

**MILITARY LAW  
REVIEW  
VOL. 52**

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Articles

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IN MILITARY LAW

A SURVEY OF THE NORMATIVE RULES OF INTERVENTION  
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## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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This Review may be cited as 52 MIL. L. REV. (number of page) (1971).

For sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, Price \$.75 (single copy). Subscription price: \$2.50 a year; \$.75 additional for foreign mailing.



PAMPHLET }  
 No. 27-100-52 }

HEADQUARTERS  
 DEPARTMENT OF THE ARMY  
 WASHINGTON, D.C., 10 May 1971

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# THE ACCUSED'S RIGHT TO A SPEEDY TRIAL IN MILITARY LAW\*

By Major Carroll J. Tichenor\*\*

*If ever the law is to have genuine deterrent effect on the criminal conduct giving us immediate concern, we must make some drastic changes. The most simple and obvious remedy is to give the courts the manpower and tools . . . to try criminal cases within sixty days after indictment, and then see what happens. . . . Indeed the delays in trials are often one of the gravest threats to individual rights. Both the accused and the public are entitled to a prompt trial. Chief Justice Warren Burger\*\*\**

## I. INTRODUCTION

The right of a military accused to a speedy trial is a concept which has generated a great deal of confusion. Although frequently litigated at the trial level, there is little "horn book law" and a review of the cases tends to leave one with the impression that military appellate courts have continued to cite cases which appear to have been reversed by later decisions. Adding to this confusion are the existence of two distinct legal philosophies concerning an accused's right to a speedy trial. One is the law developed by civilian courts, both federal and state, and the other is the law developed by military courts. The basic principles are similar, but their application to a particular set of facts varies greatly.

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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\*\*\*State of the Judiciary Address, American Bar Association Meeting, St. Louis, August 1970, reprinted in 56 A.B.A.J. 929, 932 (1970).

The purpose of this article is to provide the military lawyer with an analysis of, and practical guide to, the law on speedy trial in the military. The source of the right to a speedy trial will be traced and explained within the context of military due process. Several recent developments and problems confronting the trial defense counsel in this area will be analyzed; responsibilities of the trial counsel and military judge will be examined; and the doctrine of waiver will be traced through the case law, resulting in the suggestion of an applicable rule.

Within this broad scope, more specific areas will be considered. Among them are when the issue may be raised, perfecting the issue by the defense, the importance of actual prejudice or harm, the burden and degree of proof required, the applicable evidentiary standards, and the practical requirements when the issue is not raised at trial. This article will not provide any exact formula for determining whether an accused has been denied a speedy trial. It will, however, set forth the military law as it exists in relation to the accused, the Government, and the judiciary, and will identify significant new trends which will promote further development in this viable body of law.

## II. THE NATURE OF THE RIGHT

### A. THE CONSTITUTIONAL GUARANTEE

The sixth amendment to the Constitution of the United States provides, in part, that an accused has a right to a speedy and public trial in all criminal prosecutions. This right has "its roots at the very foundation of our English law heritage . . ." and is as fundamental as any of the rights guaranteed by the sixth amendment.<sup>1</sup> In *United States v. Ewell*,<sup>2</sup> the United States Supreme Court stated that the right to a speedy trial is essential to protect three basic demands of criminal justice: "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit possibilities that long delay will impair the ability of an accused to defend himself."<sup>3</sup> In determining whether a delay in completing a trial amounts to an unconstitutional deprivation of an accused's right to a speedy trial, the courts must look to all the

<sup>1</sup> *Klopper v. North Carolina*, 386 U.S. 213, 233 (1967).

<sup>2</sup> 383 U.S. 116 (1966).

<sup>3</sup> *United States v. Ewell*, 383 U.S. 116, 120 (1966). *Accord*, *Smith v. Hooye*, 393 U.S. 394 (1969).

facts and circumstances of the case in question.<sup>4</sup> In applying constitutional standards, the federal courts have set forth four interrelated factors that are used in their determination of an alleged denial of a speedy trial: (1) the length of the delay, (2) the reasons for the delay, (3) the existence of prejudice to the accused caused by the delay, and (4) whether the accused had waived his right to a speedy trial.<sup>5</sup>

In determining whether the accused has been denied this right, the existence of prejudice caused by the delay is very important. A landmark case considering speedy trial and prejudice resulting from undue delay is *Petition of Provoe*.<sup>6</sup> Here, the accused had been confined in excess of five years awaiting trial. After the Federal District Court found that the delay was inordinately long and that prejudice was manifest, it went on to state that the "cases hold that prejudice is presumed, or necessarily follows, from long delay; a fortiori it follows when the defendant is imprisoned over the years before trial. . . ."

Conversely, absent an inordinate delay or specific prejudice arising from the delay involved, federal courts have been reluctant to find a denial of the right to a speedy trial. This is demonstrated in *United States v. Ewell*,<sup>7</sup> where the Supreme Court held that the period of 19 months between the original arrest and the hearing on the indictment did not

itself demonstrate a violation of the Sixth Amendment's guarantee of a speedy trial. . . . [T]his Court has consistently been of the view that "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87. . . . "Whether the delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive." *Pollard v. United States*, 352 U.S. 354, 361. . . . "[T]he essential ingredient is orderly expedition and not mere speed." *Smith v. United States*, 360 U.S. 1, 10. . . .<sup>8</sup>

Another federal court case held that a four and one-half month

<sup>4</sup> See, e.g., *Smith v. United States*, 360 U.S. 1 (1959); *Beavers v. Haubert*, 198 U.S. 77 (1905); *Frankel v. Woodrough*, 7 F.2d 796 (8th Cir. 1925).

<sup>5</sup> See *United States v. Banks*, 370 F.2d 141 (4th Cir. 1966), cert. denied, 386 U.S. 997 (1967); *Bautte v. United States*, 350 F.2d 389 (9th Cir. 1965), cert. denied, 385 U.S. 856 (1966); *United States v. Simmons*, 338 F.2d 804 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965).

<sup>6</sup> 17 F.R.D. 188 (Md. 1956), aff'd per curiam, 350 U.S. 857 (1955).

<sup>7</sup> *Id.* at 203.

<sup>8</sup> 383 U.S. 116 (1966).

<sup>9</sup> *Id.* at 120.

delay between arrest and indictment was not so long that prejudice could be spelled out from the fact of confinement alone nor that the delay was arbitrary, purposeful or oppressive.<sup>10</sup> In another case, a delay of fourteen months between the arrest and the indictment was not sufficient to establish that the accused had been denied a speedy trial without evidence that the accused had actually been prejudiced.<sup>11</sup>

Pretrial delays accompanied by actual prejudice to the accused have been far more significant to a finding that the accused has been denied his right to a speedy trial. Actual prejudice and deliberate and oppressive delays have generally been held to violate the concept of due process and the sixth amendment's right of a speedy trial. However, even where prejudice to the accused may result from pretrial delays, all of the facts and circumstances of the case must be examined to determine whether the accused's rights have been violated.

## B. MILITARY SPEEDY TRIAL

### 1. Due Process.

The concept of "military due process" was established by the United States Court of Military Appeals in *United States v. Clay*.<sup>12</sup> Therein the court stated:

There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. . . . For lack of a more descriptive phrase, we label the pattern as "military due process" and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. . . .

Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes. . . .

<sup>10</sup> *E.g.*, *Mathies v. United States*, 374 F.2d 312 (D.C. Cir. 1967).

<sup>11</sup> *United States v. McCorkle*, 413 F.2d 307 (7th Cir. 1969). *See also* *Hedgepeth v. United States*, 365 F.2d 952 (D.C. Cir. 1966); *Jackson v. United States*, 351 F.2d 821 (D.C. Cir. 1965); *Reece v. United States*, 337 F.2d 852 (5th Cir. 1964).

<sup>12</sup> 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

Under our powers as an appellate court we can reverse for errors of law which materially prejudice the substantial rights of the accused, and we need go no further than to hold that the failure to afford to an accused any of the enumerated rights denied him military due process and furnishes grounds for us to set aside the conviction.<sup>13</sup>

As formulated in *Clay*, the court's concept of military due process did not specifically include the right to a speedy trial. However, the court did reserve the right to consider other rights of the accused as being within this concept and did state that the enumerated safeguards were not all-inclusive.

The question of a military accused's right to be free from unnecessary pretrial delays and to have a speedy trial under the *Uniform Code of Military Justice*<sup>14</sup> was first considered by the Court of Military Appeals in *United States v. Hounshell*.<sup>15</sup> Therein, the court stated that the "United States Constitution guarantees to all persons protected under Federal law 'the right to a speedy and public trial.' United States Constitution, Amendment VI. Article 10 of the Uniform Code . . . reiterates that guarantee . . ." <sup>16</sup> The right to a speedy trial under article 10,<sup>17</sup> UCMJ, is designed to "insure that the accused knows the reason for the restraint of his liberty, and to protect him, while under restraint, from unreasonable or oppressive delay in disposing of a charge of alleged wrongdoing, either by trial or by dismissal."<sup>18</sup> The court has held that this right is a substantial right and that a denial of it is frequently bound together with a denial of due process to the extent that the lines of demarcation are frequently unclear.<sup>19</sup> It would therefore seem clear that the Court of Military Appeals has included at least part of the accused's right to a speedy trial within the concept of military due process as defined in *United States v. Clay*. Even though the military accused is entitled to a speedy disposition of the charges against

<sup>13</sup> *Id.* at 77-78, 1 C.M.R. at 77-78.

<sup>14</sup> The UNIFORM CODE OF MILITARY JUSTICE will hereafter be set forth in the text and cited as UCMJ.

<sup>15</sup> 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

<sup>16</sup> *Id.* at 6, 21 C.M.R. at 132.

<sup>17</sup> Article 10, UCMJ (hereinafter referred to as article 10) provides in pertinent part: "when any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

<sup>18</sup> *United States v. Tibbs*, 15 U.S.C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965).

<sup>19</sup> *E.g.*, *United States v. Williams*, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); *United States v. Schalek*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); *United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

him, this right is relative. Whether it has been denied him must be decided in light of all the facts and circumstances of the particular case.<sup>20</sup> Illustrative is the case of *United States v. Werthman*.<sup>21</sup> In this case, pretrial delays resulted because the appropriate authorities were undecided on whether the accused should be prosecuted or not. Although action was held in abeyance for approximately four months, the court noted that

the accused was unable to assert honestly that his defense on the merits was impaired. . . . Giving him the benefit of all circumstances, he has failed to make any showing which would permit us to hold he has been denied due process of law.<sup>22</sup>

Reasonable delays in bringing an accused to trial do not deprive him of this right;<sup>23</sup> brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive;<sup>24</sup> and the "touch stone for measurement of compliance with the provisions of the Uniform Code is not constant motion, but reasonable diligence in bringing the charges to trial."<sup>25</sup>

In addition to the general concepts of military due process and the requirements of article 10, an examination of the accused's right to a speedy trial must also incorporate articles 30(b)<sup>26</sup> and 33,<sup>27</sup> UCMJ. The Court of Military Appeals had con-

<sup>20</sup> *E.g.*, *United States v. Brown*, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962), and cases cited therein.

<sup>21</sup> 5 U.S.C.M.A. 440, 18 C.M.R. 64 (1955). See also *United States v. Halls*, 40 C.M.R. 538 (ACMR 1969), *pet. rev. den.*, 40 C.M.R. 327 (1969).

<sup>22</sup> *United States v. Werthman*, 5 U.S.C.M.A. 440, 445, 18 C.M.R. 64, 69 (1955).

<sup>23</sup> *United States v. Herrera*, 28 C.M.R. 599 (ABR 1959), *pet. rev. den.*, 29 C.M.R. 586 (1960).

<sup>24</sup> See *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); *United States v. Williams*, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961); *United States v. Daugherty*, 38 C.M.R. 820 (AFBR 1967).

<sup>25</sup> *United States v. Tibbs*, 15 U.S.C.M.A. 350, 358, 35 C.M.R. 322, 325 (1965). See also *United States v. McKenzie*, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964); *United States v. Brown*, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962); *United States v. Davis*, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960).

<sup>26</sup> Article 30(b), UCMJ (hereinafter referred to as article 30(b)) provides: "Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interests of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

<sup>27</sup> Article 33, UCMJ (hereinafter referred to as article 33) provides: "When a person is held for trial by a general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reason for delay."

strued articles 10 and 33<sup>28</sup> giving special emphasis to "the accused's right to trial without unnecessary delay. . . ." <sup>29</sup> In *United States v. Brown*,<sup>30</sup> the court held:

it is clear that whenever it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, supra, and the accused challenges this delict by appropriate motion, then, the prosecution is required to show the full circumstances of the delay. Of course, an accused is not automatically entitled to a dismissal of all the charges against him. Rather, the law officer must decide, from all the circumstances, whether the prosecution has proceeded with "reasonable dispatch."

Again, in *United States v. McKenzie*,<sup>31</sup> the court found it necessary to discuss these two articles. In this case, the accused had been confined for 79 days before charges were preferred against him. After noting that it had been necessary to locate records that had been in the accused's possession at the time of his unauthorized absence, to gather evidence from a wide area of commands, and to obtain information upon which to conduct the defense, the court stated:

It appears . . . that at all times and in accordance with . . . Article 10, . . . immediate steps were being taken to inform the accused of the specific wrong with which he was charged and to try him. We note, however, that, although these matters are discernible in the record, they were not expressly reported in writing to the officer exercising general court-martial jurisdiction, as required by the provisions of . . . Article 33. . . . While under the particular circumstances of this case, we find neither a denial of due process nor prejudice to the substantial rights of the accused, we emphasize the duty and responsibility of every officer to comply with the mandates of the Uniform Code. . . .<sup>32</sup>

The court has also held that although article 33 requires that a report be made to the general court-martial authority within eight days of the time an accused is placed in confinement, there is no requirement that the charges be dismissed for failure to comply with the requirement where the accused has not been prejudiced by the omission.<sup>33</sup> Except for the considerations of

<sup>28</sup> *United States v. Weisenmuller*, 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968), and cases cited therein.

<sup>29</sup> *United States v. Weisenmuller*, 17 U.S.C.M.A. 636, 639, 38 C.M.R. 434, 437 (1968).

<sup>30</sup> 10 U.S.C.M.A. 498, 503, 28 C.M.R. 64, 69 (1959).

<sup>31</sup> 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964).

<sup>32</sup> *Id.* at 364, 34 C.M.R. at 144.

<sup>33</sup> See *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969); *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); *United States v. Callahan*, 10 U.S.C.M.A. 156, 27 C.M.R. 280 (1959).

the statute of limitations, the accused has no absolute right to be tried within a specified time. The accused's right to a speedy trial is dependent on the facts of each particular case.<sup>34</sup>

## 2. *Non-Due Process.*

It is not clear whether military due process involves certain standards separate and apart from the requirements of articles 10, 30(b), and 33, or whether portions of the rights enumerated in these articles constitute military due process when dealing with speedy trial. However, regardless of the theory advanced, it is clear that not all of the provisions of these articles are within the concept of military due process. Recognition of this fact is important when considering relief for the accused. If the accused has been denied military due process. Recognition of this fact is important when considering relief for the accused. If the accused has been denied military due process, he has not received a fair trial. On the other hand, if a codal provision is violated that does not affect the due process aspects of his trial, the accused may have no remedy.

In *United States v. Hawes*,<sup>35</sup> the Court of Military Appeals held that even though article 10 requires that upon arrest or confinement the accused is to be informed of the specific wrong of which he is accused, failure to comply with this requirement "is not ground for reversal of an otherwise valid conviction if the accused is not prejudiced."<sup>36</sup> In cases where it was obvious that the accused knew the reasons for his confinement, the court has held that a departure from the strict letter of the law was not a denial of due process and that it did not matter whether the accused's knowledge of the specific offense came immediately before or immediately after arrest or confinement.<sup>37</sup> A similar result has been reached where the requirement that a written report explaining why the charges cannot be forwarded to the general court-martial convening authority within eight days of arrest

<sup>34</sup> *E.g.*, *United States v. Bell*, 38 C.M.R. 558 (ABR 1967), *pet. rev. den.*, 38 C.M.R. 44 (1968). See also *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.)*, para. 215e [hereinafter cited as *MCM, 1969 (Rev.)*]

<sup>35</sup> 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969).

<sup>36</sup> *Id.* at 466, 40 C.M.R. at 178. *Cf.*, *United States v. Pierce*, 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970), where the accused was confined for 35 days, released from confinement and restored to full duty status and, 11 months later, charged with the original offense of absence without proper authority.

<sup>37</sup> See *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969); *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); *United States v. Snook*, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962).

or confinement has been violated.<sup>38</sup> However, in these cases, the reasons for the failure to forward the charges within the eight-day period were either set forth in the record of trial or were clearly apparent from the nature of the proceedings and offenses charged.

In those cases where there has been a showing that the failure to comply with the strict letter of the statute has harmed the accused or there has been no reasonable explanation for this failure, the courts have not been content to view the error as non-prejudicial. An example was a 67-day delay between the pretrial investigation and the forwarding of charges to the general court-martial convening authority. There was no explanation of this delay in the record. The conclusion was that the delay was too long to be considered a mere harmless error and, without any showing that it was reasonable, constituted a violation of the substantial rights of the accused.<sup>39</sup>

It can therefore be seen that the military accused has a right to a speedy trial that is founded in the sixth amendment to the Constitution of the United States, military due process, and additional statutory requirements for expeditious processing of charges set forth in the UCMJ. Whether any of these rights have been violated depend on the facts and circumstances of each case. Throughout this article, the right to a speedy trial will be examined from the aspect of a practical application of the law by the military lawyer. Although it is a relatively simple task to find the basic principles which relate to speedy trial issues, it is often difficult to apply these broad principles to the facts of a particular case in determining whether an accused has in fact been denied a speedy trial. Because these broad concepts are generally known to the military lawyer, a brief discussion of some of the more recent developments will provide a sufficient background to the discussion of the practical application of the law.

### III. RECENT DEVELOPMENTS IN MILITARY SPEEDY TRIAL

#### A. RESTRICTION EQUATED TO ARREST

In *United States v. Williams*,<sup>40</sup> the Court of Military Appeals considered whether restriction was the type of deprivation of

<sup>38</sup> See *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969); *United States v. McKenzie*, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964).

<sup>39</sup> *United States v. Williamson*, 28 C.M.R. 698 (CGBR 1959).

<sup>40</sup> 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967).

liberty that would bring the case within the mandates of article 10. The accused had been restricted to the limits of his company for 138 days between the time he confessed and the charges were preferred. The court described this delay as a period "of fumbling and inexcusable inaction while the accused was retained in an overseas command long past his rotation date and kept under pretrial restraint for months prior to any charge being filed against him. . . ." <sup>41</sup> The definition of "arrest," as set forth in article 9, UCMJ, was described by the court as being the restraint of a person to specified limits by an order.<sup>42</sup> Applying this definition to the facts of the case, the court stated that the restriction of Williams fell within the definition of arrest. The fact that it was labeled restriction did not alter this fact. Accordingly, the Government was accountable for the time between the date of restriction and the date charges were preferred. Absent an adequate explanation for the delay, the court found that the accused had been denied military due process and his right to a speedy trial.

Since *Williams*, the Court of Military Appeals and the courts of military review have considered the effect of varying degrees of restraint. In ordering the dismissal of the charges for a 124-day period of restriction to a barracks without charges, the Court of Military Appeals, citing *Williams*, held that in "the instant case, . . . not the slightest explanation has ever been tendered for the untoward delay. . . . [O]n the facts presented . . . we find a substantial issue raised by the lengthy, unexplained delay in processing the original charge against the accused, while he was held under close restraint. . . ." <sup>43</sup> A similar result was reached in *United States v. Weisenmuller*,<sup>44</sup> where the accused was held for 72 days without charges in a restricted status identical to the type of restraint imposed pursuant to punitive articles. The court held that the provisions of both articles 10 and 38 were applicable and had been violated to the prejudice of the accused.

Subsequent to *Williams*, only one other decision has considered the effect of a "restriction to the company area." In this decision, an Army board of review <sup>45</sup> held that a 148-day pretrial restric-

<sup>41</sup> *Id.* at 591, 37 C.M.R. at 210.

<sup>42</sup> *Id.* at 592, 37 C.M.R. at 212. See also article 9, UCMJ.

<sup>43</sup> *United States v. White*, 17 U.S.C.M.A. 462, 464, 38 C.M.R. 260, 262 (1968).

<sup>44</sup> 17 U.S.C.M.A. 636, 38 C.M.R. 484 (1968).

<sup>45</sup> *United States v. Hester*, 37 C.M.R. 653 (ABR 1967). It should be noted that the current intermediate appellate bodies for the armed forces are now courts of military review. Because of the differences between a former board

tion, most of which was within a wire compound under guard, was chargeable to the Government. This fact, coupled with a poor explanation of the delays led the board of review to conclude that the delay was "unreasonable, vexatious and oppressive. . . ." "The charges were ordered dismissed.

A more difficult consideration is involved where the accused is restricted to a much broader area, such as the post. Here, the accused has the same liberty as other soldiers except that he is not allowed to leave the limits of the installation on pass. *United States v. Smith*<sup>47</sup> was certified to the Court of Military Appeals by The Judge Advocate General of the Army after an Army board of review held that the accused's restriction to the confines of the post was equivalent to arrest. The Court of Military Appeals declined to answer the certified question as a matter of law, but instead held that the board's decision was one of fact and that under the facts of the case<sup>48</sup> there was a substantial basis for the board's decision. However, an Air Force board of review has held that withholding a pass from the accused for 77 days prior to charges and a total of 184 days prior to trial did not constitute arrest or confinement in the strict sense.<sup>49</sup>

It is suggested that in the area of restriction, numerous factors must be considered in determining whether the restraint will be equated to arrest or confinement within the meaning of articles 9 and 10. If the accused is prejudiced in his trial preparation by the restraint, such as by not being able to freely communicate with counsel, interview witnesses, or other similar factors, the restraint will be closely examined by the courts and the Government will probably be held to a higher standard of reasonableness. Conversely, where the accused is in fact restrained to the limits of the installation or a specified area and this restraint does not impose any greater limitations than that imposed upon everyone else (such as where the surrounding area is "off limits" or is held by a hostile force) the restraint of the accused should not be

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of review and the court of military review, where appropriate, reference will be made to the type of appellate agency deciding the case.

<sup>47</sup> *Id.* at 655.

<sup>48</sup> 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968). See *United States v. Smith*, 39 C.M.R. 315 (ABR 1967), for the decision of the Army board of review.

<sup>49</sup> In this case, the accused had been held in a restricted status for 99 days without charges and 40 days passed from the time of charges to trial. The charge was possession of marihuana and it required 56 days to receive the laboratory report from Fort Gordon. The trial defense counsel conceded that the accused had not been prejudiced in his defense by the delays involved.

<sup>50</sup> *United States v. Daugherty*, 38 C.M.R. 820 (AFBR 1967). The board of review also considered the explanation of the delays reasonable and that the accused had not been deprived of due process or his right to a speedy trial.

considered as being within the definition of arrest. In such cases, the Government will probably be held to a much lower standard of reasonableness. As with many things, the area between the two stated examples becomes more difficult to predict in terms of the result. The facts of each case will determine whether the restraint imposed is to be equated with arrest. As the accused becomes subject to more harassment, anxiety, and limitations on his personal freedom of action, the higher the standard of reasonableness becomes by which the Government's actions will be measured.<sup>50</sup> Once the Government becomes accountable for the pretrial delays, the burden of reasonableness is imposed, but the standards by which the Government's action is measured may vary under the circumstances. What may be a reasonable period of time in the context of one set of facts may be entirely unreasonable and oppressive under another set of facts.

#### B. WAIVING THE SPEEDY TRIAL ISSUE IN PRETRIAL AGREEMENT

In this area, it should be kept in mind that the right to a speedy trial has been characterized as a personal right that can be waived by the accused.<sup>51</sup> However, where the issue involves a possible denial of due process, the accused must consciously waive the right.<sup>52</sup>

In *United States v. Cummings*,<sup>53</sup> the court held that the accused's waiver of speedy trial as a condition in the pretrial agreement was "misleading to [the] accused and repugnant to the purpose of the agreement. . . ." <sup>54</sup> This proviso in the agreement was held to be contrary to public policy and void. In reversing and remanding the conviction, the court found that there were many unexplained delays that should have been litigated at the trial level. In subsequent cases, where the court determined from the record that there was no factual issue of speedy trial, the pretrial agreement waiver was held to be nonprejudicial error.<sup>55</sup>

<sup>50</sup> See *United States v. Batson*, 30 C.M.R. 610 (NBR 1960), *rev'd*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960).

<sup>51</sup> See cases cited in note 33, *supra*.

<sup>52</sup> See *United States v. Jennings*, 17 U.S.C.M.A. 114, 37 C.M.R. 378 (1967); *United States v. Schalek*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964); *United States v. Batson*, 30 C.M.R. 610 (NBR 1960), *rev'd*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960).

<sup>53</sup> 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968).

<sup>54</sup> *Id.* at 378, 38 C.M.R. at 176.

<sup>55</sup> See *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968); *United States v. Lance*, 17 U.S.C.M.A. 470, 38 C.M.R. 269 (1968); *United States v. Dyer*, 17 U.S.C.M.A. 476, 38 C.M.R. 273 (1968).

The court's decision in *Cummings* was but another attempt to maintain the integrity of the pretrial agreement. As will be discussed in more detail later, the case does not purport to preclude the accused from waiving his right to raise the issue of a speedy trial, but merely prohibits his doing so in the pretrial agreement.

### C. CIVILIAN CONFINEMENT CHARGEABLE TO THE MILITARY

The period of detention of an accused by civilian authorities for a civil offense prior to the preference of any charges by the military was traditionally not chargeable to the Government as part of the pretrial delay requiring explanation. Determination of whether the Government acted with reasonable dispatch was made without considering such periods.<sup>56</sup> An analogous principle of separate entities was applied by an Army board of review in the situation where Fort Benning confined an accused without charges and later released the accused to Fort Campbell where he was thereafter charged, confined, and tried on offenses unrelated to those involving Fort Benning. Although the authorities at Fort Campbell were aware of the accused's status at Fort Benning, they did not obtain custody of the accused until after he had been confined without charges for 44 days. The board found that there was no violation of the accused's right to a speedy trial as to the charges preferred at Fort Campbell.<sup>57</sup>

The question of the constitutional right to a speedy trial where the accused was serving a prison sentence imposed by one jurisdiction and under charges in a different jurisdiction came before the United States Supreme Court in 1969 in the case of *Smith v Hooy*.<sup>58</sup> There, the accused had continually petitioned the State of Texas to try him for over six years. The Texas authorities had merely replied that they would be ready for trial when he was released from confinement and could be present. The Texas authorities had made no attempt to secure the custody of the accused from the other jurisdiction during this six-year period. The Supreme Court held that upon the accused's "demand, Texas had a constitutional duty to make a diligent, good faith effort to bring him before the Harris County court for trial."<sup>59</sup>

<sup>56</sup> See *United States v. Williams*, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961).

<sup>57</sup> *United States v. Wright*, 37 C.M.R. 646 (ABR 1967). However, the board of review indicated that such an issue might very well have been decided otherwise had any charges relating to the confinement at Fort Benning been preferred.

<sup>58</sup> 393 U.S. 374 (1969).

<sup>59</sup> *Id.* at 383.

*United States v. Keaton*<sup>80</sup> is also of particular importance in this area. There, the accused, while in a status of unauthorized absence, was apprehended by the civilian police on a charge of armed robbery. After his apprehension, and while his military status was still unknown, the accused was released on bail. Shortly afterwards, he was apprehended by the Federal Bureau of Investigation for the military and was again confined in the civilian jail. No further action was taken by the military to secure the release of the accused from the civilian authorities for approximately three months despite repeated demands by the accused. The Court of Military Appeals held that the beginning date for determining whether the accused had been afforded his right to a speedy trial was the date that he had been apprehended and confined by the federal authorities on behalf of the military. The three months' delay represented a period

of total inaction by the Government in pursuit of its cause. It is a delay, we believe, born of the mistaken belief that so long as the State charge had not been disposed of the Government was under no obligation to inquire whether it could reassert control over Keaton. The frequent requests from Keaton's counsel that the Government attempt to remove Keaton from the Ocala jail were sufficient notice that the Government had the burden to at least inquire officially whether the State would relinquish custody. That these requests were unheeded for the long period mentioned earlier is enough for us to decide that the requirements of Articles 10, 33, and 98 of the Uniform Code were not met. Obviously, the appellant has suffered from the delay and in the presence of prejudice his conviction may not stand.<sup>81</sup>

In both *Smith v. Hooley* and *Keaton*, the accused demanded trial or action by the prosecuting authorities. A strict reading of the cases would support the contention that without the demand by the accused there would be no requirement for the prosecution to take action towards a trial. However, it would appear that caution would be advisable in interpreting the meaning of these cases. Even absent a demand by an accused, it would be reasonable and prudent to attempt to obtain jurisdiction over an accused at the earliest time after charges have been preferred. Also, where the military has caused the accused's confinement, whether in civilian or military facilities, it would seem only logical that the Government will be required to demonstrate reasonable diligence regardless of what factor is used to start the running of time. Therefore, whether the case falls within the

<sup>80</sup> 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969).

<sup>81</sup> *Id.* at 504, 40 C.M.R. at 216.

requirements of article 10, arrest or confinement, article 30(b), preference of charges, or article 33, being held for trial by general court-martial, the Government will be required to demonstrate that it acted with reasonable diligence in bringing the case to trial, to include attempting to secure the release of the accused from any other jurisdiction, whether it be a civilian or military jurisdiction.

Both *Smith v. Hoey* and *Keaton* also indicate that even without charges being preferred or confinement caused by the military, a demand for prosecution by an accused held in civilian confinement would be sufficient to impose the duty on the part of the Government to attempt to secure custody of the accused for the purpose of prosecution. This proposition is evidenced by the Court of Military Appeals' statement that the "frequent requests from Keaton's counsel that the Government attempt to remove Keaton from the Ocala jail were sufficient notice that the Government had the burden to at least inquire officially whether the State would relinquish custody. . . ." <sup>62</sup> As a minimum, the standards applied in *Smith v. Hoey* should be closely followed.

