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IS THE MILITARY BRIG A DEBTORS' PRISON?

Captain C. H. Morrison, Jr.*

In this Article, Captain Morrison examines the treatment accorded debtors in the armed forces. The author suggests that the military justice system is compelled to balance various interests when dealing with a serviceman-debtor. Order and discipline within the defense establishment must be preserved and the legitimate interests of creditors must be protected. At the same time, the military is aware that the debtor is often in need of assistance and advice in handling burdensome financial matters. It is therefore not surprising that in its attempt to harmonize these competing interests the military has limited the use of court-martial and imprisonment and expanded the protections and assistance afforded the military debtor.

There is no disguising the fact that Mr. Pickwick felt very low-spirited and uncomfortable; not for lack of society, for the prison was very full, but he was alone in the coarse vulgar crowd, and felt the depression of spirit and sinking of heart, naturally consequent on the reflection that he was cooped and caged up, without a prospect of liberation. Dickens, The Posthumous Papers of the Pickwick Club 619 (Mod. Lib. ed. 1932).

The term "debtor's prison" evokes faint images from the past of entire families living in squalid cells, cold, oppressed and hungry, waiting anxiously for release from the tight grip of their creditors. While most people assume that such prisons no longer exist, military critics insist that the United States Armed Forces

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1. For an interesting fictional account of the treatment of debtors in eighteenth and nineteenth century England, see C. Dickens, Pickwick Papers (1838).

2. Contrary to popular belief, many debtors were imprisoned in the early history of the country. Not until the 1830's did imprisonment for debt become statutorily and constitutionally restricted by almost all of the states. See Comment, Imprisonment for Debt and the Constitution, 1970 L. & Soc. Order 659. A brief history of imprisonment for debt in the United States is found in P. Coleman, Debtors and Creditors in America ch. 18
still imprisons debtors. They also maintain that this military custom runs counter to an American tradition which properly abhors incarceration for mere mismanagement of one's financial affairs. However, these critics are wrong on both counts.

While a serviceman may be imprisoned for conduct related to his debt, simple failure to repay a financial obligation is insufficient cause for imposition of this serious penalty. The military requires that the conduct be so reprehensible as to border upon fraud before imprisonment will be justified. In fact, a civilian who engages in similar conduct may incur the same punishment in the nonmilitary sector.

This Article will examine the treatment of military debtors on both a theoretical and practical level. The legal parameters of the military offense of dishonorable failure to pay debts will be analyzed and the special problems arising from concurrent civilian and military authority over the serviceman will be discussed. In addition, various regulations, current statistics, and interviews with senior military officials will be used to illustrate the prevailing practices which affect the military debtor.

IMPRISONMENT FOR DEBT IN THE MILITARY

Military critics charge the armed forces with imposing harsh sanctions upon military personnel who mismanage their debts. However, the Uniform Code of Military Justice clearly limits

(1974). See notes 43 & 44 infra for contemporary state constitutional and statutory provisions regarding imprisonment for debt.


4. For purposes of this Article, the word "serviceman" and other words of the masculine gender include the feminine gender.

5. See MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 127c (rev. ed. 1969) (Table of Maximum Punishments) [hereinafter cited as MANUAL]. The MANUAL is a detailed set of regulations which supplements and explains provisions of the Uniform Code of Military Justice. The present MANUAL was promulgated by Executive Order No. 11476 on June 19, 1969.

6. UCMJ arts. 1-140, 10 U.S.C. §§801-940 (1970). This codification of military law is applicable to all the Armed Services. Articles in the Code may be found in 10 U.S.C. by adding 800 to the numbered article. For example, Article 125 is 10 U.S.C. §925 (1970).
imprisonment of military debtors to instances where the service-
man is guilty of fraudulent conduct. When one considers the im-
portant rationale for imposition of the sanction, plus the require-
ment of fraudulent conduct, the criticism appears unjustified.

Under Article 134 of the Code, servicemen are subject to court-
martial and imprisonment for conduct which "prejudice[s] good order and discipline" or "bring[s] discredit upon the armed forces." Discrediting conduct is defined as "conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem". When a serviceman's actions in handling his debts constitute discrediting conduct, he can be court-martialed under Article 134 for dishonorable failure to pay debts.

The rationale underlying this offense is the unique nature of the military. The armed forces are given the special responsibility to "fight or be ready to fight wars" and therefore order within the

7. UCMJ art. 134, 10 U.S.C. §934 (1970). Article 134, the General Article, provides:
   Though not specifically mentioned in the chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The Manual, which has been called the Code's "junior relative," United States v. Downard, 6 U.S.C.M.A. 538, 544, 20 C.M.R. 254, 260 (1955), says:
   Article 134 makes punishable all acts not specifically proscribed in any other article of the code when they amount to disorders or neglects to the prejudice of good order and discipline in the armed forces or to conduct of a nature to bring discredit upon the armed forces, or constitute non-capital crimes or offenses denounced by enactment of Congress or under authority of Congress.

MANUAL ¶ 213b.

The Supreme Court, responding to an appeal alleging vagueness, has held that both Article 134 and Article 133 are constitutionally valid. Parker v. Levy, 417 U.S. 733 (1974); accord, Secretary of the Navy v. Avrech, 418 U.S. 676 (1974).

