POW Collaboration – 104 or Treason

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COMMENTS

POW COLLABORATION—104 OR TREASON

The prisoner of war situation in the Korean War has been the source of many problems which are of grave concern to the whole nation.¹ Probably the greatest problem from the standpoint of persons involved has been that of collaboration or misconduct while in an enemy prison. Of the 4,428 American fighting men returned from enemy prison camps, all of whom were screened, the conduct of 565 was questioned. Three hundred seventy-three cases were cleared or dropped.² The services proceeded cautiously with the remaining 192 cases, and sifted those to be brought to trial.³ Since the end of the Korean War, twelve men have been court-martialed on collaboration charges. Two officers and one enlisted man have been acquitted. Six enlisted men have been convicted and sentenced to terms ranging from two years to life imprisonment. Two Lieutenant Colonels and a Major have been convicted: one was dismissed from the Army; one was suspended from rank for two years; and another was sentenced to ten years.⁴

The specific section of the Uniform Code of Military Justice⁵ dealing with collaboration is Article 104:⁶

Aiding the enemy. Any person who—(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

Article III, Section 3, of the United States Constitution seemingly defines the same crime:

Treason against the United States, shall consist only . . . in adhering to

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² POW REPORT 25.
³ 112 cases were still pending as of July, 1955, and it was felt to be fairly certain that substantially less than half of those would be brought to trial. Ibid. See also 1954 ANN. SURV. AM. L. 123.
⁶ Article 104 is former Article of War 81 and first appeared in American military law, in substantially the same form, as Articles of War 27 and 28 of 1775. Article 104 can also be traced to Article 8 of the Code of James II, and to Articles 67, 71, 76, and 77 of Gustavus Adolphus. See WINTHROP, MILITARY LAW AND PRECEDENTS 629 (2d ed. Reprint 1920) (hereinafter cited as WINTHROP).
⁷ There have also been convictions for collaboration under Article 134, U.C.M.J., the catch-all article. See United States v. Fleming, CM 377486 (1954).
their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.7

Does the conduct prohibited by Article 104 constitute treason? This question was recently before a federal district court in the case of Major Ronald E. Alley,8 one of the men convicted of collaboration.9 Alley had been a prisoner of war in Korea for about thirty-three months. After his return to this country he was charged inter alia with a violation of Article 104. Before trial, but after the court-martial had convened, he brought suit in the federal district court for the District of Columbia against the Secretary of Defense to enjoin the court-martial on the ground that the acts with which the Army charged him amounted to treason, and that treason was triable only in the civil courts. The court sustained the Government's motion to dismiss on the ground that the acts charged did not constitute treason. There was therefore no reason to decide whether treason was triable only in the civil courts.

The question was thus resolved by the court's holding that conduct charged as violative of Article 104 is not treason. This disposition of the case seems unsatisfactory in light of the restrictive policy of the treason clause.10

The Substantive Scope of Treason

Historically treason is a generic term for subversive activities against the Government, but its long coexistence with other crimes of a subversive nature casts doubt on whether the crime of treason embodies the generic term.11

It is clear that if the Government wants to prosecute for treason it must charge the accused with conduct that constitutes adhering to the enemy, giving them aid and comfort. The converse is not so clear: when the Government charges one with conduct that constitutes adhering to the enemy, giving them aid and comfort, must it prosecute for treason? The latter is the basic problem of the Alley case.

It has been stated by at least one writer,12 and argued by the Government in the Alley case, that since treason is a crime of specific intent, i.e., there must be an intent to betray, Article 104 defines a different crime because no intent to betray need be alleged. However valid that analysis may be in cases involving an indifferent overt act, where no treasonable intent can be drawn from the

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7 The omitted part reads “in levying war against them, or.” Treason in this article is limited to “adhering to the enemy, giving them aid and comfort.”


9 Alley was found guilty by a general court-martial. CM 387487 (1955).

10 See Hurst, Treason in the United States, 58 Harv. L. Rev. 395 (1944-45). (This article is in three parts beginning at 226, 395, 806.)


12 WINTHROP 630.
act itself, it would not seem applicable to Article 104 violations because the acts prohibited are clear acts of aid and comfort from which the intent to betray can be inferred. Since violations of Article 104 must be committed intentionally, the proof of the intent to do the act is proof of the intent to betray. Thus the specific intent required for a treason conviction is present where there is a specific intent to effect the prohibited result, i.e., aiding the enemy. Any defense of no specific intent (intent to betray) in this type case merely raises the irrelevant question of motive.