#### D. FINALITY OF MILITARY JUDGE'S DECISION ON ISSUES OF SPEEDY TRIAL

The authority of the convening authority to reverse the military judge's ruling dismissing a case for failure to afford the accused a speedy trial was considered by the Court of Military Appeals in *United States v. Boehm*.<sup>63</sup> There, the court stated that the ruling to dismiss for lack of speedy trial did not amount to a finding of not guilty and was thus reviewable by the convening authority under the provisions of article 62(a), UCMJ.<sup>64</sup> Then, discussing this authority, the court cautioned that when reviewing such a question that affected

a constitutional right, an appellate authority must be circumspect in regard to findings of fact favorable to the accused. . . . Still, it is bound to determine whether there is a substantial basis for the findings, and to reverse the ruling below if there is not. . . . We are satisfied that the convening authority's decision to reverse was justified as a matter of law and fact. The evidence shows an important witness had absented himself without leave for

<sup>62</sup> *Id.*

<sup>63</sup> 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).

<sup>64</sup> Article 62(a), UCMJ, provides: "If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action."

a considerable part of the pretrial period. . . . We hold, therefore, that the convening authority did not err in returning the charge to the original court-martial for further proceedings.<sup>65</sup>

A decision by an Army board of review,<sup>66</sup> citing *Boehm*, held that the convening authority had acted within his authority in sending the case back to the court-martial for further proceedings.<sup>67</sup>

From the tenor of the court's holding, it is clear that returning the discretionary ruling of the military judge will be condoned only where his decision is clearly erroneous, manifestly unreasonable, or arbitrary.<sup>68</sup> Where the ruling is based on a finding of fact by the military judge that is supported by "substantial evidence," the dismissal should not be overturned. It is in this area that a discerning staff judge advocate will be of immeasurable assistance to his convening authority.

#### IV. THE ISSUE AT TRIAL

##### A. RAISING THE ISSUE

###### 1. At What Stage is the Issue Raised?

The issue of speedy trial should be litigated at that level where a detailed inquiry into the facts and circumstances surrounding the particular delay may be conducted.<sup>69</sup> Because the resolution of this issue depends on the facts of the particular case, it will often be necessary for both sides to examine witnesses and offer other evidence. It is also well established that a denial of the accused's right to a speedy trial bars further prosecution for such offenses.<sup>70</sup>

<sup>65</sup> *United States v. Boehm*, 17 U.S.C.M.A. 530, 536, 38 C.M.R. 328, 334 (1968). See also *Lowe v. Laird*, 18 U.S.C.M.A. 181, 39 C.M.R. 131 (1969), where the Court of Military Appeals cited *Boehm* as standing for the proposition that the convening authority has the power to review a trial ruling dismissing the charges because of a denial of the accused's right to a speedy trial.

<sup>66</sup> *United States v. Garner*, 40 C.M.R. 778 (ACMR 1969).

<sup>67</sup> See also *United States v. Frazier*, No. 420461 (ACMR 4 Feb. 1970), where, in a footnote, the Army court of military review discussed the holding in *United States v. Boehm*. The court stated that the action taken by the convening authority under article 62(a) does not constitute a reversal of the trial ruling, but is merely a request for reconsideration. As such, it does not require the military judge to amend or change his ruling, but only to again consider or analyze the basis for his prior decision.

<sup>68</sup> See *United States v. Goode*, 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968).

<sup>69</sup> See *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Williams*, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

<sup>70</sup> MCM, 1969 (Rev.), para 68.

The issue is raised by a defense motion to dismiss, directed either to the convening authority prior to trial, or the military judge, or president of a special court-martial without a military judge, after commencement of the trial. When addressed to the military judge, or the president sitting without a military judge, the motion should be made prior to the entry of the plea or the conclusion of the article 39(a) session held prior to assembly of the court, whichever occurs earlier.<sup>71</sup> The question of whether the right to assert a denial of speedy trial is waived by failure to raise the issue at trial will be treated separately. However, it is important to recognize that inaction may be sufficient, in some cases, to constitute a waiver of this right by an accused.

Once the question is before the military judge, he must decide whether the prosecution has proceeded with reasonable dispatch and, where it has not, dismiss the charges. What is not clear is what burden, if any, is placed on the defense counsel to perfect this issue and present evidence. The case law is clear that the military judge cannot place the burden of proof on the accused to establish that there was a denial of his right to a speedy trial;<sup>72</sup> but, it should be equally clear that a great deal of information that is logically relevant to the resolution of this issue will be known only to the accused. Examples of this include whether a delay resulted in the loss of a defense witness or created still further delays in obtaining certain witnesses, whether the delay has resulted in confusion of the memory of the witnesses or the accused, and whether there has been any unusual mental stress imposed on the accused by reason of the delays. Consequently, even though the law does not impose a burden on the defense to prove the validity of the motion to dismiss, practical considerations may dictate that the defense establish the existence of actual prejudice to the accused stemming from the pre-trial delays. In addition to any particular effect on the accused occasioned by the delay in processing the case to trial, the defense counsel should be aware of the reasons for any period of delay at each step of the proceedings, from the commission of the offense to the date of trial. Even though the accused has suffered no actual harm to his defense or to himself by the delays, they may be of such inordinate length that in and of themselves they constitute a denial of the accused's right to a speedy trial.

It is in this latter area, where the accused has incurred no actual prejudice or where information known only to the ac-

<sup>71</sup> *Id.* at para 66, 67. See also *United States v. Brown*, 10 U.S.M.A. 498, 28 C.M.R. 64 (1959).

<sup>72</sup> *United States v. Brown*, 10 U.S.C.M.A. 498, 503, 28 C.M.R. 64, 69 (1959).

cused does not make the delays particularly oppressive in nature, that consideration should be given to directing the motion to dismiss to the convening authority prior to trial. Where additional defense testimony or evidence will be necessary to perfect the assertion of a denial of a speedy trial, it will often be too cumbersome to gather and present the evidence to the convening authority in a reliable form. However, where the delays appear excessive standing alone, it may be tactically advantageous to raise the issue prior to trial. By moving for a dismissal, the trial counsel will be required to explain the reasons for the delays to the convening authority. In this situation, the defense counsel will not only have the opportunity of obtaining a dismissal of the charges, but will be able to perfect his own motion and possibly discover the method the Government intends to employ to defeat that motion.<sup>73</sup>

## 2. *Perfecting the Defense Assertion.*

Whether the motion to dismiss is presented first to the convening authority or to the military judge, it is important that the defense counsel perfect the grounds for the motion to the extent possible. The more factors that are presented as representing actual prejudice or an oppressive design by the Government, the greater the possibility that the motion will be sustained. Even though it is true that the effects of confinement by itself can be considered in determining whether the delay in the trial is oppressive,<sup>74</sup> a motion to dismiss should not be predicated solely on the period of confinement if there are additional considerations relevant to the issue. The validity of this procedure is reflected in the statement by the Court of Military Appeals that the "interval of time between initial confinement in connection with the charge and the date of trial is not the sole determinant of the issue, but only one of the factors to be considered."<sup>75</sup> A delay

<sup>73</sup> See dissenting opinion by Judge Ferguson in *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969). In his dissent, Judge Ferguson stated that the convening authority acts in a judicial capacity in ruling on pretrial motions and his reply to a motion should be set forth in the record of trial. In acting on the motion in a judicial capacity, it would seem that the same burden of proof would apply and that the trial counsel would have to come forward to explain the reasonableness of the delays. Whether the defense counsel could then have access to this explanation has not yet been litigated in any reported cases; however, by appropriate motion to the military judge, this issue could readily be settled.

<sup>74</sup> *Petition of Provo*, 17 F.R.D. 183 (Md. 1955), *aff'd per curiam*, 350 U.S. 857 (1955). See also *United States v. Broy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964).

<sup>75</sup> *United States v. Hawes*, 18 U.S.C.M.A. 464, 465, 40 C.M.R. 176, 177 (1969). See also *United States v. Hester*, 37 C.M.R. 653 (ABR 1967).

that appears unreasonably long on its face may not constitute a violation of the accused's right to a speedy disposition of the charges against him in light of the explanation of the delay by the Government. It would appear obvious that the greater the period of delay the more difficult it will be to explain it as having been reasonable. Similarly, as the delays become shorter, it becomes increasingly more difficult to successfully assert that the accused's rights were violated.

Because each case necessarily turns on its own facts, it is important that the defense counsel exploit all of the circumstances of his case at all stages. To accomplish this, the defense must be ready to proceed to trial as early as possible. Any delays caused or created by the accused or in his behalf cannot be asserted as being violative of his right to a speedy trial.<sup>76</sup> Defense caused delays can result from requests for medical or psychiatric care, requests for additional time to prepare the case, or numerous other factors which result in the expenditure of additional time prior to trial.

An otherwise unreasonable delay may be lost to the defense if it is exploited to the advantage of the accused. An example is where a long period of confinement is used to mitigate the sentence. Although it would appear to be in the best interests of an accused to move for a dismissal because of a denial of a speedy trial and, if denied, to present the period of pretrial confinement to the court in mitigation of the sentence to be imposed, the Court of Military Appeals has indicated that such action would preclude further assertion of the issue on appeal.<sup>77</sup> Some of the earlier cases of this court held that the failure to make a demand for trial or protest the confinement by making a request for release could fatally affect raising the issue of speedy trial before the military judge and later on appeal.<sup>78</sup> Although this is not the current posture of the law,<sup>79</sup> a good faith demand for trial by an

<sup>76</sup> *E.g.*, United States v. Snook, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962); United States v. Batson, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960); United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959).

<sup>77</sup> See United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); United States v. Loose, 38 C.M.R. 717 (NRB 1967).

<sup>78</sup> See United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); United States v. Hounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956); United States v. Morris, 27 C.M.R. 965 (AFBR 1959). In *Wilson*, the court stated that a request for trial could be directed to any officer who was working in a military justice capacity at the time the request was submitted to him. Examples of such were the commanding officer of the accused, the trial counsel, military judge, convening authority, inspector general, and others in a similar position.

<sup>79</sup> *E.g.*, United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

accused will serve to draw attention to the fact that he desires an expeditious disposition of the charges against him. Such a demand could have the effect of making the courts scrutinize the Government's explanations of the delay more closely than would be done if the first complaint were made at trial.

Although this discussion has generally been related to periods of delay while the accused was in confinement, confinement is not a prerequisite to asserting the issue. While the courts generally require greater speed in processing a case to trial when the accused is in confinement, it is well accepted that either the preference of charges or confinement will start the period for which the Government will be accountable.<sup>50</sup> However, it is possible to have a denial of this right even though no charges have been preferred and the accused is not in confinement. In *United States v. Ortego*,<sup>51</sup> an Army board of review held that the decision to keep potential charges in abeyance with the provision that if the accused committed further offenses the old charges would be revived and prosecuted along with the additional offenses, constituted a violation of articles 10, 30, and 33, UCMJ. Similarly, in a case involving a civil rights worker, the Supreme Court of the United States held that a North Carolina court order for a *nolle prosequi* with leave to reinstate the prosecution at a future date was contrary to the sixth amendment's guarantee of a speedy trial.<sup>52</sup> The Court reasoned that the potential criminal prosecution could subject the accused to public scorn, deprive him of employment, and restrict his speech, associations, and participation in unpopular causes. The prolonged uncertainty would be oppressive and accompanied by the anxiety and concern of one who has been publicly accused. In this area, it would appear that unusual circumstances would have to exist to circumvent the traditional rule that the accused has no right to be tried within a specified period of time, absent the statute of limitations, where he has not been deprived of his liberty and the charges have not been preferred.

### 3. *The Importance of Actual Prejudice or Unexplained Delay.*

An additional factor useful in perfecting the defense of lack of speedy trial is to demonstrate that the pretrial delays have prejudiced the accused. The Court of Military Appeals has often stated that an "apparently satisfactory explanation for a partic-

<sup>50</sup> See *United States v. Williams*, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961); MCM, 1969 (Rev.), para 215e.

<sup>51</sup> 37 C.M.R. 691 (ABR 1967).

<sup>52</sup> *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

ular delay might be revealed as unreasonable in light of the specific harm to the accused occasioned by the delay. . . ."<sup>53</sup> In the case of *United States v. Davis*,<sup>54</sup> the court found that a 144-day period from the pretrial confinement to trial did not violate the accused's right to a speedy trial. The only explanation for that delay was that the Government required investigation into the case. In reaching their determination that the accused's rights had not been violated the court stated:

Unquestionably, pretrial confinement is burdensome. However, the defense does not dispute the validity of the confinement; and the period of confinement is not, in our opinion, so extended as to indicate in any way that the confinement is part of an oppressive design on the part of the Government against the accused. Also, in our opinion, the period is not so long and so free of statutory requirements for the performance of essential preliminary proceedings to establish, as a matter of law, that there was a lack of reasonable diligence in prosecution. . . .<sup>55</sup>

The court's opinion in *Davis* identifies at least three potential ways in which a pretrial delay may be shown to have violated the accused's right to a speedy trial. The first is to establish that the Government had some plan or design to delay the case as part of an oppressive act against the accused. The second is to demonstrate that there was a substantial violation of a statutory time requirement resulting from an absence of reasonable diligence. The last is to show that the pretrial delay acted to the substantial prejudice of the accused. As noted, in *United States v. McKenzie*,<sup>56</sup> the court found that a 79-day period of confinement prior to the preference of charges did not violate the accused's right to a speedy trial where the record demonstrated that the delay was occasioned while attempting to obtain evidence against the accused and the record was free from any demonstrated prejudice to the accused. Similarly, in *United States v. Hawes*,<sup>57</sup> the court allowed a 21-day period of confinement prior to the preference of charges and a total period of 106 days from the start of the confinement to the trial. They found that the initial 34-day period from apprehension by the Federal Bureau of Investigation to the completion of the article 32 investigation report was not inordinately or unjustifiably prolonged. Also, the

<sup>53</sup> *United States v. Parish*, 17 U.S.C.M.A. 411, 416, 38 C.M.R. 209, 214 (1968). See also *United States v. Smith*, 17 U.S.C.M.A. 55, 37 C.M.R. 319 (1967); *United States v. Brocy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964).

<sup>54</sup> 11 U.S.C.M.A. 410, 29 C.M.R. 225 (1960).

<sup>55</sup> *Id.* at 414, 29 C.M.R. at 230.

<sup>56</sup> 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964).

<sup>57</sup> 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969).

37-day period from the forwarding of the article 32 investigation report to the date of trial was considered timely and reasonably expeditious. The remaining 35 days resulted from the fact that the case file was lost or misplaced and could not be found. The record did not demonstrate that the accused suffered any actual prejudice from the delays occasioned and the court found that there was no oppressive or unreasonable delay in the prosecution. In answer to the appellate contention that the accused's rights were violated by the failure to take immediate steps to inform him of the specific wrong with which he was charged, the court stated that an "omission of that kind is not ground for reversal of an otherwise valid conviction if the accused is not prejudiced." <sup>88</sup> The delay caused by the lost file was characterized as being intolerable, especially where it resulted in unnecessary pretrial confinement of the accused. However, the court was not "persuaded by defense counsel's postulate that the 'durance vile' of accused's confinement during this period constituted Government oppression or resulted in prejudice to the accused. . . ." <sup>89</sup>

The importance of either actual prejudice to the accused or a period of unexplained delay is vividly demonstrated by a comparison of *McKenzie* and *Hawes* with cases involving similar periods of pretrial delays where the court has found a denial of the right to a speedy trial. In *United States v. Parish*,<sup>90</sup> there was a total pretrial confinement of 134 days, of which 49 days were prior to the preference of charges. The accused contended at trial that the delay resulted in the loss of two defense witnesses. In light of this impairment to the defense of the case, the court held that the accused was prejudiced by the delay between the confinement and the imposition of charges and thus was denied the right to a speedy trial. In *United States v. Weisenmuller*,<sup>91</sup> the court did not find any actual prejudice to the accused where he had been in close restriction for 72 days prior to the preference of charges and a total of 184 days prior to trial. However, the Government's explanation of the delays contained lengthy periods of unexplained inactivity. In holding that the accused had been denied a speedy trial, the court stated that the accused had been prejudiced. It went on to state:

unnecessary delay, dependent upon the facts and circumstances, may necessitate reversal and dismissal of the charges—not as a punitive measure but because the accused's substantial statutory

<sup>88</sup> *Id.* at 466, 40 C.M.R. at 178.

<sup>89</sup> *Id.* at 465, 40 C.M.R. at 177.

<sup>90</sup> 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968).

<sup>91</sup> 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968).

and constitutional right to be free from unnecessary trial delay and the harrassment inherent in pretrial restraint was violated to his prejudice. . . ."

In *United States v. Keaton*,<sup>83</sup> the three-month period where the accused was held in a civilian jail on behalf of the military was held to be violative of articles 10 and 33. The court found that the entire three months was chargeable to the Government for determination of the issue of speedy trial and that while there had been no actual harm to the accused there had been almost total inaction by the Government during this period. The court held that "the appellant has suffered from the delay and in the presence of prejudice his conviction may not stand. . . ." <sup>84</sup>

In viewing these seemingly similar periods of delay, it should be kept in mind that in those cases where the court found a denial of military due process and speedy trial, there was either an absence of a reasonable explanation of the delays by the Government, or some actual prejudice to the accused. Conversely, where no denial of this right was found, the Government had satisfactorily explained the pretrial delays and the evidence did not indicate that the accused had suffered any actual prejudice. As the period of unexplained delay becomes shorter, there is greater necessity to affirmatively demonstrate that the accused suffered some actual prejudice in the preparation or presentation of his defense. Where the period of unexplained delay becomes longer, the importance of actual prejudice decreases. A variable that influences this consideration in favor of the accused is the existence of some form of pretrial restraint.

#### 4. *Remedy for Denial of the Right.*

Once the issue has been raised and the accused has been found to have been denied the right to a speedy trial,

the remedy is dismissal of the charges. . . . Otherwise, the accused is afforded no relief, for ordering a rehearing would be self-defeating in that it would merely mean a staler retrial of already stale charges. . . . Accordingly, . . . once a denial of speedy trial is found to exist, the appropriate remedy to cure the evil is to end the prosecution.<sup>85</sup>

<sup>83</sup> *Id.* at 639, 38 C.M.R. at 437.

<sup>84</sup> 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969).

<sup>85</sup> *Id.* at 504, 40 C.M.R. at 216.

<sup>86</sup> *United States v. Lipovsky*, 17 U.S.C.M.A. 510, 512, 38 C.M.R. 308, 310 (1968). See also *United States v. Parish*, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968); *United States v. Williams*, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); *United States v. Davis*, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960).

However, with respect to multiple charges, the denial of this right as to one or more, but not all of the charges, does not require that the unaffected charges be dismissed.<sup>54</sup> Stated differently, where the accused is denied his right to a speedy trial as to one offense, it would not necessarily bar a prosecution for an unrelated offense. In *United States v. Wright*,<sup>55</sup> the accused was confined at Fort Benning, in connection with a suspected larceny. While that investigation was being processed, the authorities at Fort Campbell, Kentucky, discovered that the accused was a suspect in a larceny at that installation. After Fort Campbell had completed their investigation, Fort Benning released the accused from confinement to Fort Campbell without having preferred charges. Fort Campbell then preferred charges against him only for the offense at Fort Campbell. The defense asserted that the 44-day confinement without charges at Fort Benning constituted a denial of the accused's right to a speedy trial and barred the Fort Campbell prosecution. In discussing this issue on appeal, an Army board of review stated that

the confinement imposed upon the appellant at Fort Benning was completely unrelated to the offenses of which he now stands convicted. It was imposed at a different place, by a different authority, and for a different reason, albeit contrary to Articles 10 and 33, Uniform Code of Military Justice. . . . Had charges growing out of the Fort Benning investigation been preferred against the appellant after his return to Fort Campbell he would have reason to complain and move for the dismissal of any such charges. However, such was not the case. As to the charges preferred against the appellant at Fort Campbell and his confinement there, the government has fully complied with Articles 10 and 33. . . . To argue, as the appellant impliedly does, that because of his unauthorized confinement at Fort Benning, for completely unrelated reasons, any and all charges growing out of offenses committed prior to such confinement must be dismissed as both illogical and without merit.<sup>56</sup>

## B. THE GOVERNMENT'S BURDEN

### 1. *The Burden of Proof.*

It is well settled that once the defense raises the issue of a denial of the accused's right to a speedy trial, the Government

<sup>54</sup> *E.g.*, *United States v. Ortego*, 37 C.M.R. 691 (ABR 1967), where one period of unauthorized absence held in abeyance with the threat to the accused that if he absented himself again, both periods of absence would be referred to a general court-martial for trial. Board of review found that as to the first period of absence, the accused had been denied his right to a speedy trial and ordered that charge dismissed.

<sup>55</sup> 37 C.M.R. 646 (ABR 1967).

<sup>56</sup> *Id.* at 648.

must come forward and demonstrate the reasonableness of the pretrial delays.<sup>99</sup> In discussing this rule, the military appellate courts have often found it necessary to advise that once the issue is raised at trial, the facts necessary to decide the question should be incorporated into the record in such a manner as to reflect credit on the proceedings.<sup>100</sup>

Once the defense raises the issue of speedy trial by motion to dismiss,<sup>101</sup> a question of fact is presented on the reasonableness of the periods of delay that are involved. As with other factual issues, evidence must be presented in accordance with proper evidentiary standards.<sup>102</sup> It is therefore incumbent upon both the trial and defense counsel to prepare for this issue in the same manner as would be done for any question of fact relating to the guilt or innocence of the accused. Because of the nature of the military system of criminal law, the pretrial delays in bringing the charges to trial are normally a matter of record or are easily discernible by both sides. Therefore, it is often the case that no issue remains as to what delays occurred, but only as to the legal effect of these delays. In these cases, much time and effort will be saved by using a stipulated chronology of events to trace the development of the administration of the charges toward trial. In some cases, where the defense has not objected, less desirable methods have been used by the trial counsel to establish the facts bearing on this issue. Some of these methods include offers of proof, affidavits, and other records which may not be capable of qualification as admissible evidence.<sup>103</sup> Although these practices are not reversible error absent a defense objection, they do not portray a favorable image of

<sup>99</sup> *E.g.*, *United States v. Brown*, 13 U.S.C.M.A. 11, 82 C.M.R. 11 (1962); *United States v. Williams*, 37 C.M.R. 700 (ABR 1967), *aff'd*, 17 U.S.C.M.A. 358, 38 C.M.R. 156 (1968); *United States v. Kim*, 38 C.M.R. 640 (ABR 1967); and other cases cited in footnote 149, *infra*.

<sup>100</sup> *See United States v. Wilson*, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); *United States v. Ficke*, 40 C.M.R. 691 (ACMR 1969), and cases cited therein.

<sup>101</sup> *See MCM*, 1969 (Rev.), paras. 67*a* and 68*a* and *i*. An assertion that the accused has been denied his right to a speedy trial should ordinarily be raised by a motion to dismiss prior to entry of the plea.

<sup>102</sup> Although specific holding to this effect has not been found, *see MCM*, 1969 (Rev.), paras. 67*e* and 137. Paragraph 67*e* provides that pertinent evidence is to be introduced before action is taken on a contested motion raising a defense or objection. Paragraph 137 provides for the relaxation of the rules of evidence in certain instances, but these do not include evidence introduced on issues raised by a motion to dismiss.

<sup>103</sup> *See United States v. Yelverton*, 40 C.M.R. 655 (ACMR 1969); *United States v. Morgan*, 40 C.M.R. 583 (ACMR 1969); *United States v. Cunningham*, 30 C.M.R. 698 (NBR 1960), *rev'd on other grounds*, 12 U.S.C.M.A. 402, 30 C.M.R. 402 (1961).

the trial counsel. Such procedures strongly indicate a lack of adequate preparation for trial, for if the defense counsel has no objection to the facts, a stipulation of fact is more reliable and accurate. Therefore, where the parties are capable of agreement on the facts, a stipulation of fact should be used. Where there is no agreement as to an isolated fact or all the facts, witnesses and other competent evidence bearing on the disputed areas should be offered and made a part of the record of trial.

The degree of proof required in deciding the issues raised should also be kept in mind by both parties to the trial. It is not required that the Government prove beyond a reasonable doubt that the accused was not denied his right to a speedy trial. The facts need only be established by a preponderance of the evidence.<sup>104</sup> The ruling on this issue by the military judge is predicated on the exercise of his sound discretion applied to the facts presented to him on the record.<sup>105</sup> It is therefore imperative that a full explanation of all the delays be made at the trial level. This was clearly demonstrated in *United States v. Weisenmuller*,<sup>106</sup> where the accused's conviction was reversed by the Court of Military Appeals because the Government's chronology of events showed long unexplained periods of inactivity. Further explanation of the delays involved was presented to the court in the form of affidavits by appellate counsel. None of the additional information contained in the affidavits had been presented at trial to the military judge. The court discussed this additional information in a footnote where it is stated:

We are aware of the explanations tendered by the Government at this level in the form of affidavits, as well as the additional material in similar form urged by the accused. None of this was presented to the law officer and, as it is within the propriety of his ruling that we are concerned, we give it no consideration here. It is at the trial and not on appeal that these explanations should be heard.<sup>107</sup>

## 2. *The Reasonableness of the Delay.*

It should be evident that a full explanation of the delay is important even where it may appear that the delay is not unreasonable on its face. There must be sufficient evidence in

<sup>104</sup> MCM, 1969 (Rev.), para 67e.

<sup>105</sup> See *United States v. Goode*, 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968); *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

<sup>106</sup> 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968).

<sup>107</sup> *Id.* at 640, n.1, 38 C.M.R. at 438.

the record to allow an appellate review of the issue and support a determination at that level that the military judge did not abuse his discretion. Therefore, the Government should be prepared to demonstrate the reasonableness of the time taken to process the charges to trial from the inception of the period where the Government becomes accountable for this time. Except for some factual situations of unusual circumstances, discussed earlier, the accountable period begins as of the date of confinement or other form of restraint, or the date charges are preferred, whichever is earlier.<sup>108</sup> Obviously, the end of the accountable period is the date the accused has been afforded his right to a trial. Whether the lapse of time between these two points has been reasonable or not is a question that must be viewed in light of all the facts and circumstances of the particular case.

In looking at the facts of a particular case, it is to be kept in mind that the Government is entitled to consume reasonable amounts of time in obtaining the evidence against the accused and preparing its case for trial.<sup>109</sup> Also, it has been held that brief periods of inactivity in an otherwise active prosecution of the case do not constitute a denial of the right to a speedy trial.<sup>110</sup> Consequently, it is not necessary that the Government demonstrate that everything that could have been done was in fact accomplished, but only that reasonable diligence was observed in bringing the charges to trial.<sup>111</sup>

Notwithstanding the fact that the law of speedy trial is still developing and is subject to revised interpretation and application, the announced standards by which a delay is measured have remained substantially unchanged. In considering the periods of delay and all other factors bearing on the issue of speedy trial, it must be established that

the Government displayed reasonable diligence in bringing the charges to trial, albeit brief periods of inactivity which . . . were not in any way oppressive. . . . [N]o denial of due process has been made . . . [and there is] no indication that appellant has been denied a fair trial, deprived of any defense, or prejudiced by the delays in question. . . .<sup>112</sup>

<sup>108</sup> *E.g.*, United States v. Keaton, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969); United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967); United States v. Williams, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961).

<sup>109</sup> United States v. McKenzie, 14 U.S.C.M.A. 861, 34 C.M.R. 141 (1964).

<sup>110</sup> United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

<sup>111</sup> *Id.*

<sup>112</sup> United States v. Morgan, 40 C.M.R. 583, 585 (ACMR 1969).

The use of words such as "reasonable diligence," "oppressive," "due process," "fair trial," and "prejudiced" substantiate the extreme difficulty in trying to establish a fixed rule to determine whether the accused was or was not denied his rights by a particular delay. With the admonition that concepts of reasonableness, fairness, or prejudice may vary in light of specific situations, some attempt can be made to determine what constitutes a denial of a speedy trial or an unreasonable delay.

The mandate of article 10, to take immediate steps to inform an accused of the charges against him when he is placed in arrest or confinement and to try him or dismiss the charges and release him, was considered by the Court of Military Appeals in *United States v. Tibbs*.<sup>113</sup> In *Tibbs*, the accused forcibly entered an exchange building and was apprehended inside the building in possession of stolen merchandise. He was placed in pretrial confinement but charges were not preferred and the accused informed thereof until some 15 days later. In discussing article 10, the court held that its

provisions are intended to insure that the accused knows the reason for the restraint of his liberty, and to protect him, while under restraint, from unreasonable or oppressive delay in disposing of a charge of alleged wrongdoing, either by trial or by dismissal. . . .<sup>114</sup>

The court then held that Tibbs knew the reason for his confinement and that the purpose of the notification requirement of article 10 was satisfied whether the knowledge on the part of the accused came immediately before or immediately after the confinement. "When it is certain that the basic purpose of a prescribed procedure has been achieved, a departure from the strict letter of the law defining the procedure is not a denial of due process."<sup>115</sup> In *United States v. Hawes*,<sup>116</sup> the accused was confined 21 days before charges were preferred and he was informed thereof. The record of trial did not indicate that the accused actually knew of the offense for which he was confined. However, the court stated that an "omission of that kind is not ground for reversal of an otherwise valid conviction if the accused is not prejudiced."<sup>117</sup> From the court's statement, it appears that it is no longer necessary that the accused in fact

<sup>113</sup> 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

<sup>114</sup> *Id.* at 353, 35 C.M.R. at 325.

<sup>115</sup> *Id.* at 353, 35 C.M.R. at 326-27.

<sup>116</sup> 18 U.S.C.M.A. 464, 40 C.M.R. 178 (1969).