8. MANUAL ¶ 213c. The Manual lists offenses which are violations of Article 134: assaults involving intent to commit certain offenses of a civil nature; indecent assault; indecent acts with a child under the age of 16 years; false swearing; disloyal statements undermining discipline and loyalty; misprision of a felony; bigamy; communicating a threat; use or possession of false and unauthorized passes, permits, discharge certifications, and identification cards; negligent homicide; offenses against correctional custody; receiving stolen property; dishonorable failure to maintain funds for payment of checks; and dishonorable failure to pay debts. See MANUAL ¶ 213f.

military is of extreme importance. Disputes over debts between servicemen weaken discipline within the ranks and may endanger the effectiveness of troops in combat. Moreover, the defense establishment must retain a good reputation within the civilian sector. A respectable image is necessary to recruiting and retention of armed forces, to fostering general public support, and to insuring the extension of credit to other servicemen. The failure of servicemen to honor debts owed to civilian creditors hampers the attainment of these goals. In addition, the transiency of the military populace creates special problems in insuring that debts are honored. The difficulty of effecting civil process on a mobile debtor requires that servicemen be encouraged to make timely repayment of debts. A high standard of conduct and the threat of court-martial are strong inducements.

Charges against a commissioned officer-debtor for dishonorable failure to pay debts are usually brought under Article 133 for "conduct unbecoming an officer and a gentleman," and not under Article 134. This suggests that the officer's conduct, while clearly in violation of Article 134, is being sanctioned due to his...

12. Id. In Kirksey, the court stated:
   Moreover, members of the military community—easily identified through the wearing of the uniform—are inevitably grouped in the public mind as a class—with the result that a failure by one to discharge monetary responsibilities tends to brand all not only as criminal persons, but as poor credit risks as well.
13. Id.
14. See Note, supra note 3; Everett, supra note 3, at 147.
15. UCMJ art. 133, 10 U.S.C. §933 (1970). Article 133 provides that "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

The Manual, in discussing Article 133, lists several instances of violations of the Article. In addition to dishonorable failure to pay debts, it mentions public association with notorious prostitutes, committing or attempting to commit a crime involving moral turpitude, and opening and reading letters of another without authority. Manual ¶ 212.

Commissioned officers are defined as those persons vested with military rank and authority by virtue of a commission issued by or in the name of the President. See Army Reg. 600-20 (April, 1971); L. Crocker, The Officer's Guide 15 (1975).

status as an officer rather than simply because of his membership in the military. This is not surprising; the conduct of officers has traditionally been subject to stricter rules. Operative leadership is an essential element in a well-disciplined and combat-ready military establishment. Effective leadership cannot be exercised by those whose conduct may erode the respect of subordinates.

The greater part of the criticism directed at the military's treatment of debt does not surround Article 133, however, for it is not difficult to concur with the rationale regarding higher standards of conduct for officers. Most criticism is aimed at Article 134, particularly as applied to enlisted persons. Apparently, the objectors do not expect the standard of conduct for enlisted members of the service to be any higher than that of their civilian counterparts. However, the Supreme Court has justified the application of higher standards of conduct to enlisted men, recognizing that the military is "a specialized society separate from civilian society." Moreover, military courts have noted that traditional military ethics, though particularly binding on officers, "have not at all been rejected in . . . [the case of] . . . enlisted personnel." 17

17. A high standard of conduct for officers has been well-documented back to the time of the Norman Conquest. The influence of the British Articles of War on American military law is seen in the high standard of conduct of officers found today in the Code. See J. SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 887-89 (1953). For a brief outline of the historical development of higher standards for officers and a discussion of the possible vagueness of Article 133, see Nelson, Conduct Expected of an Officer: Ambiguity, 12 A.F. J.A.G. L. REV. 124-25 (1970).

18. See note 3 supra.

19. See Note, supra note 3.

20. Parker v. Levy, 417 U.S. 733, 743 (1974). In Parker, the Supreme Court related a historical background for the General Article that is not much different than that of Article 133. In justifying the existence of Article 134 and the Code in general as applicable to all servicemen, Justice Rehnquist, speaking for the majority, said:

This Court has . . . recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." (citation omitted).

Id. at 743.

21. United States v. Kirksey, 6 U.S.C.M.A. 556, 559, 20 C.M.R. 272, 275 (1955). Parenthetically, one should not forget that many enlisted persons serve in positions of leadership and the rationale for Article 133 standards may also apply to them. Congress, however, has never applied a separate standard of conduct to the noncommissioned officer, who
While both Articles 133 and 134 of the Code evidence the military justice system's intention to deter and punish failure by servicemen to honor their financial obligations, imprisonment of every debtor who defaults does not occur. In fact, mere failure to pay a debt is insufficient for conviction of dishonorable failure to pay debts. In prosecutions for the offense, the key word is "dishonorable." The military courts are adamant in requiring that the debtor's actions indicate an intentional nonpayment or a grossly indifferent attitude toward repayment. The requisite mental element has been found where the debtor's conduct was characterized by fraud, deceit, evasion, false promises of payment, or denial of indebtedness. For example, when a captain purported to pay his debt to a lieutenant with checks issued on a nonexistent bank and when a serviceman ran from taxicabs to avoid paying fares, the military courts held that their fraudulent
and deceitful conduct indicated an intentional nonpayment. Gross indifference and bad faith were found where a solvent debtor ignored the counsel of his commanding officer to pay his debts. In addition, failure to communicate with creditors who had sent the accused several letters was held to be evidence of gross indifference.