Martin v. Young dealt with this problem. A discharged serviceman was being held for a violation of Article 104 under Article 3 (a), which gave the military jurisdiction to try persons for offenses which they had committed while in the service, and for which they could not be tried in the civil courts. The court held that the conduct charged as violative of Article 104 could be tried in the civil courts as a violation of the statutes codifying the constitutional definition of treason. The Government argued that the criminal intent needed for a treason conviction is not necessary for an Article 104 conviction. The court, without deciding whether the intent needed for treason and Article 104 were the same, rejected this contention on the ground that the specification charged that the petitioner acted wrongfully, unlawfully, and knowingly; and that this was tantamount to the intent needed for a treason allegation. In United States v. Batchelor, another Article 104 case, the board of review referred to the discussion in United States v. Chandler about the intent necessary for treason, and approved the law officer's instructions regarding criminality and intent. In the Chandler case the court approved a charge to the jury wherein the court

18 "Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his own country." Cramer v. United States, 325 U.S. 1, 31 (1945). "When the act itself amounts to treason it involves the intention, and such was the character of this act." (The act was delivery of certain prisoners to the enemy). United States v. Hodges, 26 Fed. Cas. No. 15,374, at 334 (C.C.D. Md. 1815). See also Warren, Aid and Comfort to the Enemy, 27 Yale L.J. 331, 345 (1918); Hurst supra note 10, at 816-17.

19 Article 3(a) of the Uniform Code of Military Justice was subsequently held unconstitutional in United States ex rel. Toib v. Quarles, 76 Sup. Ct. 1 (1955).

14 In general the same intent is required in the military courts as is required in the civil courts in regard to crimes punishable by the punitive articles of the U.C.M.J. In the MANUAL FOR COURTS-MARTIAL, ¶ 183 (1951), it is stated that acts violating Article 104 must be performed knowingly. Every case found has used some variation of the words knowingly, wrongfully and unlawfully in the charge. These are generally taken to mean criminal intent. See Martin v. Young, 134 F. Supp. 204, 208 (N.D. Cal. 1955); MANUAL FOR COURTS-MARTIAL, ¶ 28 (1951).

15 The profit motive or desire to accommodate a friend does not negate a criminal intent. See Douglas, J., dissenting in Cramer v. United States, 325 U.S. 1, 55 (1945). For a collection of cases affirming this point see Hurst supra note 10, at 817 n.231. Of course duress, coercion, or brainwashing constitute a good defense if one of these were to negate the intent.


17 Article 3(a) of the Uniform Code of Military Justice was subsequently held unconstitutional in United States ex rel. Toib v. Quarles, 76 Sup. Ct. 1 (1955).


19 CM 377832 (1954).

20 171 F.2d 921, 942 (1st Cir. 1948).
stated, "in the law of treason, like the law of lesser crimes, every person is assumed to intend the natural consequences that he himself knows will result from his act," and "a person cannot do an act which he knows will aid the enemy and then attempt to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy."21

It seems clear from these cases that the intent involved in both Article 104 violations and in treason is one and the same, unless one chooses to engage in logomachy. To allow the Government to prove the act and the intent, as is required by Article 104, but to disclaim a treason prosecution, seems contrary to the restrictive policy of the treason clause. If the two elements of the crime are present, treason has been committed. Treason, the betrayal of one's allegiance, is not a fact to be proved but a legal conclusion, a name for certain types of conduct.

The reasoning in Ex parte Quirin22 may be thought to justify convictions under Article 104. Eight German saboteurs who landed in this country during World War II were being tried under the laws of war and the Articles of War by a military commission. On its own motion the Court considered and rejected the argument that one of the saboteurs, who was a United States citizen, had to be tried for treason. Speaking for a unanimous Court, Chief Justice Stone said:

The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with a hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. Morgan v. Devine, 237 U.S. 632; Albrecht v. United States, 273 U.S. 1, 11-12.

This reasoning has been criticized by Hurst:23

The decisions cited as analogies by the Court are now standard authorities holding that the double jeopardy clause of the Constitution is not violated by conviction for two or more offenses which are in substance part of the same criminal transaction, but which involve different elements of the allegation. It is not a convincing technique of interpretation to apply to a constitutional guaranty having in its own history of policy a formal test developed under a different clause of the Constitution, with no demonstration that the policies behind the respective clauses are so similar as to be fulfilled by the same criterion. The double jeopardy clause is historically a guaranty against the abuse of law enforcement machinery as such, without reference to abuses peculiar to any one of the major types of crime. When the Constitution singles out the offense of treason as subject to special abuse, citation of a highly technical rule developed by a judicial construction out of the general guaranty is in itself little evidence that the peculiar dangers against which the special guaranty was erected have been avoided.

