicial to the accused.\textsuperscript{449}
A lapse of 76 days following imposition of the sentence did not nullify a
conviction where the convening authority's action (though delayed) was con-
sistent with the pretrial provisions.\textsuperscript{450}

4. Speedy Trial

The military standard for speedy trial, as exemplified by article 10, UCMJ,
and implementing Manual provisions,\textsuperscript{451} is more rigorous than the sixth amend-

\begin{itemize}
  \item \textsuperscript{8} U.S.C.M.A. 504, 25 C.M.R. 8 (1957); United States v. Mogardo, 41 C.M.R. 490 (A.B.R.
  \item \textsuperscript{443} United States v. Sanchez, 40 C.M.R. 698, 699-700 (A.B.R. 1969).
  \item \textsuperscript{444} United States v. Veteto, 18 U.S.C.M.A. 64, 39 C.M.R. 64 (1968); United States v.
  \item \textsuperscript{446} \textit{See,} United States v. Conway, 43 C.M.R. 512 (A.C.M.R. 1970).
  \item \textsuperscript{448} United States v. Troglin, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972).
  \item \textsuperscript{451} Under article 10, any person arrested or confined is entitled to "immediate steps" to
    inform him of the specific wrong of which he is accused and to try him or to dismiss the
    charges and release him; MCM, 1969 (Rev.); \textit{supra} note 300, paras. 68i, 215e.
\end{itemize}
ment’s requirement that the accused shall enjoy the right to a speedy trial in all criminal prosecutions.452

Recently, the Court of Military Appeals determined that, in the absence of a request for continuance by the accused, there is a presumption that accused has been denied his right to a speedy trial when his pretrial confinement exceeds three months.453 The right to a speedy trial is enforced through provision for a motion by the accused to dismiss charges based on evidence showing a denial of the right,454 which imposes upon the prosecution the burden of establishing that the delay was not unreasonable.455

The right to a speedy trial was early determined to be a personal right which could be waived by failure to assert it at the trial.456 After a series of supplemental decisions,457 it became apparent that circumstances could tie a speedy trial issue to claims of denial of due process and that waiver by inaction might not apply to closely related issues alleging lack of speedy trial and denial of due process.458

The mere passage of time does not necessarily equate with a denial of the constitutional privilege of timely trial. For example, an accused cannot claim as unreasonable delay a period which he exploited to his advantage as a defendant in a civilian court prosecution.459 On the other hand, a speedy trial contention based on failure of notice of charges while an accused was confined was held to be proper, notwithstanding the accused understood the reasons for confinement as determined pursuant to questioning by the military judge.460

Where the Government has made credible explanation, the speedy trial contention was not favored.461 Conversely, when the record reflected total inactivity on the part of the Government for 47 days after the accused’s confinement and, during the next 10 days, the Government merely had moved the accused from a civilian jail to a military confinement facility and where no reasons were given for the Government’s inaction, the accused was denied his right to a speedy trial.462

The problem of speedy trial usually is addressed to transactions concluding with the commencement of actual trial. However, the Court of Military Ap-

454 Para. 68i, supra. MCM, 1969 (Rev.), supra note 5, para. 68i.
peals has expressed concern also with expediting review of the court-martial record at every stage of the appellate process. In an annual report, the court called attention to the increase in time required to dispose of cases at the appellate review level. Several cases trace tentative judicial ventures into this area. In one instance, the Government attempted to account for alleged delay in review of the case by reference to inadvertent misrouting of the record. Though the issue was not dispositive of the case, the Court of Military Appeals observed, "When the Government has control of the procedures required to effect timely disposition of criminal charges, neither its good faith nor 'inadvertent' negligence can excuse inordinate delay." Delay between findings and appellate review, in the absence of demonstrated prejudice (e.g., where accused failed to identify errors redressable by prompt review), presented "no wrong to be righted."

Though denial of counsel during pretrial confinement in itself may not amount to a violation of Miranda rights, an accused's frustrated effort to obtain legal help in such circumstances may cause a court to characterize trial delay, if any exists, as vexatious to such an extent as may warrant reversal of conviction.

---