February 4, 1949.

MEMORANDUM

Jurisdiction of Military Government Courts
Over United States Citizens for Crimes Committed in Germany

According to press reports, on December 14, 1948, after trial by a three-judge court appointed by General Lucius Clay, Mrs. Wilma Ybarbo, an American citizen, was sentenced to serve two concurrent 20-year terms of imprisonment for killing her husband, United States Army Sergeant John Ybarbo, in the American zone of Germany.

The court in which Mrs. Ybarbo was tried appears to have been one constituted by the American Military Government pursuant to Military Government Ordinance No. 31, United States Military Government Courts for Germany. That ordinance established for the United States Area of Control of Germany a court system known as the United States Military Government Courts for Germany (Article 1) which consists of District Courts (Article 3) and a Court of Appeals (Article 4). Article 7 of Ordinance 31 gives the District Courts "criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations[1] with respect to offenses under (a) legislation issued by or under the authority of the Allied Control Council, (b) United States Military Government legislation, and (c) German law in force in the judicial district of the court. When an accused is charged with an offense under German law, the court is limited to the sentence or other penal provision of such law. Ordinance 31, Art. 3, par. 8. The judges of the district

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1/ It is not entirely clear whether, in the absence of the existence of the United States Military Government Courts for Germany, civilians in Mrs. Ybarbo's position would be subject to court martial under the Articles of War. See Article 2(d), 10 U.S.C. 1473, which provides that "all persons accompanying . . . the armies of the United States without the territorial jurisdiction of the United States" are subject to military law. See also Perlstein v. United States, 151 F. (2d) 167, 169 (1945); In re Di Bartolo, 50 F. Supp. 929, 932 (1943); Ex parte Gerlach, 247 Fed. 616, 617 (1917); 4 Bull. JAG 223, 7 Bull. JAG 125, CM 330683 and JAGJ CM 329933. In any event, The Judge Advocate General of the Army has expressed the view that dependents of members of the United States armed forces in Germany are not subject to the jurisdiction of a court martial under Article 2(d). JAGJ 1946/7691, October 10, 1946. Cf. Military Government Ordinance No. 32, Article IV, paragraph 1.

courts sit singly in criminal cases where the sentence to be imposed does not exceed ten years. Art. 3, par. 4. A three-judge court, however, may decide any criminal case, including those where death may be the penalty. Art. 3, par. 5.[2]

Military Government Ordinance No. 32 sets up a Code of Criminal Procedure for United States Military Government Courts for Germany which in many respects affords the accused the rights and privileges which an accused is normally entitled to in criminal courts in the United States. Ordinance 32 contains detailed provisions for preliminary hearings in which the accused has the rights, inter alia, to cross-examine any witnesses appearing against him, not to testify unless he so desires, to have and to consult with counsel before proceeding further, and to be advised of his rights in these matters. Article III. The charges against an accused must be in writing and must be sufficiently particularized so that the accused may have the information reasonably necessary to enable him to prepare his defense. Art. IV, par. 1. The charges must be served upon the accused at least 24 hours before he is required to plead. Id., par. 4. The court before which the accused is to be tried is required to inform the accused of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had. Id., par. 6. If the accused is unable to obtain counsel himself, the court is required to appoint counsel for him. Id., par. 7. If the accused is charged with an offense for which a death sentence is asked, representation by counsel is mandatory and no proceedings may be had until counsel has been procured or assigned. Id., par. 8. The court is required to read the charges to the accused and his counsel and to be satisfied that the accused and his counsel understand them. Id., par. 9. If the offense charged is one for which the law provides a death penalty, a plea of guilty may not be entered. Id., par. 10. The trial procedure prescribed is not unlike that in criminal courts generally in the United States. Article V. The right of cross-examination by the accused or his counsel is specifically preserved. Art. V, par. 2. Article VI adopts the rules of evidence generally recognized in the trial of criminal cases in the United States. Par. 1. Full provision for appellate procedure in the Court of Appeals established by Ordinance No. 31 is provided by Article XI of Ordinance No. 32.

Notable among the differences between the system of criminal justice established by Ordinances 31 and 32 and criminal justice as administered in the United States is the absence of a right to trial by jury in the

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2/ Military Government Ordinance No. 1 provides that killing or assaulting any member of the armed forces is an offense punishable by death or such other penalty as a military government court may impose.

Military Government Courts. This difference, however, is not entirely surprising since the Military Government Courts in many respects bear strong resemblance to courts-martial, from which they are an outgrowth and which, of course, do not provide trial by jury. In any event, American citizens do not have a constitutional right to trial by jury with respect to crimes committed outside of the United States. See Neely v. Henkel, 180 U.S. 109 (1901). That case involved an American citizen, Neely, who committed a crime in Cuba during the American military occupation of Cuba following the Spanish-American War. Neely escaped from Cuba to the United States but was subsequently returned there in an extradition proceeding at the request of the American Military Governor of Cuba. Neely contended that if he were returned to Cuba he would be tried there in a court established by the Military Governor and would not receive a jury trial to which he claimed to be entitled under the United States Constitution. In overruling this contention, the Supreme Court said (180 U.S. at p. 123):

> ". . . But such citizenship does not give him immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and whose justice he has fled."

See also In re Ross, 140 U.S. 453 (1891), which held that the indictment and jury trial provisions of the Constitution are inapplicable with respect to persons tried in consular courts for crimes committed on American vessels, and United States v. Best, 76 F. Supp. 857 (1948), which held that the search and seizure provisions of the Fourth Amendment are inapplicable to acts committed by American authorities in the American zone of occupation in Austria. See also Casement v. Squier, 46 F. Supp. 296 (1942), aff'd. 138 F. (2d) 909 (1943), and Balzac v. Porto Rico, 258 U.S. 298 (1922). There is, therefore, nothing in the law to entitle American citizens to a jury trial in the Military Government Courts of Germany for crimes committed within the jurisdiction of those courts. Whether, despite this, trial by jury should be made part of the system of criminal justice administered by those courts presents serious questions of policy and of military administration of occupied areas with which this memorandum does not purport to deal.

Two possible alternatives to trial in Germany by the American Military Government Courts for offenses committed by American citizens there deserve brief consideration. One alternative might be trial of such persons in the German courts. While American Military Government Law No. 2 permits the German courts to operate in the American zone, it expressly excludes from their jurisdiction, inter alia, criminal cases involving American nationals. This is a rule obviously sound as a matter of policy.

A second alternative may be to remove the accused to the United States for trial here in a criminal court. This could not be accomplished without legislation, since commission of a crime in the American zone of Germany does not usually result in the violation of any federal or state law or law of the District of Columbia and under our system of criminal justice criminals are tried and punished under the laws in force at the situs of the offense.[2] The desirability of conferring such jurisdiction upon American criminal courts seems dubious in view of the problems presented.

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[2] An exception to this rule permits crimes against the sovereign in a personal sense, such as treason or defrauding the government, to be tried and punished even though the criminal act was performed beyond the sovereign's territorial limits. United States v. Bowman, 260 U.S. 94 (1922). It is to be noted, however, that the jurisdiction of the courts over such crimes depends upon statute. Statutes also give jurisdiction over crimes committed on the "high seas" which otherwise would go untried and unpunished (18 U.S.C. 7, 3241; Robinson on Admiralty, par. 29, p. 241); 18 U.S.C. 3238 provides that, where punishable by federal law, such crimes shall be tried in the district "where the offender is found, or into which he is first brought." See also Jones v. United States, 137 U.S. 202 (1890); Cf. Vermilya-Brown v. Connell, No. 22, October Term 1948 (decided December 6, 1948).