

## PERSONS WHO CAN BE TRIED BY COURT-MARTIAL\*

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THE GENERAL PUBLIC KNOWS that "GI Joe" can be tried by court-martial if he commits a serious military offense, such as willful disobedience or desertion. It may not realize that he can also be tried for certain actions, like robbery or murder, that would have been crimes in civilian life, and for which he may well remain punishable by civilian courts. Still less does the public understand that, in addition to GI Joe, many civilians may be subject to trial by court-martial. The fountainhead for court-martial jurisdiction is, of course, the Uniform Code of Military Justice.<sup>1</sup>

As might be expected, all military personnel are covered by military justice wherever they are stationed—"in all places" as it is phrased in the Code.<sup>2</sup> In fact, even when in the hands of an enemy, an American serviceman remains subject to duties imposed by the Code. Thus, he can be court-martialled for misconduct as a prisoner—which might involve injuring other prisoners in order to seek favor with his captors or maltreatment of other prisoners over whom the enemy puts him in control.<sup>3</sup> Offenses like these have been the basis for several celebrated trials of American soldiers who were Communist captives in Korea.

### I. WHEN A SERVICEMAN?

Since a serviceman can be punished by court-martial, it is important to know when someone becomes a member of the armed forces. Ed Enlistee comes under military jurisdiction from the time he is mustered into or accepted in those forces.<sup>4</sup> Enlistment regulations of the service involved must be consulted to determine whether "acceptance" has taken place in a particular case. The Supreme Court has indicated that Dick Draftee could be subjected to court-martial jurisdiction from the time when, under the draft laws, he would be required to report for induction.<sup>5</sup> This was the case under the Selective Draft Act of 1917.<sup>6</sup> Then, if a draftee failed to appear

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1 64 Stat. 108 (1950), 50 U.S.C. §§ 551-736 (1952).

2 U.C.M.J. Art. 5, 50 U.S.C. § 555 (1952).

3 U.C.M.J. Art. 105, 50 U.S.C. § 699 (1952). See *U.S. v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); *U.S. v. Batchelor*, 19 C.M.R. 452 (1955).

4 U.C.M.J. Art. 2(1), 50 U.S.C. § 552(1) (1952).

5 See *Billings v. Truesdell*, 321 U.S. 542, 556 (1944).

6 *Ibid.*, at 546.

for induction at the time duly set by his draft board, he could be prosecuted before a court-martial for his failure. In World War II, however, the attachment of military jurisdiction was made to hinge on when the draftee was "actually inducted," and not on when he was supposed to be inducted. Under the Selective Service Regulations then in effect, it was held that actual induction requires the taking of an oath.<sup>7</sup> A draftee, therefore, who failed to take the oath would generally fall outside military jurisdiction; and failure or refusal to obey the draft board notice to report for induction could not be made the basis of trial by court-martial, although it could be prosecuted in federal civilian courts.

In passing the Uniform Code, Congress again utilized the criterion of "actual induction."<sup>8</sup> The test of military jurisdiction still seems to be whether the accused took the oath of allegiance customarily administered during induction. However, under the Code, as under prior law, failure to take this oath will not keep military jurisdiction from attaching if the draftee goes ahead with life as a soldier without calling attention to the omitted formality.<sup>9</sup>

## II. RESERVISTS AND RETIRED PERSONNEL

If Reg Reservist is ordered to extended active duty, he falls under military jurisdiction from the date on which his orders direct that he report for duty. Should he never report in, he can be court-martialled for failure to obey his orders.<sup>10</sup> This provision may become of special importance if it is decided to rely heavily on the Reserve Forces for American defense. Even a reservist on authorized inactive duty training is subject to trial by court-martial if he voluntarily accepts orders for such duty which specifically state that he will be subject to the Uniform Code of Military Justice.<sup>11</sup> In this way Congress furnished the armed services with a means to control the reservist, the "week-end warrior," who takes part in inactive duty training involving dangerous or expensive equipment such as airplanes or submarines.<sup>12</sup> It is irrelevant that the reservist is wearing a uniform or is receiv-

<sup>7</sup> *Billings v. Truesdell*, supra note 5; *U.S. v. Ornelas*, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952).

<sup>8</sup> U.C.M.J. Art. 2(1), 50 U.S.C. § 552(1) (1952); Hearings before the House Committee on Armed Services on H.R. 4,080, H.R. Rep. No. 491, 81st Cong. 1st Sess. 10 (1949); Hearings before the Senate Committee on Armed Services on H.R. 4,080, Sen. Rep. No. 486, 81st Cong. 1st Sess. 4, 7 (1949).

<sup>9</sup> *U.S. v. Rodriguez*, 2 U.S.C.M.A. 101, 6 C.M.R. 101 (1952); *Mayborn v. Heflebower*, 145 F.2d 864 (C.A.5th, 1944), cert. denied 325 U.S. 854 (1945).

<sup>10</sup> U.C.M.J. Art. 2(1), 50 U.S.C. § 552(1) (1952); Air Force Military Justice Circular par. 202(1) (July 31, 1953). Cf. *Billings v. Truesdell*, supra note 5.

<sup>11</sup> U.C.M.J. Art. 2(3), 50 U.S.C. § 552(3) (1952).

<sup>12</sup> Sen. Rep. No. 486, supra note 8, at pp. 4-5. When the Uniform Code was passed, the Naval Reserve contained four components—the Fleet Reserve, the Organized Reserve, the Merchant Marine Reserve, and the Volunteer Reserve. Under laws then in effect, members of the Fleet Reserve were "subject to the laws, regulations, and orders for the government of the Navy," whether or not they were on active duty at the time. One Pasela, a Fleet Reservist, was employed in a civilian capacity at a naval base in New London, Connecticut. He was tried in a federal district court for the theft of government property from that base. After conviction of and sentence for this offense, he was recalled to active duty for the purpose of trial by court-martial on a charge of bribery and of conduct prejudicial to good order and discipline in the Navy, this conduct relating to the same theft for which he had previously been convicted in the district court. In a habeas corpus proceeding, Pasela challenged the

ing pay for his training; he must have revealed his consent to military jurisdiction by accepting orders that say he will be subject thereto.

A serviceman's retirement may not end military jurisdiction over him. Retired personnel "of a regular component of the armed forces who are entitled to receive pay" can be court-martialled.<sup>13</sup> A retired reservist, however, is not within military jurisdiction, despite receipt of retirement benefits, unless he is being hospitalized in a military hospital.<sup>14</sup> In a way, the retired serviceman is treated as having bargained to be subject to court-martial in return for the benefits of pay or hospitalization.

### III. MARTIAL LAW

Many individuals more clearly civilians than are either reservists or retired personnel may become subject to trial by court-martial. In this connection, some distinction must be drawn between military justice, the law of war, and martial law—all three of which can, however, have impact on civilians. Military justice is a term best limited to the system of law that governs servicemen and other persons closely connected with the armed services. The Uniform Code of Military Justice sets forth the basic principles of this system. The law of war is a phase of international law. War crimes, military government, and the disposition of spies and prisoners of war can all be considered matters that relate to the law of war. This law is adverted to only incidentally in the Uniform Code.<sup>15</sup>

The Code does not even mention martial law. This phrase, often ambiguous and misunderstood in its use, refers to the situation existing when civilian laws, civilian courts, civilian justice are replaced in some degree by military authority. Then everyone—military and civilian—who is in the area where martial law obtains becomes subject to directives issued by the military authorities. Under these circumstances, enforcement of the directives and the maintenance of order rests largely in the military's hands. Many countries have been compelled, at times, to invoke martial law during recent troubled years. American history also furnishes precedents for this. In fact, during the Civil War, President Lincoln proclaimed martial law in considerable areas. One of those tried by a military tribunal under martial law was Congressman Vallandigham of Ohio, a suspected Confederate sympathizer. When he requested the Supreme Court to review his

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right of the Navy to court-martial him under these circumstances. The right of the Navy to court-martial him under these circumstances was upheld. *Pasela v. Fenno*, 167 F.2d 593 (C.A.2d, 1948), cert. dismissed, 335 U.S. 806 (1948). In Art. 2(6), the Uniform Code reasserted jurisdiction over personnel of the Fleet Reserve and the Fleet Marine Corps Reserve, but subsequently the whole structure of the Naval Reserve was changed by legislation. As the Naval and Marine Corps Reserves are now set up, it appears that a member of those Reserves not on active duty would be free from military jurisdiction unless he voluntarily accepted orders that placed him under the Code.

<sup>13</sup> U.C.M.J. Art. 2(4), 50 U.S.C. § 552(4) (1952).

<sup>14</sup> U.C.M.J. Art. 2(5), 50 U.S.C. § 552(5) (1952).

