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Cover Page Footnote
Captain, U.S.A.F. Member of the Bars of the Supreme Court of the United States, the United States Court of Military Appeals, and the State of New York.
THE MANUAL FOR COURTS-MARTIAL — ITS LEGAL STATUS AND THE EFFECT OF DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS

FRANK FEDELE

It is axiomatic that no statute can provide all the numerous details expected to be encountered in the administration of any judicial system. In providing for the courts-martial system, Congress, in Article 36 of the Uniform Code of Military Justice, has therefore authorized the President to issue regulations prescribing the detailed procedure to be fol-

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The creation of the United States Court of Military Appeals represents unquestionably the most outstanding innovation in the field of military law brought about by the enactment of the Uniform Code of Military Justice which became effective on 31 May 1951. The establishing of a civilian court to act as final appellate tribunal in the military justice hierarchy marks the introduction of an entirely new concept to the court-martial procedure—that of placing part of the administration of military law in the control of civilians who are entirely separate from and independent of the Department of Defense, except for administrative purposes.

This civilian “supreme court” for the review of court-martial convictions was by no means an instantaneous development. Its roots lie in the slow, gradual, and almost imperceptible growth of the concept of appellate review in the military justice system. The primary object of the parent dissertation was to examine, analyze, and evaluate the role played by this Court during the first twenty-eight months of its nascent existence (from 31 May 1951 to 3 October 1953); to appraise its effect on military law; and to pose some of the problems that have arisen as a result thereof. The current article is confined to a discussion of the effect that the Court’s decisions have had upon the Manual for Courts-Martial.

The views expressed herein are those of the author and do not reflect the official opinion or policy of the Office of The Judge Advocate General, United States Air Force, the Department of the Air Force, the Department of Defense, or any other Department or Agency of the United States Government.

1. “... The complexities of law enforcement have disclosed the inadequacies of legislative regulation to a degree which has impelled legislatures themselves to confer on executive and administrative departments the authority to make ‘rules and regulations’ in an endeavor to make the enforcement of the law actually achieve the policy intended. Thus the making of rules and regulations by executive and administrative departments becomes not a matter of law enforcement but of secondary law creation.” 1 Sutherland Statutory Construction 11-12 (3d ed., Horack, 1943).

2. Congress, having set up the legal structure for military justice, delegated to the President the authority to finish the task by providing the procedural rules within the
The regulations of the President which implement the Uniform Code are issued in the Manual for Courts-Martial, United States, 1951. Unlike the procedural rules of civil courts, the Manual covers the operation of the entire courts-martial system, from the initial steps to be taken before trial to the completion of the case. It deals fully with the various crimes and offenses, the evidence which can be used to prove them, and the sentences which can be imposed. It, in effect, declares much of the military law in advance, not for any specific case but for all cases which may arise in the future. In form it not only resembles a text or compendium of military law, but in substance it has become the "bible of military justice" and is used as such by all persons having any dealings with military justice, including the accuser, convening authority, counsel, law officer, court-members, investigating officer, re-


3. The granting to the President of such broad discretionary powers was not without opposition. See Hearings before House Committee on Armed Services on H. R. 2498, 81st Cong., 1st Sess. 756, 1014-1019, 1061-1064 (1949). Article 56 of the Uniform Code also empowers the President to establish maximum limits of punishment.


5. The declaration of law in advance for similar cases which may arise in the future is legislative and not judicial power. This method of declaring the law is a hangover from the concept of Roman Law and is at variance with our common law idea of laws built up by judicial precedents, unvexed and unaided by legislation. See Page, A Study in Comparative Law, 32 Harv. L. Rev. 349, 352-370 (1919).


7. As a matter of practice, each member on a general or special court is usually supplied with a copy of the Manual for his use and guidance during the course of trial. Although this doubtful practice, not authorized by statute or regulation, is not entirely free from question, the practice has become so deeply imbedded in the system that it is seriously doubted whether a change can be brought about in the absence of an express statutory mandate to the contrary. The use of the Manual by the court-martial in closed
viewing authority, and the members of the Boards of Review.

Since the provisions of the Manual are lawmaking in nature, one of the first questions to arise is: What legal force and effect does it enjoy? Article 36 of the Uniform Code partially answers the question by expressly providing that the President may prescribe procedural rules "generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code." Thus, it is abundantly clear that if a provision of the Manual is in conflict with a provision of the Uniform Code, the latter will prevail. In such event the Manual provisions would have no legal force or binding effect.