<sup>117</sup> *Id.* at 465, 40 C.M.R. at 178.

know why he is in confinement so long as he is not prejudiced by this omission.<sup>118</sup>

In both *Hawes* and *Tibbs* the court also discussed the requirement of article 33 that when an accused is held for trial by a general court-martial, the charges or a written report explaining the delays shall be forwarded to the general court-martial convening authority within eight days after the accused is placed in confinement or arrest. The court stated that this article

does not prescribe dismissal of the charges for failure to submit the report. . . . It certainly does not mandate reversal of a conviction in the absence of prejudice for failure to submit the report.<sup>119</sup>

One contention in connection with article 33 is that when the charges cannot be forwarded within the eight-day period and no report is made to the general court-martial convening authority concerning the delays, the accused is denied an opportunity to have the convening authority personally consider the reasons for the delays in his judicial capacity. The issue of whether the accused may be prejudiced or denied a substantial procedural right because he has been denied an opportunity for possible favorable action has not yet been entertained by the court. However, the court's admonition in *United States v. Weisenmuller*<sup>120</sup> stands as a clear warning to comply with article 33.

We reiterate our belief that it would be a relatively simple matter to comply with this positive requirement of the law and, thus, to explain on the record the reasons for otherwise untoward delay while the accused languishes in *durance vile*. Such action would soon quiet the course of troubled appellate waters and insure that each man would receive the speedy, fair disposition of his case to which he is entitled under the Uniform Code, eliminating otherwise needless reversals.<sup>121</sup>

<sup>118</sup> See *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969), where the Court of Military Appeals stated in a footnote that even if it were assumed that the accused had not been informed of the offense when he was first confined, there had been no prejudice to the accused by the delay. This would seem to lend support to the theory that unless the accused is able to show that he has been prejudiced from the failure to receive notice of the pending charges, he cannot complain that the Government failed to comply with the requirements of articles 10 and 33.

<sup>119</sup> *United States v. Hawes*, 18 U.S.C.M.A. 464, 467, 40 C.M.R. 176, 179 (1969).

<sup>120</sup> 17 U.S.C.M.A. 636, 640, 38 C.M.R. 434, 438 (1968). *Accord* *United States v. McKenzie*, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964).

<sup>121</sup> *United States v. Weisenmuller*, 17 U.S.C.M.A. 636, 640, 38 C.M.R. 434, 438 (1968).

Another problem is when does an accused start being held for trial by a general court-martial?<sup>122</sup> Reading article 33, it is clear that if a person is placed in confinement while awaiting a trial by special court-martial, there is no requirement to forward the charges to the general court-martial convening authority nor to make any written report.<sup>123</sup> However, the type of court-martial for which the accused is being held is not always clear. In *United States v. Mladjen*,<sup>124</sup> the accused was initially placed in confinement and within 13 days his case was referred to trial by special court-martial. At this point, article 33 was clearly not applicable. However, four days later, the Government delayed proceedings to await the outcome of an investigation in which the accused was suspected of having committed the offense of breaking and entering. Later the accused was charged with the additional offense, an article 32 investigation was conducted, and all charges were referred to trial by general court-martial. Accused challenged the failure to refer charges until after the article 32 hearing. The majority opinion found that article 33 did not apply until after completion of the article 32 investigation. In a separate concurring opinion, Judge Ferguson reached a different determination. He found that article 33 became applicable upon the preference of the additional charges.

In most cases this distinction will not be relevant, but in light of the court's admonition for strict compliance with the provisions of this article, an accused should be treated as if he were being held for trial by a general court-martial in all cases where such trial is possible. With regard to the reporting requirement, an Army board of review has suggested that as a matter of good practice, both the

company commander and the officer responsible for the Article 32 investigation should comply with the provisions of Article 33 in required cases by reporting in writing to the officer exercising general court-martial jurisdiction the reasons for the delay in forwarding the case to him.<sup>125</sup>

<sup>122</sup> See *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965). In this case the court assumed, for the purpose of that appeal, that the eight-day period started to run as of the date of confinement.

<sup>123</sup> See *United States v. Pierce*, 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

<sup>124</sup> 19 U.S.C.M.A. 159, 41 C.M.R. 159 (1969).

<sup>125</sup> *United States v. Lucero*, 39 C.M.R. 520, 524 (ABR 1968). The case was not decided on the article 33 issue. The decision was based on a denial of the right to a speedy trial because of 139 days pretrial confinement before the case was referred to trial and no satisfactory explanation for the delays.

This practice would not only serve to keep the general court-martial convening authority informed of the progress of the case, but it would also serve to furnish first hand information for the record on this important issue and further impress upon commanders at all levels the importance of expeditious administration of court-martial charges.

To understand the requirement to explain the reasonableness of delays, it is of benefit to categorize the factual pattern of the cases in light of the explanation offered by the Government. There has been a finding that the accused has been denied his right to a speedy trial where there has been pretrial restraint without charges in excess of 50 days, a total pretrial restraint of over 100 days, and an unsatisfactory explanation of the pretrial delays.<sup>126</sup> Conversely, where the facts have been similar, but the explanation of the delays has been adequate, there has been a finding that the accused's rights have not been violated.<sup>127</sup> Varied results are evidenced for periods of pretrial restraint without charges for less than 50 days combined with total pretrial restraint in excess of 100 days,<sup>128</sup> and less than 100 days.<sup>129</sup>

<sup>126</sup> See *United States v. Weisenmuller*, 17 U.S.C.M.A. 686, 38 C.M.R. 434 (1968), where the accused was held in close restriction for 184 days, 72 days of which were without charges, and the offered explanation of the delay was not supported by the record; *United States v. Goode*, 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968), where the accused was held in confinement for 122 days, 86 days of which were without charges, and the sole explanation for the delay was that an attempt was made to have a record corrected in connection with a 31-day unauthorized absence charge; *United States v. Smith*, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968), where the accused was restricted to post for 185 days, 100 days of which were without charges, and the explanation of the delays left over 45 days unexplained; *United States v. Williams*, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967), where there was a 138-day restriction without charges and a total time lapse of 318 days from the start of the restriction to the trial and the attempted explanation was without merit; *United States v. Lamphere*, 16 U.S.C.M.A. 580, 37 C.M.R. 200 (1967), where the accused was confined 172 days prior to trial, 53 days of which were without charges, and there was no explanation of the delays.

<sup>127</sup> See *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969), where the accused was confined for 110 days prior to trial, 72 days of which were without charges, but the explanation of the delays was detailed and demonstrated expeditious processing by the Government. The explanation also noted that while charges had not been preferred for 72 days, the accused had been informed of the charges against him after nine days of confinement. See also *United States v. Silver*, 34 C.M.R. 608 (ABR 1964), *post. rev. den.*, 34 C.M.R. 480 (1964), where the accused was in pretrial confinement for 87 days prior to trial, 56 days of which were without charges, and the explanation of the delays was sufficient to demonstrate continuous effort toward trial.

<sup>128</sup> For holdings that the accused had been denied his right to a speedy trial, see *United States v. Parish*, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968),

Where there has been no pretrial restraint without charges but the total restraint exceeds 100 days, the results of the cases again depend on the adequacy of the explanation of the delays.<sup>130</sup> Where all of the restraint has been without charges, the longest

where the accused was confined for 134 days prior to trial, 49 days of which were without charges, but the explanation of the delays was not sufficient to overcome the actual prejudice to the accused in having lost the services of two witnesses as a result of the delays; *United States v. Hester*, 37 C.M.R. 653 (ABR 1967), where the accused was restricted for 148 days prior to trial, 19 days of which were without charges, and except for one charge that was minor and used in an attempt to explain the delays, all the Government's information was known at the time of the original apprehension of the accused. For holdings that the accused was not denied this right to a speedy trial, see *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969), where the accused was confined 106 days prior to trial, 21 days of which were without charges, and the accused preferred confinement to service in Vietnam, the delays were not due to the indifference of the Government, and no prejudice resulted to the accused; *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968), where the accused was confined 142 days prior to trial, 28 days of which were without charges, and the explanation of the delays showed almost immediate preparation of the charges followed by constant progression toward trial; *United States v. Callahan*, 10 U.S.C.M.A. 156, 27 C.M.R. 280 (1959), where the accused was confined 142 days prior to trial, 30 days of which were without charges, and the explanation of the delays demonstrated the complexity of the case, defense caused delays, and orderly progression toward trial; *United States v. Connor*, 40 C.M.R. 614 (ACMR 1969), where the accused was confined 112 days prior to trial, 21 days of which were without charges, and the explanation of the delays demonstrated that the accused was not prejudiced by the delays nor denied a fair trial; *United States v. Behling*, 35 C.M.R. 529 (ABR 1964), *pet. rev. den.*, 35 C.M.R. 478 (1965), where the accused was restricted and confined for a total of 170 days prior to trial, 31 days of which were restriction without charges, and the explanation showed that once the charges had been preferred, the case was brought to trial with reasonable dispatch. The board of review also decided that the restriction was not such as to bring the case within the requirements of articles 10 and 33.

<sup>129</sup> There has been one case with this factual setting that resulted in a finding that the accused was denied a speedy trial, *United States v. Ortego*, 37 C.M.R. 691 (ABR 1967). Here the accused was confined 74 days prior to trial, 47 days of which were without charges, and there were long unexplained and unexcusable delays as to the initial charge, which had been held in abeyance as a threat to the accused. For holdings that the accused was not denied the right to a speedy trial, see *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965), where the accused was confined 55 days prior to trial, 15 days of which were without charges, and the explanation of the delays showed that the accused was apprehended during the commission of the offense satisfying the requirements of article 10, that no prejudice resulted from the failure to comply with article 33, and that all the delays were adequately documented; *United States v. Wimberly*, 34 C.M.R. 567 (ABR 1964), where the accused was confined 41 days prior to trial, 13 days of which were without charges, and the explanation satisfactorily accounted for the periods of delay.

<sup>130</sup> For the case holding a denial of this right, see *United States v. Whitaker*, 31 C.M.R. 833 (ABR 1961), where the accused was held in

period of reported delay that has been satisfactorily explained has been 79 days.<sup>121</sup>

It should be noted that this simple categorization of the cases is not intended to represent the sole factors used by the courts in reaching their decisions. At best it will serve only as a general guide to the types of cases that have been decided by the military appellate courts and some of the considerations, in brief, that were discussed. It should be again apparent that the primary factor that distinguishes the cases is the adequacy of the explanation of the delays by the Government. Once the burden is placed on the Government to explain the delays in the case, it is incumbent that a full and complete explanation be

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confinement for 87 days and restriction for 167 days prior to trial and the Government could not explain a delay from May to August and the article 32 investigation took 122 days to complete. For holdings that this right was not violated, see *United States v. Snook*, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962), where the accused was held in pretrial confinement for 129 days on a charge of murder, the defense requested an additional 30 days to prepare for trial after the accused had been confined for 95 days, and the explanation of the delays was satisfactory in light of the seriousness of the charge, the steps taken to prosecute the case, and the additional time requested by the defense; *United States v. Batson*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960), where the accused was confined 152 days prior to trial and the explanation showed that the accused caused a delay of 95 days and that the Government expeditiously processed the charges during the remaining 57 days chargeable to them; *United States v. Davis*, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960), where the accused was confined for 144 days prior to trial and the delays were not such as to constitute, as a matter of law, a lack of unreasonable diligence nor were they oppressive; *United States v. Yelverton*, 40 C.M.R. 655 (ACMR 1969), where the accused was restricted for 47 days and then confined for 79 days prior to trial, and the Government adequately explained the delays showing no resulting prejudice to the accused; *United States v. Kim*, 38 C.M.R. 650 (ABR 1967), where the accused was confined for 105 days prior to trial and the delays were explained as required to obtain evidence of the accused's unauthorized absence from Vietnam and surrender in Hawaii, absence from Hawaii and surrender in San Francisco, absence from San Francisco and surrender in Hawaii, and finally his return to Vietnam; *United States v. Bell*, 38 C.M.R. 553 (ABR 1967), *pet. rev. den.*, 38 C.M.R. 44 (1968), where the accused was confined 167 days prior to trial and the delay was explained as attempting to obtain jurisdiction over the accused from the French authorities.

<sup>121</sup> See *United States v. McKenzie*, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964), where the accused was held in confinement for 79 days without charges prior to trial and the delays were explained as necessary to locate records that the accused had in his possession when he absented himself and to gather evidence scattered from Korea to North Carolina. There was no resulting prejudice to the accused. For similar cases holding a denial of the right to a speedy trial, see *United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969), where the accused was confined for over three months with complete inaction by the military in moving towards prosecution; *United States v. White*, 17 U.S.C.M.A. 462, 38 C.M.R. 260 (1968), where the accused was restricted to his barracks for 124 days without charges and there was no explanation given for these delays.

given which demonstrates the reasonableness of the efforts expended in bringing the case to trial.

### 3. *The Burden When the Issue is not Raised.*

Frequently, the issue of whether the accused has been denied his right to a speedy trial has been raised for the first time on appeal.<sup>122</sup> In these cases, the Court of Military Appeals has held that where substantial periods of unexplained delay or clear violations of articles 10 and 33 exist, the inherent factual questions should be resolved at the trial level. Because a proper explanation may exist for such delays, the case is often returned for a rehearing on the issue of speedy trial.<sup>123</sup> However, where it appears that nothing further would be accomplished by a rehearing, the court will order the charges dismissed.<sup>124</sup>

Both actions constitute needless expenditure of time, money, and effort. Where there appear to be periods of delay that would be sufficient to raise the question of speedy trial, if unexplained, the trial counsel should insure that the record contains a full and adequate explanation of all delays.<sup>125</sup> This can be accomplished effectively by a detailed chronology of events incorporated in the record of trial. A stipulation of fact or a written chronology may be placed into the record of trial on motion by the trial counsel that it be made an appellate exhibit. Just as it has become common practice to prepare a stipulation of fact in negotiated plea cases, so should it become common practice to prepare a chronology of events in every case where there is a remote possibility of the issue of speedy trial being raised for the first time on appeal. This chronology should be carefully prepared to explain any periods of delay on the face of

<sup>122</sup> See *United States v. Jennings*, 17 U.S.C.M.A. 114, 37 C.M.R. 378 (1967); *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

<sup>123</sup> See *United States v. Cummings*, 17 U.S.C.M.A. 276, 38 C.M.R. 174 (1968); *United States v. Blasio*, 39 C.M.R. 418 (ABR 1968).

<sup>124</sup> See *United States v. White*, 17 U.S.C.M.A. 462, 38 C.M.R. 260 (1968).

<sup>125</sup> *But see United States v. Pierce*, 19 U.S.C.M.A. 225, 227, 41 C.M.R. 225, 227 (1970), where the Court of Military Appeals addressed the question: "If an accused suffers little pretrial confinement and makes no issue at trial of a delay in his being summarily charged and tried, to avoid a remand when such an issue is raised on appeal must the Government introduce some evidence into the record of the considerations that caused a delay of trial?" The court declined to impose such a requirement as a matter of law due to the many variables such as the length and nature of pretrial confinement that would create a "guessing game" situation in determining when such evidence was required. Notwithstanding this decision, where there are substantial periods of unlitigated pretrial delays, an explanation thereof will provide the appellate courts with some factual basis upon which to determine whether there is, in fact, a litigable issue of speedy trial.

the chronology.<sup>126</sup> By its decisions, the Court of Military Appeals has refused to accept the principle that if no satisfactory explanation for a delay existed, the defense counsel would have asserted the issue at trial. It is incumbent upon the trial counsel to protect the record of trial.

#### 4. *New Trends in Scope of Government's Burden.*

As with the preservation of the record of trial by the trial counsel, those entrusted with the administration of military justice should continually be conscious of their responsibility to insure that the rights of the accused are not impaired. To accomplish this, it is necessary to identify newly emerging trends which may further develop the law of speedy trial. In his dissenting opinion in a recent case, *United States v. Przybycien*,<sup>127</sup> Judge Ferguson noted one such area. In this case the accused was held in confinement for 72 days prior to the formal preferment of charges. During this time he was not furnished an attorney nor did the record of trial reflect that he had been advised of his right to consult with counsel. Noting that the lines of demarcation between issues of speedy trial and due process are not always clear, Judge Ferguson stated that "where, as here, an uncharged accused is held in confinement for seventy-two days without benefit of counsel . . . I have no hesitancy in holding that he was denied due process."<sup>128</sup> Even though this may be an isolated instance, it is clear that the reasonable practice will be to furnish the accused with counsel or at least advise him of this right at the time he is charged or is placed in confinement, whichever is earlier. Where this is not accomplished and actual prejudice to the accused results from this omission, an appropriate remedy could well be the dismissal of the charges.

As the rights of the accused continue to expand, it sometimes becomes difficult to determine whether a particular course of action is favorable or adverse to the accused. Similarly, the interplay of one protection may tend to adversely affect another safeguard of the accused. This setting was considered by the

<sup>126</sup> Compare *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968), with *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 147 (1968), where both contained a chronology of events pertaining to the pretrial delays in the case and the latter case was returned for further explanation of the delays.

<sup>127</sup> 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969).

<sup>128</sup> *Id.* at 127, 41 C.M.R. at 127. The majority opinion also noted the lack of a defense counsel for 72 days, expressing concern that this practice was allowed to exist in this case.

Court of Military Appeals in *United States v. Pierce*,<sup>139</sup> where the accused's right to a speedy trial and the effect of the decision in *O'Callahan v. Parker*<sup>140</sup> presented potential conflicts. In *Pierce*, the accused was absent without leave for approximately fifteen months, during which time he wrongfully used a found credit card to obtain approximately \$800.00 worth of food and money to support his family. Upon the termination of his unauthorized absence, the accused was restricted for two days, confined for the next 35 days, and then restored to a full duty status. Pending disposition of the civilian charges for the wrongful use of the credit card, no military charges were preferred for the unauthorized absence. Eleven months after he was apprehended, the accused was sentenced by the civilian court to five years, given probation and ordered to make restitution at the rate of \$50.00 per month. Thirteen months after his apprehension and confinement, the accused was charged for his unauthorized absence, tried by special court-martial, and sentenced to a bad conduct discharge and reduction to private first class. At trial, while represented by qualified legal counsel, the accused raised no issue of speedy trial. The record of trial contained no explanation of the reasons for the delay in the court-martial and the issue of speedy trial was first raised during the appellate review. Discussing the issue of speedy trial, the court noted that a result of *O'Callahan* is that an accused will often be liable for trial by court-martial either before or after a civilian criminal trial. The court continued, noting that an

ostensible right can be converted into a handicap if military authorities precipitately decide on a military trial, the results of which can complicate or limit the negotiation of a settlement of the civilian offense. . . . The delay here did not impair the ability of the accused to defend himself in fact it is more likely that he benefited from it.<sup>141</sup>

The court further noted that once the preliminary inquiries were completed, the accused was not under pretrial restraint; the accused's anxiety and concern were caused by the civilian charges, not the military offense; and that counsel's failure to raise the issue at trial was in recognition that the accused's duty status was beneficial in receiving a light sentence in the civilian trial. The court declined to hold that there had been a denial of the accused's right to a speedy trial and affirmed the conviction.

<sup>139</sup> 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

<sup>140</sup> 395 U.S. 258 (1969).

<sup>141</sup> *United States v. Pierce*, 19 U.S.C.M.A. 225, 227, 41 C.M.R. 225, 227 (1970).

The *Pierce* case would appear to stand for the principle that delays in a military prosecution can be justified on the basis of waiting for the conclusion of civilian criminal proceedings. It is suggested, however, that the facts of *Pierce* and the language of the court strongly indicate that such delays must be the product of an actual intent to benefit the accused, or, in fact, result in such benefit to him. The opinion contains very little guidance for a pretrial determination as to when such delays would be in the best interests of the accused. It would therefore seem that the Court of Military Appeals intended only to identify a potential problem area without attempting to provide a solution thereto. A practical approach would be for the Government to process the military charges, notwithstanding any civilian prosecution, and assign qualified legal counsel to assist the accused at the earliest stage. The accused would thus be able to make an intelligent determination as to whether the military trial would unduly complicate or interfere with the civilian criminal trial. If so, he could request a delay in the military proceedings. The competing interests of the Government and the accused could then be weighed in reaching a decision. The appellate review would be concerned with whether there had been an abuse of discretion where the request for continuance was denied. This process will satisfy the apparent conflict presented in *Pierce* and will eliminate the need for the Government to decide what action would be in the best interest of the accused.

### C. RESPONSIBILITIES OF THE MILITARY JUDGE

A motion to dismiss for denial of speedy trial is properly addressed to the military judge under article 51(b), UCMJ, and his ruling on the motion is predicated upon the exercise of his sound discretion as applied to the facts before him.<sup>142</sup> In commenting on the latitude allowed the military judge, the Court of Military Appeals has stated that his:

discretion is wide and we will not substitute our judgment as to what should have been done at the trial unless it appears the ruling was manifestly unreasonable or arbitrary. "Each ruling alleged to be erroneous must be 'separately analyzed,' according to the 'issues, facts, and circumstances' of the case." *United States v. Freeman*, 15 USCMA 126, 129, 35 CMR 98. . . .<sup>143</sup>

<sup>142</sup> See *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

<sup>143</sup> *United States v. Goode*, 17 U.S.C.M.A. 584, 586-87, 38 C.M.R. 382, 384 (1968).

A possible abuse of discretion may occur in cases where the military judge requests information on the speedy trial issue from the defense. The Court of Military Appeals has long held that an "accused is entitled to a fair hearing in which all the underlying factual issues are actually and reliably determined. . . . The responsibility therefore rests upon the law officer."<sup>144</sup> In fulfilling this responsibility, the question still remains as to how far the military judge can go in requesting information from the accused, or his counsel, that may have a bearing on the speedy trial issue. In *United States v. Brown* requiring the accused to establish specific prejudice curtailed the development of the issue of whether the lapse of 108 days from confinement to trial was due to a purposeful oppressive design or a lack of reasonable diligence on the part of the prosecution. The Court of Military Appeals held that this action by the military judge prejudiced the accused.<sup>145</sup> Dissenting therefrom, Judge Quinn noted that if the military judge is to exercise his discretion wisely, he must know whether the delay impaired any substantial right or privilege of the accused, information which the defense is in the best position to supply. Some of the factors which may be known only by the accused and are important to the issue of speedy trial are whether the accused has lost the services of witnesses, whether the burden on the defense has been increased by the delay, whether witnesses' memories have become confused, and possibly whether the accused has been under some type of mental stress.

The apparent conflict of views between the judges was settled in *United States v. Smith*.<sup>146</sup> There, after the issue of speedy trial had been raised and the Government had presented its evidence on the matter, the military judge asked the defense counsel if the accused had been injured in any way by the pretrial confinement. He also asked both the trial and defense counsel if they had additional information or evidence that they wanted to submit on this issue before he ruled on the motion. On appeal, the accused contended the burden of proving that he was denied a speedy trial had been placed upon him by

<sup>144</sup> *Id.* at 587, 38 C.M.R. at 385, citing *United States v. Schalck*, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964), and *United States v. Jackson*, 3 U.S.C.M.A. 646, 14 C.M.R. 64 (1954).

<sup>145</sup> *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

<sup>146</sup> 17 U.S.C.M.A. 55, 37 C.M.R. 319 (1967). Further guidance in the area, and support for a defendant's right to silence, is provided by *United States v. Turnipseed*, 20 U.S.C.M.A. 137, 42 C.M.R. 329 (1970), decided after the completion of this article.

the military judge. The Court of Military Appeals answered this contention:

An apparently satisfactory explanation for a particular delay might be revealed as unreasonable in the light of specific harm to the accused occasioned by the delay. . . . It is thus always relevant to consider the actual consequences to the accused of any interruption in the proceedings against him. . . . Consequently, inquiry into the matter does not itself indicate the law officer misunderstood or misplaced the burden of proof. . . .<sup>147</sup>

In still another case, the military judge, after hearing both the trial and defense counsel present oral argument on the issue of speedy trial, requested counsel for both sides to enter into a stipulated chronology showing all the time periods upon which they could agree. Upon those matters in disagreement, they were to be prepared to present evidence.<sup>148</sup> Although the issue of misplacing the burden of proof upon the accused was not raised, the decision of an Army board of review was based on the premise that the denial of the motion was correct and that the accused had not been denied a fair trial, deprived of any defense, nor prejudiced in any way. It would therefore appear that although the military judge cannot place the burden of proof or even the burden of going forward with the evidence upon the accused, after the trial counsel has produced evidence, the military judge can seek additional information from the defense that would generally be known only to the accused. Although the defense cannot be compelled to furnish information or to submit to a stipulated chronology, posing such questions to the accused by the military judge would help to insure that some factor warranting consideration is not inadvertently overlooked.

Turning to the permissible requirements that may be placed upon the trial counsel by the military judge, there is little doubt that he may be ordered to produce evidence or face the possibility of a dismissal of the charges. This follows for when the accused challenges pretrial delays as having denied him a speedy trial, the prosecution is required to show the full circumstances of the delay.<sup>149</sup> Also, as stated in *United States v. Goode*,<sup>150</sup> the military judge has the responsibility to insure that all of the underlying factual issues are "actually and reliably determined." By com-

<sup>147</sup> *Id.* at 58, 37 C.M.R. at 322.

<sup>148</sup> *United States v. Yelverton*, 40 C.M.R. 655 (ACMR 1969).

<sup>149</sup> See *United States v. Smith*, 17 U.S.C.M.A. 55, 37 C.M.R. 319 (1967); *United States v. Brown*, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962); *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959); and other cases cited in footnote 99, *supra*.

<sup>150</sup> 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968).

binning these propositions, the military judge has the authority to require the trial counsel to place into the record all available facts bearing on the issue of speedy trial which are necessary to a proper disposition of the underlying factual issues. If the evidence is not produced and it appears, absent any explanation, that an unreasonable delay has occurred, the military judge would have no alternative but to dismiss the charges.<sup>151</sup>

The preceding discussion has considered problems arising after the issue has been raised at trial. There is still the problem of what is required when the issue is not raised by the defense. Such an issue normally arises where apparently excessive delays unsatisfactorily explained in the allied papers were not unreasonably incurred and the defense is aware that the delays can be satisfactorily explained. In these situations, there is a very real possibility that the issue may be raised on appeal,<sup>152</sup> and the case returned to the trial level for further litigation. Even when the issue is not raised and the Government places a chronology of events into the record, the chronology may not adequately explain the nature of the delays in question,<sup>153</sup> again necessitating a rehearing on the issue of speedy trial.<sup>154</sup> This result could often be avoided by properly prepared documentation explaining the delays in the case notwithstanding the absence of a defense raised issue. Where the trial counsel does not take the initiative in this matter, the military judge should require litigation on the issue or insure that the record contains an adequate explanation of the delays. A careful examination of all pretrial delays is imperative and will greatly reduce needless reversals of otherwise valid convictions.

## V. THE DOCTRINE OF WAIVER

### A. AS ORIGINALLY ESTABLISHED

The first case before the Court of Military Appeals on the issue of whether an accused had been denied his right to a speedy trial because of pretrial delays involved a situation where the issue had not been raised at trial. In this case, *United States*

<sup>151</sup> See cases cited in footnote 95, *supra*.

<sup>152</sup> See *United States v. Schalck*, 14 U.S.C.M.A. 371, 84 C.M.R. 151 (1964), where the accused had been confined 96 days prior to charges being preferred and the issue was not raised at the trial.

<sup>153</sup> See *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968).

<sup>154</sup> *Id.* See also *United States v. Schalck*, 14 U.S.C.M.A., 371, 84 C.M.R. 151 (1966).

v. *Hounshell*,<sup>155</sup> the government appellate counsel urged that the accused had waived his right to a speedy trial. The court discussed this issue, stating:

The right to a speedy trial is a personal right which can be waived. If the accused does not demand a trial or does not object to the continuance of a case at the prosecution's request or if he goes to trial without making any objection to the lapse of time between the initiation of the charges and the trial, he cannot complain of the delay after he has been convicted.<sup>156</sup>

Two years later, the court, considering this issue for the second time, again held that the right to a speedy trial could be waived, stating that the right "is readily enforceable by appropriate application prior to trial. Moreover, a failure to assert it at the trial level precludes its consideration on appeal. . . ." <sup>157</sup> These cases held that the accused had to take affirmative action at the trial in order to preserve his right. One could even argue that if the accused did not demand a trial after a period of delay, he would be precluded from raising this issue even at trial. Such was the issue in *United States v. Wilson*.<sup>158</sup> Here, after being confined for 141 days, the accused first raised the issue at his trial. The court discussed the right of speedy trial in the federal courts and noted that a demand for trial was not an invariable condition precedent to asserting a motion to dismiss for lack of speedy trial. The court went on to observe that where the accused is in pretrial confinement, the doctrine of waiver "had little to recommend it." When in confinement, the accused might not know of his right to a speedy trial or what was required to perfect that right. Thus it would be unjust to infer from the absence of an objection that he consented to the delay or in fact caused it himself. However, the court went on to find that the facts did not establish that the accused had been denied his right to a speedy trial. The court's dicta was the first insight into what was to become a continual erosion of the doctrine of waiver announced in *Hounshell*. The court again entertained the waiver issue in *United States v. Davis*.<sup>159</sup> Here, it stated that when the issue is raised at trial and resolved against the accused, a subsequent plea of guilty does not bar raising the issue on appeal.

The rule, formulated by the court in these four cases, was that

<sup>155</sup> 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1965).

<sup>156</sup> *Id.* at 6, 21 C.M.R. at 132.

<sup>157</sup> *United States v. Buck*, 9 U.S.C.M.A. 290, 297, 26 C.M.R. 70, 77 (1958).

<sup>158</sup> 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959).

<sup>159</sup> 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960).

if the issue was not perfected prior to trial and raised at trial, the accused lost the right to complain of a denial of speedy trial. However, once raised at trial, a denial of the motion was reviewable on appeal despite a subsequent plea of guilty. A possible exception to the requirement to make a demand for trial existed where the accused was in pretrial confinement.