<sup>15</sup> U.C.M.J. Art. 18, 50 U.S.C. § 578 (1952); consult also Art. 104 and 106, 50 U.S.C. §§ 698 and 700 (1952).

conviction, it was held that the military's action was not reviewable in civilian courts.<sup>16</sup>

Is there, then, any brake on martial law? An affirmative answer was given by the Supreme Court in the case of one Milligan, a longtime resident of Indiana. Though not in the armed services, he had been tried by a military commission during Civil War days and sentenced to die for his allegedly disloyal activities. The sentence was held invalid on the ground that civilians cannot be tried by military tribunals unless the situation is such that civilian courts cannot function.<sup>17</sup> In short, martial law is purely an emergency measure. This principle was underscored in connection with cases that arose in Hawaii a few months after the Pearl Harbor attack and the almost concurrent declaration of martial law. The Supreme Court concluded that the emergency existing in Hawaii did not justify trial of civilians by military courts except during a short interval after the Japanese onslaught.<sup>18</sup> Civilian courts, it was emphasized, could have been reopened to deal with crimes committed by civilians; and arguments were rejected that to use the military courts was within the discretion of the President, as Commander-in-Chief, and of his military subordinates, in the light of the military situation that existed at the time.

In the event of martial law, courts-martial—provided for in the Uniform Code—could be utilized to try civilians. The military authorities, however, would appear free to use other kinds of military courts for this purpose. With regard to servicemen, would the protections of the Uniform Code be suspended, and would they be subject to trial by whatever sort of tribunal military authorities might select? Nothing in the Code suggests that it is to be suspended in areas where martial law obtains though, of course, the Code does not in any way expressly deal with martial law. On the other hand, does the serviceman have the safeguards of the Code while a civilian under martial law becomes subject to trial by a makeshift military commission operating under such rules as military authorities may provide?

#### IV. CIVILIANS SUBJECT TO THE UNIFORM CODE

Martial law is by no means the only basis for bringing a civilian before a court-martial. One category of civilians made subject to military justice by the Uniform Code is composed of persons "serving with, employed by, or accompanying the armed forces without the continental limits of the United States"—except in Puerto Rico, the Panama Canal Zone, the Hawaiian Islands, and the Virgin Islands.<sup>19</sup> Thus, civilian employees of the Army, Navy, or Air Force overseas can lawfully be tried by court-martial for offenses committed there. Apart from some treaty to the contrary, it makes no difference whether or not the civilian employee is an American or an alien.<sup>20</sup>

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<sup>16</sup> *Ex parte Vallandigham*, 1 Wall. (U.S.) 243 (1863).

<sup>17</sup> *Ex parte Milligan*, 4 Wall. (U.S.) 2 (1866).

<sup>18</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>19</sup> U.C.M.J. Art. 2(11), 50 U.S.C. § 552(11) (1952).

<sup>20</sup> *U.S. v. Weiman*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953).

The Code's reference to persons accompanying the armed services clearly includes servicemen's dependents overseas. The Supreme Court has said as much in discussing the status of an Air Force lieutenant's wife who killed her husband in Germany.<sup>21</sup> Similarly, military correspondents or Red Cross workers with the military establishment overseas would, under the Code, fall within military jurisdiction.

The Court of Military Appeals recently gave detailed attention to this category of civilians. One Garcia had signed on as a seaman on a ship chartered by the Military Sea Transport Service. The Court entertained no doubt that, as a civil service employee sailing on such a vessel, the accused was subject to military justice while the vessel was in Pacific waters. The real issue concerned Garcia's status after the vessel stopped in Japan, where he jumped ship—or at least missed the ship's sailing. Detained by Japanese authorities as an illegal entrant, he received no employment. He did, however, busy himself in committing several crimes while waiting for some vessel on which he could work his way back to the United States. For his offenses he was tried by an Army general court-martial. When this court-martial's jurisdiction was questioned on appeal, the Court of Military Appeals ruled that Garcia, who had reached Japan as a civilian subject to military justice, had never changed his status, and so could be court-martialled.<sup>22</sup>

Garcia's attorneys analogized his presence in Japan to that of a casual tourist. The Court, however, emphasized that he had not been admitted to the country in that role, but instead had been brought into Japan in connection with a military venture. Only if Garcia had been allowed by the Japanese to "merge" into their economy and populace, would he have been able to immunize himself from trial by court-martial for any offense he might commit.

The Court's opinion in *United States v. Garcia* appears to have been written with an eye to practical consequences. The most apparent result of a narrower interpretation of court-martial jurisdiction would be virtual exemption of an individual like Garcia from trial by any American court. Apart from the problems of extradition, only a few offenses, such as treason, can be tried by American civilian courts if they were committed outside the United States and its territories. Furthermore, even if they could be tried in the American civilian courts, there would be great difficulties in obtaining the witnesses, many of whom might be foreign nationals immune to American subpoena.

If Garcia could not be court-martialled, he either would go free or would be delivered to the Japanese for trial. Certainly the first alternative is unpalatable—whether in terms of the premise that crime deserves punishment or simply because neither the United States nor any host country for American troops would be especially pleased if there were no punishment

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<sup>21</sup> *Madsen v. Kinsella*, 343 U.S. 341 (1952).

<sup>22</sup> *U.S. v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954).

for crimes committed by certain persons who entered that country with our armed forces. The second alternative, trial by the host country, is likewise sometimes unsatisfactory. For one thing, the host country, in this case Japan, may be unhappy with the extra burden of trying and punishing persons whom American armed forces brought into the country. Especially will this burden be distasteful if the only victims of the crimes are Americans. After all, why wash our dirty linen for us? Even if the host country is willing to try the accused, American sentiment might well favor handling the case in some sort of American court.<sup>23</sup> In fact, at one time, rather than have Americans tried by foreign courts, the United States adopted a policy of obtaining extraterritorial rights in many countries—including Japan—and establishing consular courts there.<sup>24</sup> Americans accused of crime would be tried in these special courts rather than in those of the foreign country. Against this background, it would be unusual to adopt a narrow view of the jurisdiction of American courts-martial overseas, for in many instances those would be the only American courts that could try the offense charged. Unquestionably, such considerations played a significant role in moving the Court of Military Appeals towards a broad interpretation of the Code's words, "accompanying the Armed Forces."

Other seamen besides Garcia have been held subject to trial by court-martial because of crimes committed overseas. Among them have been sailors on so-called General Agency Agreement vessels. These vessels are owned by the United States through the National Shipping Authority, which is under the Department of Commerce. They are operated, however, through some steamship company which acts as general agent for the Government. In turn, this company employs its crew through the usual union hiring halls; and these seamen are not civil service employees. If, as is frequently true, the vessel is allocated to the Military Sea Transport Service and thus becomes an integrated part of the MSTS fleet under the orders of MSTS, its crewmen are held to come under military jurisdiction when outside the United States and its possessions. They can be court-martialled for crimes committed aboard ship or in foreign ports where the ship docks.<sup>25</sup>

One other facet of the Garcia case should be mentioned. He and his defense counsel had stipulated with the Government that certain facts existed which, if true, would clearly have meant that he was subject to military jurisdiction. Probably Garcia's willingness so to stipulate was due to an expectation that, if he could not be court-martialled, he would be turned over to the Japanese for trial—a prospect he would scarcely relish as the

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<sup>23</sup> As was pointed out by Congressmen during hearings on the Code, the civilians in overseas areas might prefer to be tried by courts-martial instead of by the local courts. Moreover, the question was raised whether trial by the local government would be very feasible in areas like New Guinea. Consult Hearings before the House Committee on Armed Services on H.R. 2,498, H.R. Rep. No. 491, 81st Cong. 1st Sess. 768-69 (1949).

<sup>24</sup> See *In re Ross*, 140 U.S. 453 (1891).

<sup>25</sup> See *U.S. v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102 (1955); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D.Va., 1943); *In re Berue*, 54 F.Supp. 252 (S.D. Ohio, 1944); *U.S. v. Redmond*, 14 C.M.R. 430 (1954); *U.S. v. Patterson*, 16 C.M.R. 295 (1954); *Op. JAG Navy*, 2 Dig. Op. JAG 165-66, § 47.1 (1952).

victims of his offenses had been chiefly Japanese nationals. When, upon appeal, Garcia's lawyers repudiated the stipulation with the Government and claimed that jurisdiction had been lacking, he was held bound by what he had originally agreed. As a practical matter, then, it seems that anyone overseas could, with the cooperation of military authorities, subject himself to their jurisdiction. He would merely have to agree that certain allegations were true, which would bring him within military jurisdiction. As Garcia's case suggests, use of this method is more than a theoretical possibility, since there may be instances when an accused would prefer trial by an American court-martial to prosecution in a foreign court.