21 In Cramer v. United States, 325 U.S. 1, 31-32 (1945), the Court spoke of the intent involved in treason in similar words.
22 317 U.S. 1, 38 (1942).
23 Hurst supra note 10, at 395.
The reasoning in *Ex parte Quirin* has been followed in *United States v. Rosenberg*, 2 where the defendants were convicted of violating the Espionage Act of 1917. This Act prohibited the communication of certain information to a foreign government, regardless of injury to this country and regardless of whether the foreign country was an enemy. The court said that giving this intelligence to the enemy is irrelevant to the espionage offense, but necessary to treason; it thus found the element "essential to one" but "irrelevant to the other."

But the *Quirin* reasoning does not support the holding in the *Alley* case. The evidence needed to convict for a violation of Article 104 is the same as is needed to convict for treason. There are no different elements involved, and it would appear to be a clear case of double jeopardy if the Government attempted to prosecute for both offenses on the basis of the same conduct. 25 This case seems to be the one that Justice Jackson was referring to in *Cramer v. United States*, 26 when speaking of the power of Congress to enact prohibitions of specified acts thought detrimental to the national safety: "Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense a different name."

Some have urged that, although conduct violative of Article 104 does constitute treason, it is permissible to try offenders under the Articles of War and the law of war.

(O)ne who aids the enemy in time of war . . . has thereby brought himself within the class of persons who are in fact participants in the war; who, although not in uniform and not a part of the enemy's forces in a purely military sense, are nevertheless a part of the very effective and direct opposition to our army and navy. By so making themselves an integral part of the enemy's strength being used against us, they placed themselves squarely among those who, whether they are criminals in the ordinary and moral sense or not are certainly war criminals within the meaning of international law as expressed in the laws and usages of war. 27

Such reasoning merely begs the question because treason can only be committed during precisely the same time that the offense against the law of war can be committed. One cannot aid the enemy when there is no enemy to aid. To allow Congress to supersede the treason clause during time of war would be to render the treason clause wholly nugatory.

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24 195 F.2d 583, 610-11 (2d Cir. 1952).

25 Double jeopardy as prohibited by the fifth amendment is present when there are two prosecutions for the same offense, *Burton v. United States*, 202 U.S. 344, 380 (1906), and the test of identical offenses is the identity of evidence needed to convict. *Morgan v. Devine*, 237 U.S. 632 (1915). *Wade v. Hunter*, 336 U.S. 684 (1949), impliedly accepted the proposition that the double jeopardy clause applies to the military. See also Article 44, U.C.M.J.

26 325 U.S. 1, 45 (1945).

27 McKinney, *Spies and Traitors*, 12 Ill. L. Rev. 591, 623-24 (1918). The writer was referring to civilians, assuming that no problem existed in regard to military jurisdiction over the military; but the reasoning is still pertinent here.
The Procedural Aspects of Treason

Assuming that conduct violative of Article 104 does constitute treason and must be tried as such, the further problem of the court wherein it shall be tried remains.

It is interesting to note that Article 104 expressly applies to all persons, not solely to those in the military establishment. Commentators have maintained that Article 104 means what it says; but it is almost impossible to give the words "Any person who—" a literal interpretation in light of Ex parte Milligan, Ex parte Quirin, and the recent case of United States ex rel. Toth v. Quarles. However, for our purposes we will concern ourselves with jurisdiction of the crime of treason since the determination of that matter will render many of the questions of jurisdiction over the person irrelevant.

The reasoning in Ex parte Quirin sheds some light on the question of which court has jurisdiction over treason. In determining whether the saboteur, who was a citizen, had to be tried for treason, the Court first satisfied itself that Ex parte Milligan did not bar military jurisdiction. It would seem that that would answer any question raised by the guaranties of the treason clause. However, the Court deemed it necessary to show that treason was not the gravamen of the charge. The implication to be drawn is that if treason were the crime charged, it would be cognizable only in the civil courts, where all of the procedural safeguards could be afforded the accused.