A military debtor whose actions do not indicate the requisite mental element cannot be court-martialed. Negligent failure to pay debts is not sufficient, even if the conduct is discrediting to the service. In determining the guilt of the accused, the military courts are sensitive to good faith efforts of the serviceman. For example, when a serviceman attempted to make arrangements to pay his debts or honestly believed he had the money to cover his checks, the courts have reversed convictions for dishonorable conduct. In addition, if the creditor was satisfied with the

The law does not require the doing of a useless act. After an accused, as in this case, has made it plain that his purpose was to defraud the taxicab drivers of their fares, there existed no additional requirement for them to make useless demands for payment and then wait a specified period of time.

Id. at 848.

34. Instructions given to the members of the court-martial will be held insufficient unless they require the members to find dishonorable conduct. See, e.g., United States v. McArdle, 27 C.M.R. 1006 (ACM 1959); United States v. Jones, 5 C.M.R. 797 (ACM 1952); United States v. Friend, 5 C.M.R. 638 (ACM 1952).
37. United States v. Richardson, 15 U.S.C.M.A. 400, 35 C.M.R. 372 (1965) (held that accused could honestly rely on checks which were proceeds of a gambling game and he therefore lacked the intent necessary for the offense); United States v. Remele, 13 U.S.C.M.A. 617, 33 C.M.R. 149 (1963) (held that accused's reliance on deposit allegedly made by another negated the intent required for offense).
debtor's conduct or if the failure to pay was beyond the debtor's control, the charge usually failed. If there is a defense to the creditor's claim or if there is a genuine dispute between the parties, the offense will not be charged.

It should be emphasized that the military charge of dishonorable failure to pay debts is different from a civil suit brought by a creditor seeking a judgment. The court-martial is a criminal action in which the United States seeks to protect the image and status of the armed forces and its personnel. Therefore, the debtor in uniform does not necessarily carry the key which unlocks the prison door in his own pocket, as he usually does in the civilian sector. Paying the debt after one has committed dishonorable conduct is of little or no consequence, except, perhaps, for purposes of extenuation and mitigation in the presenting hearing. Imprisonment for dishonorable failure to pay debts is punishment for dishonorable conduct and a present obligation to repay is neither a necessary nor a sufficient condition for conviction of the offense.

IMPRISONMENT FOR DEBT IN STATE AND FEDERAL JURISDICTIONS

To put the military practice into perspective, it should be pointed out that neither the federal constitution nor the majority of state constitutions contain blanket prohibitions of imprisonment for debt. In many jurisdictions, civilians can be jailed by state court order for actions involving mismanagement of their

40. See, e.g., United States v. Hansen, 8 C.M.R. 231 (CM 1952); United States v. Maxwell, 7 C.M.R. 632 (CM 1952). For example, a serviceman between transfers may have his pay record lost or misplaced by those in charge of forwarding it to his next command. This may result in no pay for several pay periods. In such a circumstance, the failure to pay his debts would obviously be beyond the control of the debtor.
debts. Most often, these jurisdictions authorize body execution, i.e., imprisonment, when the debtor is guilty of fraudulent conduct.44

The state of Illinois, for example, has constitutional and statutory provisions not unlike those found in the *Uniform Code of Military Justice*. The Illinois Constitution prohibits imprisonment for debt except when the debtor "... refuses to deliver up his estate for the benefit of his creditors ... or unless there is a strong presumption of fraud."45 The enumerated exceptions to the general prohibition against imprisonment for debt are comparable to the types of conduct characterized as dishonorable within military jurisprudence.

Using the constitutional guidelines as a pattern, the Illinois legislature enacted a statute authorizing body execution of a judgment debtor, resulting in imprisonment for a maximum of six months,46 if "... the debtor has fraudulently conveyed, con-

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44. The following state constitutions prohibit imprisonment for debt except in certain cases. The most common exception is for fraud. The corresponding statutes authorize body execution in such circumstances as when the judgment debtor has been fraudulently incurring the debt, has concealed or refused to deliver up his estate, has received money in a fiduciary capacity, has been found guilty of a malicious tort, or may abscond from the state. ARIZ. CONST. art. II, §18; ARIZ. REV. STAT. §12-1563 (1956); ARK. CONST. art. II, §16; COLO. CONST. art. II, §12; COLO. REV. STAT. ANN. §13-59-103 (1973); CONN. GEN. STAT. REV. ch. 52, §§369, 355, 562 (1960); DEL. CODE ANN. tit. 10, §§5051-52 (1974); FLA. CONST. art. I, §11; IDAHO CONST. art. I, §15; IDAHO CODE §§11-102, -104 (1947); ILL. CONST. art. I, §14; ILL. REV. STAT. ch. 77, §§5, 65 (1975); IND. CONST. art. I, §22; IND. ANN. STAT. tit. 34, §§1-41-10 to 15 (1971); IOWA CONST. art. I, §19; KAN. CONST. BILL OF RIGHTS, §16; KY. CONST. BILL OF RIGHTS, §18; KY. REV. STAT. §§425.070, 426.400 (1962); MASS. GEN. LAWS ch. 224, §§2 et seq. (1958); MICH. CONST. art. I, §21; MICH. COMP. LAWS ANN. §600.675 (1961); MINN. CONST. art. I, §12; MO. CONST. art. I, §11; MONT. CONST. art. II, §27; NEB. CONST. art. I, §20; NEB. REV. STAT. §25-1566 (1943); NEV. CONST. art. I, §14; NEV. REV. STAT. §§21.020, 21.080 (1973); N.J. CONST. art. I, §13; N.J. REV. STAT. tit. 2A, §§15-42, 54-4(3) (1951); N.C. CONST. art. I, §28; N.C. GEN. STATS. §§1-311, 1-410, 1-415 (1969); N.D. CONST. art. I, §15; OHIO CONST. art. I, §15; OHIO REV. CODE tit. 23, §§2331.01, 2331.02 (1953); OKLA. CONST. art. II, §12; OKLA. STAT. tit. 12, §844 (1951); OREG. CONST. art. I, §19; OREG. REV. STAT. §23.080 (1974); PA. CONST. art. I, §16; R.I. CONST. art. I, §11; R.I. GEN. LAWS ANN. §§25-15 (1956); S.C. CONST. art. I, §19; S.C. CODE ANN. §§10-802, 10-1705, 17-574 (1962); S.C. COMPIL. LAWS ANN. §§115-18-9, 10-20-5, 22-2 (1967); UTAH CONST. art. I, §16; VT. STAT. ANN. tit. 12, §§3521, 3522, 3529 (1957); WASH. CONST. art. I, §17; WYO. CONST. art. I, §5; *But see* WYO. STAT. ANN. §§1-651, 1-705 (1957).