This principle was first exemplified in the case of United States v. LaGrange wherein two accused were tried and convicted by a special court convened by an officer, junior in rank to that of the accuser. The commanding officer of the accused, a Navy captain in rank, having signed the charge sheet as the accuser, was thereby disqualified to act as the convening authority. He thereupon forwarded the charges to his superior officer in the chain of command, who in turn directed trial by a special court and designated a certain Commander in rank as authority to exercise jurisdiction and appoint the court. By virtue of this authority, the Commander acted as convening authority and appointed the court which tried the accused. On appeal, a Navy Board of Review reversed the conviction on the ground that the Commander was not authorized to appoint the court. The Judge Advocate General of the Navy certified the case to the Court of Military Appeals on the sole question of whether an officer, junior in rank to the accuser and not in the normal chain of command, had authority to appoint the court. The determination of this question required the resolution of a patent inconsistency between the provisions of the Uniform Code and those of the Manual.

Article 23 (b) of the Uniform Code provides that when the convening authority of a special court is an accuser, the court shall be convened by "superior" competent authority. This provision is amplified by paragraph 5a(3) of the 1951 Manual which states in pertinent part:

"When any commander who would normally convene the general court-martial is the accuser in a case, he shall refer the charges to a superior competent authority who will convene the court or designate another competent authority to exercise jurisdiction."
The inconsistency is readily apparent. Whereas the Uniform Code limits the convening of the court to “superior” competent authority, the Manual extends the authority to “another” competent authority. In declaring the supremacy of the statutory provision, the Court said emphatically:

“Article 36 of the Uniform Code of Military Justice, 50 USC Sec. 611, provides that the President may prescribe rules of procedure, including modes of proof in cases before courts-martial, provided they are not contrary to or inconsistent with the provisions of the Code. This Article brings into the Code the oft-expressed rule that the terms of a congressional enactment can not be defeated by terms engrafted thereon by an executive order, and if the two are inconsistent, the statute must stand alone. But, it imposes on this Court the duty to reconcile any conflicting provisions dealing with the same subject matter and to construe them, in so far as reasonably possible, so as to be in harmony with each other.”

In construing the two provisions, the Court took cognizance of the manifest intent of Congress to lessen command control and gave it effect by limiting the wording of the Manual to meet the specifications of the Uniform Code.

The rule in the LaGrange case was liberally applied by an Air Force Board of Review to a somewhat analogous situation. In the Burnette case, the officer preferring the charges and the accuser in the case was the commanding officer of the accused’s Air Rescue Squadron, with the rank of colonel. The charges were referred to trial by a special court convened by order of the commanding officer of the Air Base Group, who had the rank of lieutenant colonel and acted upon the record of trial as convening authority. It appeared that the Air Rescue Squadron was not under the command jurisdiction (i.e., operational control) of the Air Base Group. Following the LaGrange case, the Board of Re-

10. United States v. LaGrange et al. (No. 313), 1 USCMA 342, 3 CMR 76, 78 (1952).
11. The following rule of construction was announced: “Regulations and statutes are to be construed with reference to their manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat that object, they should receive the former construction.” Id. at 78.

This rule was later applied in construing permissive language in the Manual as requiring mandatory instructions on lesser included offenses reasonably raised by the evidence. Otherwise, a conflict between the Uniform Code and the Manual would result. United States v. Clark (No. 190), 1 USCMA 201, 2 CMR 107, 110 (1952). A detailed study of the evolution of military law requiring instructions has been made. See Fedele, The Evolution of the Court-Martial System and the Role of the United States Court of Military Appeals in Military Law (S.J.D. Thesis—The George Washington University Law Library 1954).
13. The Air Rescue Squadron was a unit assigned to and under the command jurisdiction of a certain composite wing of the Strategic Air Command. The Air Base Group
view held that the convening authority, being junior in rank to the accuser and not in the chain of command, was disqualified to convene the court thus rendering it without jurisdiction to try the accused. It is to be noted that the Board of Review refused to depart from the principle announced in the LaGrange case even though the instant case on its facts differed from the former on two salient points. Unlike the LaGrange case, the Squadron commander was not empowered to convene a special court. Although it could be argued that this factor removes the Squadron commander from the category of those officers to whom the prohibition in Article 23(b) applies, the Board of Review was unable to accept such a restrictive interpretation of the language of the statute. Furthermore, the charges in the instant case were forwarded by the squadron commander to the Air Base Group commander as the officer exercising summary court-martial jurisdiction over the squadron. Although this fact would indicate that the Air Base Group commander was superior to the accuser in the chain of command in court-martial matters, the Board of Review held that such a situation was not sufficient to create an exception to the principle enunciated in the LaGrange case.