Anyone, military or civilian, who is within an "area leased by or otherwise reserved or acquired for the use of the United States" can be tried by court-martial if the area in question is "under the control of a Secretary of a Department" and is outside the continental United States, the Hawaiian Islands, the Canal Zone, Puerto Rico, the Virgin Islands, and most of Alaska.<sup>26</sup> Of course, many of our air and naval bases overseas will be in leased areas. The Code's grant of military jurisdiction over such areas is limited by applicable treaties or rules of international law; and as a practical matter, the exercise of jurisdiction by the United States often will be dealt with in the very treaty under which the land is leased. Obviously, a foreign government leasing land to or conferring other rights upon the United States may wish to retain exclusive power to try its own citizens or residents who are charged with committing offenses in a leased area, or who, for some other reason, might in the absence of a treaty be subject to military jurisdiction.

According to Article 2(10) of the Uniform Code, "In time of war, all persons serving with or accompanying an armed force in the field" become subject to court-martial.<sup>27</sup> Of course, if these people are overseas accompanying, serving with, or employed by the armed services, they will be subject to the Uniform Code anyway—whether or not they are in the field in time of war. Thus, this provision is chiefly of importance as to civilians within the continental United States, Puerto Rico, the Panama Canal Zone, the Hawaiian Islands, and the Virgin Islands.

When is an armed force "in the field"? The answer apparently hinges less on the location of the forces than on the activity in which they are engaged. The enemy may be thousands of miles away; but, if the armed forces involved are engaged in military operations with a view to the enemy, the civilians accompanying those forces in time of war are subject to court-martial.<sup>28</sup> In today's era of total war, when the home front becomes the battle front, this provision of the Code might sweep many civilians under military jurisdiction.

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<sup>26</sup> U.C.M.J. Art. 2(12), 50 U.S.C. § 552(12) (1952). Areas like Guam might fall within military jurisdiction under this provision.

<sup>27</sup> U.C.M.J. Art. 2(10), 50 U.S.C. § 552(10) (1952).

<sup>28</sup> See, e.g., *Hines v. Mikeil*, 259 Fed. 28 (C.A.4th, 1919); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D.Va., 1943); *In re Berue*, 54 F.Supp. 252 (S.D. Ohio, 1944); *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y., 1917).

Within the present context what is a "time of war"? In days gone by this inquiry would have been easier to answer than in the present epoch of limited hostilities. In considering the Korean "police action," many civilian courts concluded that, despite the label, the large-scale combat in Korea was a "war" within the meaning of certain standard insurance policy riders.<sup>29</sup> The Court of Military Appeals has decided that the same conflict constituted a "war" within the meaning of those Uniform Code provisions which suspend the running of some statutes of limitations during wartime.<sup>30</sup> An Army board of review has even said that, so far as limitations on punishments are concerned, the Korean hostilities were a war which went on even after the cease-fire was signed with the Communists.<sup>31</sup>

In considering how to interpret "time of war" for jurisdictional purposes, one must, however, always reckon with the reluctance to permit the court-martialing of civilians so long as civilian courts are functioning. This reluctance was quite recently manifested by the Supreme Court, as will be discussed later in this chapter. In view of the hostility to military jurisdiction over civilians, a narrow construction of "time of war" might be adopted.

That hostility also suggests a question whether Article 2 (10) of the Code is constitutional under any interpretation thereof. However, various precedents directly uphold the constitutionality of this provision. Furthermore, there is an exceedingly strong analogy for it in the Selective Service laws. Under those laws civilians are taken from their homes and forced into uniform, whether willing or not. Once having taken the induction oath, they are subject to military discipline and to trial by court-martial. In fact—as has been mentioned earlier—the Supreme Court has indicated that selectees could be made subject to court-martial from the time they are supposed to report for induction, even if they never arrive. If the power of the United States to defend itself and to make war authorizes these measures, it is hard to see why it would not permit the trial by court-martial of persons accompanying or serving with American Armed Forces in the field—at least, if that category is narrowly construed. Indeed, for the most part such persons would be subject to military jurisdiction by reason of some past voluntary act on their part which has placed them in a status subject to

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<sup>29</sup> *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W. 2d 554, (1953), cert. denied, 347 U.S. 928 (1954); *Langlas v. Iowa Life Ins. Co.*, 245 Iowa 713, 63 N.W.2d 885 (1954); *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420 (S.D.Cal., 1953).

<sup>30</sup> *U.S. v. Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954) (absence without leave); *U.S. v. Taylor*, 4 U.S.C.M.A. 232, 15 C.M.R. 232 (1954) (fraudulent enlistment). See also *U.S. v. Bancroft*, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953); *U.S. v. Gann*, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953).

<sup>31</sup> *U.S. v. Smith*, C.M. 374052, decided Sept. 16, 1954. The accused was charged with having left the place where he was posted as a sentinel. Since the board of review considered that the offense, which occurred in March, 1954, was committed in time of war, they concluded that it was a capital crime and that, therefore, the court-martial had erred in accepting a plea of guilty. The president has, by executive order, fixed January 31, 1955, as the cutoff point for certain rights conferred in connection with the Korean fighting—among them, the exclusion for income tax purposes of pay received in a combat zone and the educational privileges under the GI Bill of Rights. Probably this presidential action would terminate the "Korean War" even under the rationale of the board of review's decision.



the Uniform Code. This is much more than can be said about many inductees!

The power to draft men for the armed forces has not been held to depend on the existence of a war—declared or otherwise. In fact, the peacetime draft seems now a permanent part of our national life. By analogy, there would seem to be no constitutional requirement of a full-scale declared war to bring Article 2 (10) of the Code into play; and the real issue would be only what Congress intended by “time of war.” In this connection, there is little reason to infer that Congress meant to be less practical than in other parts of the Uniform Code, which have been interpreted to include an undeclared war such as that in Korea. The Korean fighting, therefore, would be a “time of war” for purposes of such military jurisdiction over civilians with the armed forces in the field. On the other hand, it is less probable that an undeclared war, like that in Korea, would be held, for jurisdictional purposes, to continue after the firing stops. Perhaps the whole problem is academic, since—if only for public relations reasons—the armed services will probably not seek to try civilians within the United States, its territories and possessions, except in instances where martial law would also support the proceedings.

#### V. THE LAW OF WAR AND SPIES

At an earlier point, reference was made to military jurisdiction over civilians under the “law of war.” The law of war impinges on the Uniform Code of Military Justice at three points. The most important of these is the Code’s authorization, like that of the Articles of War, for trial by general court-martial of anyone who “by the law of war is subject to a trial by a military tribunal.”<sup>32</sup> Several Supreme Court cases illustrate the broad scope of the law of war. In one such case the Court upheld the conviction by a military commission of eight spies who in 1942 landed from German submarines along the East Coast of the United States.<sup>33</sup> These defendants had been found guilty under the law of war, since, as spies and saboteurs, they had violated the ground rules of this law. They fell outside the coverage of The Bill of Rights, even if they were American citizens, and so could be tried by court-martial or, as here, by a military commission. Such a commission operates under whatever rules are prescribed by military authorities, rules which may or may not coincide with those used in courts-martial.

Another military commission was convened under authority of General MacArthur, Commander of United States Army Forces in the Pacific, to try the Japanese General, Yamashita, for the latter’s failure to control his troops during their occupation of the Philippines. The trial occurred only a few months after the cease-fire in the Pacific. The Supreme Court concluded that the law of war permits action by military authorities against war criminals despite the end of hostilities—at least so long as peace has not “been

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<sup>32</sup> U.C.M.J. Art. 18, 50 U.S.C. § 578 (1952).

<sup>33</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

officially recognized by treaty or proclamation of the political branch of the Government.”<sup>34</sup> Here the military commission operated under rules which allowed it to receive evidence that would not have been considered either in a civilian court or in a court-martial. Nonetheless, the Supreme Court ruled that such a commission can work under such rules as military authorities provide; and its actions will be untrammelled by the safeguards of the Bill of Rights—or even by those incorporated in laws like the Uniform Code which are applicable to courts-martial.

General Yamashita was Japanese, but Americans overseas may be caught up in the same net. Under the law of war, offenses in an occupied country are usually handled by the military authorities of the occupying power. Therefore, after American occupation of Germany in 1945, the United States prohibited German courts from trying Americans for crimes committed in Germany. Then, instead of trying these Americans by court-martial, our Military Government established a special system of occupation courts to try such persons, and also to try German nationals in certain cases. These courts punished violations of German laws, insofar as those laws had not been repealed by the occupying powers; and in many instances German trial procedure was prescribed for these courts. When an American civilian complained that her trial by such a court deprived her of constitutional rights, the Supreme Court held that these proceedings under the law of war also lay outside the scope of the Bill of Rights.<sup>35</sup>

A case which could be sent to a military commission for trial under the law of war can, instead, be sent to a general court-martial. In this event it will be tried—and apparently reviewed on appeal—like any other trial by general court-martial. For instance, one Schultz had been an Air Force captain stationed in Japan, but was separated honorably from that service and employed as a salesman for a commercial firm in Tokyo. He acquired a permit to be in Japan as a “commercial entrant.” Later, on August 22, 1950, he killed two Japanese pedestrians in an automobile accident and was tried by a general court for negligent homicide. Schultz, unlike the seaman, Garcia, whose case was previously discussed, was not a civilian who, apart from the law of war, would be subject to court-martial. He clearly had “merged” into the Japanese economy and population. It made no difference that he had originally arrived in Japan with the armed forces, since subsequently he had been permitted by proper authorities to conduct his business in Japan; and this was the reason for his being in Japan at the time of the offense. In short, he was like any other American businessman who might have been in Japan. Both at the time of the accident and of the trial, however, Japan was an occupied country. Therefore the law of war applied, whereunder the law of the occupied country normally remains in effect except as repealed by the conqueror. The Japanese Penal Code pro-

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<sup>34</sup> *In re Yamashita*, 327 U.S. 1 (1945).