In the famous trial of Brigadier General William Hull, the Army charged him with treason and with cowardice for needlessly surrendering Fort Detroit to the British in 1813. A distinguished military court, with whom Martin Van Buren, then a civilian lawyer and later President of the United States, was associated as "special judge advocate," tried the general. The court held that it had no jurisdiction to try the general for treason and that the accused could not waive or consent to the jurisdiction over the offense by the military. However,

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29 4 Wall. 2 (U.S. 1866) (military jurisdiction over civilians not connected with military precluded where civil courts are open). But see United States v. McDonald, 265 F. 754 (E.D.N.Y. 1920).
30 317 U.S. 1 (1942) (military jurisdiction over enemy belligerents for offenses against law of war not precluded even though civil courts are open).


32 317 U.S. 1, 38 (1942); and see discussion of Quirin case supra page 59.
33 See Hurst supra note 10, at 422 n.135.
34 Case of Brig. Gen. Wm. Hull, Printed Trial (1813).
Hull was found guilty of cowardice and sentenced to die. Because of his distinguished record as a soldier and because of his age, clemency was recommended and President Madison remitted the sentence.

In *United States v. Dickenson* the defendant was convicted of a violation of Article 104. On appeal he urged that Article 104 was unconstitutional because it subjected all persons to military jurisdiction for the crime of treason. The court held that although it might not constitutionally be applied to civilians, the defendant was in no position to attack it on that ground, since he did not attack the military jurisdiction over him, and even if he did it was clear that Article 104 applied to him. The court recognized that Article 104 and treason might define the same crime but did not see any significance in this similarity unless the party charged was a civilian. It is submitted that both the court and counsel failed to recognize the problem. It is not whether the military had jurisdiction over the person, but whether the treason clause precludes the military from exercising jurisdiction over the subject matter—treason.

Commentators say, or assume, that treason, as such, is cognizable only in the civil courts, but would allow prosecutions by the military to be determined, not by the conduct that is charged, but by the name given to such conduct. Such a position would render any benefits of the treason clause purely illusory.

In the *Alley* case the Government argued that since the fifth amendment expressly excludes indictment in cases arising in the land or naval forces, it would be impossible to bring this case in a civil court, since the case could only be initiated there by indictment. It is true that criminal cases do not start in the civil courts except by indictment; but there is nothing in the Constitution to prevent an indictment of a person in the military when he commits a crime that is cognizable by the civil courts. The fallacy in the Government's argument is that the *case does not arise* when the facts upon which the charge is based occur. The *case arises* when the charge is brought.

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30 "Treason as such is not an offense properly cognizable by a court-martial." WINTHROP 629. See also McKinney supra note 27.
37 Cf. *Matter of Stacy*, 10 John. 328, 333 (N.Y. 1813). A civilian was being held by the military for treason. In regard to this, Chancellor Kent said: "The pretended charge of treason, without being founded upon oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement." (emphasis added.)
38 Supra note 8.
39 See *Respublica v. McCarty*, 2 Dall. 86 (1781).
40 *United States ex rel. Toth v. Quarles*, 76 Sup. Ct. 1 (1955). See also Reed, J., dissenting in the *Toth* case citing *Re Bogart*, 3 Fed. Cas. No. 1,596, pp. 796, 799 (C.C. Cal. 1873): "Among the ordinary and most common definitions of the word 'arise,' are 'to proceed, to issue, to spring,' and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service.'
41 This construction exempts treason from military jurisdiction since the case would arise under 18 U.S.C. § 2381 (1952), rather than Article 104. See also Note, 67 Harv. L. Rev. 479, 488-92 (1954).
The location of the treason clause in Article III indicates that treason is triable only in the civil courts. Hurst, in discussing the restrictive nature of the treason clause, has stated:

There would seem significance in the fact that the Committee on Style shifted the treason clause out of Article I into Article III in the final shaping of the document; the matter of the scope of the offense had been so clearly taken from Congress that it was logical to place the remaining admonition of policy in that part of the document dealing with the courts, which must still administer the clause. To allow other than Article III courts to have jurisdiction over treason might allow the other tribunal to avoid the restrictions deemed necessary in a treason trial.

Even if it should be ruled that military men can be tried for treason in a military court there seems to be no valid reason why the two-witness rule should not apply. The two-witness requirement of Article III, Section 3, has been recognized as one of the procedural guaranties of the Constitution, like that of trial by jury. Many of the constitutional guaranties have been ruled inapplicable to military trials, although the Uniform Code of Military Justice makes a salutary change in some respects. The difficulties in requiring military courts to give the accused the safeguards that are applicable in a civil court do not inhere in the two-witness rule. Since the two-witness rule is evidentiary in nature, albeit an important one, there would be no administrative problem in making it applicable to the military trial.