An interesting question concerning the power of the President to prescribe a cruel and unusual punishment prohibited by the Uniform Code was presented in the case of United States v. Wappler. Upon conviction by a Navy special court-martial in California, the accused was sentenced to confinement at hard labor for sixty days; solitary confinement on bread and water, with a full ration every third day, for thirty days; to forfeiture of $50.00 per month for three months; and to receive a bad conduct discharge. The convening authority, in approving the sentence, suspended the punitive discharge with provision for its automatic remission six months after termination of confinement. This action having been approved by the supervisory authority, the record of trial was reviewed by a Navy Board of Review. In a two to one decision, the Board of Review set aside the bad conduct discharge on the ground that confinement on bread and water may not be legally im-

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14. The Air Rescue Squadron was not a "separate squadron" within the purview of Art. 23(a) of the Uniform Code, or a "separate or detached command" as defined in paragraph 5b(3) MCM, 1951. Ibid.

15. Its position was founded on the clear Congressional intent to lessen command control and influence in the military justice system, even though there was no evidence of command control or influence in the case. Ibid.

16. MCM 1951, par. 32f.

17. (No. 1457), 2 USCMA 393, 9 CMR 23 (1953).
posed where a punitive discharge is also adjudged, but otherwise approved the remainder of the sentence. The dissenting member was of the opinion that the court was without power to impose confinement on bread and water. The Judge Advocate General of the Navy thereupon certified the case to the Court of Military Appeals, requiring a consideration of the legality of bread and water confinement.

Inasmuch as paragraph 125 of the Manual specifically provides that Navy, Marine, and Coast Guard courts-martial may impose confinement on bread and water for periods not in excess of 30 days, with the restriction that “no accused shall be deprived of a full ration for a period longer than three consecutive days,” the legality of the sentence under consideration depended upon the presence or absence of any conflict of the Manual provision with the Uniform Code. The only mention made of confinement on bread and water as punishment is contained in Article 15(a)(2) of the Uniform Code which permits confinement on bread and water as nonjudicial punishment by commanding officers but limits it to “a person attached to or embarked in a vessel” and to “a period not to exceed three consecutive days.” In addition Article 55 prohibits “cruel or unusual punishment.” After examining the legislative history to the Uniform Code on the matter of cruel punishments, the Court concluded that it was not the Congressional intent to give “free rein to the Chief Executive to authorize Naval courts-martial to impose bread and water confinement within its grant of power to him to establish the maximum limits of sentence.” Instead the Court found a contrary intent in the language of Article 55, prohibiting “cruel and unusual” punishments to bar confinement on bread and water, except to the extent permitted by Article 15. In other words, it squarely held that no court-martial, Navy or otherwise, may legally adjudge confinement on bread and water for personnel other than those “attached to or embarked in a vessel,” but a court-martial of any service may impose confinement on bread and water in cases involving personnel “attached to or embarked in a vessel,” for a “period not to exceed three consecutive days.” Speaking of the conflict between the provisions of the Manual and the Uniform Code, the Court stated emphatically and unequivocally:

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18. Sentences to confinement on bread and water for Army and Air Force personnel are expressly forbidden by the same paragraph.

19. Confinement on bread and water, with a full ration every third day for a period up to thirty days, has been expressly permitted by the Articles for the Government of the Navy for many years (Arts. 30, 35, AGN, and N. C. & B., Sec. 447). Such punishment has long been prohibited by the Army, and has never been recognized by the Air Force. United States v. Wappler, supra note 17.
"To the extent which paragraphs 125 and 127c of the Manual are in conflict with this construction of the Code, they are without sanction of law and must fall." 20

It is interesting to note that while the Manual test as to what constitutes a lesser offense had been applied with approval by the Court in a number of instances 21 it was rejected in a homicide case on the reasoning that the Manual rule was intended merely to furnish a working test under Article 79, which test is "sound and workable in the overwhelming majority of cases, but it simply and badly fails in homicide—and, to the extent that it conflicts with the intention of Article 79, it must fail." 22

In the leading case of United States v. Rosato 23 the Court later manifested no hesitancy in declaring that the part of paragraph 150b of the 1951 Manual which provides that the prohibition against self-incrimination is not violated by requiring an accused to make a sample of his handwriting, contravenes the privilege against self-incrimination secured to an accused through Article 31(a) of the Uniform Code and the Fifth Amendment, is in conflict therewith, and therefore is of no legal effect. The violation was based on the fact that the accused was here required affirmatively to exercise both his mental and physical faculties. This test was subsequently applied in the Greer case 24 where

20. The Court went on to hold that the provision of paragraph 127c of the Manual permitting the substitution of equivalent punishments, including confinement on bread and water, on the basis there indicated for the punishments listed in the Table of Maximum Punishments, "unless dishonorable or bad conduct discharge is adjudged," does not conflict with the Uniform Code. Accordingly, where a punitive discharge is imposed, the court may not additionally sentence the accused to confinement on bread and water. The Court thereupon set aside the bread and water confinement and affirmed the bad conduct discharge. Ibid. Cf. United States v. Wyatt (No. 1140), 2 USCMA 647, 10 CMR 145 (1953), where the Court set aside the bad conduct discharge and affirmed the bread and water sentence insofar as it covered a three day period.