<sup>35</sup> *Madsen v. Kinsella*, 343 U.S. 341 (1952). The appendix to the decision contains an interesting chronology of the establishment of American Military Government Courts in Germany during 1945-50.

scribed negligent homicide, and this provision had never been repealed by occupation authorities. Thus, it was law in Japan—for Americans as well as for Japanese. Either nationality could be tried by a military commission for negligent homicide; and either could be tried for that offense by a general court-martial. In Schultz's case the latter option had been exercised; and, on review, the Court of Military Appeals upheld the conviction against the argument that the court-martial had no jurisdiction.<sup>36</sup>

After World War II, the Supreme Court upheld the trial by military government courts in Germany of a civilian dependent who would admittedly have been subject to trial by court-martial under the Articles of War, which were then in effect.<sup>37</sup> Does the same principle hold true under the Uniform Code? It would seem to. If so, can an American serviceman in an occupied country also be subjected to trial by some sort of military commission for crimes he commits there instead of to a trial by court-martial? No definite answer to this question can be given, but it would seem anomalous to give military authorities an option to deprive a serviceman of his protections under the Uniform Code simply by referring charges against him to a military commission operating solely under the law of war.

With the prosecution of the eight German spies in mind, the draftsmen of the Code authorized trial by general court-martial of "[a]ny person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of the armed forces of the United States, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States or elsewhere."<sup>38</sup> If convicted, the spy must be put to death. Clearly, civilians, wherever located, are subject to this provision.

And so we return to the question of what constitutes a war. Must Congress declare war formally? Does it suffice that Congress make large-scale defense appropriations and pass other laws which indicate that it considers a war to be in progress—even though, perhaps for diplomatic reasons, there is no outright declaration of war? Or is it simply enough that American troops in large numbers are engaged in fighting and dying? The current judicial tendency to view war in terms of realities, rather than labels and declarations, would suggest that a formal declaration of war would not be requisite for exercising this type of jurisdiction over spies. Opposed is the traditional aversion to subjecting civilians to trial by military authorities. And ultimately it is the law of war, a branch of the international law recognized among nations, that must provide the answer.

If an undeclared war suffices to permit trial of a spy by court-martial or by military commission, a subsidiary issue is: when does that jurisdiction come to an end? Had there been a declared war, military jurisdiction would continue until there was some formal proclamation of peace. Are "police

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<sup>36</sup> U.S. v. Schultz, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

<sup>37</sup> Madsen v. Kinsella, 343 U.S. 341 (1952).

<sup>38</sup> U.C.M.J. Art. 106, 50 U.S.C. § 700 (1952).

actions" to be treated in the same way? Of course, there will probably be few test cases since, as a practical matter, prosecution of civilian spies within the United States will normally be undertaken in the civilian courts.

The Uniform Code also states that any person, military or civilian, who "aids, or attempts to aid, the enemy," or who "knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly" may be tried by court-martial or military commission and given death or such lesser sentence as may be appropriate.<sup>39</sup> There is no mention of "war" in this provision. Then is Soviet Russia an "enemy" today for purposes of this section? Or Communist China? If the accused is a person otherwise subject to the Code, these countries might well qualify as "enemies." For trial of a person not otherwise subject to the Uniform Code, however, this would seem much less clear. Here the military jurisdiction would rest only on the law of war, and this would probably be construed to require the existence of actual hostilities.

#### VI. THE TOTH CASE

One issue concerning termination of military jurisdiction has recently led to many headlines and, in one case, to a grant of review by the Supreme Court. Toth, the defendant there, had once been an airman stationed in Korea. Following his rotation home to the United States and receipt of an honorable discharge, he became suspected of participation in the murder of a Korean. The Air Force dispatched personnel to Pittsburgh, where he was taken into military custody; and soon he was on his way to Korea to stand trial. A federal district judge promptly intervened to order that Toth be returned to the United States, and ultimately ordered his release by the Air Force. The Court of Appeals for the District of Columbia overturned this ruling; and this action was, in turn, reversed by the Supreme Court.<sup>40</sup>

The Air Force relied on provisions in Article 3(a) of the Uniform Code in support of military jurisdiction.<sup>41</sup> Under that article, and subject to the relevant statutes of limitations provided in Article 43 of the Code,<sup>42</sup> anyone charged with committing, while subject to the Uniform Code, an offense that is punishable by five years confinement or more, and which cannot be tried in any state or federal court, shall remain subject to court-martial, even though he might otherwise no longer be amenable to military jurisdiction. Clearly, an ex-serviceman who had committed serious crimes before being separated from the service would come within the thrust of Article 3(a). So, too, would any civilian who, under Article 2 of the Code, was subject to the Code at the time of the offense—for example, someone employed by or accompanying the armed forces overseas.

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<sup>39</sup> U.C.M.J. Art. 104, 50 U.S.C. § 698 (1952).

<sup>40</sup> *Toth v. Quarles*, 350 U.S. 11 (1955). For the lower courts' opinions see 113 F.Supp. 330 (1953); 114 F.Supp. 468 (1953); and 215 F.2d 22 (C.A.D.C., 1954).

<sup>41</sup> 50 U.S.C. § 553(a) (1952).

<sup>42</sup> 50 U.S.C. § 618 (1952).

There was little dispute that Toth fell within this provision for retention of military jurisdiction. Murder, the crime with which he stood charged, is punishable by more than five years' confinement and can be prosecuted no matter how long a time interval falls between the crime and the trial. It is not one of those offenses, such as treason or fraud against the government, which, even if committed overseas, can be tried in some civilian court in the United States. The chief issue concerned the constitutionality of the Uniform Code's provision for such a trial by court-martial. The basic argument against it is, of course, that it deprives civilians like Toth of various safeguards which would be available in a civilian trial.

The majority in the Supreme Court reasoned that the legislation was invalid unless it fell within Congress' power, under Article I of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces." In the majority's eyes this power, "given its natural meaning . . . would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." It was added:

There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.<sup>42a</sup>

If it were necessary to prosecute former servicemen for offenses committed prior to their discharges, the majority considered that Congress should pass laws authorizing the federal district courts to entertain such cases.<sup>43</sup>

The dissenting justices agreed with the government that, in providing for the punishment of offenses committed by a serviceman, Congress was making "Rules for the Government and Regulation of the land and naval forces," despite any discharge given the serviceman after the crime and before the effort to try him. In support of their position the dissenters cited cases decided under an act passed in 1863, which preserved military jurisdiction over ex-servicemen in certain fraud cases,<sup>44</sup> and they pointed out

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<sup>42a</sup> Toth v. Quarles, 350 U.S. 11, 15 (1955).

<sup>43</sup> Would not such legislation also have to be supported constitutionally by reference to the congressional power "To make Rules for the Government and Regulation of the land and naval forces"? Why, then, is such rule-making legal when it provides for trial of a former serviceman by a civilian court, but illegal when it authorizes his trial by court-martial? Would not the only basis for such a differentiation lie in the wording of the Fifth Amendment? This, however, was not the reasoning employed by the majority.

During legislative hearings on the Code, the then Judge Advocate General of the Army suggested that the federal district courts, rather than courts-martial, should be entrusted with the trial of ex-servicemen. He feared that emotional attacks would be leveled against the armed services if they tried to exercise jurisdiction under Article 3(a); and these attacks did materialize during the Air Force's effort to prosecute Toth. The Judge Advocate General also feared that it might be hard to tell whether a federal civilian court did have jurisdiction where prosecutions under Article 3(a) were proposed. Sen. Rep. No. 486, *supra* note 8, at pp. 256-57. See also *Martin v. Young*, 134 F.Supp. 204 (N.D.Cal., 1955).

<sup>44</sup> See, e.g., *Kronberg v. Hale*, 180 F.2d 128 (C.A.9th, 1950), cert. denied, 339 U.S. 969 (1950); and other cases cited by Mr. Justice Reed in his forceful dissent.

that other democratic countries such as Great Britain, Australia, Canada, and New Zealand have laws similar to Article 3(a) of the Uniform Code. Also, it can be argued that Congress' authority under Article I to regulate the armed forces should be interpreted together with, and in light of, the Fifth Amendment to the Constitution, which exempts "cases arising in the land or naval forces" from the requirement of an indictment. Does not a case "arise" in the armed forces if it concerns a person who was a serviceman at the time of the crime, regardless of whether he is a serviceman at the time of trial?<sup>45</sup> If this be so, did not the founding fathers intend that Congress could provide for military jurisdiction over such cases?