Generally, the rules of evidence in the military courts are the same as those in the civil courts. Article 36 of the Uniform Code of Military Justice provides that the President shall prescribe procedural rules and modes of proof for military courts, basing such rules on those of the United States district courts.

In 1902 Congress recognized the problem in regards to the Philippine Islands and passed a statute requiring the two-witness rule to be applied in treason trials, both in the military and civil courts there. Congress, assuming that all treason...
trials in the United States were protected by the Constitutional guaranties, intended that the treason trials in the Philippine Islands should have the same protection.46

**Conclusion**

The majority of subversive activities have been removed from the substantive scope of the treason clause; the courts have psittacistically followed the dictum of Marshall in *Ex parte Bollman.*47 *Ex parte Quirin*48 has further limited the substantive scope of treason by allowing prosecution under some other heading despite the presence of the elements of treason. The prosecution is merely required to allege some other element not peculiar to treason. One convicted of the same crime with a different label could still be given the same punishment as a traitor; and the stigma attaching to him would not be lessened.49

On the other hand, the procedural guaranties of the treason clause have always been held applicable when treason itself is charged. Thus, whether the accused is afforded the constitutional protections may depend, not on the conduct which is the basis of the charge, but upon the charge as made by his accusers. The primary purpose of the treason clause was to protect from prosecution for non-violent political activity;50 but it is also intended to afford certain safeguards to those who actually commit overt acts of treason.51

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46 35 Cong. Rec. 1734 (1902) (notice of amendment); 35 Cong. Rec. 1965-66 (1902) (debate). Mr. Patterson, Senator from Colorado, felt that the prohibitions on Congress contained in the bill of rights were as applicable to the territories as to the states, citing *Downes v. Bidwell,* 182 U.S. 244 (1901). The amendment, which dealt with the two-witness rule in treason trials, passed and became the law quoted *supra* in note 45. Surely if Congress felt this should apply to citizens of territories of the United States it should certainly apply equally as well to citizens of the United States who are in the armed forces. See also Sen. Doc. 173, 57th Cong., 1st Sess. (1902).

47 4 Cranch 75, 127 (U.S. 1807). "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

See note 11 *supra* for cases excluding subversive activities from the scope of the treason clause.

48 317 U.S. 1 (1942).

49 The stigma attached to a charge of "treason" may be a good reason for prosecution under a different heading. See Hurst *supra* note 10, at 395, 424. But "collaboration" imports the same meaning. For example, the POW REPORT refers to the conduct of collaborators as "treasonous."

50 The framers of the Constitution accomplished this by the overt act requirement.

51 This was accomplished by requiring two witnesses to the overt act.
The treason clause has not served as the principle legal weapon in combatting disloyalty. But the validity of the legal weapons which have been used has never been adequately examined in light of its restrictive nature and policy. The treason clause is passing from the obsolescent to the obsolete.

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CIVILIANS BEFORE COURTS MARTIAL

On or about September 27, 1952 a Korean named Bang Swoon Kill was apprehended by certain military authorities near a United States Air Base in Korea. Later under order of a security officer, he was marched forward and shot by two airmen. The officer and one airman were subsequently tried and convicted for this crime. But to the dismay of the Air Force, it was discovered that the third perpetrator, Toth, had been discharged on December 8, 1952. On April 8, 1953 he was formally charged with conspiracy to murder and murder. Under authority of Article 7 (b) of the Uniform Code Of Military Justice, he was apprehended at his place of employment in Pittsburgh, Pa. After certain preliminaries, he was flown to Korea to be tried by a court martial, jurisdiction being predicated upon Article 3 (a) of the Uniform Code of Military Justice.

Thereafter Toth's sister applied for a writ of habeas corpus in the United States District Court for the District of Columbia. Toth was returned from Korea; the District Court granted the writ and ordered his release. It reasoned that since the Uniform Code of Military Justice was silent as to the procedure to be followed in arresting and apprehending a civilian, Congress intended that the procedure should be identical to that exercised by any civilian arresting officer. Thus, before being removed to a distant point to stand trial, Toth should have been arraigned before a United States Commissioner or any nearby officer empowered to commit persons charged with offenses against the laws of the United States.

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1 N.Y. Times, Nov. 8, 1955, p. 26, col. 5.
2 50 U.S.C.A. § 675, Art. 81, U.C.M.J.
4 50 U.S.C.A. § 561(b).
5 U.S.C.A. § 553(a). Subject to the provisions of section 618 of this title, (statute of limitations) any person charged with having committed while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts martial by reason of the termination of such status.