46. ILL. REV. STAT. ch. 77, §§65, 68 (1975). Illinois also allows body execution for a tort
cealed, or otherwise disposed of some part of his estate, with a
design to secure the same to his own use, or defraud his creditors . . . .”47 Thus the familiar terms “fraud,” “conceal,” and “defraud,” which are used to define “dishonorable” in the military, also appear in a civilian statute.

Conduct similar to the dishonorable debt-related actions punished by the military also works to the disadvantage of debtors in the United States Bankruptcy Court. The Federal Bankruptcy Act48 offers a discharge of debts to those who have acted honestly and in good faith in managing their financial affairs. Conversely, the privilege of discharge is denied to debtors whose actions reflect dishonesty or bad faith. Section 14c of the Bankruptcy Act49 authorizes the court to refuse discharge for certain types of conduct. For example, if a bankrupt transfers or conceals assets to defraud creditors, tampers with his financial records, makes false oaths or claims, or obtains credit with a false financial statement, none of his debts will be discharged.

In addition, individual debts may be excluded from the general

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47. I.L. REV. STAT. ch. 77, §5 (1975). In Huntington v. Metzger, 158 Ill. 272, 41 N.E. 881 (1895), the Illinois Supreme Court held that the grounds for body execution in the statute “are within the contemplation of the constitution.” The provision regarding body execution in the present Illinois Constitution is identical to the provision which the court examined in Huntington.


49. Id. §32(c). Section 14(c) provides:

The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained . . . or (3) while engaged in business, obtained for such business money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; or (4) . . . transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors; or . . . (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities . . . .
discharge under section 17 of the Act. Liabilities obtained by false pretenses or representations, incurred for willful or malicious injuries to person or property, or created by fraud of an officer or fiduciary, can be challenged by the creditor and denied discharge.\textsuperscript{50}

While the Federal Bankruptcy Act's primary purpose is not to be a federal ban against imprisonment of debtors,\textsuperscript{51} it does protect a bankrupt from civil arrest and possible confinement based on a claim discharged in bankruptcy. Conversely, if a debtor is denied discharge he may be sued in a state court for the debt and then imprisoned under a body execution statute.\textsuperscript{52} Whether discharged or not, a misbehaving debtor is also subject to prosecution and imprisonment under federal and state criminal statutes prohibiting the fraudulent conduct described in the Bankruptcy Act.\textsuperscript{53}

Since a civilian debtor may be imprisoned for fraudulent conduct in connection with his debts under both state and federal law, it is only logical that a serviceman, held to a higher standard of conduct than a civilian, should also be liable for dishonorable actions in managing his debts. The current practice of imprisonment of military debtors is not an anomaly in American jurisprudence, but a commonly prescribed method for dealing with fraudulent debtors.

\textbf{Interaction of Military and Civilian Courts}

A member of the armed forces is subject to both the military and the civilian courts, and within the civilian system, is liable to both civil and criminal complaints. Therefore, the military justice system has attempted to protect the military debtor from multiple liability by determining the boundaries between the systems and the impact of a judgment in one court on litigation in the other. Statutes, military policy, and judicial decisions have

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} §356.
\item \textsuperscript{51} Section 9 of the Bankruptcy Act, 11 U.S.C. §27 (1970), protects a bankrupt from civil process based on a claim dischargeable in bankruptcy. However, a claim is not dischargeable if it is based on fraud or other reprehensible conduct. \textit{Id.} §356.
\item \textsuperscript{52} See text accompanying notes 43-47 supra.
\item \textsuperscript{53} 11 U.S.C. §§32(c), 356 (1970).
\end{itemize}
attempted to clarify the areas of confusion so that the military debtor is tried within a rational and equitable framework.