Close attention should also be given to the Supreme Court's suggestion that Congress give jurisdiction over individuals like Toth to the federal civilian courts. For one thing, these courts will be in a less favorable position than members of a court-martial to understand the importance of a crime and its effect on military operations and discipline. For example, the military personnel sitting on a court-martial would probably take a different view of crimes such as misbehavior before the enemy than would a civilian judge. And, is it not desirable in such a situation that the punishment be imposed by persons who are well acquainted with the effects of the particular crime involved? Moreover, for offenses committed overseas—like the one with which Toth himself was charged—there will be many practical obstacles to prosecutions in a federal civilian court. The district judge is not authorized to hold sessions in foreign countries. Even if he could do so, from whom would the grand jury and the trial jury be obtained?<sup>46</sup> How would the witnesses be subpoenaed to appear before the grand jury and the trial jury? Foreign witnesses are beyond the subpoena power of federal courts, and their testimony could not be introduced against an accused through depositions as is permissible in courts-martial. Witnesses from the armed services would be available; but, if the trial were held in the United States, considerable interference with their military duties might result from their return to this country to testify. Moreover, when a trial is held in the United States for an offense committed overseas, there may be conflict with the policy expressed in the Sixth Amendment's directive that a trial shall take place in the area "wherein the crime shall have been committed." Yet if the proceedings were to be held overseas, near the scene of the crime, they simply could not be accomplished in American civilian courts.

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<sup>45</sup> Justice Reed discusses the cases on this point. The Fifth Amendment also provides that no one shall be compelled to incriminate himself "in any criminal case." Would not this privilege against self-incrimination apply even though no charges had ever been preferred against the person called upon to testify? Then does not the word "case" in the Fifth Amendment include situations where no charges have been preferred? The basic argument is that a case arises, for the purposes of the Fifth Amendment, when the crime is committed, and that this Amendment should have been taken into account by the Supreme Court when it decided whether Congress had the power, under Article I of the Constitution, to provide for the trial of former servicemen like Toth.

<sup>46</sup> Probably the venue would be "in the district where the offender is found." 18 U.S.C. § 3238 (1952). The failure to heed this provision in a treason prosecution led to reversal in *U.S. v. Provoost*, 215 F.2d 531 (C.A.2d, 1954).

In practice, then, the choice as to many offenses committed overseas by former servicemen must be between trial by court-martial and no trial at all;<sup>47</sup> and consequently the Supreme Court's decision in the Toth case will signify that some alleged vicious crimes will go unpunished. Toth himself will go completely free although two co-conspirators of his have been found guilty and punished by courts-martial. Similarly, the "turncoat" prisoners of war who only recently returned to this country after having originally elected to remain in Communist hands, will apparently not be tried because while prisoners they were discharged from the Army by Secretary of Defense Wilson.<sup>48</sup> Rather clearly, though, the majority's decision was far less influenced by these inevitable aftermaths than by profound distrust of military justice and fear that military authorities would abuse any jurisdiction to try former servicemen.

Shortly after the Supreme Court's decision in the Toth case an attack was made on military jurisdiction over Mrs. Clarice B. Covert, a civilian whom the Air Force was prosecuting for having killed her master sergeant husband. Since she was in England as his dependent at the time of the offense, and had been brought to trial there, there is little doubt that she fell within the wording of Article 2 (11) of the Uniform Code, which has been discussed previously. However, the federal district judge who passed on her petition for a writ of habeas corpus took the Toth decision to be a cue for holding, in substance, that this provision of the Code is unconstitutional and that military authorities could not prosecute this accused.<sup>49</sup>

Were the same ruling to be made by the Supreme Court, it would mean an end to courts-martial for civilians who were "serving with, employed by, or accompanying the Armed Forces." And there is wording in the Toth opinion which could support such a ruling. On the other hand, Toth himself had absolutely no connection with the armed forces at the time charges were preferred, while Mrs. Covert, as a serviceman's dependent overseas, had a very close relation to those forces. Thus, the two cases are certainly distinguishable. Also, there is at least one previous Supreme Court decision which seems strongly to support military jurisdiction over Mrs. Covert.<sup>50</sup> In addition, if the armed services lacked jurisdiction over persons who, though not in uniform, were intimately associated with our forces over-

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<sup>47</sup> Extradition to a foreign country for trial of the offense may be impossible. The foreign country may not request extradition, or it may have no treaty with the United States covering the crime in question. During World War II two American servicemen were alleged to have slain an American major with whom they were participating in an OSS operation behind enemy lines in Italy. The suspected offense came to light only after both men had been discharged from the armed services. Therefore, no authority existed under the law then applicable to try them for the crime—either by a court-martial or an American civilian court. Italy's attempt to extradite the accused failed, after which that nation tried them in absentia. With reference to extradition, it might be suggested that trial by an American court-martial is not much worse than extradition to a foreign jurisdiction for trial there.

<sup>48</sup> Some persons have claimed that Mr. Wilson went beyond his authority in giving the "turncoats" dishonorable discharges while they were in Communist hands. If that is right, are they still in the Army, and thus still subject to court-martial? Probably not, for the purported discharges—though not dishonorable in legal effect—could nonetheless be discharges.

<sup>49</sup> Washington Post, p. 1 (Nov. 23, 1955).

<sup>50</sup> Madsen v. Kinsella, 343 U.S. 341 (1952).

seas—and if those persons had to be brought back to the United States for trial in every instance, or else tried by foreign courts—a noticeable burden would be imposed on the military establishment. Such factors suggest that the Supreme Court will not require trial by civilian courts for civilians abroad with our forces.

#### VII. DISCHARGE AS A BAR TO COURT-MARTIAL

In general, a discharge from the armed services bars trial by court-martial for crimes committed prior to the discharge. Even if the offender reenlists, he usually cannot be tried for crimes committed before his discharge.<sup>51</sup> However, the Court of Military Appeals has held that a clean slate cannot be obtained unless there has been a “break” in the accused’s status as a person subject to the Uniform Code. A serviceman who was discharged from his enlistment ahead of time for the convenience of the government and in order to reenlist immediately has not had a break in his status; therefore, he can be tried for offenses committed before his reenlistment.<sup>52</sup> If, however, Sam Soldier reaches the end of his normal enlistment period and receives a discharge, it would make no difference what interval, if any, occurred before his reenlistment; he could not be tried for his actions during his first tour of duty. Probably the result would remain the same even though Soldier reenlisted before he had actually been handed his discharge papers—so long as it was not a discharge ahead of schedule to permit reenlistment.

If Albert Airman gets his discharge overseas and stays there “accompanying” the military establishment, there would appear to be no “break” in his status as a person subject to the Uniform Code. Accordingly, he could be court-martialled for offenses during his tour of duty. Should he then reenlist from his “accompanying” position, there would still be no “break,” and military authorities could try him for crimes committed during the first enlistment. If Corporal Culprit is sentenced by a court-martial to dishonorable discharge and confinement, he remains subject to military jurisdiction while he is in the custody of the armed forces, whether or not the discharge is ordered into execution.<sup>53</sup> Incidentally, under the Articles of War he could

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<sup>51</sup> *Hirshberg v. Cooke*, 336 U.S. 210 (1949). This, incidentally, was the case Congress seems to have had particularly in mind when it enacted Art. 3(a) of the Uniform Code. *Hirshberg*, a Navy enlisted man, had been a Japanese prisoner of war during World War II. After his liberation his normal term of enlistment expired and he re-enlisted the next day. Later he was court-martialled for maltreatment of other prisoners of war. After habeas corpus proceedings had been instituted to test military jurisdiction, the Supreme Court held that, under applicable statutes, the discharge made *Hirshberg* immune from court-martial for crimes committed during his first enlistment. Consult H.R. Rep. No. 491, *supra* note 8, at p. 5. In the same context, the report refers to the larceny by American personnel of the crown jewels of Hesse. One of the participants was a WAC captain who was apprehended while in terminal leave status. A federal court decided that while in this status she remained subject to military jurisdiction. *Hironimus v. Durant*, 168 F.2d 288 (C.A.4th, 1948), cert. denied, 335 U.S. 818 (1948).

<sup>52</sup> *U.S. v. Solinsky*, 2 U.S.C.M.A. 153, 7 C.M.R. 29 (1953). See also *U.S. v. Johnson*, 6 U.S.C.M.A. 320, 20 C.M.R. 36 (1955). There is a possibility that this rule of military justice may be challenged through habeas corpus proceedings in the federal district courts.