### B. AS CURRENTLY APPLIED

The first significant modification of the rule announced in *Hounshell* occurred in 1964 in *United States v. Schalck*.<sup>100</sup> There, the issue of speedy trial was not raised at trial and the accused pleaded guilty. He had been in pretrial confinement for 96 days without charges being preferred against him and both articles 10 and 33 had been violated. The Court of Military Appeals stated that the right to a speedy trial was a personal right that could be waived if not promptly asserted by a timely demand for trial. However, the court observed that a guilty plea in the federal courts only waives those issues that are not founded in due process or jurisdiction. It further held that this concept had been carried into the military law. The court continued by noting that the "issues of speedy trial and denial of due process are frequently inextricably bound together and the line of demarcation is not always clear."<sup>101</sup> Consequently, the court found the accused had not waived the issue of speedy trial by "his failure to raise the issue at trial and by his plea of guilty. . . ." <sup>102</sup> Even though the accused might waive some of the safeguards of military due process granted by Congress, the court stated that they would not waive them for him when he did not take steps to perfect the issue by making a demand or raising the issue at the trial.<sup>103</sup> After *Schalck*, it appeared that the principle of waiver by inaction did not apply to an issue of speedy trial that was founded in military due process. There still remained the possibility that issues of speedy trial not founded in military due process could be waived by the accused's inaction.

Even though this latter theory of waiver might be true, we have noted the difficulty of determining that a particular factual situation raises military due process issues.<sup>104</sup> Where the issue of

<sup>100</sup> 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

<sup>101</sup> *Id.* at 373, 34 C.M.R. at 153.

<sup>102</sup> *Id.* at 375, 34 C.M.R. at 155.

<sup>103</sup> See *United States v. White*, 17 U.S.C.M.A. 462, 38 C.M.R. 260 (1968); *United States v. Jennings*, 17 U.S.C.M.A. 114, 37 C.M.R. 378 (1967).

<sup>104</sup> See the statement by the Court of Military Appeals in *United States v.*

speedy trial is founded in military due process, it seems that the accused would have to take some voluntary action by which he knowingly intends to waive the right to assert the issue at trial and on appeal.<sup>165</sup>

The first case before the Court of Military Appeals in which there was a specified attempted waiver of the speedy trial issue was *United States v. Cummings*.<sup>166</sup> In this case, the pretrial agreement with the convening authority contained the following declaration:

The accused waives any issue which might be raised which is premised upon the time required to bring this case to trial (and specifically waives any issue of speedy trial or of denial of due process). . . .<sup>167</sup>

As noted, the Court of Military Appeals found valid speedy trial issues and rejected the attempted waiver. The court found the waiver:

misleading to an accused and repugnant to the purpose of the agreement. . . . We . . . conclude the inclusion in this agreement of a waiver of accused's right to contest the issues of speedy trial and due process are contrary to public policy and void.<sup>168</sup>

It is no answer to say the accused waived such an inquiry below, when he was operating under the effects of a palpably void consideration in his agreement with the convening authority. . . . Under the circumstances presented, prejudice to his substantial rights is clearly demonstrated. Accordingly, we reverse and remand.<sup>169</sup>

In five successive cases where the same or a similar waiver provision was incorporated in the pretrial agreement, the court held that there was no issue of speedy trial present in the case. The court reasoned that the lack of a legitimate issue of speedy trial demonstrated that the pretrial agreement waiver did

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Schalck, 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964), that the line between speedy trial and due process is not always clear and that the issues of these two concepts are often "inextricably bound together."

<sup>165</sup> See *United States v. Batson*, 30 C.M.R. 610, 615 (NBR 1960), *rev'd*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960), where the Navy board of review stated that the "Sixth Amendment to the Constitution compels a speedy trial unless that right is intentionally and consciously waived. . . ." The board went on to find a denial of the accused's right to a speedy trial. The Court of Military Appeals reversed on the ground that there had been no denial of this right but did not discuss whether the accused had waived the right to assert the issue. *But see United States v. Brady*, 17 U.S.C.M.A. 614, 38 C.M.R. 412 (1966), discussed in footnote 177, *infra*.

<sup>166</sup> 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968).

<sup>167</sup> *Id.* at 378, 38 C.M.R. at 176.

<sup>168</sup> *Id.* at 378, 38 C.M.R. at 176-77.

<sup>169</sup> *Id.* at 379, 38 C.M.R. at 178.

not compel the accused to forego a defense that might have otherwise been raised.<sup>170</sup> Because the accused was not restricted in the defense of his case, the void waiver provision did not prejudice the accused. Reading *Cummings*, together with the subsequent five cases, it becomes clear that the court did not believe that the accused could exercise a free and voluntary disposition in waiving the issue of speedy trial in a pretrial agreement.

In *Cummings*, the court stated that a plea of guilty does not waive either the right to a speedy trial or due process and cited three cases as authority for this point. The first case was *United States v. Davis*.<sup>171</sup> However, here, the court's holding did not discuss the distinction between due process and speedy trial but merely stated that the issue had been perfected below and was not waived by the subsequent guilty plea. The second case cited, *United States v. Schalck*,<sup>172</sup> made the initial distinction between due process and speedy trial by stating that speedy trial could be waived but under the adopted federal practice due process could not. The continued practice of the court in discussing this issue in the context of both the right to a speedy trial and the right to due process would seem to negate the possibility that *Schalck* stands for the proposition that all issues of speedy trial are founded in due process. As final authority for the assertion that a plea of guilty does not waive either issues of speedy trial or due process, the court cited *United States v. Tibbs*.<sup>173</sup> The only assertion in *Tibbs* concerning waiver was the statement that "[n]either the failure to demand trial nor a plea of guilty at trial deprives the accused of the protections accorded him by Articles 10 and 33 of the Uniform Code. . . ."<sup>174</sup>

It has already been established that at least some of the requirements of article 10 are within the concept of military due process and that the same can possibly be said for article 33. Even though military due process is founded in the statutory rights enacted by Congress<sup>175</sup> and can be enlarged to encompass ad-

<sup>170</sup> *United States v. Curtis*, 17 U.S.C.M.A. 478, 38 C.M.R. 276 (1968); *United States v. Dyer*, 17 U.S.C.M.A. 475, 38 C.M.R. 273 (1968); *United States v. DeShazo*, 17 U.S.C.M.A. 472, 38 C.M.R. 270 (1968); *United States v. Lance*, 17 U.S.C.M.A. 470, 38 C.M.R. 269 (1968); *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968).

<sup>171</sup> 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960).

<sup>172</sup> 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

<sup>173</sup> 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

<sup>174</sup> *Id.* at 353, 35 C.M.R. at 325.

<sup>175</sup> See *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951), and the discussion in section II of this article.

ditional rights, the Court of Military Appeals has declined to do so with at least some of the provisions of article 33. It would therefore appear that the cases cited by the court are tenuous authority for the assertion that a plea of guilty does not waive non-due process issues of speedy trial. Regardless of this, it seems that the court is now prepared to treat the issues of both speedy trial and due process in the same manner, at least insofar as concerns the application of the doctrine of waiver. If this assumption is correct, the court has completely overturned the role of waiver as originally set forth in *Hounshell*.<sup>17</sup> Whether this is in fact the result of these cases or not, the trend would seem to dictate to the discerning military attorney that all issues of speedy trial be treated as though they were founded in due process and that any attempt to waive this issue by the accused be done at trial where the military judge can ascertain on the record whether the accused freely and voluntarily undertakes that action and fully understands its consequences.<sup>17</sup> This question does not seem to be of major importance at the trial level as it will rarely be in the best interests of the accused to waive a valid issue of speedy trial. However, the theory of waiver will no longer excuse the Government's failure to explain long pretrial delays in the absence of a free and voluntary waiver by the accused. In every instance of apparently unreasonable pre-

<sup>17</sup> *But see* United States v. Gionfriddo, 39 C.M.R. 602, 605 (ABR 1968), where an Army board of review quoted the statements pertaining to waiver found in *Hounshell* and Buck and stated: "It is our view that the above quoted principles have not been overruled by the recent holdings of our military supreme court. The appellant, of course, contends that more is involved, namely, that he has been deprived of due process. . . ." The board found no deprivation of due process involved in the case. *See also* United States v. Martin, 39 C.M.R. 621 (ABR 1968), for the same language by the same Army board of review. In both cases, the board found that there was no denial of the accused's right to a speedy trial and the request for a limited rehearing on the issue was not necessary.

<sup>18</sup> *See* United States v. Brady, 17 U.S.C.M.A. 614, 38 C.M.R. 412 (1968), where the accused, in the pretrial agreement, discussed his intention of not raising any issue relating to speedy trial, but specifically provided that he was not attempting to waive his right to do so in the agreement. However, the agreement did provide that if the issue was not raised at trial, it would be the result of a deliberate and informed waiver of this right. At trial, the military judge made a detailed inquiry of the accused concerning his right to waive this issue and ascertained that the accused did intend to waive any such issue. In discussing that, the Court of Military Appeals stated: "Even were we to hold that the mere inclusion in a pretrial agreement of any reference to a waiver of the issue of speedy trial (and due process based upon the time required to bring the case to trial) was void as repugnant to public policy that would not settle the matter for the issue is personal and can be waived. . . . We so hold in this case." 17 U.S.C.M.A. at 616, 38 C.M.R. at 414.

trial delay, the Government will be required to satisfactorily explain the reasonableness of the delay or face the very real possibility of reversal of the case by the appellate courts.

## VI. CONCLUSIONS

The issues relating to a speedy trial have become increasingly important with the continuous litigation of this right at the trial level and the constant examination of pretrial delays by the military appellate courts. This fact requires that the military lawyer be knowledgeable in the law pertaining to speedy trial and continually strive for expeditious administration of all matters pertaining to military justice.

Fundamental to understanding this right to a speedy trial is a working knowledge of the various sources from which this right springs. Clearly, the right to a speedy trial is embodied in the sixth amendment of the Constitution of the United States and in articles 10, 30(b), and 33 of the *Uniform Code of Military Justice*. However, this orientation is not sufficiently definitive to provide a useful understanding of the nature of the right as applied to the military accused. It is the opinion of the author that the sixth amendment's right to a speedy trial, as interpreted and applied by the civilian courts, is of little, if any, significance to the military accused. The standards of speedy trial applied by the military courts include all of his constitutional rights as well as affording the accused a broader guarantee than that found in the civilian jurisdictions. Consequently, there is very little need for the military lawyer to argue the constitutional concept of speedy trial. The important distinction, however, lies in the area of whether the issue is founded in military due process. The greatest significance of this distinction lies with the available remedy to redress the wrong. If the accused has been denied military due process, he has not received a fair trial and is therefore entitled to have his conviction set aside. On the other hand, if the particular harm does not go to the fairness of the proceedings, the courts have been reluctant to set aside the conviction without a showing that the accused has suffered some actual prejudice as a result of the failure to meet the prescribed standards.

The standards used in measuring the fairness of the proceedings affected by pretrial delays are general in nature and offer very little help in formulating any specific rule to be applied to all factual situations. Whether or not the Government has pro-

ceeded with reasonable diligence is a subjective concept and varies depending on the attendant facts and circumstances. In the author's opinion, concepts of equity or fair play are the governing principles by which the accused's right to a speedy trial is measured. After viewing the totality of the circumstances and their consequences, the primary question to be answered is whether the accused has been fairly treated, and if not, what is the fair and equitable result that should be reached. By recognizing this approach to the problem, the trial and defense counsel can do much to assist the military judge by properly preparing and presenting all the facts which relate to this issue: was the accused treated fairly in light of the needs of the Government?

In attempting to answer this question, the accused can be of considerable assistance to his own cause by perfecting the assertion of a denial of a speedy trial. Where actual prejudice exists or pretrial delays have resulted in unusual consequences to the accused, such matters should be brought before the military judge and fully explored on the record. Defense caused delays should be kept to an absolute minimum and consideration should be given to making a strategically timed demand for trial and for release from any pretrial restraint. The interests of an accused can be best served by an imaginative counsel who is thoroughly prepared on all of the facts of the case and the applicable law. Similarly, careful expeditious processing of the charges by the Government will do much toward eliminating a large volume of otherwise unnecessary litigation in this field. It will be a rare case that contains a legitimate issue of speedy trial that is not the product of a careless or indifferent attitude on the part of a person responsible for some phase of the administration of military justice. This is not to say that most litigated issues of speedy trial are the product of any intentional act of misconduct directed towards the accused. More often it is the result of a lack of legal supervision and training at the lowest command levels. The failure to take immediate steps often stems from an uninformed system of establishing priorities by persons inexperienced in matters pertaining to military justice. Command emphasis by the general court-martial convening authority, coupled with continuous detailed staff supervision and assistance by the staff judge advocate will greatly reduce pretrial delays. With this backing, the trial counsel's burden becomes much easier to satisfy. The full and complete explanation of all pretrial delays will be readily available and the reasonableness of such delays will follow almost as a matter of course.

Although the military judge has little direct control over the administration of military justice matters, he can exert a substantial influence in this area through indirect means. The degree of interest and concern that a military judge gives to the issues of speedy trial during the court-martial proceedings cannot help but have a corresponding effect on the degree of interest that is focused on this problem throughout the preparation of the case for trial. Such matters are rightfully the concern of the military judiciary, not only from the standpoint that the right to a speedy trial is a substantial right of the accused, but also from the fact that the Government has an interest in insuring that the public interest is promoted by a fair and proper trial. All persons connected with the administration and trial of criminal charges have a direct responsibility to insure that the proceedings are conducted within the meaning and the spirit of the law.

It is therefore important that the newly developing trends be continually kept in mind and deviations therefrom be avoided. Possibly one of the most important extensions of military due process that has recently come to light in the area of speedy trial is the indication that a military accused may have an affirmative right to the assistance of appointed counsel at the time of his pretrial confinement, regardless of the existence of any custodial interrogation. Even though it can be properly asserted that the accused has not been affirmatively harmed merely from the lack of counsel at the commencement of his pretrial confinement, it must be recognized that this rule has now been suggested by the military appellate courts. Where actual prejudice results from the lack of counsel, there is a strong possibility that the accused will be found to have been denied military due process. A second area of the law of speedy trial that has been the subject of much appellate criticism is the failure to comply with the mandates of article 33. History has often demonstrated that after repeated warnings without positive results, appellate courts find it necessary to impose the sanction of setting aside convictions in order to secure the desired course of action. Unless the appellate courts are able to discern that efforts are being made to comply with the provisions of article 33, the author believes that its requirements will be incorporated within the concept of military due process, necessitating the reversal of convictions for noncompliance.

The development of the law of speedy trial has also brought the doctrine of waiver of this right to a much narrower scope

than originally expressed. At present it appears that the accused will be required to make a free and voluntary statement of intent to waive this right and be subjected to examination thereon by the military judge before the military appellate courts will allow the issue to be waived. It is therefore important that all possible or potential issues relating to pretrial delays be litigated or adequately explained in the record of trial.

After a careful examination of the cases dealing with issues of speedy trial, it becomes evident that the formulation of any specific rule or guidance is almost impossible. It is perhaps this difficulty that partially explains the growing concern in the military that unless an accused is brought to trial within one to two months from the date of the commission of the offense there is a substantial possibility that the accused will have been denied a speedy trial. Another view that seems to have acquired common acceptance is that article 10 requires the immediate preference of formal charges and the completion of the formal notice to the accused of the specific nature of the charges. It is asserted that both of these ideas are not supported by the military appellate courts and that the military rule of speedy trial is not judged by hard and fixed standards. Rather, the case against the accused is to be processed in an expeditious manner that is reasonable under the existing facts and circumstances. The law does presuppose that those charged with this responsibility will act conscientiously with a disposition toward judicial impartiality and fairness toward the accused. If these standards are applied, the accused will, in law and fact, receive a speedy trial.



# A SURVEY OF THE NORMATIVE RULES OF INTERVENTION\*

By Captain James E. Bond\*\*

*The Vietnam War has focused considerable scholarly attention on the international law aspects of military intervention. The author examines and evaluates these varying views. He suggests that the recently articulated norms of intervention have much in common with their historical predecessors.*

## I. INTRODUCTION

Though no one doubts that the control of intervention<sup>1</sup> is today a major public order problem, many question whether international law is a useful means of control. The diplomat turned historian and sage George Kennan scores as "the most serious fault of our past policy formulation . . . the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints."<sup>2</sup> Kennan and his fellow-traveling realists,<sup>3</sup> viewing international law as a set of motherly no-noes, do not understand the international legal proc-

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\*The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup>"Intervention" is a chameleon-like term whose meaning always reflects the sense in which it is used and often the policy biases of the one using it. See Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1061, 1062-67 (R. Falk ed. 1969), and Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 212-17 (1969). Throughout this article I mean by intervention the attempt by one country to exert influence on events in another country by employing military force within or against the territory of that other country.

<sup>2</sup>G. KENNAN, AMERICAN DIPLOMACY 1900-1950, at 95 (1951).

<sup>3</sup>Chief among his *realpolitik* cohorts is Professor Hans Morgenthau. See H. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY (1951).

ess and little appreciate the diverse roles law and lawyers play. While they recognize that the economist, the political scientist, the historian, and the diplomat should all sit around the policy-planning table, they regard the international lawyer as the extra cook who spoils the broth. The realists see international law much as John Austin did a century ago: as nothing more than positive morality.<sup>4</sup> Former Secretary of State Dean Acheson, who, perhaps to his regret, is himself reputed to be a distinguished international lawyer, reminds us that moral considerations are irrelevant in policy-making:

[T]hose involved in the Cuban crisis of October, 1962, will remember the irrelevance of the supposed moral considerations brought out in the discussions. Judgment centered about the appraisal of dangers and risks, the weighing of the need for decisive and effective action against considerations of prudence; the need to do enough, against the consequences of doing too much. Moral talk did not bear on the problem.<sup>5</sup>

That international law presumes major states will sacrifice their national interests to its commands and refrain from wading into the familial squabbles of other states only proves to the skeptics that Mr. Bumble was right: the law is an ass.

## II. EDUCATED EXPECTATIONS: WHAT CAN NORMS OF INTERVENTION DO?

The international lawyer must answer that one can criticize the utility of interventionary norms only in the context of "educated expectations."<sup>6</sup> That states will *always* act within the applicable legal norms is not within the educated expectations of the sophisticated scholar.

The surprise is not that states occasionally violate international law but that they obey it at all. Before the Hague Conference agreed in 1907 that states could not call out their gunboats against defaulting bondholder states,<sup>7</sup> international law imposed no restraints on a state's right to use force.<sup>8</sup> There prevailed a

<sup>4</sup>"Much of what is called international law is a body of ethical distillation, and one must take care not to confuse this distillation with law." Acheson, *Remarks*, 1968 PROC. AM. SOC. INT'L L. 13, 14.

<sup>5</sup>Acheson, *Ethics in International Relations Today*, THE VIETNAM READER 13 (M. Raskin & B. Fall eds. 1965).

<sup>6</sup>I confess "stealing" the phrase "educated expectations" from Professor Inis Claude.

<sup>7</sup>Article I, A Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 89 (J. Scott ed. 1915).

<sup>8</sup>O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 4-7 (1965).

pervasive sense—similar to the parental sigh that boys will be boys—that states will be states; and nothing much could be done about it. A little war, after all, never hurt anybody.<sup>9</sup> Even the League of Nations, often cited as the first significant attempt to circumscribe a state's right to resort to force, did not prevent members from exercising their sovereign right to wage war. All the Covenant asked was that states think before firing the first cannonball; it contained, for example, a number of cooling-off provisions designed to prevent accidental war.<sup>10</sup> Not until 1928 did states take the first step toward outlawing the use of force in international relations when they signed the Kellogg-Briand Pact, which declared:

The High Contracting Parties . . . condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."

The draftsmen of the United Nations Charter mixed the procedural restrictions of the League Covenant with the substantive prohibitions of the Kellogg-Briand Pact and gave us the recipe with which we have tried to brew world peace in our time. States have occasionally balked at swallowing what smelled to them of hemlock. Or, to change the figure, they have refused to play the Charter game.

It is not so much that one cannot teach an old dog new tricks as that it takes time to teach any dog new tricks. Our own domestic experience with civil rights legislation should remind us that law which contradicts long-established community prac-

<sup>9</sup> The Western philosophical view that struggle and conflict are the natural order is at least as old as Hobbes' *Leviathan* and as new as Ardrey's *The Territorial Imperative*. Geopolitik, a grotesque perversion of this view, was developed by German scholars and provided a theoretical justification for Hitler's expansionist wars. See DORPALEN, *THE WORLD OF GENERAL HAUSHOFER* (1952).

<sup>10</sup> *E.g.*, LEAGUE OF NATIONS COVENANT art. 12, para. 1 provided: "The members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council." BASIC DOCUMENTS OF THE UNITED NATIONS 298 (L. Sohn ed. 1968).

<sup>11</sup> Article I, The General Treaty for the Renunciation of War, II INTERNATIONAL LAW 300, 301 (1962). Though some scholars have questioned whether even the Kellogg-Briand Pact outlawed aggressive war (*e.g.*, Schwarzenberger, II INTERNATIONAL LAW 487-94 (1968)), the Nuremberg Tribunal cited the Pact as authority for its conclusion that wars of aggression were illegal in 1939. I TRIAL OF THE MAJOR WAR CRIMINALS 218 (1947). Professor Wright has traced the history of man's efforts to prohibit aggressive war in *THE ROLE OF LAW IN THE ELIMINATION OF WAR* (1961).

tices is often initially ignored or flaunted. Only over time will states gradually accept these restraints on their freedom of action.

Not only are the substantive rules of intervention new, they are undeveloped and unrefined. There is first the general prohibition on the use of force in international relations. Article 2(4) of the U.N. Charter states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.<sup>13</sup>

To this rule the Charter permits two exceptions: (1) states may use force pursuant to a Security Council determination under chapter VII;<sup>13</sup> (2) states may also use force in "self-defense" against an "armed attack."<sup>14</sup> These Charter abstractions are not self-defining, of course; but there is a limit to which even the most imaginative definition can give specific content to such generalities. Consequently, they do not tell us when and where and how states may intervene in internal conflicts.

Yet scholars continue to hang their arguments on these theoretical pegs. Those condemning an intervention point to the article 2(4) prohibition on use of force;<sup>15</sup> those justifying an intervention point to the self-defense rationale.<sup>16</sup> These divergent interpretations may only illustrate Llewelyn's view that all legal norms travel in pairs of complementary opposites. Legal norms, however, come not in pairs but in threes: "either," "or," and "maybe." The "maybe" norms develop out of the tension between the "either" and "or" norms. "Maybe" norms represent a resolution of the competing policies reflected respectively by the "either" and "or" norms and are therefore more specific and refined and provide greater guidance in particular situations.

Again, the inadequacy—indeed, almost absence—of "maybe" norms of intervention should not surprise us. In our domestic legal system legislators, administrators, and judges develop "maybe" norms by deciding concrete disputes. Each determination is not, however, ad hoc because disputes arise so frequently that the decision-maker can identify broad categories of "like" cases to which the refined norm will apply. In the international legal system disputes arise—by comparison, at least—infrequently; and each case is sufficiently unique to conclude that it is unlike

<sup>13</sup> U.N. CHARTER art. 2, para 4, I INTERNATIONAL LAW 176 (1964).

<sup>14</sup> U.N. CHARTER arts. 39-42, I INTERNATIONAL LAW 183 (1964).

<sup>15</sup> U.N. CHARTER art. 51, I INTERNATIONAL LAW 185 (1964).

any other. Consider, for example, the United States' successive legal interpretations of "action" in article 53 of the United Nations Charter, which provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ." <sup>17</sup> When Cuba first protested her expulsion and the economic sanctions voted by her sister O.A.S. states as unauthorized "enforcement action," <sup>18</sup> the U.S. contended that only military force constituted "enforcement action." <sup>19</sup> During the Cuban missile crisis the O.A.S. employed military force. Was this then enforcement action? "No," argued the United States, because the action was only recommendatory; and participation was therefore voluntary. <sup>20</sup> In the Dominican crisis the U.S. pointed out that since there was no government to coerce, the intervention was not enforcement action. <sup>21</sup> Moreover, there is no centralized institution which regularly passes upon interventionary claims. Today the United States Government decides whether it will dispatch Marines to Santo Domingo; tomorrow the Soviet Union decides whether it will roll tanks into Prague. I do not mean to suggest that the successive U.S. rationalizations of its conduct in the Cuban and Dominican crises were unpersuasive; or that, were the same body to decide the merits of U.S. and Soviet interven-

<sup>17</sup> E.g., Professors Brownlie and Wright argue that art. 2(4) abolished the customary right of humanitarian intervention. See I Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 298-301 (1963); Wright, *The Legality of Intervention under the United Nations Charter*, 1957 *Proc. Am. Soc. Int'l L.* 79, 88.

<sup>18</sup> E.g., A. Thomas and A. Thomas, *The Dominican Republic Crisis 1965—Legal Aspects*, IX *HAMMARSKJOLD FORUM PROC.* 11-18 (1967). The Thomases argue that intervention to protect nationals is an act of self-defense under article 51 of the United Nations Charter. Such an interpretation may stretch the Charter language beyond the limits of constitutional elasticity. A more sophisticated extrapolation of policy guidelines from the Charter norms is found in Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, *ESSAYS ON INTERVENTION* (R. Stanger ed. 1964).

<sup>19</sup> U.N. CHARTER art. 53, I *INTERNATIONAL LAW* 186 (1964).

<sup>20</sup> Letter from Representative of Cuba to President of the Security Council, 22 Feb. 1962, 17 *U.N. SCOR*, Supp. Jan.-Mar. 1962, at 82, *U.N. Doc. S/5080* (1962).

<sup>21</sup> 17 *U.N. SCOR*, 991st Meeting 18-19 (1962).

<sup>22</sup> See Department of State Memorandum: *Legal Basis for the Quarantine of Cuba*, in A. CHAYES, T. EHRLICH, AND A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS, DOCUMENTS SUPPLEMENT* 552 (1969). The evolving relationship between the U.N. and the O.A.S. is studied in MacDonald, *The Developing Relationship between Superior and Subordinate Political Bodies at the International Level: A Note on the Experience of the United Nations and the Organization of American States*, 2 *CAN. Y.B. INT'L L.* 21 (1964).

<sup>23</sup> Report of the Security Council, 16 Jul. 1964-16 Jul. 1965, 20 *GAOR Supp. 2*, at 117, *U.N. Doc. A/6002* (1965). Cf. *The Certain Expenses Case*, [1962] *I.C.J.* 151.

tions in the Dominican Republic and Czechoslovakia, it would find both either justified or unjustified. I rather wish to emphasize that the episodic nature of international legal problems and the diffuse character of the international legal system mean that there are fewer opportunities to develop refined norms of intervention.<sup>22</sup> Law must speak not only to Holmes' bad man but to the puzzled man (or, as in our case, state) as well; and where the law does not speak clearly, the state will act without regard to it.

If states will not invariably follow the rules of international law, what can we expect from any interventionary norms? We may expect, first, that they will provide after-the-fact rationalizations for decisions made for a variety of reasons other than the intrinsic lawfulness of the act. Cloaking one's action in the rhetoric of legality is important because people at home and abroad expect governments to act legally.<sup>23</sup> A lawyer must often argue with wit and imagination, a straight face and reasonable voice, that proposition which best serves his client's case; and it helps to have a grab bag of legal arguments from which to choose.

Being a mouthpiece is not, however, a lawyer's sole function as an old chestnut about Mike the burglar will show. Mike, caught redhanded with the goods, was haled into court. Asked if he wanted a lawyer, Mike replied: "No. It's too late now—I needed a lawyer when I was planning to rob the joint. If I'd had a good lawyer then, you wouldn't have caught me with the goods." A lawyer's chief job is to advise his client on his future conduct and plans. His role is no different when his client is a government. International law often embodies certain idealized concepts

<sup>22</sup> That the international legal process is diffuse does not mean that it completely lacks established decision-makers and procedures. For a sophisticated analysis of the international legal system, see McDougal, Lasswell, & Rusman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (2 pts 1967). See Cristol and Davis, *Maritime Quarantine: the Naval Interdiction of Offensive Weapons and Associated Material to Cuba*, 1962, 57 AM. J. INT'L L. 525 (1963), for an interesting attempt to demonstrate how a particular international event generates a rule of international law. The authors argue that "the international decisional process was provided with an opportunity to construct a new rule derivable from preexisting and well-known legal principles, namely, maritime quarantine is a collective peaceful process involving limited coercive measures interdicting the unreasonable movement of certain types of offensive military weapons and associated material by one state into the territory of another." *Id.* 527.

<sup>23</sup> The "law habit" conditions authorities to act legally as well as the people to expect that their leaders will act legally. Professor McDougal is talking about the same idea when he describes law as "the process of authoritative decision." McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 2 (1966).

about the kind of world in which we would like to live; and unless the lawyer feeds such long-term considerations into the decision-making process, the pressured decision-maker may adopt disastrous policies.<sup>24</sup> It may be true that in the long run we will all be dead. The challenge is to survive the short run. Second, we may, therefore, expect that the norms will provide guidance to our modern Hamlets,<sup>25</sup> who must decide whether to intervene.

We may finally expect interventionary norms to serve as an international language. Professor Farer puts the point succinctly:

It [international law] provides a highly necessary medium for communication. Demands and objections can be transmitted in terms which have some agreed content.<sup>26</sup>

An example will prove the assertion. During the Cuban missile crisis President Kennedy communicated his limited aims to Chairman Khrushchev through international law. When the President avoided using "blockade," which carried act of war connotations, and chose instead "quarantine" to describe the U.S. act, he was telling the Russian leader that he neither intended to eliminate Soviet influence nor to "take Cuba away from Castro" <sup>27</sup> but only to prevent the installation of offensive missiles on that island. The conduct of the quarantine itself was a line of communication between the President and Khrushchev.<sup>28</sup>

In such circumstances the international lawyer must draw what Thomas Ehrlich elegantly styles "the measuring line of occasion."<sup>29</sup> More prosaically, the lawyer must develop norms that tell states when and where and how they may intervene in internal conflicts.

<sup>24</sup> See Falk, *Six Legal Dimensions of the United States Involvement in the Vietnam War*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 216, 219-31 (R. Falk ed. 1969).

<sup>25</sup> One who doubts the agony of decision-making in the nuclear era should read R. KENNEDY, THIRTEEN DAYS (1969).