22. United States v. Davis (No. 646), 2 USCMA 505, 10 CMR 3, 7 (1953).


24. United States v. Greer (No. 3155), 3 USCMA 576, 13 CMR 132 (1953). However, the Court very recently held that the procuring of a urine specimen from an accused by catheterizing was not violative of his rights against compulsory self-incrimination. United States v. Booker (No. 3836), 4 USCMA 335, 15 CMR 335 (1954) (accused was conscious and consented to the catheterization); United States v. Williamson (No. 3898), 4 USCMA 320, 15 CMR 320 (1954) (accused was unconscious).

Whether the taking of a blood sample from an accused against his will is violative of
the Court likewise discarded that provision of paragraph 150b of the 1951 Manual providing that the privilege of self-incrimination is not violated by requiring an accused to utter words for the purpose of voice identification. Where, however, an inconsistency exists between provisions of the Manual, the provision which sets out the more stringent rule and inclines to be more directly in favor of the accused, will prevail.\textsuperscript{25}

In one instance the Court rejected a Manual provision even though not in conflict with the Uniform Code. Notwithstanding the provision of paragraph 73c of the Manual vesting complete and final control in the law officer over requested additional instructions, a bitterly divided Court declared that failure to give a specific request for clarifying instructions is a clear abuse of discretion and constitutes error.\textsuperscript{26}

What status is enjoyed by the Manual in the absence of any inconsistency presents another facet of the subject matter under consideration. The Court was first presented with this problem in the case of United States v. Lucas.\textsuperscript{27} There, the accused pleaded guilty to an offense of "AWOL" and was found guilty thereof by a special court. The president of the court had failed to instruct and charge the court as to the elements of the offense, the rules of presumption of innocence, burden of proof, reasonable doubt, and lesser degrees. Paragraph 73b of the Manual provides that after instructing the court as to the elements of each offense charged, the law officer in a general court or the president in a special court shall in all cases, including those in which a plea of guilty has been entered, charge the court on the four elements set forth in Article 51(c) of the Uniform Code. It is to be noted that the Manual requires the charge to be given in cases where a plea of guilty has been entered, whereas the Uniform Code does not so require. In construing the language of the Uniform Code and the Manual dealing with the same subject matter, the Court held that in the absence of inconsistency, both function on the same authoritative level, and that the usual rules of statutory interpretation which require that each be given effect are applicable.\textsuperscript{28} Thereupon, the Court went on to find that the subject

\textsuperscript{25} United States v. Whitman (No. 2168), 3 USCMA, 179, 11 CMR 179 (1953).
\textsuperscript{26} United States v. Offley et al. (No. 1841), 3 USCMA 276, 12 CMR 32 (1953).
\textsuperscript{27} (No. 7), 1 USCMA 19, 1 CMR 19 (1951).
\textsuperscript{28} "For the purpose of this case we can and do hold that the act of Congress (the Code) and the act of the Executive (the Manual) are on the same level and that the ordinary rules of statutory construction apply. In that event the general rule is that statutes dealing with the same subject should, if possible, be so construed that effect is given to every provision of each. Moreover, in dealing with each, its provisions should
provisions of the Manual, not being prohibited by the Uniform Code, were mandatory and that a failure to comply therewith was error as a matter of law.\textsuperscript{29}

In the later case of \textit{United States v. Merritt},\textsuperscript{20} the Court had occasion to hold that the only limitation upon the President imposed by Article 36 of the Uniform Code is that his orders must be consistent with and not contrary to the Uniform Code.\textsuperscript{31}

be construed so that no part will be inoperative, superfluous, void or ineffective." United States v. Lucas (No. 7), 1 USCA 19, 22, 1 CMR 19, 22 (1951).