<sup>53</sup> U.C.M.J. Art. 2(9), 50 U.S.C. § 552(9) (1952); *McDonald v. Lee*, 217 F.2d 619 (C.A.5th, 1954).



be tried by court-martial so long as he was "under sentence adjudged by court-martial"—that is, whether confined in a military prison or in a federal civilian institution.<sup>54</sup> Since there is no "break" in Culprit's status as a person subject to the Uniform Code while he is in the military prison, there is no reason why he could not be court-martialled for offenses committed before he received the dishonorable discharge and became a civilian.

An interesting problem is posed by considering what would have been the result in the Toth case had the accused tired of civilian life and reenlisted in the Air Force before charges against him were preferred.<sup>55</sup> Or what if, as a reservist, he had been ordered back to active duty? He would still be within the wording of Article 3 (a) of the Code. The Supreme Court has declared that the effort of this Article to make civilians subject to court-martial is unconstitutional. However, since, under the facts supposed, Toth would not be a civilian when brought to trial, the logic of the Court's decision would not be directly applicable. The question then would be whether Article 3(a) was voided entirely by the Court, or instead was only made inoperative as to persons who were civilians at the time of trial.

Article 3(b) of the Uniform Code states that a serviceman who obtains a discharge by fraud can be tried by court-martial for the fraud. If convicted thereof, he returns to the same position he would have occupied had no discharge ever been given him; and he could be tried for crimes committed before he was discharged.<sup>56</sup> In light of the Toth case, it is clear that this section is unconstitutional insofar as it authorizes court-martial of an ex-serviceman for getting a fraudulent discharge.

#### VIII. INTER-SERVICE TRIALS

A civilian employed by or accompanying one armed service has been held subject to trial by a court-martial of a different service.<sup>57</sup> However, the question arises whether a member of one armed force can be tried by the court-martial of another. Prior to the Uniform Code of Military Justice he could not. For example, a Navy general court-martial could not try a soldier or an airman. In Article 17 the Code provides: "Each armed force shall have court-martial jurisdiction over all persons subject to this Code," but adds: "The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President."<sup>58</sup> The regulations are contained in the Manual for Courts-Martial.<sup>59</sup> However, as became apparent recently during the review of a case by the Court of Military Appeals, those regulations are far from clear.<sup>60</sup> One Hooper, a sailor, had been tried by a court-martial appointed

<sup>54</sup> *McDonald v. Lee*, 217 F.2d 619 (C.A.5th, 1954).

<sup>55</sup> These were the facts in *Martin v. Young*, 134 F.Supp. 204 (N.D.Cal., 1955), and *Hirshberg v. Cooke*, 336 U.S. 210 (1949).

<sup>56</sup> 50 U.S.C. § 553(b) (1952).

<sup>57</sup> *U.S. v. Biagnini*, 10 C.M.R. 682 (1953).

<sup>58</sup> 50 U.S.C. § 577 (1952).

<sup>59</sup> Manual for Courts-Martial, United States, par. 13 (1951).

<sup>60</sup> *U.S. v. Hooper*, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955).

by an Air Force general who commanded a joint project to which the accused had been attached. After action on the case by the general, it went to a Navy board of review which held that the convening of this court by an Air Force officer was unauthorized, and the court-martial was without jurisdiction.<sup>61</sup> Both the accused and counsel representing the Navy took before the Court of Military Appeals this same position that the court had lacked jurisdiction. However, the Army and the Air Force were allowed to intervene to present a contrary view.

Although the court affirmed the conviction, each of its three judges wrote a separate opinion, so that the legal principles governing inter-service exercise of jurisdiction are somewhat unsettled. The chief judge concluded that, if properly empowered either by the President of the United States or the Secretary of Defense, the commander of a joint project, command, or task force may convene courts-martial to try members of another armed force, as he sees fit. The other two judges appear to have agreed that even this joint commander is subject to a policy that, instead of himself convening a court-martial to try the charges, he deliver the accused to the latter's own armed service if this can be done "without manifest injury to the service." A majority of the court would apparently also hold that any objection to the exercise of reciprocal jurisdiction must be made at the trial to merit consideration. And, even if the objection were promptly made, it is doubtful that the decision by the officer who convened the court-martial would be reviewable.

Therefore, the interpretation of the Code and the Manual seems to be that the President did not want an indiscriminate exercise of reciprocal jurisdiction, even in joint commands. Instead, he intended a policy that, as a general rule, offenses be tried in courts-martial appointed by officers of the same armed service as the accused. Enforcement of this policy, however, is placed solely in the hands of the various commanding officers empowered to convene a court-martial; and it is not a matter for review either by military or civilian courts.<sup>62</sup>

#### IX. COURTS-MARTIAL AND CIVILIAN COURTS

Many purely military offenses interdicted by the Uniform Code have no opposite numbers in civilian laws. On the other hand, many acts made punishable by the Code, such as murder, rape, assault, sodomy, arson, or larceny, would also violate the laws of the state or foreign country where committed. What is the effect on military jurisdiction of the presence of civilian courts where the same offense could be tried? As between the state and military authorities, the problem is handled on a first come, first served

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<sup>61</sup> The Uniform Code provides that the record of trial by general court-martial be reviewed by "[t]he Judge Advocate General of the armed force of which the accused is a member." Art. 61, 50 U.S.C. § 648 (1952). A record of trial by special court-martial where a bad conduct discharge was adjudged and approved by the officer who convened the court will also be reviewed by a board of review of the accused's own armed service. Art. 65, 50 U.S.C. § 652 (1952).

<sup>62</sup> U.S. v. Hooper, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955).

basis. If state authorities commence a prosecution, then they are entitled to carry the trial through without interference from the military,<sup>63</sup> or, vice-versa, if the military authorities should first begin action, this point seems generally misunderstood, and a number of experienced military lawyers are convinced that military authorities, upon demand, have a right to delivery of an accused from a civilian jail where he is awaiting trial—so long as the military intends to try him for the suspected offense. Many civilian officials may, for a number of practical reasons, be perfectly willing to turn the offending GI over for a military trial; but there is no necessity for their doing so. The only situation where the state proceedings can be discontinued as a matter of law is in instances where the serviceman claims immunity from state law because he was acting in performance of his military duties. For example, a guard who shot an escaping military prisoner might qualify for this immunity from state prosecution.<sup>64</sup> If the claim of action in the course of official duties is advanced, that defense contention is decided, not in a court-martial, but in a federal district court, to which the case must be removed.<sup>65</sup>

Whether an accused is acquitted or convicted of a crime by the state courts, court-martial jurisdiction to try him for the same offense is unaffected, and, for that matter, the converse also holds true.<sup>66</sup> If convicted and sentenced to imprisonment in a state court, the serviceman does not have to be turned over to the armed services for trial until he has served his term. But the statute of limitations will not run in his favor during this period;<sup>67</sup> and, if they choose, military authorities can court-martial him when he is finally released. In short, the state and military jurisdiction are independent of each other.<sup>68</sup> As a matter of policy, however, often the

<sup>63</sup> The Uniform Code provides that, upon request, a member of the armed forces may be delivered to civil authority for trial of a suspected crime. Art. 14, 50 U.S.C. § 568 (1952). The armed services have issued regulations as to the circumstances under which a serviceman will be turned over for a civilian trial. However, if the accused serviceman is stationed at an installation in the United States over which the federal government lacks exclusive jurisdiction, it appears that state authorities armed with a warrant are entitled to come on the post and arrest the accused. Consult Op. JAGAF, Dig. Op. 1, The Judge Advocates General, Military Personnel § 17.1 (1952).

<sup>64</sup> *In re Fair*, 100 Fed. 149 (C.C.Neb., 1900). A shore patrolman who used reasonable force in the performance of his assigned duties could not be prosecuted for assault in a Virginia court. *Lima v. Lawler*, 63 F.Supp. 446 (E.D.Va., 1945). See also *In re Neagle*, 135 U.S. 1 (1890).

<sup>65</sup> If a prosecution of a serviceman is begun in a state court "on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the Armed Forces thereof, or under the law of war," the case may be removed to a federal district court for trial. 64 Stat. 108, c. 169, § 9 (1950), 50 U.S.C. § 738 (1952).

<sup>66</sup> *U.S. v. Lanza*, 260 U.S. 377 (1922).

<sup>67</sup> U.C.M.J. Art. 43(d), 50 U.S.C. § 618 (d) (1952).