<sup>26</sup> Farer, *Harnessing Rogue Elephants: A Short Discourse on Intervention in Civil Strife*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1089, 1107 (R. Falk ed. 1969). Rosalyn Higgins, who also considers international law "a common language," nevertheless points out that it breaks down "where the reiteration of legal principles . . . is inappropriate to the facts." Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 3 (1970).

<sup>27</sup> T. SORENSON, KENNEDY 682 (1965).

<sup>28</sup> Brower, *McNamara: Seen Now, Full Length*, LIFE, 10 May 1968, at 78.

<sup>29</sup> Professor Ehrlich borrowed his phrase from a Psalm in the Dead Sea Scrolls: "I will set a sober limit to all defending of faith and exacting of justice by force. I will bound God's righteousness by the measuring line of occasion." Ehrlich, *The Measuring Line of Occasion*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1050 (R. Falk ed. 1969).

### III. TRADITIONAL NORMS AID WIDELY RECOGNIZED GOVERNMENT OR "DO YOU BELONG TO THE COUNTRY CLUB?"

Traditional international law provided one measuring line: third party states could always aid widely-recognized governments but never insurgents. A footnote to this rule warned that once insurgents became belligerents the third party state could aid neither.<sup>20</sup> And how does one tell a belligerent from an insurgent if one bumps into him in the jungle? There are five litmus paper tests: (1) are there general hostilities?; (2) do the rebels act like an army?; (3) do they have an effective government?; (4) do they control substantial territory?; and (5) do third states recognize the rebels as belligerents?<sup>21</sup> If the answer to all five questions is "yes," one says: "A belligerent, I presume." The Confederacy during the American Civil War is the classic example of a belligerency.

The traditional rule has its advantages. It fosters stability because it reinforces legitimate authority. Like the house gambler who has unlimited chips, the government always wins in the long run because it can draw on foreign assistance.

The traditional rule also reflects one of the basic theoretical constructs of the international system: the sovereign equality of states. Although traditional doctrines of sovereignty are beginning to crumble at the edges, the idea that all states are "entitled to the same degree of respect and recognition" remains a fundamental basis for international legal order.<sup>22</sup> Established governments usually regard insurgents as outlaws. They would naturally consider another state's assisting the insurgents an unjustifiable interference with their sovereign right to capture and punish common criminals. The whole reason for requiring states to stand aside once the insurgents achieve the status of belligerents is that there are now two "states" where once there was one, and both merit equal treatment.

Unfortunately, the traditional rule has several disadvantages. It is ambiguous, and Professor Farer has rightly pointed out that a rule "swollen with the potential for conflicting interpreta-

<sup>20</sup> II OPPENHEIM, II INTERNATIONAL LAW 250 (7th ed. H. Lauterpacht 1952). Professor Friedmann considers the traditional rule the "majority rule." Friedmann, *Intervention, Civil War and the Role of International Law*, 1965 PROC. AM. SOC. INT'L L. 67, 72.

<sup>21</sup> II OPPENHEIM, *supra* n. 30, at 249.

<sup>22</sup> Friedmann, *supra* n. 30, at 67.

tions" encourages violations.<sup>55</sup> When is government widely recognized? Do the litmus paper tests objectively distinguish belligerents from insurgents, or does the rebel status in fact depend on the subjective evaluation of the official answering the questions? Although Judge Lauterpacht regarded recognition as an objective act,<sup>56</sup> most scholars agree that it is a subjective determination.<sup>57</sup> Some have therefore urged that the U.N. be charged with the collective responsibility for recognizing states and other groups like belligerents.<sup>58</sup> Though adoption of the proposal would not moot disputes over status, it would provide a single authoritative decision. And states do violate the rule. The Russians take pride in supporting insurgent groups; and while the C.I.A. modestly denies winning revolutions, the U.S. does not invariably support the Swiss bank account set either.<sup>59</sup> A rule honored only in the breach is scarcely better than no rule at all.

Moreover, the rule may undergird the status quo, and the status quo enjoys little status in this revolutionary age. One need not favor wars of national liberation to realize that the shot fired at Concord Bridge still echoes around the world. In many backward and undeveloped countries revolution alone produces reform and progress. A rule which invariably favors the entrenched elite makes little policy sense, for it may promote stability at an undesirable cost in self-determination and lost human rights.<sup>60</sup>

#### IV. INTERVENTION TO PROTECT THE LIVES AND PROPERTY OF NATIONALS AND HUMANITARIAN INTERVENTION OR "KEEP 'EM IN THEIR PLACE"

The nineteenth century produced another interventionary norm: a nation may intervene in another country to protect the

<sup>55</sup> Farer, *Intervention in Civil Wars: A Modest Proposal*, I THE VIETNAM WAR AND INTERNATIONAL LAW 509, 514 (R. Falk ed. 1968).

<sup>56</sup> H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1948).

<sup>57</sup> Kunz, *Critical Remarks on Lauterpacht's Recognition in International Law*, 44 AM. J. INT'L L. 713 (1950).

<sup>58</sup> See P. JESSUP, *A MODERN LAW OF NATIONS* 46 (1948). Professor Moore has recently reasserted the desirability of collective recognition machinery. Moore, *The Control of Foreign Intervention*, *supra* n. 1, at 341.

<sup>59</sup> Richard Barnet lists as examples of U.S. support of "liberal and even leftist elements" C.I.A. assistance to the revolutionaries in Algeria, Mozambique, and South Africa. Barnet, *Patterns of Intervention*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1162, 1166 (R. Falk ed. 1969).

<sup>60</sup> Professor Moore may have unwittingly captured the rule's illusory effect by characterizing it as a Maginot Line for the status quo. Moore, *The Control of Foreign Intervention in Internal Conflict*, *supra* n. 1, at 315. For though it does indeed appear to favor legitimate authority, it will not always or even

lives and property of its nationals.<sup>40</sup> Whether the rule, having grown up in the colonial era when Western powers needed a justification for rescuing the local representative of Standard Oil from the native cooking pot,<sup>41</sup> has survived the accession into the international community of those very colonies may be questioned. Professor Brownlie has grave reservations about the rule, which he believes is unwise and untenable and at a minimum is no longer applicable to property.<sup>42</sup> Despite such misgivings, the rule enjoys considerable vitality. The State Department, for instance, rested its legal case for our intervention in the Dominican Republic on the familiar ground that it was sending Marines ashore "to protect the lives of U.S. nationals. . . ."<sup>43</sup>

The rule has obvious advantages. It has a humane purpose: to save the lives of innocents. The argument that foreign nationals should enjoy no greater protection than local citizens is unpersuasive when equal protection means no protection. The protection rationale justifies intervention in no greater force and for no longer time than is necessary to secure the evacuation of the endangered nationals. The purpose narrowly circumscribes exercise of the right; and properly conducted, intervention for this purpose does not influence the outcome of the on-going struggle.<sup>44</sup> Consequently, the intervention does not enlarge, prolong, or intensify the conflict itself.

It is difficult to see disadvantages to the rule though perhaps it may ruffle the feathers of sensitive sovereigns and fan native

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*usually* prevent the collapse of government. Throughout the third world, government is often so weak that even a foreign life line will not save it from drowning. And the rule does not even guarantee that major powers will toss out a life saver to a floundering government. While the rule permits aid to widely recognized government, it does not require it.

<sup>40</sup> Lauterpacht states the rule broadly: "The right of protection over citizens abroad, which a state holds, may cause an intervention by right to which the other party is legally bound to submit and it matters not whether protection of the life, security, honor, or property of a citizen abroad is concerned." I. OPPENHEIM, *INTERNATIONAL LAW* 309 (8th ed. H. Lauterpacht 1955).

<sup>41</sup> One who thinks the image is rhetorical should examine a State Department memorandum listing the instances in which the President dispatched troops to a third country. On one occasion he did so "to punish natives for the murder of a white man." 23 DEPT STATE BULL. 173 (1950).

<sup>42</sup> Brownlie, *supra* n. 15, at 300.

<sup>43</sup> Unpublished Department of State memorandum on the *Legal Basis for United States Actions in the Dominican Republic*, in A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 1179 (1969).

<sup>44</sup> For this reason some scholars do not classify it as intervention at all. Lieutenant Commander Harlow labels the act "nonpolitical" intervention or "interposition." Harlow, *The Legal Use of Force . . . Short of War*, U.S. NAVAL INST. PROC. 89, 91 (Nov. 1966). Cf. D. O'CONNELL, *I INTERNATIONAL LAW* 326 (1955).

chauvinism. Chayes, Erlich, and Lowenfeld nevertheless raise some disturbing questions about the doctrine in their casebook:

But consider some of the consequences. Under such a doctrine, could state A prohibit entry of state B's nationals because at some point state B might consider its nationals in A were threatened and might move in to protect them? If so, what happens to the objectives of relatively free multilateral interchange of people, money and goods? Conversely, does the doctrine provide a basis for state A to prohibit its own nationals from going to state B, since they might get into trouble from which state A would find it necessary to rescue them by military force? "

Perhaps more serious is the suspicion that intervention is never neutral. Like the ripples which emanate from a stone dropped in a pond, the effects of intervention radiate in decreasing but nevertheless significant impact. That this is so explains another reservation about the rule. It may be invoked as an excuse to justify intervention for purposes other than the protection of nationals.

The right of humanitarian intervention, though similar, has wider application. Professor Lillich has defined humanitarian intervention as the use of forcible self-help to protect nationals of third party states and individuals and groups of individuals against their own states.<sup>43</sup> Scholars built into the norm a shock-the-conscience test: intervention was justified only when the target state violated some minimum international law standard.<sup>44</sup> One of the most recent examples of humanitarian intervention was the joint Belgian-American airlift in the Congo, where the rebels held two thousand European hostages whose hearts they threatened to wear as fetishes and with whose skin they vowed to clothe themselves.

Although Professor Lillich concludes that "the doctrine . . . [is] so clearly established under customary international law that only its limits and not its existence is subject to debate,"<sup>45</sup> one may prefer not to endorse its use. First, the rule is ambiguous and therefore, as we have agreed earlier, subject to abuse. While scholars have recently indulged in congratulatory back-slapping over the post-World War II codification of human rights, there is still today no uniform code of human rights; and it remains un-

<sup>43</sup> A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* n. 42, at 1184 (1969).

<sup>44</sup> Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 209 (1969).

<sup>45</sup> H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 32 (1950).

<sup>46</sup> Lillich, *supra* n. 45, at 210.

clear for precisely what acts a state could intervene.<sup>16</sup> Shedding crocodile tears of humanitarian concern, a state might intervene for other motives. Recognizing its susceptibility to abuse, proponents have articulated a variety of criteria by which to judge the legitimacy of humanitarian intervention.<sup>17</sup> All emphasize the importance of an invitation by authorities. Is it likely that the Turks in the late 1800's or the Russians in 1891 and 1905 would have invited the powers criticizing their respective treatment of Christians and Jews to come in and shape up their governments? As likely as it is that South Africa will request the assistance of the O.A.U. in insuring fair treatment of its black majority. One can imagine situations in which states might request help in protecting their citizens, as where, for example, they are unable to maintain order; but one cannot assume that authorities will issue a trumpet call in all cases: first, there may be no one around to shout "help"; second, the government may be deliberately pursuing a policy which violates human rights.

Writers have also argued that the intervention should be limited in scope, duration, and force. If they mean simply to underscore the accepted idea that all force must be used proportionally, they have said nothing new. One suspects, however, that they wish thereby to sidestep the charge that humanitarian intervention aims at changing the palace guard. But if it is the government that is violating its citizens' human rights, how except by the reform of the government could humanitarian intervention accomplish its purpose? One may airlift two thousand Europeans out of the Congo; one cannot airlift all the native blacks out of South Africa. Only reform of the government would remedy the plight of blacks in South Africa. The difficulty of successfully executing such a reform in the latter situation may justify not exercising the right of humanitarian intervention, but it cannot make exercise of the right illegal. Such a conclusion is tantamount to saying that one has the right of humanitarian intervention unless the abuse is particularly grave and long-standing.

Finally, all the writers regard disinterestedness as a desirable factor in the equations. Professor Lillich is at least honest enough to admit, albeit in a footnote, that this last requirement is "some-

<sup>16</sup>*Id.* at 205-06. One is reminded of Roling's comment in his 1960 Hague Lectures: "The road to international hell is paved with good conventions." Roling, 100 HAGUE ACAD. RECUEIL DES COURS 445 (1960, II).

<sup>17</sup>See Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 347-51 (1967); Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order*, 43 DEN. L.J. 439, 475 (1966); and Moore, *The Control of Foreign Intervention in Internal Conflicts*, *supra* n. 1, at 264.

what naive." <sup>50</sup> Congresses do not vote appropriations, and Presidents do not order divisions overseas unless they perceive some benefit to the national interest. Rather than bemoan such selfishness, one ought to persuade national leaders that humanitarian intervention is in the country's self-interest and then be thankful when its satisfaction coincides with the protection of basic human rights.

#### V. MODERN NORMS: NO TACTICAL PARTICIPATION OR "YOU CAN FIGHT TO THE LAST NATIVE"

Believing the traditional norms inadequate, Professor Farer has suggested "a modest" rule for "harnessing rogue elephants." He advocates a no-tactical-support rule:

In concrete terms this means that a country could not send its own forces on patrol in support of indigenous military units. Indeed, its forces could not even enter a zone in which combat with enemy units was foreseeable, either to fight, advise, or transport.<sup>51</sup>

Chief among the rule's numerous advantages is that it may harmonize the need felt by all the major powers to influence the outcome of internal struggles with their desire to avoid exploding these civil conflicts into World War III. It is, in short, a rule that would permit the superpowers to fight proxy wars without risking that one or the other would blink in an eyeball to eyeball confrontation. It reflects current Soviet practice in the Middle East and is consistent with the United States post-Vietnam policy outlined in the so-called Nixon Doctrine. The rule also limits destructiveness because native troops rarely know how to use sophisticated weapons.<sup>52</sup> They can blow poison darts, but they can't fly B-52's; and while the former are illegal under the game rules of war, they wreak far less destruction than do bomber raids. The rule has still another virtue. It may facilitate settlement of the conflict, for once a major power has committed troops to battle, domestic pressure builds for victory at all costs.<sup>53</sup>

The no-tactical-support rule is not without its drawbacks, however. Professor Moore has observed that the threshold of tactical

<sup>50</sup> Lillich, *supra* n. 45, at 218-19 (1969).

<sup>51</sup> Farer, *Intervention in Civil Wars: A Modest Proposal*, *supra* n. 33, at 518.

<sup>52</sup> The Soviets were learning this lesson in the Middle East at approximately the same time the Americans were learning it in Southeast Asia.

<sup>53</sup> For an interesting and prophetic analysis which concludes that the irreversible psychological commitment is made when the first advisors are sent, see F. HARPER, *IN SEARCH OF PEACE* (1951).

participation is both too high and too low.<sup>44</sup> What some praise as a plus, Moore condemns as a minus: the rule legitimates a wide range of interventionary activity. Though the capacity of even superpowers to sustain several insurgencies simultaneously is limited, Moore sees the Farer rule as giving them carte blanche to peddle revolution everywhere. While Professor Moore probably exaggerates the evil consequences, he makes a persuasive debater's point. More serious is his point that the Farer rule would prohibit desirable intervention, particularly humanitarian intervention.

#### VI. NEUTRAL NON-INTERVENTION OR "KEEP YOUR NOSE OUT OF IT"

Another essentially recent normative suggestion is the neutral non-intervention rule although Hall first enunciated the concept some time ago:

Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organs of the state from managing the state affairs in its own way. Supposing it, on the other hand, to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is doubt as to which side would ultimately establish itself as the legal representative of the state.<sup>45</sup>

One cannot, in short, aid either the established government or the insurgents.

The neutral non-intervention norm is consistent with the general U.N. Charter prohibition on use of force in international relations and the few particular General Assembly and regional organization pronouncements on intervention. On 21 December 1965, the General Assembly declared:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>46</sup>

<sup>44</sup> Moore, *The Control of Foreign Intervention in Internal Conflict*, *supra* n. 1, at 321-24.

<sup>45</sup> W. HALL, *A TREATISE ON INTERNATIONAL LAW* 347 (8th ed. 1924).

<sup>46</sup> General Assembly Declaration on the Inadmissibility of Intervention, I DOCUMENTS ON INTERNATIONAL LAW FOR MILITARY LAWYERS 15 (1965).

The Assembly resolution only echoed the sentiments already expressed in the Charters of the Warsaw Pact and the Organization of American States. Article 8 of the Warsaw Pact states:

The Contracting Parties declare that they will act in a spirit of friendship and co-operation to promote the further development and strengthening of the economic and cultural ties among them, in accordance with the principles of respect for each other's independence and sovereignty and of non-intervention in each other's domestic affairs."

The prohibition on intervention is even more explicit in articles 15 and 17 of the O.A.S. Charter:

Article 18[15]. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

. . . .

Article 20[17]. The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."

"General, ergo, meaningless," rail critics.<sup>59</sup> Though indeed general, the provisions are explicit and readily understood. All intervention is impermissible.

On the one hand, critics charge that the rule is unenforceable: its reach exceeds its grasp.<sup>60</sup> The pattern of recent crises bears out this criticism: Lebanon, Cuba, the Dominican Republic, Vietnam, Hungary and Czechoslovakia, and Yemen. One suspects the

<sup>59</sup> Treaty of Friendship, Co-operation and Mutual Assistance between the People's Republic of Albania, The People's Republic of Bulgaria, The Hungarian People's Republic, The German Democratic Republic, The Polish People's Republic, The Romanian People's Republic, The Union of Soviet Socialist Republics and the Czechoslovak Republic, II DOCUMENTS ON INTERNATIONAL LAW 39, 42 (1969).

<sup>60</sup> Revised Charter of the Organization of American States, II DOCUMENTS ON INTERNATIONAL LAW 18, 21 (1969).

<sup>61</sup> Moore, *The Control of Foreign Intervention in Internal Conflict*, *supra* n. 1, at 242-45.

<sup>62</sup> "[C]omplete nonintervention in civil wars . . . would be unenforceable and unacceptable because of resulting ambiguity in the interpretation of training programs, economic aid, military assistance prior to the outbreak of internal violence, and the definition of civil war in general." *International Law and the Response of the United States to "Internal War,"* 2 THE VIETNAM WAR AND INTERNATIONAL LAW 89, 93 (R. Falk ed. 1969).

rule's defenders would answer the unenforceability charge: "Or what's a heaven for?" Professor Friedmann, for example, believes that there are black and white norms of international law whose application will yield "answers in terms of right and wrong." He adds:

If we wish to ignore them [the norms of international law], then let us say frankly that international law is of no concern to us. . . . I would rather go along with that view, though I believe it to be quite inadequate to the tasks of our generation, than the manipulation of legal argument.<sup>61</sup>

The second charge is that the rule, were it enforceable, would preclude both humanitarian intervention and counterintervention. It is possible, however, to rationalize some kinds of humanitarian intervention with the neutral non-intervention rubric, since it rests in part on article 2(4), which only prohibits force directed at "the territorial integrity or political independence" of the country. Some kinds of humanitarian intervention—the initial American intervention in the Dominican Republic or the joint Belgian-American airlift in the Congo—are not aimed at the reforming or replacing the government and therefore do not fall within the category or prohibited force.<sup>62</sup>

The charge that the rule prohibits counterintervention is more troublesome. It's one thing to tell two boys to keep their hands out of the cookie jar, but what's to be done if one nevertheless thrusts his hand in and starts gorging himself? At least one non-intervention proponent has suggested spanking the naughty boy:

It would appear that illegal intervention in the domestic jurisdiction of a state should not be made the occasion for counter-intervention but should be dealt with by the United Nations as it was in the Congo.<sup>63</sup>

<sup>61</sup> IX HAMMARSKJÖLD FORUM PROC. 112 (1967). He has on other occasions argued his case more persuasively. See Friedmann, *The Role of International Law in the Conduct of International Affairs*, 20 INT'L J. 158-64, 168-69 (1955). The argument runs along the following lines. Though the present international system does not coincide with the idealists' description of what the system should be, it is not the only conceivable realistic system of ordering international relations. Just as the discovery of gunpowder transformed feudal society into the modern state system, recent technological advances (and particularly the development of nuclear energy) may dictate acceptance of a new international system in which individual states cannot unilaterally use force. Our survival depends on the acceptance of such a new system. In effect, the idealists turn an old adage on its head and contend that invention is the mother of necessity.

<sup>62</sup> A. Thomas & A. Thomas, *supra* n. 16, at 15.

<sup>63</sup> Wright, *Non-Military Intervention*, THE RELEVANCE OF INTERNATIONAL LAW 5, 16-17 (K. Deutsch & S. Hoffman eds. 1968).

Punishment may work in one's home; it is not likely to work in the U.N. And if states cannot rely upon effective U.N. policing, they must themselves regrettably assume the role of enforcers to preserve the legal order as much as to protect their own interests.<sup>64</sup> Again, one can rationalize counterintervention with the neutral non-intervention norm. To the extent that the non-intervention norm is derived from policies inherent in the Charter prohibitions on use of force, the counterintervention norm may be derived from policies inherent in the complementary Charter self-defense exception. Particularly where the initial intervention constitutes an "armed attack," the state counterintervening is acting in self-defense.<sup>65</sup>

The difficulty is thus not so much the abstract rationalization of counterintervention with the non-intervention norm as it is the specific determination of what interventionary acts constitute an "armed attack" and what responsive acts fall within the self-defense concept.<sup>66</sup> Consider, for example, the wide range of acts which might be characterized as "intervention," even within the narrow definition used here: Cuba trains Venezuelan students in Havana after which they return to their homeland to spark the revolution; Cuba sends a few advisors to assist the Venezuelan guerrillas; or Cuba sends volunteers to fight along side their fraternal comrades. Can any or all of these be described as an "armed attack" on Venezuela? And how may Venezuela respond to these acts? May she request assistance from the United States? May she and her allies blockade Cuba? Bomb Havana? Invade Cuba? What, if any, are the limits of self-defense? While Professor Falk has suggested that in internal conflicts, third party military action either be "prohibited or confined to the political entity wherein the struggle is going on,"<sup>67</sup> it is un-

<sup>64</sup> Professor Claude makes this point in his perceptive article, *The United Nations, the United States, and the Maintenance of Peace*, 23 INT. ORGAN. 621 (1969).

<sup>65</sup> The most subtle and comprehensive treatment of the self-defense norm is M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD ORDER* 121-260 (1961).

<sup>66</sup> Alternatively, one may turn his back on the Charter norms and justify or condemn interventionary acts by reference to some sub- or pre-Charter regime of law. A recent and interesting example of such an attempt is Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969). Those scholars favoring this approach usually premise their arguments on the failure of the U.N. to function as envisioned by its founders and the consequent necessity to rely on doctrines other than the Charter norms to regulate use of force. See generally Lillich, *Forcible Self-Help Under International Law*, 22 NAVAL WAR COLLEGE REV. 56 (1970).

<sup>67</sup> Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 1 THE VIETNAM WAR AND INTERNATIONAL LAW 445, 455 (R. Falk ed. 1968).

likely that an *a priori* rule will provide satisfactory answers. The doctrine of proportionality will continue to provide us with rough standards by which we can measure the legitimacy of a particular response.

### VII. LEGISLATIVE INTERVENTION OR "IT'S OK IF WE ALL DO IT"

Still another suggested norm would sanction intervention only when authorized by an international body, usually the United Nations, but perhaps a regional organization such as the Organization of American States. Professor Falk argues in a provocative essay:

International peace is not only threatened by international warfare. Peace is also endangered by certain repressive social policies which, if allowed to remain unaltered, will produce serious outbreaks of domestic violence. This prospect prompts the central contention of this essay—that the United Nations should be authorized on a selective basis to coerce domestic changes. This authorization is what we refer to throughout as legislative intervention.<sup>68</sup>

Richard Barnet, who would prohibit all unilateral intervention, seconds the Falk motion for U.N. intervention. However, under his interpretation of the Charter the only permissible intervention is one authorized by the U.N.<sup>69</sup> And though Professor Moore predictably finds this norm alone inadequate,<sup>70</sup> he himself sprinkles collective authorization like holy water over most of his rules. Time and again an intervention otherwise damned is saved by a United Nations blessing.

Legislative intervention is an attractive proposition for several reasons. One, it preserves the sanctioning function of intervention, which, as we have seen, was recognized as a permissible self-help measure in traditional international law. The choice need not be between no intervention or any intervention. Two, it may dampen major power clashes by either (1) nipping the insurgency before it blossoms or (2) eliminating the conditions which breed rebellion.<sup>71</sup> Three, it eliminates the problem of each nation deciding for itself the legality of intervention. A collective decision would legitimate the intervention as consonant with the

<sup>68</sup> Falk, *Legislative Intervention*, ESSAYS ON INTERVENTION 31, 33 (R. Stanger ed. 1964).

<sup>69</sup> R. Barnet, INTERVENTION AND REVOLUTION 278-80 (1968).

<sup>70</sup> Moore, *The Control of Foreign Intervention in Internal Conflict*, *supra* n. 1, at 329 (1969).

<sup>71</sup> Falk, *supra* n. 68, at 44.

values of the international community. Conventional wisdom teaches that the more widely shared an agreement to intervene is the more likely it is to be legal. As Professor Lillich argues:

[T]he fact that more than one state has participated in a decision to intervene for humanitarian reasons lessens the chance that the doctrine will be invoked for reasons of self-interest.<sup>7</sup>

For all of its attractiveness, legislative intervention has its drawbacks. To begin with, the promise of effective United Nations intervention itself is illusory. The U.N. is not a synthetic superpower; and, absent the willingness of its most powerful members to commit their resources, it cannot police the world. Falk himself admits that "legislative intervention requires a consensus within the organization that transcends the fissures of the cold war."<sup>8</sup> In an international "era of good feeling" the Falk proposal might work, but in our present world the impact of the United Nations is apt to be marginal. Those who cry all power to the U.N. never explain how the U.N. will exercise its imperial power to turn thumbs up or thumbs down. By what standards will the organization decide? Are there any limits on its discretion? The old saw that two heads (or even 126) are better than one will little comfort the skeptic who believes that it all depends on the heads. Since Professor Falk puts the U.N. beyond the reach of the law—the U.N. may tread where states would not dare<sup>9</sup>—the laws which shackle states do not similarly circumscribe the authority of the United Nations. The organization is, however, bound by its own constitution, which specifies that "[n]othing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ." <sup>10</sup> Although the Charter restriction is broader than its predecessor in the League Covenant, article 2(7) is in fact no bar at all. Any limitations on the scope of U.N. authority are then institutional (*i.e.*, political) rather than constitutional.

Paradoxically, regional organizations possess institutional strengths that the United Nations lacks. Whether because they are the private fiefdom of feudal superpowers or because they are united by genuinely shared interests, regional organizations often act quickly and effectively. Their vitality may even be seen as a consequence of the United Nations' inability to preserve

<sup>7</sup> Lillich, *supra* n. 45, at 210 (1969).

<sup>8</sup> Falk, *supra* n. 68, at 54. See generally Claude, *supra* n. 64.

<sup>9</sup> Falk, *supra* n. 68, at 34-35.

<sup>10</sup> U.N. CHARTER art. 2, para. 7. See, *The Limitations on the Authority of the United Nations: Article 2(7) and Apartheid in the Republic of South Africa*, 3 THE STRATEGY OF WORLD ORDER 364 (R. Falk and S. Mendlovitz ed. 1966).

international peace and security.<sup>76</sup> Since regional authorization combines collective decision-making with the power to implement determinations, it may be thought a compromise between what is institutionally desirable and what is institutionally possible. In fact, regional authorization is the latest and most sophisticated version of the old spheres of influence idea. Professor Falk does not mince words:

The appropriate institution for partisan supranational action is to be found on the regional level. . . . It is unfortunate to compel dissenting national communities to conform to regional political preferences, but it may be indispensable for the maintenance of minimum conditions of international stability. As such, a reciprocal tolerance implicitly develops to accept intrabloc interventions, especially if authorized by a regional organization. . . ."

In short, the United States will not bother the Kremlin bully boys on their turf so long as they keep out of the American backyard. As a legal principle that leaves something to be desired.<sup>77</sup> And if the O.A.S. can purge the Western Hemisphere of communism; and the Warsaw Pact, Eastern Europe of capitalism, can the Arab states cut out the cancerous tumor that is Israel; or the African states, the Union of South Africa?<sup>78</sup> If the regional authorization rule may be thus broadly applied, one may question whether it is "indispensable for the maintenance of minimum conditions of international stability." Indeed, "partisan supranational action" sounds like a euphemism for the holy war whether it be against communism, capitalism, or zionism.

#### VIII. POLICY RESPONSIVE NORMS OF INTERVENTION OR "NEVER USE ONE RULE WHEN FIVE OR SIX WILL DO AS WELL"

Professor John Norton Moore objects to his colleagues' attempts to regulate intervention with a single norm.<sup>79</sup> Claiming that one rule is never as policy responsive as five or six, Professor

<sup>76</sup> "The withering away of the Security Council has led to a search for alternative peace-keeping institutions. . . . Regional organizations are [an] . . . obvious candidate," Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T STATE BULL. 763, 765 (1962).

<sup>77</sup> Falk, *supra* n. 68, at 55.

<sup>78</sup> It would legitimize the Brezhnev Doctrine, for example. Moreover, it smacks of the Papal decree which divided the world between Spain and Portugal in 1493.

<sup>79</sup> During the Dominican Republic crisis U.N. Secretary-General U. Thant expressed his fear that "[i]f a particular regional organization considers

Moore, stimulated by his debate with Professor Falk over the legality of American intervention in Vietnam,<sup>81</sup> has categorized interventionary situations in which like claims are raised.<sup>82</sup> For each like claim he proposes a like rule, which balances the sometimes complementary, sometimes contradictory policies of minimum world order, self-determination, and human rights. Moore identifies six broad categories of claims: (1) claims not relating to authority structures; (2) claims relating to anti-colonial wars; (3) claims relating to wars of secession; (4) claims relating to indigenous conflict for the control of internal authority structures; (5) claims relating to external initiation of the use of force for the imposition of internal authority structures; and (6) claims relating to cold-war divided nation conflicts. The following chart indicates how Professor Moore "rules" on each claim.