When a creditor seeks his remedy against a military debtor in a civilian court, his recourse is limited by the Soldiers' and Sailors' Civil Relief Act, which protects uniformed citizens from civil actions based on debts incurred prior to entry into the military. Civilian courts are given discretion to stay proceedings and executions where military status hampers the serviceman in defending or satisfying his previous debts. The rationale is simple. One could hardly expect a creditor to be able to sue the serviceman who earned $15,000 a year as a steelworker before enlisting or being drafted into the service of his country and who now receives less than one-half of his former salary. However, the Act does not grant indefinite delay of payment of all debts. Rather, courts will seek dispositions equitable to all parties involved.5

In addition, the creditor of a serviceman cannot be given satisfaction in a military court. The military can prosecute for dishonorable conduct in a criminal action, but has no authority to issue a money judgment or enforce a civil judgment issued by a court of another jurisdiction.5 However, when a serviceman’s debts

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54. 50 U.S.C. App. §§501-90 (1970). A detailed discussion of the Soldiers' and Sailors' Civil Relief Act is not appropriate here, but a limited listing of its protections is warranted. "[O]bligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property" owned by the serviceman prior to entering the military cannot be treated as defaulted unless, in the discretion of a judge, the military member could continue to make payments without undue hardship. Id. §532. The Act also provides for deferring non-federal taxes, id. §§525, 527, repaying loans on life insurance policies, id. §535, staying the execution and levy of judgment creditors, id. §523, and prohibiting repossession of real or personal property contracted for before entering military service, id. §531. See Goldman, Collection of Debts Incurred by Military Personnel: The Creditor's View, 10 TULSA L.J. 537 (1975).

55. As military pay scales increase, the use of the Soldiers' and Sailors' Civil Relief Act may decrease.

56. Army Reg. 600-15, paras. 1-3 (Feb. 11, 1970). The Army Regulation is perhaps the most detailed of all the services' regulations. Paragraphs 1-3 explain the policy of the service:

1. Policy. a. As [sic] member of the Armed Forces is expected to pay his just financial obligations in a proper and timely manner. A "just financial obligation" means one acknowledged by the military member in which there is no reasonable dispute as to the facts or the law, or one reduced to judgment which conforms to the Soldiers' and Sailors' Civil Relief Act... if applicable.
have been litigated to his advantage before a civil tribunal, he may still be court-martialed for his dishonorable conduct regarding his debts. This raises the issue of what effect, if any, the civilian judgment will have on the court-martial.

The Military Court of Appeals resolved the question in United States v. Swanson. In that case, a lieutenant being court-martialed for dishonorable failure to pay debts asserted that a prior bankruptcy judgment was res judicata as to the issue of dishonorable conduct. Pursuant to a voluntary bankruptcy petition, the accused had previously been awarded a discharge which included the debts specified in the charges at the court-martial. The lieutenant argued that the bankruptcy proceeding had settled the issue of fraud and other dishonorable acts, since the discharge had determined that the dishonest conduct of section 14c of the Bankruptcy Act was not present, or at least not proven, with respect to the debts discharged. Since conduct of a dishonorable nature was absent, the accused asserted that there could be no court-martial conviction.

The court rejected the res judicata defense, distinguishing the issues involved in each suit. The bankruptcy discharge settled only the issue of the legal obligation to pay; the court-martial was concerned with the discreditable conduct of the accused. The court stressed that a bankruptcy discharge could not bar prosecution for a criminal offense committed prior to filing of the bank-

“In a proper and timely manner” means a manner which the installation commander concerned determines does not, under the circumstances, reflect discredit on the military service.

b. The Department of the Army does not condone an attitude of irresponsibility or evasiveness by its personnel toward their just private indebtedness or financial obligations. However, the Department of the Army has no legal authority to require a military member to pay a private debt, or to divert any part of his pay for the satisfaction thereof even though the indebtedness may have been reduced to judgment by a civil court. The enforcement of the private obligations of a military member is a matter for civil authorities.

58. See text accompanying notes 48-52 supra.
59. The Air Force Board of Review decision pointed out that the parties to the military action differed from those in the bankruptcy action. The parties to the bankruptcy proceeding were the accused and his creditors; the parties to the court-martial were the accused and the government. 25 C.M.R. 832, 840 (ACM 1958). In some circumstances it is possible for the government to be a creditor in a bankruptcy proceeding. In such a case, a res judicata argument in a subsequent court-martial might be stronger.
ruptcy petition. Since the discreditable conduct of the accused took place prior to the petition, the court concluded that the court-martial was not barred by the bankruptcy action and the military court was not bound by the bankruptcy court's decision.

While a serviceman is not protected from court-martial for dishonorable failure to pay a debt already discharged in bankruptcy, he is generally protected from court-martial when he has been tried in civilian court for criminal conduct which comprises the military offense. Theoretically, military personnel may be tried in both state and federal court for the same crimes under the theory of dual sovereignty. Thus, military personnel could be tried for fraud under state law and subsequently be court-martialed for dishonorable failure to pay debts under Article 134. However, the military follows a policy against federal retrial following a state prosecution and, therefore, a serviceman will usually not be court-martialed after a civilian criminal trial.

In certain circumstances, a military court may have no jurisdiction over a serviceman accused of criminal conduct, even though he has violated the Uniform Code of Military Justice. In O'Callahan v. Parker, the United States Supreme Court held that the accused's military status alone was insufficient to authorize court-martial jurisdiction. The offense charged had to have some service connection. Since the accused, wearing civilian attire, committed the alleged offense off-base in a civilian hotel, against a non-military victim, his offense had no connection with the service. Therefore, his conviction for attempted rape was reversed because his court-martial lacked jurisdiction.

The Supreme Court's rationale for imposing the service-connection requirement was their concern for the fifth amendment rights of the accused. Since a serviceman is not given his rights to indictment by grand jury and trial by petit jury at a court-martial, the Court preferred that he be tried, if possible, in a civilian court where his constitutional rights would be honored.