Accordingly, no conflict was found in the following cases: United States v. Sonnenschein (No. 8), 1 USCA 64, 1 CMR 64 (1951) (jurisdiction of Court to review cases transmitted to Judicial Council prior to effective date of Uniform Code); United States v. Martin (No. 51), 1 USCA 82, 1 CMR 82 (1951) (same); United States v. Brasher (No. 499), 2 USCA 50, 6 CMR 50 (1952) (limitation of period of forfeitures or confinement in absence of punitive discharge); United States v. Ariola (No. 1849), 2 USCA 637, 10 CMR 135 (1953) (singleness of offense); United States v. Gann et al. (No. 1425); 3 USCA 12, 11 CMR 12 (1953) (use of deposition in case involving capital and noncapital offenses); United States v. Krull (No. 934), 3 USCA 129, 11 CMR 129 (1953) (intention to replace property as a defense in larceny); United States v. Tague (No. 1719), 3 USCA 317, 12 CMR 73 (1953) (legality of arrest pending completion of appellate review); United States v. Cambridge (No. 1850), 3 USCA 377, 12 CMR 133 (1953) (ruling by law officer on stipulation); United States v. Seymour (No. 2728), 3 USCA 401, 12 CMR 157 (1953) (admission-necessity of affirmative proof of warning of rights under Article 31); United States v. Littrice (No. 2809), 3 USCA 487, 13 CMR 43 (1953) (par. 38 of the Manual re command control not in conflict with Arts. 37 and 66 of the Uniform Code); United States v. Biesak (No. 2676), 3 USCA 714, 14 CMR 132 (1954) (provisions in par. 122a of the Manual to effect that the presumption of sanity is evidence to be considered along with other evidence is not in conflict with the Uniform Code); United States v. White (No. 3068), 3 USCA 666, 14 CMR 84 (1954) (provisions in par. 143a of the Manual re Certificate of Identity of an accused are not in conflict with the Uniform Code); ACM S-1852, Phillips, 2 CMR 671 (1951) (deferring of effective date of forfeitures by convening authority); ACM 4867, Godfrey, 3 CMR 752 (1952) (power of convening authority to specify effective date of forfeitures).

29. However, in view of the plea of guilty the error was held to be harmless.

30. (No. 53), 1 USCA 56, 1 CMR 56 (1951), where it was held that if the accused was arraigned after the effective date of the Uniform Code, the trial procedure prescribed under the 1951 Manual governs even though the court was appointed and charges were referred to trial prior thereto.

31. Cf. United States v. Burns (No. 847), 2 USCA 400, 9 CMR 30 (1953), where Rule IX F, of the Uniform Rules of Procedure for Proceedings in and before Boards of Review, promulgated by the Judge Advocates General of the Armed Forces pursuant to Article 66 of the Uniform Code, permitting the Boards of Review to consider matters outside the record of trial on the issue of insanity, was upheld and enforced as being "consistent with the Code and the Manual and good reasons support its enactment." See also, United States v. Drain (No. 4510), 4 USCA 646, 16 CMR 220 (1954) where in holding that a deposition in which the accused was represented by uncertified counsel was inadmissible in a general court-martial, the Court "reconciled without the slightest difficulty" a claimed inconsistency between Article 49 and Article 27 of the Uniform Code.
That the provisions of the Manual are both procedural and substantive in nature is axiomatic. In so far as all of the foregoing cases deal with questions of adjective military law, the correctness of their holdings to the effect that the provisions of the Manual when not inconsistent with the Uniform Code shall have the full force and effect of law cannot be seriously challenged. Such provisions are law-making in nature and consequently mandatory in their applications. However, whether the Manual in toto, including the substantive law provisions therein contained, is entitled to "all the force of law" is a question which is not entirely free from legal doubt and uncertainty.

Article 36 of the Uniform Code empowers the President to make rules governing the procedure, including modes of proof, for trials before military tribunals in clear, precise and unambiguous language. There is no express delegation of power to promulgate rules of substantive law, nor can such be reasonably inferred therein. The express language of Article 36 clearly manifests a contrary intent, for Congress "must not be taken to legislate by inference." Congress, being expressly conferred with the power under the Constitution to make rules for the government and regulation of the land and naval forces, has in its legislative wisdom seen fit not to delegate to the President the power to declare rules of substantive military law. It is, therefore, submitted that the substantive law provisions of the Manual, not falling within the grant of authority of Article 36, are without sanction of law. As such, they are purely informational and expositive in legal contemplation, and therefore not, of themselves, law-making in nature and, consequently, not mandatory in effect. Since the substantive law of the military was declared by Congress in the Uniform Code of Military Justice, the President, whether acting as Chief Executive or as Commander in Chief, is powerless to add to, detract from, or in any way modify the same.