<sup>68</sup> There is one area of interdependence. A federal statute, the Assimilative Crimes Act, adopts state law for federal purposes in areas to which the state has ceded the United States either exclusive or concurrent jurisdiction. 18 U.S.C. § 13 (1950). The Assimilative Crimes Act is equally applicable to court-martial proceedings if the crime took place on an installation to which the United States had been ceded jurisdiction. Consult *Manual for Courts-Martial, United States*, par. 213c(2) (1951). It should be recalled that, as to offenses committed on military installations in the United States, a court-martial has power only to punish military personnel and cannot, except in time of war under the conditions of Article 2(10) of the Uniform Code, punish civilians who commit crimes on a post.

armed services will not try a serviceman for the same offense for which he has been tried in a state court.<sup>69</sup>

Ironically, though, the jurisdiction of a state court not only may not shield an accused from court-martial but may actually lead to it. For instance, Private Sad Sack, while on authorized leave, is convicted by civilian authorities of reckless driving and is thrown into jail. Should this prevent his return from leave in accord with his orders, he is counted as absent without leave—even though it would be impossible for him to comply with those orders.<sup>70</sup> As an absentee, not only does he lose his right to accrue military pay and allowances, but, in addition, he would be subject to trial both for reckless driving and unauthorized absence. Fortunately, if Sack were ultimately acquitted, instead of convicted, by the state court, he would not be considered AWOL, even though he was delayed by the trial in returning from leave.<sup>71</sup> He could nonetheless be court-martialled for the reckless driving. If Sack were already AWOL when the civilian police picked him up for trial, it would be immaterial whether he were convicted or acquitted in the civilian proceeding.<sup>72</sup> In either event he would be absent without authority for the entire period that he was detained by the civilian officials.

An offense committed in the United States, such as theft of government property, may be punishable by a federal district court or by a court-martial. Here again, either civilian or military authorities would be entitled to conclude any criminal proceeding they began, regardless of later action by the other. Of course, in practice, the court in which the accused serviceman is to be tried will often be determined by agreement between military officials and the United States Attorney. Since both a federal district court and a court-martial are creatures of the same government, trial by one bars trial by the other.<sup>73</sup> Nonetheless, a serviceman who is in a civilian jail after action by a federal court is absent without proper authority from the armed services. No military pay accrues to him, and he could be court-martialled for his unauthorized absence. In practice, the latter rarely occurs, for often the serviceman convicted by a civilian court is simply discharged administratively as undesirable.

#### X. NATO STATUS OF FORCES TREATY

With large American forces overseas, it is important to know to what extent, if any, the jurisdiction of our courts-martial are limited if the offense to be punished would also be a crime under the law of the foreign country. Generally, this hinges on the terms of any treaties or agreements we may

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<sup>69</sup> See *U.S. v. Knudson*, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954).

<sup>70</sup> Consult *Manual for Courts-Martial, United States*, par. 165 (1951). However, he will not be considered absent without leave if military authorities deliver him to civilian authorities pursuant to a request based on Article 14 of the Uniform Code (discussed in note 63, *supra*).

<sup>71</sup> *Manual for Courts-Martial, United States*, par. 165 (1951).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Grafton v. U.S.*, 206, U.S. 333 (1907).

have concluded with the country in question. One such treaty is the NATO Status of Forces Treaty, which, by the summer of 1955, had been entered into by the United States, France, Belgium, Norway, Canada, the Netherlands, Luxembourg, the United Kingdom, Denmark, Turkey and Greece. A similar arrangement has been negotiated between the United States and Japan.

Under the Status of Forces Treaty, the United States reserves exclusive jurisdiction over persons subject to its military law with respect to offenses punishable under that law, but not under the law of the receiving country where the offense is committed. Conversely, as to crimes punishable under the law of the receiving country, but not under American law, that country reserves exclusive jurisdiction. This jurisdiction embraces American military personnel, their dependents, and civilians accompanying an American armed force "who are in the employ of an armed service of" the United States.<sup>74</sup>

Concerning the possible exclusive jurisdiction of a foreign power over American personnel, a Senate Report commented: "It should be noted that, as a practical matter, no such case is likely to arise respecting United States troops, because the Uniform Code of Military Justice, which Congress enacted for United States Armed Forces, permits any offense against the law of the country where the troops are stationed to be treated as an offense against the Code."<sup>75</sup> Probably the senators were referring to Article 134 of the Code, which, when it is carefully read, does not seem to support their conclusion. It is clear, however, that the most typical case will be one where the offense committed would be punishable under both American law and the foreign law concerned.

Here there is concurrent jurisdiction. One nation, nevertheless, is considered to have primary jurisdiction, the other only secondary jurisdiction. The United States would have primary jurisdiction of an offense solely against the security or property of the United States, or against the person or property of American personnel, as well as of offenses arising out of actions "in the performance of official duty." In other instances of concurrent jurisdiction, the host country has the primary right to exercise jurisdiction. It is agreed, however, that that country will give "sympathetic consideration" to any request by the United States for waiver of jurisdiction if the United States thinks such waiver "to be of particular importance."<sup>76</sup>

Article 2 (11) of the Uniform Code contains no explicit limitation in terms of nationality or normal residence on the exercise of military jurisdiction over persons serving with, employed by, or accompanying the American armed forces overseas. This jurisdiction, however, is made subject to the provisions of any treaty or agreement to which the United States becomes

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<sup>74</sup> NATO Status of Forces Agreement, Art. I, par. 1(b) and Art. VII, par. 2 (effective Aug. 23, 1953).

<sup>75</sup> Exec. Rep. No. 1, 83d Cong. 1st Sess. 5 (1953).

<sup>76</sup> NATO Status of Forces Agreement, Art. VII, par. 3.

a party and to "any accepted rule of international law."<sup>77</sup> The extent to which any accepted rule of international law would block military jurisdiction over nationals or residents of a country where our troops were stationed is unclear. The Status of Forces Treaty states that it "shall not imply any right" to exercise jurisdiction over citizens or residents of the host country unless they have entered the American armed forces.<sup>78</sup> Does this round-about wording imply an outright restriction on jurisdiction, or is it merely an effort to avoid creating jurisdiction where otherwise none would exist? If the latter, then it would have no effect on the military jurisdiction granted by Article 2 (11), and international law would be the ultimate determinant of jurisdiction. If F, a French citizen or a person who ordinarily resides in France, is employed by our armed forces in France, and commits a crime—even one against American personnel or property—could he be tried by a court-martial? What if F had married an American soldier stationed in France and was his dependent? Probably international law would block such a proceeding in view of the conditions under which our troops are today present in France. Even more probably, an exercise of court-martial jurisdiction would be avoided by American officials. Yet it would have been desirable if the Status of Forces Treaty had made the matter clearer.

There have been two main lines of assault on the Status of Forces Treaty. The most familiar is that it has violated the rights of the American soldier by permitting him to be subjected to trial in foreign courts. Ironically, some of the same critics who take this position are generally quite critical of military justice; and the question arises why a GI should complain about trial in a foreign court if American courts-martial are as bad as these persons would paint them. As a matter of fact, the foreign courts have been exceedingly lenient with the American military personnel brought before them. Of 815 Americans who were actually brought to trial only 44—about 5.4%—served any time whatsoever in a foreign jail. In some instances it is the leniency of the sentences imposed by foreign tribunals that has created difficulty.<sup>79</sup>

So far as fairness of the trial is concerned, it is unlikely that the serviceman has much to fear in the United Kingdom and Canada, whose laws are like our own. Furthermore, the Status of Forces Treaty specifically requires the foreign country to provide an accused with these important safeguards: (a) prompt and speedy trial; (b) notice before trial of the specific charge

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<sup>77</sup> No rule of international law was held to preclude the court-martial of Polish nationals who were employed at an American installation in France. *U.S. v. Weiman*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953). The Court of Military Appeals emphasized that these were not French citizens or residents, but did not state whether in such a case an accepted rule of international law would have prevented a court-martial from taking jurisdiction. In *U.S. v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102 (1955), the Court of Military Appeals considered whether a Treaty between the United States and Japan deprived American courts-martial of jurisdiction they otherwise would have possessed over certain civilians. The court upheld the jurisdiction of the courts-martial, though conceding that Japanese courts might also have had jurisdiction.

<sup>78</sup> NATO Status of Forces Agreement, Art. VII, par. 4.

<sup>79</sup> In this connection see Hearings before the Senate Committee on Armed Services to Review Operation of Article VII of the Status of Forces Treaty, 84th Cong. 1st Sess. 12, 24, 26, 36, 45-46 (1955).

against him; (c) confrontation by witnesses; (d) the right to subpoena witnesses; (e) legal representation; (f) aid of an interpreter; and (g) opportunity to communicate with his own government and, when the rules of the court permit, have a representative thereof present at his trial.<sup>80</sup> These safeguards seem to have been observed in almost every instance.

In any event, the problem must be considered not only from our standpoint but also from that of the receiving countries where our troops will be stationed. "They were particularly concerned about offenses committed by off-duty soldiers against the inhabitants of these countries—the killings, assaults, sexual crimes and highway offenses which, even in the best-regulated of armies, inevitably take place. They resented, too, a regime for visiting forces that was the same as that prevailing in occupied countries, where the local authorities exercised no control whatsoever over the occupying forces."<sup>81</sup> In short, like any host, these countries did not wish to have guests whose behavior was completely beyond their control.