<i>The claims</i>	<i>Is the claim permissible?</i>
<i>Type I Situations: Claims Not Relating to Authority Structures</i>	
A. Claims to Provide Military Assistance to a Widely Recognized Government in the Absence of Internal Disorders .....	Yes
B. Claims to Assist a Widely Recognized Government in Controlling Non-Authority-Oriented Internal Disorders .....	Yes
C. Claims to Use the Military Instrument in the Territory of Another State for the Protection of Human Rights .....	Yes
<i>Type II Situations: Claims Relating to Anti-Colonial Wars</i>	

itself competent to perform certain functions by way of enforcement action in its own region, . . . the same principle should be applicable to other regional organizations, too." N.Y. Times, 28 May 1965, at 1, col. 2.

<sup>81</sup>Edwin Brown Firmage, critiquing the no-tactical support rule, echoes Professor Moore's reservations about a single norm: "The difficulty in formulating one set of norms to govern many disparate situations is illustrated by Professor Farer's attempt." Firmage, *International Law and the Response of the United States to "Internal War,"* 2 THE VIETNAM WAR AND INTERNATIONAL LAW 89, 102 (R. Falk ed. 1969).

<sup>82</sup>See Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L. J. 1122 (1966); Moore, *International Law and the United States Role in the Viet Nam War: A Reply*, 76 YALE L. J. 1051 (1967); Falk, *International Law and the United States Role in the Viet Nam War: A Response to Professor Moore*, 76 YALE L. J. 1095 (1967).

<sup>83</sup>Moore, *The Control of Foreign Intervention in Internal Conflicts*, *supra* n. 1, at 254-59. Professor Falk has also categorized conflicts into different types which "clarify the nature and consequences of policy choices." See Falk, *International Law and the United States*, *supra* n. 81.

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<i>The claims</i>	<i>Is the claim permissible?</i>
A. Claims to Assist a Colonial Power in an Anti-Colonial War .....	No (Unless authorized by U.N.).
B. Claims to Assist the Break-Away Forces in an Anti-Colonial War .....	No (Unless authorized by U.N.).
C. Claims by an Administering Authority to Use the Military Instrument to Prevent Break-Away ..	No (Unless authorized by U.N.).
<i>Type III Situations: Claims Relating to Wars of Secession</i>	
A. Claims to Assist the Federal Forces in a War of Secession .....	No (Unless authorized by U.N. or regional organization).
B. Claims to Assist the Secessionist Forces in a War of Secession .....	No (Unless authorized by U.N. or regional organization).
C. Claims that External Assistance to an Opposing Faction Justifies Assistance .....	Yes
<i>Type IV Situations: Claims Relating to Indigenous Conflict for the Control of Internal Authority Structures</i>	
A. Claims to Assist a Widely Recognized Government in a Struggle for Control of Internal Authority Structures .....	No
B. Claims to Assist an Insurgent Faction in a Struggle for Control of Internal Authority Structures ....	No (Unless authorized by U.N.).
C. Claims to Assist any Faction in a Struggle for Control of Internal Authority Structures Where a Widely Recognized Government Cannot be Distinguished .	No (Unless authorized by U.N.).
D. Claims that External Assistance Provided to an Opposing Faction Justifies Assistance .....	Yes

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<i>The claims</i>	<i>Is the claim permissible?</i>
E. Claims to Use the Military Instrument in the Territory of Another State for the Purpose of Restoring Orderly Processes of Self-Determination in Conflicts over Internal Authority Structures Involving a Sudden Breakdown of Order .....	Yes
F. Claims to Use the Military Instrument Against the Territory of a State Providing Assistance to an Opposing Faction .....	Yes
<i>Type V Situations: Claims Relating to External Initiation of the Use of Force for the Imposition of Internal Authority Structures</i>	
A. Cold-War Claims for the Use of the Military Instrument in the Territory of Another State for the Purpose of Maintaining or Imposing "Democratic" or "Socialist" Regimes .....	No (Unless authorized by U.N.).
B. Claims for the Use of the Military Instrument in the Territory of Another State for the Purpose of Altering Internal Authority Structures which Deny Self-Determination on a Racial Basis .....	No (Unless authorized by U.N.).
C. Claims to Assist Exile or Refugee Groups for the Purpose of Restoring Self-Determination .....	No (Unless authorized by U.N.).
<i>Type VI Situations: Claims Relating to Cold-War Divided Nation Conflicts</i>	
A. Claims by One Half of a Cold-War Divided Nation to Take Over the Authority Structure of the Other Half or to Assist an Insurgent Faction in a Struggle for Control of Internal Authority Structures .....	No
B. Claims to Assist the Widely Recognized Government of a Cold-War Divided Nation to Resist Takeover of its Authority Structures by the Other Half of the Divided Nation or to Counter Assistance Provided to an Insurgent Faction by the Other Half .....	Yes
C. Claims to Use the Military Instrument Against the Territory of One Half of a Cold-War Divided Nation Which is Providing Assistance to an Insurgent Faction in the Other Half .....	Yes

In fairness to the reader and Professor Moore, it should be pointed out that he qualifies and hedges all his answers. Perhaps the chart would have more accurately reflected his conclusions

if a "maybe" rather than a "yes" or "no" had followed each claim. Professor Moore would have us practice situation ethics in international law.

What advantages inhere in the policy responsive norms of intervention? First, the policy analysis itself clarifies and illumines the complexities of intervention doctrine. No one can henceforth advocate the application of a simple rule without weighing all the circumstances and determining whether the rule promotes or frustrates community interests. Second, then, policy analysis exposes the danger of simple-minded rule application.

Professor Farer accuses Professor Moore of determining "the legitimacy of foreign participation in any instance of civil strife . . . by an elaborate contextual analysis with the objective of achieving optimal world order characterization and outcome,"<sup>83</sup> and he finds this approach unacceptable for several reasons. One, multiple-factor analysis feeds on data which are not likely to be available or easily understood.<sup>84</sup> Two, it allows all participants to cover their naked violations with a legal fig leaf. The fact that one may always draw out of a contextual analysis some legal rationale for an act does not mean, of course, that the justification is inherently persuasive. Few were convinced, for example, by Hitler's claim that he invaded Poland in self-defense against an attack by German soldiers dressed in Polish uniforms. Three, the approach intensifies the conflict because "it encourages every participant to increase the psychological stakes by stigmatizing other parties as law breakers or aggressors."<sup>85</sup> Since most nations regularly caricature their opponents as bad guys, the addition of another epithet to their already rich vocabulary of diplomatic invective will scarcely make all the difference Professor Farer suggests.

Professor Moore, however, has not given us a set of policy responsive norms. Sift his "rules" through all six categories and twenty-one claims, and only one filters out: the neutral non-intervention rule—*responsively* interpreted and *responsively* applied, but the neutral non-intervention rule by any other name. The disagreement between Professor Moore and the avowed proponents of the neutral non-intervention standard is not

<sup>83</sup> Farer, *supra* n. 26, at 1104.

<sup>84</sup> Professor Moore recognizes the importance of fact collection and has proposed the establishment "of a permanent fact-disclosure agency available to any state wishing to use it for the investigation of an alleged armed attack or intervention in internal conflict." Moore, *The Control of Foreign Intervention in Internal Conflict*, *supra* n. 1, at 307.

<sup>85</sup> Farer, *supra* n. 26, at 1104.

whether the norm is a seaworthy ship but whether one need sail it between Scylla and Charybdis. For Professor Friedmann believes that "the alternatives are either isolation of the conflict by neutrality, or intervention and counter-intervention with all the dangers illustrated by the gradual escalation of the Viet Nam war." <sup>6</sup> Professor Moore has convincingly demonstrated that the alternatives are not a stark "either-or"; that here, as elsewhere in the law, the answer is "maybe."

## IX. CONCLUSION

Judged against the requirements of rationalization, guidance, and communication, the norms of intervention are satisfactory. The plethora of approaches provides justification for a wide range of interventionary conduct. This richness is not an embarrassment to the lawyer seeking to advise his client. The newer suggestions are based on sophisticated analyses of competing policy considerations. That decisions be made on the basis of a single rule may be less important than that they be made intelligently, and the more recent theorizing suggests how decision-makers can reconcile divergent interests. So long as the underlying facts coincide with the rationale of the rule employed, the norm will convey the party's intentions and demands. The substantive content of the norms is not so amorphous that they are without meaning.

It is curious how closely the most recent proposals, taken as a whole, parallel the traditional norms. The new norms reflect the same ambivalence which permeated traditional thinking on the problems of intervention. There was and is a sense that intervention is usually undesirable and generally ought to be impermissible. Yet there is also a recognition that intervention may occasionally serve the community's interest; hence, there remains an unwillingness to ban all intervention. The difficulty, of course, is to fashion a rule or rules that best accommodates the resultant tension. The virtue of recent proposals is not that any one of them commends itself as a touchstone to decision-making, but that all together they illumine the competing policies which must be evaluated and reconciled in any decision. It is unlikely that any one approach—traditional or modern—will soon be accepted as the solution. Instead, we will eclectically fashion ad hoc legal justifications. Their persuasiveness and

<sup>6</sup> Friedmann, *supra* n. 30, at 74.

their contribution to the development of a sound legal order will depend on the extent to which they reflect the insights of present normative theory. Thus, we shall hopefully muddle through what may appear in retrospect to succeeding generations as a transitional period from an international to a world community. There is in this view little consolation for the man who seeks the illusory certainty of black letter rules. And even for those of us who believe with Mr. Justice Holmes that all of life is an experiment, there will doubtless be moments when we will share Alice's frustration:

"Would you tell me please, which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where—" said Alice.

"Then it doesn't matter which way you go," said the Cat.

"—so long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if only you walk long enough."

# RELIGION, CONSCIENCE AND MILITARY DISCIPLINE\*

By Major LeRoy F. Foreman\*\*

*The varieties of religious belief and practice have on occasion throughout our history conflicted with secular requirements. Such conflicts may raise special problems within the military. The author discusses the areas in which conflict can arise and suggests guidelines to use in making the hard distinctions between military necessity and individual belief.*

## I. INTRODUCTION

The American people have always been zealous protectors of individual rights, but recent years have witnessed a vigilance for such rights of unprecedented proportions. The United States Army has not emerged unscathed. A retired Army colonel has expressed the movement within the Army thus:

The old Olympian untouchability of much entrenched authority is being unaccepted rapidly. . . . Not every principle on every sacred tablet is being cast into rubble, but every separate principle is being reverified on its own merits. . . .

As one of the most authoritarian institutions in any society, the Army must expect that it will not escape from a social movement of the nature and dimensions we are witnessing. . . . There is a revolution of unprecedented scope under way, and we can only dimly perceive its course. . . .<sup>1</sup>

As a general rule, persons in the armed forces enjoy the same constitutional rights as civilians, except for those protections and

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup>Wermuth, *It's Time to Change the Army's Old Tune*, 19 ARMY 63 (1969).

rights which the history and text of the Constitution specifically deny to them, such as the right to trial by jury in a criminal case.<sup>2</sup> However, many of the traditional bastions of military authority are being challenged on constitutional grounds. Furthermore, in the heated and moralistic confrontations on such subjects as the United States involvement in Vietnam, many soldiers are attacking routine commands and directives not only on the grounds that they are illegal, but also that compliance with them would be immoral. Consequently, disobedience in the name of religion is not unusual.

Although the majority of Americans profess to be religious people, the religious rights of a serviceman have never been clearly defined. A traditional treatise such as Winthrop's *Military Law and Precedents* cited with approval the statement of the Duke of Wellington regarding the appeal of a British officer who refused to go into the trenches on Sunday:

The real Christian is that person who does his duty to his sovereign and to his country without demur. If his conscience be unsettled, he should quit the army at once, and not unsettle the affairs military.<sup>3</sup>

The current concern in the United States for rights of servicemen is certainly greater than the Duke of Wellington's concern for the British officer.

It is therefore appropriate to examine current military practices in light of the religious guarantees of the first amendment, in order to ascertain where military practices tend to infringe upon religious liberties and to determine in which cases military necessity takes precedence over individual religious rights.<sup>4</sup> Before examining specific Army practices affecting individual religious rights, a few general observations regarding the first amendment and the general status of religion in the Army are in order.

The first amendment provides in pertinent part that "Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. . . ." However, the first amendment is phrased as a prohibition against acts by Congress rather than by the executive branch of the federal government. Military officials, including the President as Commander in Chief,

<sup>2</sup> *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

<sup>3</sup> WINTHROP, *MILITARY LAW AND PRECEDENTS* 577 n. 34 (2d ed. 1920).

<sup>4</sup> This article was written prior to the United States Supreme Court decision in *Welsh v. United States*, 398 U.S. 333 (1970). Because of the significant changes made by that decision, discussion of the area of conscientious objection to military service is not included in this article.

the Secretary of Defense, Secretary of the Army, and all military officers are members of the executive branch of government. How then are regulations and orders of the President or other members of the executive branch brought within the purview of the first amendment?

Article I, section 8, of the Constitution empowers Congress "to raise and support armies" and "to make rules for the government and regulation of the land and naval forces." Rather than concern itself with the details of military operations, Congress has authorized the President and the heads of the military departments to make regulations for the proper discharge of those military activities authorized by Congress.<sup>6</sup> Regulations issued by the secretary of a military department are, in law, acts of the President.<sup>7</sup> Likewise, military commanders issuing legal orders represent the President.<sup>8</sup> Since regulations and orders are issued pursuant to a delegation of authority from Congress, the limitations placed on Congress by the first amendment also constitute limitations upon the members of the military departments, who receive their authority from Congress. Although applicability of the first amendment has not been specifically discussed by the United States Court of Military Appeals, in several decisions the court has assumed without discussion that the first amendment applies to orders and regulations issued by military authorities.<sup>9</sup>

The "establishment" clause of the first amendment is the principal weapon used to attack the constitutionality of employing public funds to pay chaplains and to provide religious facilities for servicemen. Authorities argue that such use of public funds constitutes an unlawful establishment of religion.<sup>9</sup> On the other hand, other authorities argue that a failure of the United States to provide religious services and facilities to soldiers away from home and frequently in remote foreign lands would violate the "free exercise" clause by depriving the soldiers of the means of practicing their religion.<sup>10</sup>

The constitutionality of the military chaplaincy has not been litigated on the merits, primarily because of the United States

<sup>6</sup> 10 U.S.C. § 121 (1964); 10 U.S.C. § 3061 (1964); see also WINTHROP, *supra* note 3 at 25.

<sup>7</sup> United States v. Eliason, 41 U.S. (16 Peters) 291 (1842).

<sup>8</sup> 10 U.S.C. § 3074 (1964); see also WINTHROP, *supra* note 3 at 27 n.10.

<sup>9</sup> E.g., United States v. Smith, 12 U.S.C.M.A. 564, 31 C.M.R. 150 (1961); United States v. Wheeler, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

<sup>10</sup> For an excellent discussion of the arguments on both sides of the question, see Figinski, *Military Chaplains—A Constitutionally Permissible Accommodation Between Church and State*, 24 Md. L. Rev. 377 (1964).

<sup>11</sup> School District v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

Supreme Court's early ruling that an individual taxpayer has no standing to challenge the constitutionality of the use of public funds.<sup>11</sup> The constitutionality of the military chaplaincy was specifically challenged in 1928 by a taxpayer before the District of Columbia Court of Appeals.<sup>12</sup> The court did not rule on the merits of the constitutional challenge, but merely dismissed the suit for lack of standing. It appeared that the issue would never be litigated on its merits until *Flast v. Cohen*<sup>13</sup> was decided by the United States Supreme Court in 1968. The *Flast* case overturned earlier precedents by holding that an individual taxpayer has standing to challenge the use of public funds. It appears, therefore, that the specific issue may be litigated on its merits in the foreseeable future. Until then, legal scholars will be free to espouse either side of the argument, with ample authority on both sides.

Apart from the questions involving the chaplaincy and the use of public funds, there are numerous day-to-day activities of the Army which affect or infringe upon individual religious practices. These range from mandatory character guidance training to the prohibitions against beards and earrings. It is in these areas that the practical problems arise, and it is these types of activities to which this discussion will be primarily devoted. Generally, discussion of a constitutional right can be divided into substantive and procedural aspects. Much of the litigation involving the first amendment concerns procedural due process, *i.e.*, the determination whether a governmental agency has followed the prescribed rules and procedures in limiting the exercise of a constitutional right. The following chapters will not discuss the broad area of procedural due process, but will be limited to a discussion of the substantive religious rights of servicemen and the limits placed on those rights by military discipline. The discussion will include the rights conferred by the Constitution as well as those created by statute or regulation. The following chapters are not intended to present a philosophical discussion of what the law should be, but are intended as a realistic appraisal of the present state of the law.

## II. COMPULSORY ACTS CONTRARY TO CONSCIENCE

### A. GENERAL OBSERVATIONS

Compulsion is an everyday occurrence in military life, and is generally accepted as such by the ordinary soldier. The con-

<sup>11</sup> *Frothingham v. Mellon*, 262 U.S. 447 (1923).

<sup>12</sup> *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928).

<sup>13</sup> 392 U.S. 83 (1968).

stitutional issues do not generally arise until a soldier disobeys an order and believes he is justified in so doing. Frequently, his belief is based on moral, religious, or philosophical grounds. Unless the soldier is unusually sophisticated he does not precisely intend to invoke the free exercise clause of the first amendment as justification for his disobedience, but he does realize that to obey the order in question would be contrary to his concept of a higher duty. He then is faced with the dilemma: to obey the military order or to obey the dictates of his conscience.

Conversely, there is the occasional soldier who has no real dilemma of conscience, but who is merely looking for legal technicalities to avoid unpleasant duty. Frequently, this soldier will invoke the first amendment as justification for his disobedience. It then becomes extremely difficult to determine whether his refusal is a sincere problem of conscience or merely a ruse to avoid military duty.

In determining the lawfulness of military orders, the courts have examined the purpose of the orders and determined in each case whether such purpose should be paramount to the individual rights of conscience. In each case the criterion has been whether the interests requiring the military duty are sufficiently important and sufficiently enhanced by the performance of such duty to justify infringement of the moral beliefs of the individual. There are many cases in which persons not claiming or not entitled to conscientious objector status will refuse to perform a particular act because they believe, on religious grounds, that the particular act required is contrary to their religious tenets. Generally, the military rule is more demanding than the civilian rule in comparable situations because of the greater requirements imposed by military discipline. The following are instances of situations in which a conflict between military duty and individual conscience may arise.

### B. SALUTING

The military salute is one of the oldest military traditions. But to many dissidents it represents the epitome of the military caste system, the final and persistent reminder of the inferiority of the enlisted man, frequently demanded by superiors and grudgingly rendered by subordinates. To many career military officers, the salute is regarded as an essential element of military discipline, a continuous influence on the attitude of discipline required for an effective military force.

The constitutional problem arises when a soldier believes that

saluting is a form of worship of graven images forbidden by his religious tenets.<sup>14</sup> The military courts have not treated such religious objections favorably, holding that an order to salute is not an illegal interference with religious liberty.<sup>15</sup> The decisions of the United States Court of Military Appeals and the respective courts of military review have not examined the purpose of efficacy of the salute, but merely have cited the general rule that religious scruples are not a defense to disobedience of an otherwise lawful order to render the salute.<sup>16</sup> Disobedience of an order to salute has been treated in the same manner as disobedience of an order to engage in weapons training, with no consideration given to the necessity of the salute to the accomplishment of the military mission.

However, the civilian courts, considering flag salutes in the public schools, have held that the salute may not be compelled, if objection thereto is based on religious grounds. It is pertinent, therefore, to examine the cases, with a view to examining and explaining the differences.

In 1940, the Supreme Court of the United States, in the case of *Minersville School District v. Gobitis*,<sup>17</sup> held that the requirement to pledge allegiance to the flag was a legitimate exercise of "specific powers of governments deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."<sup>18</sup> The Court was very reluctant to impose its judgment upon the state legislature which had imposed the requirement. It cited the need to foster patriotism and national unity, and thereby upheld the disciplinary action taken against school children who had refused on religious grounds to participate in the flag salute.

However, just three years later, the Supreme Court reversed itself in *Board of Education v. Barnette*.<sup>19</sup> The Court did not dispute the necessity or desirability of fostering patriotism in school children. However, it held that an act contrary to con-

<sup>14</sup> See *Ezodus* 20:4-5, which provides: "You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth; you shall not bow down before them or worship them."

<sup>15</sup> E.g., *United States v. Cupp*, 24 C.M.R. 565 (ABR 1957); *United States v. Morgan*, 17 C.M.R. 584 (ABR 1954).

<sup>16</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 169b [hereinafter cited as MCM, 1969 (Rev.)].

<sup>17</sup> 310 U.S. 586 (1940).

<sup>18</sup> *Id.* at 595.

<sup>19</sup> 319 U.S. 624 (1943).

science may be compelled only if its absence would pose "grave and immediate danger" to interests which may be lawfully protected. Although the majority opinion disclaims passing judgment on the efficacy of the flag salute as a means of instilling patriotism, it is apparent that they entertained serious doubts about its efficacy. The majority opinion by Justice Jackson observed, "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."<sup>20</sup> Justices Black and Douglas concurred, also questioning the efficacy of the flag salute as a means of fostering patriotism.

Once again, the Court appeared to be carefully avoiding the military question, for a footnote to the Court's opinion observes: "It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."<sup>21</sup> The Court did not elaborate on its reasons for apparently exempting military personnel from the protection of the *Barnette* case. Nor did it attempt to explain why, if the salute is not an efficacious exercise, it can be justified as producing discipline in soldiers when it does not produce patriotism in school children.

Although the Supreme Court demands a showing of grave necessity to justify infringement of first amendment rights, it appears to recognize that what is not necessary in civilian life may be necessary in military life. Faced with a constitutional attack on the military salute, it can be anticipated that the Court will give sympathetic ear to arguments showing the need within the military for such symbolism as the salute. However, it will be incumbent upon the military to show convincingly that the salute is a necessary and efficacious symbol and not merely a meaningless, anachronistic gesture.

### C. COMPULSORY MEDICAL TREATMENT

As any medical officer who has been on duty on a payday weekend knows, a soldier is not always willing to consent to necessary medical treatment. In addition to the case of the belligerent drunk, however, there are numerous other cases of resistance to necessary medical care. Certain religious sects have created substantial legal precedent by their refusal to accept medical treatment or to authorize it for their children. However, a serviceman need not belong to a traditional religious group

<sup>20</sup> *Id.* at 632-33.

<sup>21</sup> *Id.* at 642 n.19.

in order to assert that proposed medical treatment is contrary to his religious beliefs. If he is sincere in his religious beliefs, then the constitutional question is whether his own physical well-being or that of his comrades in arms justifies infringement of his religious beliefs. Both the military and civilian precedents have uniformly held that inoculations as well as medical treatment for injury or disease can be administered over the objections—on religious or other grounds—of the patient.<sup>22</sup> In the cases of military personnel, forcible inoculation is permissible.<sup>23</sup> Involuntary medical treatment or inoculation has always been justified on the grounds that it is necessary to protect the life or health of the patient or to prevent the communication of disease.

However, this traditional justification was successfully challenged before the Illinois Supreme Court when the court refused to permit involuntary blood transfusion for an elderly woman who had no dependents, holding that because no life or health other than her own was endangered, her religious preferences should be honored, even at the cost of her own life.<sup>24</sup> The significance of this case might be clearly dramatized in the case of a young, unmarried soldier who is gravely wounded, to the extent that he can never perform military duties again. If he decided on religious grounds that he desired to be permitted to die rather than spend months, years, or the rest of his life totally incapacitated, his obvious incapacity for further military duties would deprive the Army of any proprietary interest in his services. Further, there would be no danger to those other than himself as only his own life would be involved. It would appear that the Illinois case would be good authority to require that the young soldier's wishes be honored. Similar considerations would also apply in cases of lethal doses of radiation or chemical or biological agents.

The Army's interest in maintaining the health of its soldiers also comes into play in cases of intentional self-inflicted injuries. Occasionally, a soldier will intentionally injure himself to attract attention, to avoid a specific duty, or in an attempt to atone for his real or imagined moral derelictions. Intentional self

<sup>22</sup> *Zucht v. King*, 260 U.S. 174 (1922); *Jakobsen v. Massachusetts*, 197 U.S. 11 (1905); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952).

<sup>23</sup> Army Reg. No. 600-20, ch. 5, para 40b (4 Nov. 1969) [hereinafter cited as AR 600-20]; see also JAGA 1968/4004, 17 May 1968; JAGA 1966/4314, 9 Sep. 1966; JAGA 1964/3814, 27 Apr. 1964.

<sup>24</sup> *In re Brooks' Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965).

injury is a criminal offense.<sup>25</sup> What then would be the result if a soldier were to injure himself to avoid participation in a war which he considered immoral, or in a religious act of atonement for past transgressions against the moral law?

The issue has not been faced by military appellate agencies. However, the civilian courts have consistently ruled that the necessity to safeguard the peace and good order of the community outweighs the individual's right to practice his religion by self-mutilation.<sup>26</sup> Self-injury militates directly against the maintenance of a military force able and willing to perform its mission. It is unlikely that the courts would sustain a claim of religious freedom over the right of the Army to the services of able-bodied soldiers.

#### D. PHOTOGRAPHS

Every member of the armed forces is photographed at least once for his identification card. However, photo identification constitutes a "graven image" to some religious groups.<sup>27</sup> Although the case did not rise above the Superior Court for the County of Los Angeles, the requirement for a photograph on a taxi driver's license was challenged successfully in *Shubin v. Department of Motor Vehicles*.<sup>28</sup> Shubin refused to be photographed, but insisted that he should be issued the requisite license without a photograph, since his religion forbade graven images. The Superior Court of Los Angeles granted his request. Query the result if a soldier refuses to be photographed for his identification card? It is unlikely that the needs of the military services for identification and control of personnel would be equated to the need to identify and control taxis, especially in view of the large number of privileges as well as access to sensitive areas and equipment which are available upon presentation of a military identification card. However, the case is illustrative of the breadth of the areas covered by the religious guarantees of the first amendment.

<sup>25</sup> Arts. 115, 134, UNIFORM CODE OF MILITARY JUSTICE; see also *United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968).

<sup>26</sup> *E.g.*, *Mayock v. Martin*, 157 Conn. 56, 245 A.2d 574 (1968).

<sup>27</sup> See note 14, *supra*.

<sup>28</sup> *Shubin v. Department of Motor Vehicles*, No. 829-416 (Superior Court, County of Los Angeles, Cal., 1 Sep. 1964).

## III. COMPULSORY PARTICIPATION IN RELIGIOUS PRACTICES

## A. MANDATORY CHARACTER GUIDANCE CLASSES

The paternal nature of the military society is clearly visible in the requirement for periodic character guidance classes, at which attendance is mandatory.<sup>39</sup> These classes are typically taught by chaplains, the proponent of the implementing regulation is the Chief of Chaplains, and the content generally deals with personal character traits and moral values.<sup>40</sup>

Assuming that character guidance training falls within the general classification of a religious exercise, serious constitutional problems arise when the content is prescribed and attendance is mandatory. In *Engel v. Vitale*,<sup>41</sup> the United States Supreme Court considered the problem of an officially prescribed school prayer. It held that it was constitutionally impermissible for a state agency to prescribe a specific prayer to be recited in public schools. Although the schools had hoped to avoid the constitutional problems by making participation in the prayers voluntary, the Court held that the prayers were objectionable even if voluntary. The essence of the constitutional problem was "establishment," the fact that the state board of education prescribed the format of the prayer. Justice Black, speaking for the majority in the *Engel* case, set out the basis of the ruling as follows:

It is neither sacriligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.<sup>42</sup>

The Court did not appear to be much concerned that prayers were being said in the schools. But it was concerned that a state agency took it upon itself to prescribe the form and content of the prayers. The Court felt that the state had thus assumed a purely religious function, in clear contravention of the establishment clause.

The school prayer issue was again raised in *School District of Abington Township, Pennsylvania v. Schempp*,<sup>43</sup> in which the United States Supreme Court considered two cases involving

<sup>39</sup> Army Reg. No. 600-30, para 3b (1 Jul. 1970).

<sup>40</sup> *Id.* para 2, 12.

<sup>41</sup> 370 U.S. 421 (1962).

<sup>42</sup> *Id.* at 435.

<sup>43</sup> 374 U.S. 203 (1963).

Bible reading in public schools. In both cases the teachers were required to conduct the readings, but attendance by students was voluntary. The Court found that the compulsory Bible reading constituted a violation of the establishment clause of the first amendment. The Court considered the fact that participation was voluntary, but held that infringement of a particular religious freedom is not an essential element of a violation of the establishment clause. The general rule appears to be that proof of some compulsion or interference with religious freedom is required to prove a violation of the free exercise clause, but no such proof is required when relief is sought under the establishment clause.<sup>35</sup>

The case of *Lewis v. Allen*<sup>36</sup> considered whether the words "under God" in the pledge of allegiance to the flag which was recommended for use in New York schools violated the establishment clause. The court did not squarely decide whether the words "under God" were permissible, but held that there was no violation of the establishment clause since the words "under God" were merely recommended and not mandatory.

Complaints about the military character guidance training program have been regularly filed with Department of the Army by the American Civil Liberties Union as well as individual soldiers.<sup>37</sup> The Judge Advocate General of the Army re-evaluated the Army's practice in light of the *Engel* decision and recommended deletion of all religious references from character guidance training.<sup>37</sup> Subsequently, the Chief of Chaplains undertook a considerable modification of the lesson plans with a view to making the classes "moralistic" rather than "religious" in nature. The Office of The Judge Advocate General has undertaken the review of proposed lesson plans for possible constitutional objection and on several occasions has recommended deletion of certain passages, references or subjects on the grounds of excessive religious content. For example, references to the soul, to the immortality and spiritual nature of man have been found objectionable and deleted from the lesson plans.<sup>38</sup>

However, the basic question remains: whether there is any distinction in fact between moralistic training and religious

<sup>35</sup> *Id.* at 224 n. 9.