32. These are provisions of the Manual which contain rules of evidence and other rules of procedure for trial by court-martial as authorized by Article 36 of the Uniform Code, and the maximum limits of punishment imposable in such trials as authorized by Article 56 of the Uniform Code.
33. It has been long established that executive regulations have "the force of law." Gratiot v. United States, 4 How. 80 (U.S. 1846); Swaim v. United States, 165 U.S. 553 (1897); Ex parte Reed, 10 Otto. 13 (U.S. 1879); United States v. Webster, 28 Fed. Case. 510, No. 16,658 (D. Maine 1840).
35. This significant language was used by the Court in the case of United States v. Wappler (No. 1457), 2 USCMA 393, 9 CMR 23, 26 (1953).
37. See ACM 6613, D'Andrea, 10 CMR 909 (1953).
38. This limitation upon the President was expressly recognized by the Court when...
This problem is most strikingly manifested in the case of the *United States v. Solinsky*. The accused had enlisted in the Army in August 1947. Prior to the normal expiration of his term of enlistment and while stationed in Germany, he was, on September 5, 1949, given an honorable discharge for the "convenience of the Government" in order that he might re-enlist for an indefinite period of time. His discharge was dated September 5, 1949, and his reenlistment was effective the following day. Thereafter, in 1951, he was tried and convicted of certain offenses allegedly committed in 1948. The findings and sentence having been approved by the convening authority and affirmed by an Army Board of Review, the Court of Military Appeals granted accused's petition for review to determine the sole question of whether the court-martial had jurisdiction to try him for offenses committed during his prior enlistment.

We have previously seen that courts-martial are courts of special and limited jurisdiction and as such derive their power solely from Congressional grants. Also, that if the military had jurisdiction over the person at the time an offense was committed, the jurisdiction might be lost by the giving of an honorable discharge unless Congress had specifically reserved the right of the military to proceed. The general rule that court-martial jurisdiction over persons subject to military law ceases when discharge is effective and that jurisdiction as to the offenses committed during the period of service thereby terminated is not revived by re-entry into the military service is subject to certain statutory exceptions. Congress has seen fit to have courts-martial retain jurisdiction after the individual's discharge from service in the following cases only:

1. Where the offense is punishable by confinement at hard labor for five years or more, and for which the accused cannot be tried by civilian courts of the United States.

It declared that if Congress proscribed but one offense in Article 132(1)(A) of the Uniform Code, the President cannot enlarge that Article to include three offenses by providing three forms of alleging violation of that Article. *United States v. Ariola (No. 1849)*, 2 USCMA 637, 10 CMR 135, 137 (1953).

40. The nature, extent, and scope of courts-martial jurisdiction is separately treated elsewhere in the author's thesis.

41. *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949); ACM 1937, Welty (BR), 2 CMR (AF), 615 (1950); CM 324945 Moore, 74 BR 37, 38 (1947); Winthrop, Military Law and Precedents 93; MCM, 1951, par. 11a; MCM, 1949, par. 10; MCM, 1928, par. 10.

42. UCMJ, Art. 3(a). This provision was added to the Uniform Code as a result of the Hirshberg case, ibid., to "provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent ca-
2. As to persons serving a sentence imposed by a court-martial.43
3. As to persons who obtain their discharge by fraud.44
4. As to persons who desert the service.45

It is interesting to note that the Manual has engrafted the following additional nonstatutory exception:

5. Where the person's discharge does not interrupt his status as a person belonging to the general category of persons subject to the Uniform Code.46

The Court of Military Appeals, in a two to one decision giving full force and effect to this nonstatutory jurisdictional provision of the Manual,47 held that court-martial jurisdiction was not terminated upon the accused's discharge from the service in 1949.48 Without making any distinction between the procedural and substantive provisions in the Manual,49 the Court seems to have relied heavily, if not solely, upon the fact that this provision was "first enacted by the promulgation" of the 1928 Manual and "has been the law" for almost twenty-five years. Its conclusion is reflected in the following significant language: "We, therefore, believe the 1951 Manual is declaratory of what the law has been since this type of discharge came into existence."50

It is submitted that the Manual provision under consideration deals with a matter of substantive military law purely and simply. It represents an encroachment upon the legislative power of Congress. It, in effect, is a nonstatutory enlargement of the jurisdiction of courts-martial and as such is patently illegal.51 Such was the position taken by...
Chief Judge Quinn who, in his short but pointed dissenting opinion, sums up the grave weakness of the majority decision as follows:

"In my opinion, United States ex rel. Hirshberg v. Cook, ... is controlling here. I read Hirshberg to say that once an enlisted man has been discharged from the armed forces, that discharge operates as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by applicable statute. I find no statutory provision—and the majority cites none—that is applicable here.