In view of *O'Callahan*, court-martial jurisdiction for dishonorable failure to pay debts may be a problem where the offense involves a serviceman’s debts in the civilian community.\(^64\) Where there is no evidence of a connection between the accused and the military during the transaction, it is difficult to find a service connection.\(^65\) However, when a serviceman uses his military status to induce a civilian into extending credit or accepting checks, the courts have found a sufficient service connection for court-martial jurisdiction.\(^66\)

More importantly, several courts have waived the service-connection requirement in cases where the serviceman would not be accorded his fifth amendment rights even if given a civilian trial. These courts have focused on the rationale used by the Supreme Court in establishing the requirement, and have concluded that *O'Callahan* applies only when the accused’s rights to indictment by a grand jury and trial by a petit jury are threatened.\(^67\) For example, in *United States v. Ezelle*,\(^68\) the accused was charged with issuing worthless checks and dishonorable failure to pay debt. The Court of Military Appeals held that the court-martial was without jurisdiction as to the worthless check charge because the offenses involved civilian victims unconnected with the service, the crimes were not committed on a military post, and the civilian courts were open to handle the matter. The court reached a different conclusion on the charge of dishonorable failure to pay debts.\(^69\) The court reasoned that since the accused’s

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\(^64\) In Relford v. Commandant, 401 U.S. 355 (1971), aff'd 409 F.2d 824 (10th Cir. 1969), a habeas corpus proceeding, the defendant committed a crime on base against a person who worked on the base. The Court found this offense to be sufficiently service-connected. It would follow that debts incurred by a serviceman in on-base facilities would present no jurisdictional problems.


\(^68\) 41 C.M.R. 904 (ACM 1969).

\(^69\) Id. at 905-06.
failure to pay his debt to a car rental agency was not criminally punishable under the state laws, invoking court-martial jurisdiction did not deprive the accused of the benefits of a civilian criminal trial.  

This reading of *O'Callahan* properly balances the interests of the accused with those of the military. Where the accused could be afforded constitutional protections in a civilian jurisdiction, he is not court-martialed. However, where no constitutional rights are endangered, the military is allowed to exercise its jurisdiction for the purpose of controlling the conduct of its members and preserving discipline and order.

**Actual Treatment of the Military Debtor**

Although the judicial framework for handling military debtors exists, the actual frequency of courts-martial for the offense of dishonorable failure to pay debts is small. More often, the military resorts to the nonjudicial alternatives suggested by the *Code* and the regulations governing each of the military services.

The serviceman-debtor is not a helpless victim of an indifferent military institution. Generally, the military debtor is afforded protection and assistance not available to the civilian. In addition to the protections of the Soldiers' and Sailors' Civil Relief Act, the procedures for handling creditors' complaints received by the military are oriented toward assisting the debtor in straightening out his financial affairs, not coercing the debtor to pay unfair claims. The regulations for the armed services emphasize that the military is not a collection agency. For example, the military has no authority to garnish a serviceman's wages, except for alimony and child support payments.

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70. The same reasoning was evident in *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969), in which the court held that a court-martial may take jurisdiction over a nonservice-connected action where the offense charged in the civilian jurisdiction is minor. Since a defendant accused of a petty offense is not entitled to indictment or trial by jury, he loses no constitutional rights by being subjected to a military trial.


72. *See* text accompanying notes 54-55 *supra*.

73. *See* note 56 *supra*.

Each of the services has regulations which must be used as guidelines by commanding officers. Initially, the military seeks to prevent servicemen's accumulation of debt by compelling the commanding officer to instruct his personnel regarding the pitfalls of easy credit. The regulations also outline procedures to be used in responding to letters of indebtedness from creditors and dealing with the respective debtors.

Commanders are instructed that a letter of indebtedness from the creditor of a subordinate must meet certain requirements. Creditors must submit, in addition to their claims, certificates evidencing compliance with standards of fairness and/or full disclosure requirements, including the Truth in Lending Act and the Consumer Credit Protection Act. No disciplinary action will be taken against the alleged debtor if the claim is not accompanied by a certificate of compliance.

If the claim is determined to be valid, or if there has been a judgment which is not countered with a conflicting decree, the commander must counsel the debtor regarding the offense of dishonorable failure to pay debts and refer him to a judge advocate for expert assistance. The regulations further provide:

If, after consideration of all factors, a commanding officer believes that a member of his command has dishonorably failed to pay his just debts, disciplinary action may be initiated.