<sup>36</sup> *Lewis v. Allen*, 14 N.Y.2d 867, 200 N.E.2d 767 (1964), cert. denied, 379 U.S. 923 (1964).

<sup>37</sup> See JAGA 1964/4152, 17 Jun. 1964; JAGA 1959/5118, 30 Jun. 1959.

<sup>38</sup> JAGA 1968/3970, 22 May 1968.

<sup>39</sup> JAGA 1969/4318, 12 Aug. 1969; JAGA 1969/2777, 22 Apr. 1969; JAGA 1968/4684, 6 Nov. 1968.

training. The Judge Advocate General recognized this problem when he pointed out that the purpose of character guidance training is "to instruct soldiers in proper moral and social conduct—a traditionally religious function."<sup>39</sup> In an effort to protect the character guidance program from further constitutional attack, specific guidance was sent to all field commands. The guidance included instructions to avoid "preaching" or incorporating religious references, illustrations and materials in any manner which would imply exclusive authority, priority or validity for that particular source.<sup>40</sup>

In spite of the careful controls under which character guidance training is now administered, there is a serious constitutional question whether moralistic training, mandatory in nature and taught by chaplains, is permissible within the limitations of the first amendment. Even if references to God and the Bible are deleted, the fact remains that the course content is devoted to promoting a particular set of moral and ethical values.

On the other hand, it is possible that character guidance training can be justified on the same basis as the chaplaincy itself: the need for some substitute for parental and community influences which would ordinarily influence the character development of young soldiers, plus the necessity for creating a strong moral and patriotic disposition in soldiers in order to enable them to perform under the terrifying and strenuous conditions of mortal combat. Presented with this justification, the Supreme Court might determine that the peculiar needs of military life require a relaxation of the prohibition against establishment of religion—at least religion in the vague sense of moralistic training.

However, apart from the content of character guidance training, the use of chaplains to teach, supervise, and administer the program also presents a constitutional problem.<sup>41</sup> The fact that a chaplain is a priest, rabbi, or minister makes him a symbol of his religion, especially when he wears indicia of his status. His presence before a character guidance class is analogous to the presence of a teacher wearing religious garb before a public school class. The civilian courts have divided on the question of the permissibility of the latter situation.<sup>42</sup> The cases holding that

<sup>39</sup> JAGA 1968/4040, 27 May 1968.

<sup>40</sup> Letter from Department of the Army, AGAM-P(M), 3 Jul. 1968, subject: Character Guidance Guidelines for FY 1969.

<sup>41</sup> Army Reg. No. 600-30, para 12 (1 Jul. 1970).

<sup>42</sup> See generally 60 A.L.R.2d 300.

religious garb was permissible in public schools were careful to point out that religion was not being taught by the person wearing the religious garb.<sup>45</sup> Although chaplains normally wear the military uniform while conducting character guidance training, they also wear chaplain's insignia, are customarily addressed as "Chaplain" regardless of military rank, and are well known to the audience as members of a religious vocation. When the element of religious teaching is added to the religious status of the teacher, the constitutionality of character guidance training becomes questionable. It is submitted that character guidance training as currently utilized in the Army is in serious danger of being overturned by an adverse court decision. In view of the broad group of persons given standing to challenge the use of public monies by the *Flast v. Cohen*<sup>46</sup> decision, a legal challenge to the use of public buildings and government financed publications to conduct character guidance is probable. The prospect of a favorable outcome for the supporters of character guidance is very poor.

#### B. MANDATORY CHAPEL ATTENDANCE

The service academies have traditionally required chapel attendance as part of the curriculum. The practice continued notwithstanding two opinions of The Judge Advocate General of the Army that mandatory chapel attendance is a violation of the first amendment as interpreted by the Supreme Court in the school prayer cases.<sup>47</sup>

The recent federal district court decision in *Anderson v. Laird*<sup>48</sup> reached a different result. In *Anderson*, a group of midshipmen and cadets raised the first amendment issue in challenging the compulsory chapel attendance provisions. No doubt mindful of the Supreme Court precedents, academy officials stressed that: (1) exemptions were available where a conflict with sincerely held beliefs would result; (2) no one was forced to participate in any worship activities during chapel; and (3) the chapel requirement was not intended to cultivate religious belief or motivation.

The court accepted the academies' definitions and upheld the mandatory chapel requirement. In reaching its decision, it paid

<sup>45</sup> *E.g.*, *Moore v. Board of Education*, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965).

<sup>46</sup> 392 U.S. 83 (1968).

<sup>47</sup> JAGA 1969/4127, 2 Jul. 1969; JAGA 1963/4304, 18 Jun. 1963.

<sup>48</sup> 316 F. Supp. 1081 (D.D.C. 1970).

special attention to the non-religious, curriculum-based nature of the program:

Particular emphasis [in the curriculum] is placed necessarily on inculcating a sense of duty, integrity, and moral responsibility. Experience has shown that these qualities and a sensitivity to the spiritual needs of men in times of combat crisis are essential in leading men in the face of danger. Why some men resort to religion or spiritual values as support and strength in times of extreme danger and trial must be understood by a commanding officer.

Within the overall training program of the academies the most effective method of inculcating this sensitivity is attendance at chapel or church services which provide the only opportunity to observe the impact that spiritual values have on the lives of men. It would be as inconsistent with the responsibility the Academies have to train complete combat officers to ignore this necessity as it would be to ignore the more obvious physical and tactical education.<sup>47</sup>

Whether the *Anderson* decision will be the final word in the field remains to be seen. Even if it does, however, the court's extreme sensitivity to the religious issue may presage challenges in related areas.

### C. MANDATORY RELIGIOUS COUNSELING

Although marriage is a most personal affair, it has consistently been the subject of command regulation. Army regulations authorize a local overseas commander to require his personnel to be counseled by a chaplain prior to marrying a local national in a foreign country.<sup>48</sup> Frequently, the chaplain is not of the same religious persuasion as the soldier or his fiancée, or the soldier does not desire any religious instruction at all. Occasionally the soldier ignores the command regulation and is subsequently tried by court-martial for disobedience of the regulation. The religious issue was squarely presented in *United States v. Wheeler*.<sup>49</sup> In upholding the constitutionality of such a command regulation, the Court of Military Appeals stated:

To remind, or to inform a person of the fundamental nature of marriage is not to promote or to interfere with his religious beliefs. . . . However high or thick the wall of separation between church and state, the interview provision does not breach that wall. It does not force, influence, or encourage the applicant to profess any religious belief or disbelief.<sup>50</sup>

<sup>47</sup> *Id.* at 1089.

<sup>48</sup> Army Reg. No. 600-240, paras. 4, 11 (17 Dec. 1965).

<sup>49</sup> 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1961).

<sup>50</sup> *Id.* at 389.

Thus, in spite of the fact that the interview is mandatory and is clearly religious in nature, the court found that there was no conflict with the first amendment. Although not specifically stated as a ground for its decision, the court dwelt at length on the reasonableness of the regulation and the valid military purpose served by maintaining morale among young soldiers away from home for the first time in many cases and unaccustomed to the social mores of a foreign land.

#### D. MEMORIAL OR PATRIOTIC SERVICES

In view of the moralistic and patriotic motives which impel the Army's character guidance training program, it is not surprising that current Army regulations provide for a chaplain to give an invocation, prayer or benediction of military patriotic ceremonies. The regulations specify that such ceremonies will not be conducted as religious services but as military exercises.<sup>51</sup>

Those who do not profess the faith of the chaplain or agree with the text of his invocation are expected to stand silently in the ranks. The constitutional problem with such quasi-religious ceremonies is the same as that encountered in character guidance training: compulsory participation in a religious or quasi-religious activity. However, although the Supreme Court struck down official school prayers in *Engel v. Vitale*, it conceded an exception directly analogous to the military situation when it stated that its decision did not apply to patriotic or ceremonial occasions.<sup>52</sup>

Several comparisons and differences are immediately apparent between the school prayer cases and military formations. First, the school cases involved prayers from which students could be excused; military cases involve prayers from which soldiers cannot be excused. Second, the crux of the constitutional objection in the school prayer cases was the fact that a state agency prescribed the format of the prayer, not that the prayer was used. Third, there may be a valid distinction between immature elementary school students and reasonably mature soldiers. When both groups are involuntarily subjected to religious influences, the latter is much better equipped to personally evaluate such influences and decide to either accept or reject them. Fourth, military commanders are charged with maintaining the spiritual and mental, as well as physical well-being of their troops; school teachers do not have such comprehensive responsibility for their students.

<sup>51</sup> Army Reg. No. 165-20, para. 3f (18 May 1966).

<sup>52</sup> 370 U.S. 421, 435 n.21 (1962).

## IV. LEGAL RESTRAINTS UPON RELIGIOUS PRACTICES

## A. GENERAL OBSERVATIONS

A person who truly practices his religion will necessarily structure his daily life style around his religious beliefs. His religion directly affects his concept of right and wrong, his priority of values and his concept of what he must do in order to make his life worthwhile.

The courts have carefully foreclosed any inquiry into the nature, wisdom, or acceptability of the beliefs of any of the litigants appearing before them. However, they have carefully distinguished the right to hold religious beliefs from the right to engage in religious practices, and they have not hesitated to restrict religious practices which posed a threat to society. For example, in the cases involving the Mormons and the practice of polygamy, the courts conceded the Mormons' right to believe what they wanted, but they refused to allow the Mormons to engage in practices—even if designated as religious practices—which were contrary to the law of the land or detrimental to society.<sup>53</sup> The following examples will discuss some of the more common points of conflict between military authority and the serviceman who desires to engage in certain religious practices.

## B. DISTRIBUTION OF LITERATURE

Most religions impose some sort of apostolic responsibility upon their membership to gain adherents or to gain support for their tenets. The distribution of religious literature as an apostolic work has resulted in considerable civil litigation because of conflicts with local ordinances controlling the selling or dissemination of literature of any type.

The Supreme Court has refused to overturn a conviction for violation of an ordinance requiring identity badges for persons selling religious materials, stating that such a requirement is within the power of a municipality.<sup>54</sup> It has upheld a prosecution for attempting to sell religious materials without a permit,<sup>55</sup> and upheld the conviction of a Jehovah's Witness for violation of child labor laws by allowing a minor child to sell religious

<sup>53</sup> *Davis v. Beason*, 123 U.S. 335 (1890); *Reynolds v. United States*, 98 U.S. 145 (1879).

<sup>54</sup> *City of Manchester v. Leibz*, 117 F.2d 661 (1st Cir. 1941), *cert. denied*, 313 U.S. 562 (1941).

<sup>55</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

literature,<sup>56</sup> even though both parent and child believed that failure to perform missionary work would condemn the child to eternal damnation. However, the Supreme Court has overturned a city ordinance which prohibited door-to-door distribution of religious and other literature. The Court stated that a city may control the distribution of literature but may not prohibit it, since to do so would violate freedom of speech and press.<sup>57</sup>

A closely related area to distribution of literature is the solicitation of funds, either in connection with the distribution of literature or separately. In this area, the landmark case of *Cantwell v. Connecticut*<sup>58</sup> severely limits any attempt to control proselytizing activities by requirement of a license. The statute involved in *Cantwell* prohibited the solicitation of funds without first obtaining a license issued upon a finding that the organization was a true and bona fide religious or charitable organization. Commenting on the statute, the Court stated:

Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.<sup>59</sup>

Army regulations permit an installation commander to require his approval as a condition precedent to distribution of any form of literature on the installation.<sup>60</sup> When permission is granted to distribute literature or solicit funds, the activities are still subject to the guidelines imposed by the installation commander.<sup>61</sup> The same principles apply even when solicitation or distribution of literature is religiously motivated. In 1950 The Judge Advocate General of the Army approved the action of an installation commander who had promulgated a regulation pro-

<sup>56</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>57</sup> *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>58</sup> 310 U.S. 296 (1940).

<sup>59</sup> *Id.* at 306-07.

<sup>60</sup> Army Reg. No. 210-10, para 5-5e (Change No. 3, 1 Dec. 1970) [hereinafter cited as AR 210-10].

<sup>61</sup> AR 210-10, para. 4-5 (30 Sep. 1968); see generally Army Reg. No. 210-7 (11 Feb. 1970).

hibiting all door-to-door solicitation and had invoked it to deny a request by the Jehovah's Witnesses to canvass the installation for the purpose of discussing their beliefs with occupants of family quarters and distributing their religious literature. The rule was stated as follows:

This office has consistently held that a post commander may exclude all persons, except personnel of the post, from the post and reservation grounds so long as no arbitrary discrimination is made and that the power to exclude includes the power to admit subject to such regulation as the Secretary of War may prescribe.<sup>55</sup>

Taking note of the Supreme Court's previous decision that the distribution of literature could be controlled but not prohibited, The Judge Advocate General distinguished a military post from a traditional municipality, saying that—

Recognition must, however, be given to the peculiar status of an Army post or fixed installation. . . . While the post commander's regulations for the conduct of those resident or temporarily on the property might be likened to ordinances founded upon the police power vested in a civilian community, his regulations cannot be disassociated from military security, a factor not present in the civilian counterpart. . . .

In the instant case it cannot be said that the regulation pertaining to door-to-door canvassing bears no relation to the military necessity presumably found by the post commander to exist, nor is it arbitrary or discriminatory.<sup>56</sup>

In 1963 a similar case was presented to The Judge Advocate General of the Army for advice. He again relied on the 1950 decision, holding that the decision to permit or deny entry to civilians onto the installation to conduct services and solicit funds was within the discretion of the installation commander.<sup>57</sup>

### C. UNIFORM REGULATIONS

Active believers in a particular religion frequently choose to wear symbols of that religion, either in the form of religious medals or a particular style of dress. However, when a soldier wears the symbol of his faith, he may run afoul of the Army uniform regulations. In pertinent part, these regulations prohibit the wearing of jewelry and similar items on the uniform.<sup>58</sup>

<sup>55</sup> JAGA 1950/1924, 14 Apr. 1950.

<sup>56</sup> *Id.*

<sup>57</sup> JAGA 1963/3794, 22 Mar. 1963. For a general discussion of a post commander's authority to restrict entry onto the post, see U.S. DEP'T OF ARMY, PAMPHLET NO. 27-164, MILITARY RESERVATIONS para. 10.3 (1965).

<sup>58</sup> Army Reg. No. 670-5 (8 Jan. 71).

The Judge Advocate General of the Army has interpreted the regulation literally, holding that jewelry must be worn on the actual fabric of the uniform in order to violate the regulation.<sup>66</sup> Consequently, items such as watch chains violate the regulation, but watches, rings and pendants are not *per se* prohibited. Although female members of the Army are prohibited by regulation from wearing earrings while in uniform, there is no similar regulatory prohibition applicable to male members.<sup>67</sup>

This is not to say that a commander must permit his soldiers to wear earrings or other unconventional jewelry while in uniform. A commander has a general responsibility to insure that his men present a neat and soldierly appearance.<sup>68</sup>

However, the commander's duty to enforce uniform regulations becomes more complicated if the soldier insists that an earring or other unconventional item of jewelry has religious significance. In this situation, The Judge Advocate General has held that the soldier's desire for exterior manifestation of his religion may be subordinated to the commander's responsibility for insuring the neat and soldierly appearance of his troops. Consequently, the fact that the earring has religious significance does not make an order to remove it illegal.<sup>69</sup> If the order is disobeyed, the general rule applies, which holds that religious scruples are not a defense to violation of an order.<sup>70</sup>

With respect to beards, The Judge Advocate General of the Army has held on two occasions that an order given to a Black Muslim to shave off a beard is within the lawful authority of the commander, even if the beard has religious significance.<sup>71</sup> The Army has granted a specific policy exception to members of the Sikh religions, allowing them to wear a beard and turban.<sup>72</sup> No other religious group has been given special treatment.

The special privilege granted to members of Sikh religions rests in part on the particular requirements of the Sikh religions. In granting the exception, the Army authorities noted that cutting of the hair is absolutely forbidden to a Sikh, whereas in the other religions the wearing of the beard was not mandatory, but merely commemorative. Furthermore, the exception to

<sup>66</sup> JAGA 1968/3617, 15 Mar. 1968.

<sup>67</sup> Army Reg. No. 670-30, para 1-4e (13 May 1969).

<sup>68</sup> AR 600-20, para. 81a(1) (Change No. 5, 4 Nov. 1969).

<sup>69</sup> JAGA 1968/3617, 15 Mar. 1968.

<sup>70</sup> MCM, 1969 (Rev.), para. 169b.

<sup>71</sup> JAGJ 1960/8230, 10 Mar. 1960; JAGJ 1960/3793, 22 Mar. 1960.

<sup>72</sup> See JAGA 1960/4018, 4 May 1960, concurring in exception for Sikhs who are inducted.

policy applies only to Sikhs who are inducted; those who enlist are expected to shave off the beard and dress like their military contemporaries.

The rule regarding compliance with uniform regulations may be summarized simply: uniform regulations must be followed, religious preferences notwithstanding, unless an exception to policy can be obtained by the individual. Since there is substantial factual basis for treating inducted Sikhs preferentially, it appears that their special treatment falls within the rule which holds that a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.<sup>13</sup> If, however, another religious sect were to make beards mandatory rather than merely commemorative, then there would be no substantial factual difference between its beliefs and the Sikh beliefs. The military would then be required to treat both sects equally, either by removing the privilege to wear a beard from the Sikhs or extending it to the other sects. To do otherwise would grant a preferential treatment to the Sikhs which could not be justified by factual differences and would be violative of the first amendment.

#### D. USE OF NARCOTICS

Occasionally, prosecutions for illegal use and possession of narcotics are met with the defense that the narcotics are sacramental in nature and used in connection with religious experiences. The hallucinogenic properties of many narcotics have prompted proponents of the new religions to adopt their use in order to attain a feeling of closer communion with God, or some similar experience. The sacramental use of narcotics was recognized as a valid defense in *People v. Woody*.<sup>14</sup> There a group of Indians were tried for use of peyote, but contended peyote was sacramental and used in connection with their religious services. The Supreme Court of California agreed with the Indians and set aside their convictions. The court balanced the interests of society in controlling the use of narcotics against the right of the Indians to practice their religion and found that the interests of society did not require that the Indians stop using peyote. The court was careful to point out that the Indians had been using peyote for generations, that they did so in a remote area of the desert and harmed no one, and that they were sincere in their religious beliefs.

<sup>13</sup> See *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>14</sup> 40 Cal.2d 69, 394 P.2d 813 (1964).

The same defense was raised with respect to marihuana and peyote in *State v. Bullard*.<sup>75</sup> However, in that case the court found that the interests of society were paramount to the defendant's desire to use marihuana in religious services.

The most famous recent case involving religious use of narcotics is *Leary v. United States*.<sup>76</sup> Dr. Timothy Leary was convicted of illegal concealment and transportation of marihuana. He carried his appeal to the Supreme Court of the United States, raising several questions including two regarding religious freedom: (1) whether the federal marihuana statutes were unfairly discriminatory in view of the exemption granted to peyote users even though marihuana is no more harmful than peyote; (2) whether the federal marihuana statutes deprived the defendant of his right to free exercise of religion. In arguing that the marihuana statutes were an unconstitutional restriction on the free exercise of religion, Dr. Leary cited the exceptions granted for sacramental use of wine during Prohibition.

The United States Supreme Court reversed the conviction on grounds other than the religious issues, avoiding comment on the issue whether anyone other than the peyote-using Indians were entitled to an exception to the narcotics laws based on religious grounds. It is submitted that the peyote cases are limited to their facts and are not precedent for the generalized use of narcotics, marihuana or hallucinogenics for sacramental or religious purposes.

## V. VOLUNTARY RELIGIOUS ACTIVITIES

A chaplain is required by statute to hold appropriate religious services at least once on each Sunday for the command to which he is assigned. Each commanding officer is required to furnish facilities, including necessary transportation, to any chaplain assigned to his command, to assist the chaplain in performing his duties.<sup>77</sup> Army Regulation 165-20, provides that "In accordance with ecclesiastical requirements, chaplains will conduct or arrange for religious services at such times and places as may be approved by their commanders."<sup>78</sup>

In its efforts to facilitate the attendance of military personnel at religious services, the Army may have created a constitutional problem. Military duty on Sunday is required to be reduced to a

<sup>75</sup> 267 N.C. 599, 148 S.E.2d 565 (1966); *cert. denied*, 386 U.S. 917 (1967).

<sup>76</sup> 395 U.S. 6 (1969).

<sup>77</sup> 10 U.S.C. § 3547 (1964).

<sup>78</sup> Army Reg. No. 165-20, para. 3b (18 May 1966).

level of strict military necessity, whereas personnel may be excused to attend religious services on Saturday or any other weekday only "where no military requirement prohibits."<sup>79</sup> A difference in treatment is immediately apparent. A military member whose religious beliefs required him to attend services on a weekday could argue that the statute and regulation favor orthodox religions over his own and consequently violate the first amendment by giving preferred status to religions who celebrate their sabbath on Sunday.

The discriminatory treatment prescribed by the regulation is analogous to the situation created by many Sunday closing laws. In *McGowan v. Maryland*,<sup>80</sup> the Supreme Court of the United States considered the Sunday closing laws of the State of Maryland. One of the many grounds for attack of the Maryland laws was that they treated favorably those persons who normally worship on Sunday, thereby discriminating against those who desire to worship on another day. It was alleged that such discrimination was a violation of the equal protection clause of the fourteenth amendment. In this regard, the Court said:

Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.<sup>81</sup>

If the *McGowan* rationale is applied, the Army Regulation does not give rise to constitutional problems unless the distinction in treatment between Sunday and non-Sunday worshippers cannot be factually justified. It is apparent to even the casual observer that the Army cannot reduce its level of operation for several days a week without seriously impairing its efficiency. Sunday is chosen as the one day of substantially reduced activity simply because that day accommodates the greatest number of troops who desire to worship and results in minimum interference with military operations.

One of the objections raised in the *McGowan* case was that the Sunday closing laws were religiously motivated and there-

<sup>79</sup> *Id.* para 10b, c.

<sup>80</sup> 366 U.S. 420 (1961).

<sup>81</sup> *Id.* at 425-26.

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fore were objectionable as laws "respecting the establishment of religion." After a lengthy examination of the history and purpose of the Sunday closing laws, the Court concluded that the laws were based upon humanitarian rather than religious motives.

However, the Army Regulation specifically states that it is designed to facilitate attendance at religious services. If the regulation required such attendance at religious services, it would fall within the constitutional prohibition against establishment of religion. However, unlike the Sunday closing laws, the regulation does not punish those who fail to observe the Sabbath, but merely allows those who desire to worship on Sunday to do so with a minimum of interference.

To refuse to allow time off for religious services to anyone regardless of military requirements would be hostile to all forms of religion. The federal government may not act in a hostile manner toward religion, for to do so would prefer nonreligion over religion. As stated on several occasions by the Supreme Court,<sup>52</sup> a state may not establish a religion of secularism by opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe. On the other hand, the same court held in *Sherbert v. Verner*<sup>53</sup> that freedoms of religion may not be infringed by the denial or placing of conditions upon a benefit or privilege. On the premise that time off from military duties is a privilege, it may be argued that this privilege is only available if the serviceman chooses to worship on Sunday; on Saturday he will be released only "if no military requirement prohibits." However, the considerations involved in such cases as *Sherbert* are considerably different from those involved in operating an effective Army. The *Sherbert* case involved a claim for unemployment compensation by a woman who had refused to accept employment on the grounds that all of the jobs offered required Saturday work, which was prohibited by her religion. The court held that she could not be denied unemployment compensation for refusal to accept employment since she was entitled under the first amendment to practice her religion without being penalized.

The *Sherbert* case dealt with refusal to accept duties inconsistent with religion. The Army Regulation deals with excusal from duties already imposed by virtue of military status. Fur-

<sup>52</sup> *E.g.*, *School District v. Schempp*, 374 U.S. 203 (1963); *Everson v. Board of Education*, 330 U.S. 1 (1946).

<sup>53</sup> 374 U.S. 398 (1963).

thermore, the freedom to attend religious services or refrain from labor on given days may be limited by Justice Jackson's observation in *Board of Education v. Barnette*: "It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."<sup>44</sup>

## VI. CONCLUSIONS

It should be apparent from the preceding survey that the applicability of the first amendment is extremely broad, ranging from purely religious exercises such as chapel attendance to non-religious areas such as uniform regulations. Generally speaking, the courts have treated the military differently from the remainder of society, recognizing that the needs of the military sometimes create a different context for the application of constitutional rights.

The difference in treatment is apparent in cases dealing with the establishment clause of the first amendment. Although the constitutionality of using appropriated funds to support the military chaplaincy has yet to be litigated on the merits, there is some indication that the United States Supreme Court will hold the armed forces to a different standard in determining when an unlawful establishment of religion has occurred. The Court has indicated that a certain amount of "establishment" is necessary in order to preserve the corollary right of free exercise, by stating that it is necessary for the Army to support and provide religious activities so that soldiers may practice their religion even when removed from familiar or friendly surroundings.

The Supreme Court has on several occasions recognized that the military society has different needs than civilian society. Religious freedom is tempered by the needs of society, and religious freedom in the military service is tempered by the needs of the military society. However, whenever individual rights are limited, the military society must be prepared to show the need for such limitation. The courts will first look to the particular act prohibited or limited by military discipline and determine whether the activity is "religious." If they are satisfied that it is religious, then they will examine the military order or directive to determine whether it is necessary to further the military mission. The court will uphold a limitation on religious

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<sup>44</sup> 319 U.S. 624, 642 n.19 (1943).

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liberty only if it finds that the order or directive is reasonably related to the overall mission of the armed forces and that compliance with the order or directive may reasonably be expected to further the overall mission. The courts will not be satisfied with mere assertions that certain compulsory acts are necessary to preserve military discipline. They also will demand that the compulsory act be an efficacious and necessary means of maintaining discipline. The Army has faithfully subscribed military goals to most areas of conflict with religious rights, but it may be hard pressed to establish that the compelled acts are necessary and efficacious means of attaining their stated goals. It is submitted for these reasons that the Army is on weak constitutional ground in the areas of compulsory chapel, compulsory character guidance, and perhaps even the military salute. It is in these areas that the benefit generated by infringement on individual rights is not readily apparent or empirically provable, and it is in these areas that the courts may well rule in favor of the individual.

Courts soon will be required to decide to what extent they will allow individual rights and military efficiency to limit each other. The current trend has been to extend individual rights at the expense of military efficiency. However, the day is rapidly approaching when the court must decide whether further expansion of individual rights will imperil the effectiveness of our national defense. Such a decision must be grounded not only on legal technicalities but also on a profound understanding of the nature of military discipline and the needs of an effective military force. It is frequently said that the parties to a lawsuit have the responsibility to educate the judge about the merits of their case. If so, the burden is upon the military to demonstrate that certain limits on individual rights are essential. At the same time the Army must be willing to discard those measures which are anachronistic and ineffective. The future of the United States may depend upon our ability to strike a rational balance between military strength and individual liberty.



# THE FREEDOM OF INFORMATION ACT: A COMPENDIUM FOR THE MILITARY LAWYER\*

By Major John T. Sherwood, Jr.\*\*

*The Freedom of Information Act is now five years old. Yet many of the difficulties that plagued its predecessor hinder its full application. The author examines the history, provisions, and subsequent interpretation of the 1966 Act in order to provide guidelines for the military practitioner. He stresses the necessity of giving a liberal interpretation to the philosophy of the Act: that full disclosure should be the rule and not the exception.*

## I. THE ACT: BACKGROUND AND PURPOSE

This article is designed to provide the military attorney with a comprehensive reference guide for use in the interpretation of the Freedom of Information Act<sup>1</sup> when responding to specific requests for the disclosure of government records. At the outset it is essential to appreciate the full implication of Congress' command to the Executive. This law was promulgated to give force and effect to the following goals: (1) that disclosure be the general rule, not the exception; (2) that all individuals have equal rights of access to government information; (3) that the burden be on the Government to justify the withholding of a

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> 5 U.S.C. § 552 (Supp. IV, 1969), Pub. L. No. 89-487, 80 Stat. 250 (1966), as amended and codified by the Act of 5 Jun. 1967, Pub. L. No. 90-23, 81 Stat. 54 (1967). The Freedom of Information Act, an amendment to section 3 of the Administrative Procedure Act of 1946, was enacted on 4 July 1966, to become effective 4 July 1967. The codification contained some changes in the internal structure and included specific reference to the military (uniformed services) as falling within the term "agencies" bound by the mandatory disclosure provisions of the Act. This statute shall henceforth be referred to as the Act.

document; (4) that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;<sup>2</sup> and (5) that there will be a change in government policy and attitude.<sup>3</sup>

Some background is necessary to understand the circumstances that prompted Congress to strengthen the citizen's right to know. Experience demonstrated that the Federal Register and the Code of Federal Regulations created in 1935 did not provide satisfactory methods by which the people could learn of the rules and procedures proliferated by administrative agencies. Section 3 of the Administrative Procedure Act of 1946<sup>4</sup> was passed to offer greater access to government information. However, by 1966

20 years of history had turned Section 3 into a vehicle to suppress and withhold information from the public. . . . [S]ecrecy minded Government officials were able to rely on such phrases as "secrecy in the public interest," "matters relating solely to the internal management of any agency," or "confidential for good cause found." And only "persons properly and directly concerned" were entitled to those government records which escaped withholding under the above categories. Nor was there any remedy for wrongful withholding of information from citizens by government officials.<sup>5</sup>

These nebulous standards enabled the Government to suppress information without explanation. Since there was no provision for judicial review "the agencies were left to their own good faith, an occasionally elastic safeguard."<sup>6</sup> Absence of recourse to the courts, coupled with arrogance on the part of government functionaries, served to insulate the civilian and military organs of the executive branch from effective scrutiny. The Freedom of Information Act was passed to cure such abuses.

<sup>2</sup> 5 U.S.C. § 552(a) (3) (Supp. IV, 1969). "On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. . . . [P]roceedings before the district court . . . take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

<sup>3</sup> See *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, United States Department of Justice, III-IV (1967) [hereinafter referred to as *Attorney General's Memorandum*].

<sup>4</sup> Act of 11 Jun. 1946, ch. 324, § 3, 60 Stat. 238.