"It is immaterial, I think, that there may be persuasive policy arguments in support of the result reached by the majority. We are here concerned with courts-martial, special tribunals whose jurisdiction must be found solely within the confines of the statutes creating them. If jurisdiction is not conferred by statute, then it matters not that it should be conferred."52

Although an Air Force Board of Review has recognized and admitted in at least one case that the factual examples enumerated in the Manual justifying an intent not to return in a desertion case are not and should not be applied as "rules of law" but are mere "examples,"53 it is reasonably certain, in view of the Solinsky case and others,54 that the Court of Military Appeals as the military court of last resort has refused or failed to recognize any distinction between the legal efficacy of substan-

52. United States v. Solinsky (No. 594), 2 USCMA 153, 161, 7 CMR 29, 37 (1953). On similar facts and on the authority of the Solinsky case an Air Force Board of Review has recently rejected the contention that substantive jurisdictional provisions of the Manual have no legal effect. See ACM 7944, Bridges, — CMR — (1954), where, however, the conviction was reversed on another ground.

53. ACM 5427, Howe, 6 CMR 753, 758 (1952).

54. See United States v. Kirschner (No. 654), 1 USCMA 477, 4 CMR 69 (1952), where effect was given to the provisions in the 1951 Manual recognizing negligent homicide as an offense under the general catch-all article, Article 134. Also, United States v. Simmons (No. 505), 1 USCMA 691, 5 CMR 119 (1952), where one question presented was whether knowledge on the part of the accused is an essential element to the offense of willful disobedience in violation of Article 90 of the Uniform Code. Paragraph 169a of the Manual provides that lack of such knowledge is a "defense." After justifying the essentiality of the element of knowledge, the Court in a dictum made the following suggestions: "We do, however, suggest to the services that the Manual for Courts-Martial, United States, 1951, be corrected to show that in this type of offense knowledge is an element which must be included in the proof." It is noteworthy that in this case the Manual provision, though substantive in nature, is not in conflict with the Uniform Code. In a surprising turn of events about six months following the Simmons case, the Court gave its first indication that it was going to discard the dictum of that case by referring to knowledge as an "affirmative defense," rather than as an element of the offense. United States v. Miller (No. 1021), 2 USCMA 194, 7 CMR 70 (1953). However, it was not until about three months later that the majority of the Court flatly refused to declare whether knowledge was an "element" or an "affirmative defense," and instead adopted a special "either or" rule. United States v. Wallace (No. 953), 2 USCMA 595, 10 CMR 93 (1953).
tive and procedural rules promulgated by the Manual. It is giving full force and effect to all provisions of the Manual, whether procedural or not and without regard to the limited authorization of Article 36 of the Uniform Code, insofar as they are not inconsistent with the Uniform Code. The only remaining remedy available to further test this issue is the writ of habeas corpus. As the Solinsky case clearly seems to meet the very limited requirements of that remedy, it would be the ideal case upon which to sue out such a writ. Whether this final step will in fact be taken by the accused is a matter which merits future attention.

The decisions of the United States Court of Military Appeals have had a sobering effect upon the concept that the Manual for Courts-Martial, as the “bible” of military law, was infallible. While the Manual was put on the same effective legal level as the Uniform Code, when not inconsistent therewith, and thus given recognition as a source of military law without distinguishing between the adjective and substantive provisions therein, at the same time, the notion that every provision therein is absolute law has been completely shattered.

In addition to giving legal efficacy to the Manual as a whole and in particular to those provisions not inconsistent with the Uniform Code, the decisions of the Court may be said to have had a bipartite effect upon the Manual—that of rejecting those provisions conflicting with the Uniform Code, and that of amplifying the Manual.

With regard to rejecting a Manual provision, the stand taken by the Boards of Review has been that their function is “to apply and interpret” the provisions of the Manual. They maintain that they do not have the power “to make law” and therefore cannot disregard, reject or overrule the expressions in the Manual. Without going into the obvious fallacies in this line of reason, it is a foregone conclusion that this position of the Boards of Review will not change. No amount of appellate advocacy seems to be able to persuade them otherwise. It seems

55. Judgments of courts-martial are not directly reviewable by civil courts. However, they are always open to collateral attack by review in habeas corpus proceedings in a United States District Court for the sole purpose of determining the question of jurisdiction.