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75. See Air Force Reg. 35-18c (Feb. 22, 1974); Army Reg. 600-15 (Feb. 11, 1970); Marine Corps Order P5800.8, ch. 6 (Aug. 17, 1970); Bureau of Naval Personnel Manual, 6210140 (Nov. 21, 1975).
76. See Air Force Reg. 35-18, §B paras. 4(a)-(b) (Feb. 22, 1974); Army Reg. 600-15, paras. 2-2(d) (Feb. 11, 1970); Bureau of Naval Personnel Manual, 6210140, ch. 6 paras. 5(a)-(d) (Nov. 21, 1975).
79. See Air Force Reg. 35-18, §A para. 1(b), §B para. 2(b) (Feb. 22, 1974); Army Reg. 600-15, para. 3(1)(c)(2) (Feb. 11, 1970); Army Reg. 600-14 (Sept. 30, 1965); Marine Corps Order P5800.8, paras. 6001-(1-B), (9), (10) (Aug. 17, 1970); Bureau of Naval Personnel Manual, 6210140, ch. 6 para. 12(b) (Nov. 21, 1975).
80. See Air Force Reg. 35-18, §B para. 5(b)(2)(b) (Feb. 22, 1974); Army Reg. 600-14, para. 4(4) (Sept. 30, 1965); Bureau of Naval Personnel Manual, 6210140, ch. 6 para. 3(j) (Nov. 21, 1975).
81. See Air Force Reg. 35-18, §D para. 11 (Feb. 22, 1974); Army Reg. 600-15, para. 3(1)(b) (Feb. 11, 1970); Bureau of Naval Personnel Manual, 6210140, ch. 6 para. 3(5) (Nov. 21, 1975); MANUAL ¶ 127c.
Obviously, judicial action may be taken against those who dishonorably fail to pay their debts. However, nonjudicial forms of punishment for minor offenses are also available; they are prescribed in Article 15 of the Code. Its application is generally limited to offenses which, if tried by general court-martial, could not be punished by dishonorable discharge or confinement for more than one year. Since the Manual of Courts-Martial Table of Maximum Punishment allows a bad conduct discharge and only six months confinement for those convicted of dishonorable failure to pay debts, it is permissible to use Article 15 for lesser violations of this nature. The Army regulation, in fact, suggests the use of this article in punishing a soldier for dishonorable failure to pay debts. In any case, nonjudicial punishment cannot be awarded until the debt's validity has been established, for Article 15, while not judicial, is certainly disciplinary. Punishments which can be imposed under Article 15 include extra duties, restriction, correctional custody, forfeiture or detention of pay, and reduction in grade.

The existence of valid, unpaid debts is detrimental to the career service member even though no judicial or nonjudicial action is taken. All of the regulations provide for the inclusion in official service records of letters of indebtedness found to be in compliance with the various statutes. Those records are reviewed for promotion and assignment purposes, and a bad faith debtor will certainly suffer for his misconduct. In addition, fitness reports

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82. UCMJ art. 15, 10 U.S.C. §815 (1970). Punishment authorized by this article is also called "office hours," "captain's mast," or "an Article 15." An Article 15 sanction bans a later court-martial for a minor offense. See Manual ¶ 215c; Moyer, supra note 61 at ¶2-733.

83. MANUAL ¶ 129b.

Generally, the term "minor" includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial. This term ordinarily does not include misconduct of a kind which, if tried by general court-martial, could be punished by dishonorable discharge or confinement for more than one year.

MANUAL ¶ 129b.

84. Id. at ¶ 127c.

85. See Army Reg. 600-15, para. 3(1)(b) (Feb. 11, 1970).


87. Air Force Reg. 35-18, paras. 1(b) and 11 (Feb. 22, 1974); Army Reg. 600-15, para. 3(1)(b) (Feb. 11, 1970); Marine Corps Order P5800.8, para. 6001.4, 6001.5 (Aug. 17, 1970); Bureau of Naval Personnel Manual, 6210140, para. 12 (Nov. 21, 1975).
and efficiency reports of senior enlisted personnel and officers, and proficiency and conduct marks of junior enlisted members will be marred since the senior officer making the report takes into consideration recently received valid letters of indebtedness.88

Empirical evidence indicates that military officials display genuine concern for servicemen confronted with financial difficulties. The predominate form of assistance to these servicemen includes inspection of creditor allegations of indebtedness and a preference for imposition of nonjudicial, nonpunitive measures when those allegations are substantiated. A survey of several officers of the rank of lieutenant colonel or commander and above89 revealed that each carefully scrutinized letters of indebtedness, especially those from "easy credit" clothing and jewelry establishments near the front gates of military bases. Each of the responding officers also contacted the legal officer to ensure the validity of each claim, many of which were found to be invalid. There was only one report of an Article 15 having been imposed. In that case the debtor was restricted to his ship as it visited various ports. The purpose of the sentence was to prevent the sailor from spending the money on shore that he should have been using to pay his valid debts.

Research into the records of the Air Force, Army, and Navy for the years 1970 through 197690 yielded the parallel conclusion that few servicemen are ever court-martialed for dishonorable failure to pay debt when they fail to repay their financial obligations. However, the data from the Army and the Navy91 are not completely adequate for research purposes because records at department level are kept only for more serious offenses which are tried

88. Particularly in the case of fitness reports and efficiency reports, senior officers reporting on subordinates are asked to mark such characteristics as trustworthiness and the conduct of one's personal affairs.
90. The author is grateful to those individuals in each of the military service departments who responded promptly to a request for statistical data.
91. Statistics from the Department of the Navy include records of the Marine Corps.
at general or bad conduct discharge special courts-martial. 92

The Air Force records since July 1, 1974, include lesser courts-martial and Article 15 nonjudicial proceedings. Therefore, Air Force statistics will be used to determine the frequency of punishment for dishonorable failure to pay debts. The Air Force statistics should be fairly representative of the services in light of the fact that all use the same Code and Manual.