The argument is made that our troops are scarcely guests in any true sense, since they are present to protect the receiving country. Nevertheless, unlike the situation in an occupied country, they are there because of the consent of the receiving country. While protection of the other country is part of our purpose, another important part is protection of the United States itself. Realistically viewed, NATO is a joint venture rather than a mere charity on our part. It is understandable that, as is often the case in a joint enterprise, the United States and its personnel must make some sacrifices. The serviceman may not have chosen to go overseas where he might fall subject to foreign jurisdiction. But he may also not have chosen to enter the armed services in the first place—the point being that many sacrifices are demanded of him. Moreover, the United States retains primary jurisdiction over the serviceman while he is performing his military duties and is engaged in activities which do not involve foreign personnel or property. The individual who is overseas can limit materially his contact with local citizens if he is especially fearful of falling under foreign jurisdiction. Thus, even here, the serviceman remains to a great extent the "master of his fate." In view of the arguments that support the Status of Forces Treaty, it is clear why the United States may properly remain a party to the Treaty so long as the foreign countries involved are reasonable in their dealings with American personnel.<sup>82</sup>

So far, foreign countries—both in and outside of NATO—have usually

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<sup>80</sup> Status of Forces Agreement, Art. VII, par. 9. The rare occasions when these safeguards were not granted are discussed in the Senate Hearings, *supra* note 79, at pp. 21-23, and 58-60. A Department of Defense directive requires that the Armed Services carefully check on the treatment of Americans confined in foreign prisons. *Ibid.*, at 41-42. Furthermore, a serviceman usually will not be administratively discharged during the time that he is confined by a foreign government. *Ibid.*, at 42 and 47.

<sup>81</sup> Statement by Major General Mickelwait, Deputy Judge Advocate General of the Army, August 18, 1954, quoted in Bulletin 18, *The Judge Advocate Journal* 16 (Oct., 1954).

<sup>82</sup> One attack on this Treaty which was attempted in the federal courts has been rebuffed. See *Keefe v. Dulles*, 222 F.2d 390 (C.A.D.C. 1954), cert. denied, 348 U.S. 952 (1955); see also Senate Hearings, *supra* note 79, at 65-68 and 75.

proved quite reasonable in relinquishing American offenders for court-martial. During 1954 waivers were granted in over sixty-five per cent of all cases.<sup>83</sup> Naturally there are differences among countries in their readiness to grant waivers;<sup>84</sup> but certainly the statistics reveal no desire on the part of foreign countries where our troops are stationed to persecute Americans. In fact, in the run-of-the-mill case a foreign official may be glad to save himself some worry, waive jurisdiction, and let an American court-martial dispose of the charges.

In addition to the complaint that it is unfair to the serviceman to subject him, under any circumstances and safeguards, to foreign jurisdiction, there is a contention that "subjecting our people to the jurisdiction of foreign courts may hamper operations, destroy disciplinary control and impair morale. That there is some basis for this feeling is apparent from a consideration of the well established principle that discipline, efficiency and morale are all tied to prompt and impartial administration of punishment for offenses committed by military personnel. Clearly, a military commander is handicapped in administering discipline when questions of whether and when he will be permitted to take action are introduced, and it would seem that this same uncertainty might have deleterious effects on morale."<sup>85</sup>

In view of the liberality with which other countries have waived jurisdiction, there is not too much uncertainty that the military commander can take action when needed to punish conduct he considers harmful. Moreover, the United States has retained the primary right to punish "any act or omission done in the performance of official duty."<sup>86</sup> It is this type of performance in regard to which the military commander needs to retain especially close disciplinary control, and this he is allowed to do. As for crimes committed by servicemen in an off-duty status, there is little reason to anticipate a wave of offenses merely because foreign courts have a right to punish such crimes. In fact, the converse would hold true. Essentially, the chief military

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<sup>83</sup> Senate Hearings, *supra* note 79, at 24, 39-40, and 45-46.

<sup>84</sup> *Ibid.*, at 27-39. Sometimes the granting of a waiver hinges on whether or not a financial settlement has been made with the injured party. See Report of Proceedings, Army Judge Advocates' Conference 124 (1954). With reference to the British viewpoint on waivers, the following statement by an informed Army legal officer is apposite: "I might add here, too, that there has been a little friction with our British cousins lately, occasioned by our requesting waivers in all cases subject to their jurisdiction. They felt this wasn't sporting, and we felt we were acting in consonance with the Senate reservation to the Status of Forces Agreement. This one has a happy ending. Apparently, the quibble is over." *Ibid.*, at 135. The Treaty itself, as has been noted, speaks of waivers being given "sympathetic consideration" if the request is considered to be "of particular importance." This might well be taken to imply that waivers are not to be asked in every case. Even the Senate reservation to the Status of Forces Treaty does not appear to state that a waiver is to be requested in every case where the foreign power has primary jurisdiction.

<sup>85</sup> Carlisle, A Report on the Exercise of Criminal Jurisdiction under the North Atlantic Treaty Status of Forces Agreement and the Parallel Provisions of the Japanese Administrative Agreement, *The JAG Journal* 23 (Jan., 1955).

<sup>86</sup> Some difference of opinion has arisen about which country determines whether the questioned acts were in the performance of official duties. The United States has maintained that our government must make the final decision whether American servicemen were performing official duties at the relevant times. The United Kingdom and Turkey have contended that the courts of the host country must determine this. Senate Hearings, *supra* note 79, at 28-30; Report of Proceedings, Army Judge Advocates' Conference 135 (1954).



problem arising from the Status of Forces Treaty is that morale of servicemen might be lowered because of being subjected to the jurisdiction of foreign courts. This is a danger. Equally dangerous, though, would be the possibility of deteriorating relations between Americans and citizens of the host country if our personnel could not be tried by local courts for any crime, however heinous, that they might commit against the citizens. Poor relations with the local populace are also not going to bolster the morale of our troops stationed overseas.

Without a treaty to the contrary, a trial in a foreign court would presumably have no more effect on military jurisdiction than does a trial in a state court in this country. Whether the accused was convicted or acquitted, he could be tried again for the same offense. The Status of Forces Treaty provides a greater protection for the serviceman. American personnel tried in the foreign court cannot thereafter be court-martialled "for the same offense within the same territory."<sup>87</sup> Despite some ambiguity, the words "within the same territory" do not seem to relate to where the second trial would be held; and, therefore, the accused serviceman could not be made subject to court-martial by taking him for trial outside the country which first prosecuted him. The treaty limits former jeopardy as to American military personnel—though not their dependents or accompanying civilians—by providing that a foreign trial shall not prevent American military authorities from later trying a member of our armed services "for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another contracting party."<sup>88</sup> Presumably the "rules of discipline" are something less than all the prohibitions set forth in the Uniform Code; but how much less is uncertain. One thing that does seem clear is that an accused serviceman who is confined after conviction by a foreign court is absent without leave from the armed services. He would not receive pay during the time he was confined,<sup>89</sup> and there is nothing that bars court-martial jurisdiction to try him for the absence.

#### XI. SUMMARY

The scope of military jurisdiction under present law is undoubtedly broader than most persons would suppose, and arises from the Uniform Code of Military Justice, the law of war, and martial law. However, the Supreme Court's decision in the *Toth* case destroyed the jurisdiction over former servicemen which Congress sought to confer upon courts-martial. And it is possible that future decisions in the same vein may eliminate military jurisdiction over civilians closely related to American armed services overseas. In any event, any power to court-martial civilians will probably be exercised quite sparingly by the military authorities in view of

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<sup>87</sup> NATO Status of Forces Agreement, Art. VII, par. 8.

<sup>88</sup> *Ibid.* In connection with this provision of the Treaty, see also *U.S. v. Sinigar*, 6 U.S. C.M.A. 330, 20 C.M.R. 46 (1955).

<sup>89</sup> Senate Hearings, *supra* note 79, at 48-50.

the traditional public aversion to military trials of civilians—an aversion of which the Toth opinion was a vivid manifestation.

Court-martial jurisdiction is independent of that of a state court, so that trial in the latter court, whatever the outcome, does not bar prosecution by military authorities for the same crime. There is no primary jurisdiction of a crime as between state officials and military authorities, so that, if the former have custody of an accused, they are entitled to go ahead with their prosecution. Overseas the relationships between military jurisdiction and that of the foreign courts are frequently made the subject of a treaty. The NATO Status of Forces Treaty, the most important of such international arrangements, provides detailed rules for allocating primary jurisdiction. In practice, however, the primary jurisdiction of foreign courts has often been waived to permit American court-martial proceedings. Under the Status of Forces Treaty, exercise of primary jurisdiction by a foreign power would oust the jurisdiction of courts-martial to try the accused for the same offense.

Several problems are encountered in determining whom courts-martial may try. Among them are some arising out of ambiguity in the Status of Forces Treaty and in the Code and Manual for Courts-Martial provisions governing interservice jurisdiction. Moreover, the meaning of “time of war” and “enemy,” as used in the Code, is unclear in today’s era of “cold war” and “police actions.” And there is uncertainty about the extent to which a military commander may use special military commissions instead of courts-martial when martial law or the law of war is operative.