56. Since the Manual is a regulation promulgated by the President pursuant to his order as Commander-in-Chief of the armed forces, members of the Boards of Review, being part of the military establishment, feel that they have no alternative but to comply with the President’s order. This military relationship poses a very fascinating question, to wit: Would the members of a Board of Review, who in deciding a case rejected a provision of the Manual as being illegal, be guilty of the offense of failing to obey the regulations or orders of their Commander-in-Chief? While this problem seems to be more academic than realistic, supporters of both sides of the issue can be found.
that relief of this sort must in the final analysis be sought for and had in the Court of Military Appeals where by virtue of its superior independent authority it can overrule the Boards of Review. Herein lies one of the greatest needs for and accomplishments of a civilian military appellate court. By declaring the law and supervising its application by inferior military agencies, the Court of Military Appeals can insure that justice in the military is a reality and not a fiction. It was by this process that in a relatively few instances provisions of the Manual have been declared illegal.

By far the greatest effect of the Court on the Manual has been that of adding to and amplifying its provisions. While the Manual provides a foundation for principles of military justice by implementing the provisions of the Uniform Code, it is by no means complete. In building up a single, unified framework of the principles of military criminal law, the Court has established a substantial body of substantive and adjective common law military with the result that it has added to and engrafted upon a wide variety of subjects covered in practically every chapter in the Manual.

The largest single addition has been in the field of instructions. This particularly troublesome subject has involved a disproportionately large percentage of the Court's cases. Of the 392 decisions rendered during the period under consideration, 37.5 per cent or a total of 147 cases involved instructional questions. In this area, we have seen how the Court, by the process of judicial legislation, has expanded the "elements of the offense" to resemble more the "law of the case" by requiring mandatory instructions on lesser included offenses and certain affirmative defenses directly touching one of the elements of the offense charged, and by recognizing the right of defense counsel to request additional instructions. By the same token the Court has erected a framework of instructional rules varying somewhat from those prevailing on the civilian side and designed to meet the "practical" exigencies of military requirements.

A large number of cases have involved the duties and responsibilities of the law officer—now for the first time, divorced from participation

57. This constitutes one of the prime objectives of the United States Court of Military Appeals. The extent to which this objective, plus others, has been met by the Court is the subject of a study already made. See Fedele, The Evolution of the Court-Martial System and the Role of the United States Court of Military Appeals in Military Law (S.J.D. Thesis—The George Washington University Law Library 1954).

58. The greatest contribution by the Court to military law both from a quantitative and qualitative basis lies in the field of instructional law and is separately treated in the parent dissertation. See note 57 supra.

59. From 31 May 1951 to 3 October 1953.
in the deliberations of the court-martial, and charged, in most essential
respects, with the duties of a civilian judge. Particularly troublesome
have been those cases dealing with the unauthorized presence of the
law officer in the closed session of the court-martial.60

The cases involving rules of evidence have presented some of the
Court's most serious challenges.61 The chapter on evidence in the Manual
presents little more than a guide to those involved in trying cases, and
certainly does not settle many of the issues that arise and ultimately
reach the Court. So also, the officer with no legal training participating
in special courts cannot be expected to grasp the complexities and re-
finements of the rules of evidence. It is in this area that brings to the
Court some of its most difficult tasks.

A large portion of the Court's opinions were concerned with almost
every facet of the jurisdictional field. The remaining opinions have in-
volved various matters, some very minor from the point of view of
establishing a substantive body of law, and others undoubtedly of great
importance, such as the duty to retreat in self-defense.62

The net effect of all these decisions was to add to, delete from, and
modify the provisions of the Manual to such a substantial degree as to
amount to a complete revision thereof. The decisional influence of the
United States Court of Military Appeals has been so great that the
Army and the Air Force have already not only published a pocket
supplement to the Manual,63 but have also issued pamphlets designed
to assist and guide the law officer64 in the execution of the newly im-
posed, highly technical requirements of military law. Military law has,
with the advent of the Uniform Code of Military Justice and the United
States Court of Military Appeals, finally become of age. It is now a
highly specialized branch of our American legal jurisprudence. The
days when the Manual represented the supreme and only authority,
for all practical purposes, in military law and constituted the sole
working tool for the military practitioner are now behind us forever.

60. An analytical study of this subject is separately treated in the parent work. See
note 57 supra.
61. A detailed treatment of this subject is beyond the scope of the parent study.
63. MCM, 1951, U.S. Army 1953 Cumulative Pocket Part; MCM, 1951, U.S. Air
Force 1953 Annual Pocket Part.
64. Department of the Army Pamphlet No. 27-9, Military Justice Handbook: The Law
Officer, December, 1952; Department of the Air Force, The Judge Advocate General,
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