In the Air Force, during the period from January 1, 1970, through January 1976, 93 there were no general or bad conduct discharge special courts-martial based solely on a charge of dishonorable failure to pay debt. 94 Since July 1, 1974, through the end of the period, statistics of lesser courts-martial 95 and Article 15 nonjudicial proceedings were recorded at the department level. During that time, there were no lesser courts-martial in which dishonorable failure to pay debt was the only offense charged. 96

92. There are three basic types of courts-martial: general, special, and summary. The seriousness of the offense or offenses charged determines the type of court-martial which the individual will receive. A general court-martial, which usually can only be convened by a flag or general officer in command, may adjudge any punishment found in the Table of Maximum Punishments. MANUAL ¶ 5a, ¶ 127c. A special court-martial may be convened by mid-level commanding officers and cannot award punishment greater than a bad conduct discharge, six months confinement, and two-thirds forfeiture of pay for six months. Id. ¶ 5b, ¶ 15b. A summary court-martial, in essence a one-officer hearing, is also convened by mid-level commanding officers, but the degree of punishment is limited. Id. ¶ 5c. There can be no discharge, confinement is limited to 30 days, and two-thirds forfeiture of pay may be imposed for only one month. Id. ¶ 16b. Officers and those in training to become officers may not be tried by a summary court-martial. Id. ¶ 16a. In addition, anyone referred to a summary court-martial may refuse one, demanding to be heard before a special court-martial. Id. ¶ 16a.

93. Letter from Walter L. Lewis, Colonel, United States Air Force, Chief, Military Justice Division, to C.H. Morrison, Jr., Mar. 30, 1976, updating letter from Walter L. Lewis, Colonel, United States Air Force, Chief, Military Justice Division, to C.H. Morrison, Jr., July 8, 1975. This information was obtained from the Automated Military Justice Analysis and Management System. This fully automated data system is used by the Judge Advocate General's Department, USAF, to collect statistics on courts-martial and nonjudicial punishment.

94. During the period from June, 1975, through January, 1976, two enlisted men were tried by general court-martial and given bad conduct discharges for multiple offenses which included dishonorable failure to pay debts. However, the gravity of the other offenses charged indicates that the discharge was punishment for the more serious offenses, not the dishonorable failure to pay debt.

95. Lesser offenses may be tried by non-bad conduct discharge special court-martial or summary court-martial. During the period examined, there were 1,823 non-bad conduct discharge special courts-martial and 112 summary courts-martial.

96. The Air Force reports only one non-bad conduct special court-martial in which
There were, however, 49 Article 15 proceedings. These resulted in 43 reductions in grade, 39 of which were suspended; 14 forfeitures in pay, 11 of which were suspended; and 11 restrictions to quarters or extra duty.\textsuperscript{97}

The economic state of the nation since July 1, 1974, has been especially conducive to the excess accumulation of debt. During this period an increase in the number of dishonorable debtors could be expected. The statistics, however, show that no such trend is developing.\textsuperscript{98} In fact, the preceding data indicate that few military persons are imprisoned for dishonorable failure to pay debts. Indeed, few are court-martialed or otherwise disciplined in any manner.

dishonorable failure to pay debts was one of several charges. The serviceman tried was sentenced to two months confinement.

\textsuperscript{97} Some airmen received more than one punishment. For this reason the punishments add up to more than 49.

\textsuperscript{98} In the Army, only general and bad conduct discharge special courts-martial are recorded at the department level. During the period from January 1, 1970, to March 1, 1976, five officers and fourteen enlisted members were tried for the crime of dishonorable failure to pay debts in addition to other offenses. Four of the five officers were convicted and dismissed from the service. One of those convicted was also awarded a partial forfeiture of pay and 18 months confinement at hard labor. Since the Table of Punishment only authorizes six months confinement for conviction of dishonorable failure to pay debts, it must be assumed that a good portion of the sentence was for the other joined offenses.

Of the 14 enlisted personnel tried, nine convictions resulted. All the sentences called for a bad conduct discharge, partial or total forfeiture of pay, and reduction in grade (unless already at the lowest grade when tried). Eight of the nine courts-martial awarded confinement at hard labor for periods ranging from three months to five years. Again, much of this confinement was obviously the result of the other charges. The Court of Military Appeals dismissed one of the convictions and is presently considering two more. Another two soldiers had their sentences reduced on review. One review proceeding was abated because of the death of the convicted defendant. Letter from James D. Kemper, Jr., Clerk of Court, United States Army Judiciary, Falls Church, Virginia, to C.H. Morrison, Jr., Mar. 11, 1976.

The Department of the Navy, like the Army, only has records at the headquarters level of general and bad conduct discharge special courts-martial. From January, 1970, to March 1, 1976, the Navy has tried only two individuals for the dishonorable failure to pay debt. Both were enlisted men, one a sailor and the other a Marine. Sentencing information on these cases is not available. Letter from Deputy Assistant Judge Advocate General (Military Justice), Department of the Navy, Washington, D.C., to C.H. Morrison, Jr., July 7, 1975; interview with Deputy Assistant Judge Advocate General (Military Justice), Department of the Navy, Washington, D.C., Mar. 10, 1976.
CONCLUSION

In the final analysis, the armed forces' need for respected leadership and for high public regard of the military service and its personnel requires prohibition of conduct which brings dishonor or discredit to the uniformed ranks. Thus, the military brig is not a debtors' prison in the traditional sense of that phrase. It does, however, periodically confine those who exhibit dishonorable conduct in the management of their just debts. While this conduct may not be punishable in all civilian jurisdictions, some states, and the federal government through the Bankruptcy Act, afford no more protection for the dishonest debtor than do the Code and Manual. In fact, the military justice system's prohibition of dishonorable failure to pay debts is tempered by regulations which not only encourage expert assistance to the financially troubled serviceman, but also protect him from the unscrupulous creditor.
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