<sup>5</sup> Kass, *The New Freedom of Information Act*, 53 A.B.A.J. 667, 668 (1967).

<sup>6</sup> Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L. J. 18, 28 (1967).

However, the Act has not put an end to the unjustified withholding of information. Continued agency contumacy is exemplified by this description of practices in the Federal Trade Commission:

When investigators . . . requested a personnel organization chart, it was at first "not in existence." Later it was "not easy to locate." Finally, when Budget Control Records were found which contained all of the relevant information, the agency still maintained that the records were not public documents since they contained the salaries of all personnel. The agency ignored the arguments that public monies paid public employees should be made public and that anyway the salaries could be blocked off. . . . The Agency finally released the information. Interestingly, it did not even bother to eradicate the salary figures—despite the fact that this was the sole basis for the initial failure to disclose. . . .<sup>1</sup>

The military side of the executive branch is not entirely without sin. An attorney representing a Department of the Army civilian employee attempted to secure from his client's organization an investigative report compiled pursuant to the client's earlier claim for an incentive award. The employee felt that he should have received an award for his participation in effecting a multi-million dollar cost saving that was declared by the Army to have occurred on one of its major weapons systems. The attorney's request was denied in a letter from the agency's Chief Counsel. It was alleged that the investigative report was statutorily exempted from disclosure as an "internal communication or staff paper containing staff advice, opinions or suggestions preliminary to a decision or action." The true reason for avoiding disclosure was later admitted by the Chief Counsel:

[The command] reluctantly concludes that we cannot make available . . . the requested report. Our reason for this will be apparent from the inclosed . . . Board Report. . . . "Actual dollar savings cannot be computed *nor in fact did they ever exist.*"<sup>2</sup>

The undaunted civilian employee petitioned a member of the House of Representatives in another attempt to obtain the investigative report. The resulting congressional correspondence was staffed through the Office of The Judge Advocate General. The latter's opinion is a model of understatement:

Indeed, probably the major impetus behind the passage of the information Act was Congress's concern with Executive secrecy for

<sup>1</sup> Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 345, 352 (1969).

<sup>2</sup> JAGA 1969/4296, 19 Aug. 1969 (emphasis added).

the sole purpose of avoiding embarrassment. While a good case might be made here that the reason for withholding the . . . report is the preservation of staff candor . . . the file does contain certain information which may lead an unsympathetic observer to conclude that the real reason for nondisclosure is to conceal error. . . . [O]n the basis of these nonexistent savings, an award has already been presented to [the command], and the Project Manager, a military officer, has been decorated. Probably most observers would conclude that a desire to conceal this embarrassing fact, rather than to preserve the integrity of the Army's internal processes, motivates [the command's] continuing refusal to release the report to [the employee].\*

The report was released pursuant to the requirements of the Freedom of Information Act.

As the above examples indicate it is easy to lose sight of the basic purposes of the Act either by accident or design. Before proceeding to a detailed consideration of the individual sections of the Act, the military attorney should focus clearly on its long range goals. The Act and implementing military regulations reveal two black letter considerations that should never be forgotten. First, disclosure is the rule, not the exception. Second, even when a record falls within a statutorily exempt category, government policy nevertheless requires disclosure where no legitimate purpose would be served by withholding the information.<sup>10</sup>

\**Id.*

<sup>10</sup>"Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

"[T]he exemption, even though it may be literally applicable, should be invoked only when actually necessary." *Attorney General's Memorandum*, 2-3, 31.

"Information exempt from public disclosure . . . should be made available to the public when its disclosure is not inconsistent with statutory requirements . . . and when component officials determine that no significant purpose would be served by withholding the information." Dep't of Defense Directive No. 5400.7, sec. IV.B. (23 Jun. 1967) [hereinafter referred to as DOD Directive].

"In compliance with DOD Directive 5400.7, records should be made available upon the request of any member of the public if no significant purpose would be served by withholding them under an applicable exemption, *provided* disclosure is not prohibited by executive order . . . or by a statute." Armed Services Procurement Reg. § 1-329.3(b) (1 Jan. 1969) [hereinafter referred to as ASPR].

"Information within a category which is normally exempt from public disclosure under paragraph 10 should be made available if no legitimate purpose exists for withholding it from the public." Army Reg. No. 345-20, para 2b (30 Jun. 1967) [hereinafter referred to as AR 345-20].

*Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

## II. 5 U.S.C. 552(a)(1): PUBLICATION OF INFORMATION IN THE FEDERAL REGISTER

The Freedom of Information Act requires that each agency publish

substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and each amendment, revision or repeal of the foregoing.<sup>11</sup>

The Attorney General has defined the term "agency" to include "every department, board, commission, division, or other organizational unit in the executive branch."<sup>12</sup> Failure of an agency to observe the subsection insures that a citizen cannot be affected adversely by matters required to be published but which are not.

The Attorney General has held that a rule of general applicability requiring publication in the Federal Register does not comprehend those rulings by the agency "addressed to and served upon named persons."<sup>13</sup> This is an illogical interpretation. It would seem unimportant whether a ruling was directed to an individual, since the critical question is whether it has resulted in a change in general policy, thus becoming a ruling of general applicability.<sup>14</sup>

The Attorney General also holds that an agency need not publish those policies and interpretations developed by its administrative adjudicative processes.<sup>15</sup> This, too, appears erroneous, particularly in cases where the repeated adjudication of similar disputes has crystallized in the formulation of common rules of uniform application, constituting "interpretations of general applicability."

This subsection may ultimately have significant impact upon operations of the statutory board system in Department of the Army. This possibility is discussed in section VI.

## III. 5 U.S.C. 552(a)(2): AVAILABILITY OF DATA FOR PUBLIC INSPECTION AND COPYING

Each agency must make available for public inspection and copying four classes of information: (1) "final opinions, includ-

<sup>11</sup> 5 U.S.C. § 552 (a) (1) (D) (E) (Supp. IV, 1969).

<sup>12</sup> *Attorney General's Memorandum*, 4.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> Sky, *Agency Implementation of the Freedom of Information Act*, 20 AD. L.Rev. 445, 448-49 (1968).

<sup>15</sup> *Attorney General's Memorandum*, 10.

ing concurring and dissenting opinions, as well as orders, made in the adjudication of cases";<sup>16</sup> (2) "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register";<sup>17</sup> (3) "administrative staff manuals and instructions to staff that affect a member of the public";<sup>18</sup> and (4) "a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published."<sup>19</sup> The penalty for an agency's failure to observe the public inspection and copying provision is also set forth in the Act:

[A] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party . . . only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.<sup>20</sup>

Two recent cases have examined this section. In the first case the plaintiff filed suit under the Act to compel disclosure of several documents, among them a comprehensive General Services Administration plan to dispose of a tract of surplus government realty.<sup>21</sup> Plaintiff purchased real property from GSA, resold the land and treated the profits as a long-term capital gain.

<sup>16</sup> 5 U.S.C. § 552(a)(2)(A) (Supp. IV, 1969).

"[A]djudication' comports with the judicial function, and an 'order' is equivalent to a judgment. The 'orders' contemplated by this subdivision of the Act are no more than the decrees issued as a result of a judicial proceeding on the administrative level.

"Presumably, an 'opinion' is every reasoned determination, but like 'orders' the Act limits its application to those 'made in the adjudication of cases,' i.e., opinions rendered in connection with a judicial proceeding on the administrative level." Note, *The Freedom of Information Act: Access to Law*, 36 *FORDHAM L. REV.* 765, 777-78 (1968).

<sup>17</sup> 5 U.S.C. § 552(a)(2)(B) (Supp. IV, 1969). "This sentence completes the all-inclusive reach of the Act—every statement of policy or interpretation must either be published in the Federal Register or made available for copying." Note, *supra* note 16, at 778.

<sup>18</sup> 5 U.S.C. § 552(a)(2)(C) (Supp. IV, 1969). "[S]taff manuals contain the standards which are used daily by agency personnel to dispense the law, and there is no question that the public has the right to know the effective standards being applied." Note, *supra* note 16, at 779.

"[T]he Defense Contract Audit Agency (DCAA) has issued a Directive relating to the availability of the Defense Contract Audit Agency Manual . . . Volume I . . . is to be withheld from public disclosure." Paul, *Access to Rules and Records of Federal Agencies: The Freedom of Information Act*, 42 *L. A. B. BULL.* 459, 482 (1967).

<sup>19</sup> 5 U.S.C. § 552(a)(2)(C) (Supp. IV, 1969).

<sup>20</sup> *Id.*

<sup>21</sup> *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969).

The Internal Revenue Service questioned such treatment; and the data requested from GSA was, to the court's satisfaction, necessary for plaintiff to respond to the tax inquiry. The court ordered release of the realty disposal plan, holding that such plan was a "statement of policy" required to be made available for public inspection and copying.

Plaintiff in the second case was a draft counselor. He requested memoranda from the Illinois State Selective Service Director concerning deferments, exemptions and associated procedures. The Director replied that such documents were available for inspection at local and appeal boards, but not for general distribution. He further noted that the memoranda were subject to frequent change.

The court found that the Act required disclosure and distribution so long as the plaintiff was willing to pay costs of reproduction.<sup>22</sup> The deferment data was held to be within two classes of information subject to availability for public inspection and copying: "statements of policy" adopted by the agency; and "instructions to staff."

#### IV. 5 U.S.C. 552(a) (3) : THE RECORDS SECTION

##### A. WHAT IS A "RECORD" SUBJECT TO DISCLOSURE?

Subsection 552(a) (3) provides that:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records . . . shall make the records promptly available to any person.<sup>23</sup>

1. *The Definition.* A great deal of intellectual effort has been expended, most of it unnecessarily, in attempts to determine what constitutes a "record." Predictably, government writers have taken a restrictive view, presumably in an effort to insulate the maximum number of agency documents from the disclosure requirements of the Act.

Prior to launching into an examination of case law and the opinions of legal writers, it should be recalled that disclosure is the rule, that the burden is upon the Government to justify nondisclosure, and that "there will be a change in Government policy and attitude."<sup>24</sup>

<sup>22</sup> *Tuchinsky v. Selective Service System*, 294 F. Supp. 803, 805 (N.D. Ill. 1969).

<sup>23</sup> 5 U.S.C. § 552(a) (3) (Supp. IV, 1969).

<sup>24</sup> See text accompanying note 3, *supra*.

Though the term "record" is not defined in the Act, the Attorney General has adopted the comprehensive definition formulated by Congress in connection with the treatment of official records by the National Archives.

[T]he word "records" includes all books, papers, maps, photographs, or other documentary materials, *regardless of physical form or characteristics*, made or received by any agency of the United States Government . . . in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein.<sup>24</sup>

This definition has also been incorporated into Department of Defense and Department of Army regulatory implementations of the Freedom of Information Act.<sup>25</sup>

However, many government officials have backed away from the unambiguous wording of the Archives statute, introducing instead a "property" concept in attempting to carve out a rather substantial class of records to be exempted from disclosure under the records subsection. To permit the Government to claim that a document is "property," rather than a "record," would be to graft an extrastatutory exemption onto the Act.<sup>26</sup> Indeed, one writer viewed with alarm the possibility that documents containing anything important might be available to the public:

This definition [in the Archives statute] is not entirely satisfactory since it is concerned with record disposal and its relevance to "identifiable records" under the Act is questionable. . . . The Justice Department . . . felt it desirable to limit the scope of the term by excluding objects or articles of property, such as furniture, vehicles and equipment [citing the *Attorney General's Memorandum*, 23]. . . . However, if an item of *property* is set forth on a piece of paper, such as a *research formula*, so that a copy can be made, the concept of exclusion based on availability of a copy that the Justice Department makes is not applicable. Such items of *property* on paper can be made available by means of a copy and therefore resemble a "record."<sup>27</sup>

## 2. Contractor-Produced Computer Tapes.

Nowhere has the "records" definition been of more consequence

<sup>24</sup> 44 U.S.C. § 366 (1964) (emphasis added).

<sup>25</sup> DOD Directive, sec. VII.B.; 32 C.F.R. § 286.7(b) (Supp. 1970) and AR 345-20, para 4.

<sup>26</sup> See Note, 80 HARV. L. REV. 909, 911 (1967).

<sup>27</sup> Caron, *Federal Procurement and the Freedom of Information Act*, 28 FED. BAR. J. 271, 277 (1968) (emphasis added).

to private industry than in the controversy surrounding the availability of government computer programs and data.<sup>29</sup> At the outset, one should distinguish between the set of commands, or instructions, called the "program," and the raw data that is manipulated by the program. Conflicting views with regard to computer materials may be found in two government legal opinions, one drafted by Department of Defense, the other by the Office of The Judge Advocate General of the Army.

The DOD position was prepared in response to the Assistant Secretary of the Air Force's request for policy guidance concerning the release of computer programs to individuals or organizations outside the federal government. The following is extracted from the DOD response:

As you know, the development of a computer program is the effort of DOD or contractor personnel at planning, devising *inventing* and recording coherent and purposeful sequences of actions in a form which can be communicated to a computer. . . . The initiation of computer programs can be closely analogized to "designs" or "drawings" developed for the government. . . . [I]t is our opinion that computer programs and documentation are of the type of items considered by the Department of Justice to be in the nature of *property* and therefore exempt under 5 USC 552(b)(4) [trade secrets and commercial . . . information obtained from a person and privileged or confidential].<sup>30</sup>

Reference to computer programs as "inventions" is error. As viewed by the Patent Office: "The basic principle to be applied is that computer programming per se, whether defined in the form of process or apparatus, shall not be patentable."<sup>31</sup> There are several other problems with the DOD stance. First, if "property" that looks like a record is not a record, it is unnecessary to refer to the Freedom of Information Act. Second, if a piece of property-on-paper is considered under the Act, and treated under the exemption concerning commercial information it cannot, as implied above, be automatically excluded from disclosure, but must be individually examined on its merits. Third, government opera-

<sup>29</sup> "The computer is revolutionizing industry and it will soon revolutionize the entire field of tax practice and tax administration. If the advantage of the computer [IRS' RIRA system] is given only to the government side, then the taxpayer might as well give up, since his representative will be fighting with not one but . . . both arms tied behind his back." Eaton & Lynch, *Tax Practice as Affected by the Freedom of Information Act and the Information Retrieval System*, 17 TUL. TAX INST. 405, 408 (1968).

<sup>30</sup> Memorandum from Office of the Comptroller, Department of Defense to the Assistant Secretary of the Air Force (FM), undated, subject: Release of ADP Programs and Other Documentation (emphasis added).

<sup>31</sup> 38 Fed. Reg. 15809-610 (1968).

tions are not analogous to those of private industry. There is no requirement upon private industry to disclose anything under the Act. Fourth, the citizen's tax dollars purchased the contractor-supplied material. Fifth, regulations require disclosure even where certain data falls within an exemption where no legitimate purpose for suppression is found to exist. Sixth, the Armed Services Procurement Regulation provides that contractor-produced technical data will, as a matter of policy, be acquired by the Government with unlimited rights.<sup>32</sup> "Unlimited rights" are defined in ASPR as granting to the Government the option to "use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so."<sup>33</sup> It seems that the United States does not obtain title to data, but does acquire a contractual right to distribute and divulge.

The Judge Advocate General recommended the release to a private firm of a computer data base developed for the Army by another company. Contractor technicians had created a computer systems analysis program to enable the Government to compare competing automatic data processing systems and to determine which system should be purchased by the Army for particular tasks. The computer analysis program was supported by the data base, which contained purely factual information on magnetic tape concerning the machine hardware characteristics of leading commercial computers. These computer manufacturers would presumably be in competition from time to time for government contracts involving the lease or sale of computer devices and systems to the United States. The firm requested the raw data (on tape) concerning the physical characteristics of certain commercial computers, but not the instruction set that performed the comparative evaluation of such machines.

In view of the "property" position taken by the DOD memorandum, The Judge Advocate General's opinion offers an element of humor, in revealing that DOD originally did not agree with the Department of Justice proposal to distinguish between records that were "records" and records that were "property":

In its comments to the Department of Justice . . . DOD, also recommended that "it would seem preferable, whenever possible, to simply rely on the exemptions of subsection [(b)] rather than a

<sup>32</sup> Armed Services Procurement Reg. § 9-202.2(c) (Rev. No. 4, 29 Aug. 1969).

<sup>33</sup> Armed Services Procurement Reg. § 9-201(c) (Rev. No. 4, 29 Aug. 1969).

*tenuous distinction between those formulae, designs and drawings which are records and those which are property.*" (DOD Comments on Department of Justice Analysis of Public Law 89-487, undated). *This distinction was discreetly deleted in the final version of the Memorandum.*<sup>34</sup>

The Judge Advocate General's opinion contains a careful analysis of the public information implications posed by this request. It was held that a magnetic tape reel is a "record" within the meaning of the Act. The opinion stated that:

[I]nformation on a magnetic tape is as much a "record" as the same information on a hardcopy document. For one thing, the Act itself frequently speaks in terms of "information," although, to be sure, 5 USC § 552(b)(3), which pertains to release, speaks of "identifiable records." More significantly, however, DA has adopted as its regulatory definition of records . . . the broad description set forth in . . . 44 USC 366.

An executive agency could hardly maintain that tapes are "records" . . . for the purposes of statutory requirements to create and preserve records" . . . but . . . [that they] . . . are not "records" under that definition for the purposes of release under 5 USC § 552.<sup>35</sup>

### 3. "Identifiable" v. "Identified" Records.

The case of *Bristol-Myers Company v. FTC*<sup>36</sup> illustrates judicial confusion between an *identifiable* record, as opposed to a record that was not initially *identified* with sufficient particularity. Plaintiff filed suit against the Federal Trade Commission to secure disclosure of data collected by the latter pursuant to a nation-wide investigation of patent medicines. Bristol-Myers demanded "each item of material, whatever its form or nature, which relates to, bears upon, contains or purports to describe, report or discuss, or which otherwise, in whole or in part, records, reflects, evidences, has contributed to or constitutes" information relating to the speed, strength and duration of certain pain-relievers.

The district court, in denying plaintiff's request, stated that an identifiable record is one that is

<sup>34</sup>JAGA 1968/4146, 29 Jul. 1968 (emphasis added).

<sup>35</sup>"Final authority of Administrator [of GSA] in matters regarding surveys of records, etc.

"Notwithstanding any other provisions of the Federal Property and Administrative Services Act of 1949, as amended, the Administrator shall have final authority in all matters involving the conduct of surveys of Government records, and records creation, maintenance, management and disposal practices in Federal agencies. . . ." 44 U.S.C. § 396a (1964).

<sup>36</sup>JAGA 1968/4146, 29 Jul. 1968.

<sup>37</sup>424 F.2d 935 (D.C. Cir. 1970).

[D]escribed with sufficient precision in order that by ministerial action of some subordinate the document can be identified and selected out of the files. It does not mean that the head of an agency or his immediate assistant must use judgment in seeking through the file to determine whether a particular document is within the classification asked for.<sup>37</sup>

The Court of Appeals reversed, citing the Attorney General's memorandum to the effect that: "This requirement of identification is not to be used as a method of withholding records."<sup>38</sup> The Court continued:

The FTC can hardly claim that it was unable to ascertain which documents were sought by Bristol-Myers. The commission relied on certain materials promulgating its proposed rule, and referred to them in announcing the rule-making proceeding. These materials are adequately identified in the request for disclosure of the items mentioned. . . .<sup>39</sup>

Only as to other materials did the court find plausible the failure of identification argument.

The appellate approach seems the sound one. While an imprecise demand may be sharpened by an agency request for clarification a private citizen or firm often may simply not be possessed of detailed identifying information about the desired record. If the record is identifiable, it should not be grounds for denial that it was not precisely identified the first time around.<sup>40</sup>

## B. WHO IS "ANY PERSON" ENTITLED TO OBTAIN RECORDS?

Under the old information statute a person could be denied access to records on the ground that he was not a "person properly and directly concerned," where he did not have a specific interest in the subject matter covered by the records.<sup>41</sup> Now, however, "any person" has standing to request government records,<sup>42</sup> whether or not he has the slightest actual contact with, interest in or need for them.<sup>43</sup>

<sup>37</sup> Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 747 (D.D.C. 1968).

<sup>38</sup> See *Attorney General's Memorandum*, 24.

<sup>39</sup> Bristol Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970).

<sup>40</sup> "[Agencies] should keep in mind . . . that . . . their superior knowledge of the content of their files should be used to further the philosophy of the Act by facilitating, rather than hindering, the handling of the request for records." *Attorney General's Memorandum*, 24.

<sup>41</sup> Kass, *supra* note 5, at 668.

<sup>42</sup> *Attorney General's Memorandum*, IV.

<sup>43</sup> "[A]ppellants lack of need for the memorandum is irrelevant to their right to obtain it under the Act." *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 704 (D.C. Cir. 1969).

One observer expressed doubt that the judiciary could cope with the Act's new standing test.

[T]he legislative history demonstrates a conviction that any person is entitled to see information held by the government. It is urged that courts follow this intent. However, there are indications that they will not. It is possible that balancing the interests has too long been a part of the court's procedure . . . for them to change now.<sup>46</sup>

That the above view was not unjustified became clear in the district court opinion in *Bristol-Myers*:

Its [the Act's] purpose was to prevent Government agencies from unjustifiably withholding information that should be reasonably available to a person having some basis for seeking it.<sup>47</sup>

Two opinions of The Judge Advocate General have enforced disclosure. Active duty Army officers must be provided with copies of their efficiency reports.<sup>47</sup> The right to obtain such reports applies to former officers as well.<sup>48</sup> It was held that none of the disclosure exemptions were applicable to requests for efficiency reports. It was further stated that even if one or more of the exemptions did apply, there would be no legitimate purpose for suppression, since the officer may, either on his own or through an agent, make copies of such documents upon visiting his branch personnel office. The same rationale supports the proposition that a member is entitled to copies of other documents from his official personnel file.

#### V. 5 U.S.C. 552(b): EXEMPTIONS TO THE DISCLOSURE MANDATE

This subsection is the heart of the Act. Though it was the intent of Congress to open the filing cabinets of government to the people, it was also recognized that unrestricted disclosure might produce more mischief than benefit. As such it is essential to acquire a thorough familiarity with the scope of these exemptions. They are not nearly so restrictive as first impression might indicate.

The Supreme Court has not had the opportunity to resolve in-

<sup>46</sup> Note, *The Federal Freedom of Information Act as an Aid to Discovery*, 54 IOWA L. REV. 141, 158 (1968). See also *Consumers Union v. VA*, 301 F. Supp. 796, 806 (S.D. N.Y. 1969).

<sup>47</sup> *Bristol Myers Co. v. FTC*, 284 F. Supp. 745, 747 (D.D.C. 1968) (emphasis added).

<sup>48</sup> JAGA 1968/3603, 28 Mar. 1968.

<sup>49</sup> JAGA 1967/4382, 25 Sep. 1967.

terpretational inconsistencies produced by the federal district courts. Indeed, there are relatively few circuit court decisions involving the Act. The exemptions will be examined in light of such judicial guidance as is available, coupled with reference to administrative opinions and comments by legal writers. Parenthetically, it should be noted that the nine exemptions apply not only to the records subsection, but to the Federal Register and public inspection and copying subsections as well.<sup>49</sup>

**A. MATTERS SPECIFICALLY REQUIRED BY  
EXECUTIVE ORDER TO BE KEPT SECRET IN THE  
INTEREST OF NATIONAL DEFENSE OR  
FOREIGN POLICY**

[T]his exemption is going to cause problems. . . . Conceivably there will be no greater specificity than already exists via Executive Order 10,501, which makes secret all "defense information or material the unauthorized disclosure of which could result in serious damage to the nation." Vaguely-phrased orders of this nature could make the new bill of no greater value than the old, with its standard of "requiring secrecy in the public interest."<sup>50</sup>

The above prediction was borne out in *Epstein v. Resor*,<sup>51</sup> the only case decided under this subsection. Plaintiff, an historian at Stanford University, filed suit to enjoin the Secretary of the Army from withholding an old file (classified "Top Secret" since 1948) concerning an alleged agreement between the United States and the Soviet Union to forcibly repatriate Russian prisoners of war. It was alleged that these prisoners were executed or died in concentration camps upon delivery to Soviet authorities. At trial, Epstein introduced an affidavit executed by Representative Moss, co-sponsor of the Freedom of Information Act. Representative Moss said that it was his intention that the court's powers of inquiry, and the Government's burden of proof, pertain to *all* exemptions raised in opposition to disclosure. The court rejected the affidavit as competent evidence of the intent of Congress, as it was prepared subsequent to the effective date of the Act. The defendant then moved to dismiss for lack of jurisdiction and moved for summary judgment. The district court granted summary judgment.

On appeal the Secretary of the Army contended "that agency determination that the material sought falls within one of the

<sup>49</sup> *Attorney General's Memorandum*, 29.

<sup>50</sup> Note, *supra* note 6, at 80.

<sup>51</sup> 421 F.2d 930 (9th Cir. 1970).

nine exempted categories takes the case out of subsection (a)(3) and precludes the broad judicial review provided by that subsection."<sup>52</sup> The Court of Appeals rejected this view. It stressed the "legislative purpose to make it easier for private citizens to secure Government information" and held that judicial review *de novo* "with the burden of proof on the agency should be had as to whether the conditions of the exemption in truth exist."<sup>53</sup>

The Court of Appeals, however, refused to require the district judge to examine the classified file to determine whether the Top Secret classification should remain. The Court treated the "secret matters" exemption as:

. . . significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review . . . under [this exemption] this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the Executive. The judicial inquiry is limited to the question of whether an appropriate executive order has been made as to the material in question.<sup>54</sup>

In examining the decision to make the file Top Secret the Court was satisfied that the classification did not rest "on an ancient order unrelated to the conditions of today." The Court noted that a current review of the files was proceeding on a document by document basis. Convinced that the original classification was not arbitrary or capricious and that valid reasons for maintaining the classification existed, the Court denied access to the file.

In essence, the *Epstein* court formulated an impressive test, indicating that the judiciary will scrutinize the Executive's claim of secrecy. Then the court sought to render a finding under circumstances that effectively precluded it from implementing the test.

The court said that it was limited to determining whether the Secretary acted capriciously in exercising his authority. Under Executive Order 10,501, the head of a military department is authorized to place a Top Secret restriction on

defense information or material which requires the highest degree of protection . . . applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack

<sup>52</sup> *Id.* at 932.

<sup>53</sup> *Id.* at 932-33.

<sup>54</sup> *Id.* at 933.

against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.<sup>65</sup>

It is submitted that the legal test adverted to above means simply, in practice, that the courts will not stand in the way of a tenaciously-advocated claim of secrecy when a document has been classified pursuant to executive order.

One might examine the impact of *Epstein* upon those provisions in DOD regulations that require disclosure though a document falls within an exemption but where "no legitimate purpose" exists for withholding it.<sup>66</sup> Such provisions would seem unworkable, with regard to this exemption, since no one outside the executive branch could occupy a position to determine whether the data so exempted was *actually* important to the national defense, or merely politically embarrassing.

It has been pointed out that Executive Order 10,501 includes matters classified as Top Secret, Secret and Confidential, but

[I]nformation marked differently from the aforementioned classifications, e.g., "For Official Use Only," should not be considered as falling under this exemption.<sup>67</sup>

#### B. MATTERS RELATED SOLELY TO THE INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY

The potential for abuse here lies in the temptation to withhold data concerning agency practices that the public has a legitimate right to know, but which the agency desires to conceal. There is evidence that some organizations are wont to perpetuate secrecy in spite of the Act. The following report indicates that the Government need never resort to an exemption to justify the withholding of a document, so long as its existence is stoutly denied.

An example of suppression which is traceable directly to the Commissioners themselves concerns the existence of a master list of investigations opened against individual corporations. Such a list is kept, but . . . the Commission prefers officially to deny its existence.<sup>68</sup>

One court summarily rejected an agency's contention that a plan for the sale of surplus real estate was exempt as a statement of internal personnel rules. It was held that the Government did

<sup>65</sup> 3 C.F.R. § 979 (Supp. 1949-1958).

<sup>66</sup> See text accompanying note 10, *supra*.

<sup>67</sup> Bennett, *The Freedom of Information Act, Is It a Clear Public Records Law*, 34 BROOKLYN L. REV. 72, 82 (1967).

<sup>68</sup> Fellmeth, *supra* note 7, at 737.

not offer compelling reasons for nondisclosure, as required by its regulations in implementation of the Freedom of Information Act.<sup>59</sup> The court could have added that the exemption selected by the agency had no relevance to the document sought to be withheld.

Suggestions in the Senate Report as to the scope of justifiably exempt personnel data are incredible, though the House adopted a more rational position.

Senate Report No. 813 . . . states that examples under this exemption include "rules as to personnel's use of *parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like.*" It is difficult to reconcile the examples in the Senate Report as not being "routine administrative procedures" mentioned in the House Report. . . . House Report 1497 . . . expressly states that the exemption does not cover all "matters of internal management" such as employee relations and working conditions, and routine administrative procedures. . . .<sup>60</sup>

There is no justification for employing this exemption as a theory upon which to support nondisclosure. Those internal personnel rules and practices that are to be kept secret are bound to be illegal or unfair, else they would not be suppressed.

### C. MATTERS SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE

The Attorney General feels that this exemption indicates a congressional "intention to preserve whatever protection is afforded under other statutes, whatever their terms."<sup>61</sup> However, one commentator has suggested that the term "specifically" should be construed to mean that this exception does not apply to those statutes granting to administrators the discretionary power to withhold information "in the public interest."<sup>62</sup> The latter position appears correct, viewing the Act in light of its antecedent's discredited past.

A seeming conflict between two statutes should be noted. There exists a federal law assessing criminal penalties for the unauthorized disclosure of certain confidential information.<sup>63</sup> One court

<sup>59</sup> GSA v. Benson, 415 F.2d 878 (9th Cir. 1969); 41 C.F.R. § 105-60.105-2 (1968).

<sup>60</sup> Bennett, *supra* note 57, at 77-78 (emphasis added).

<sup>61</sup> Attorney General's Memorandum, 31-2.

<sup>62</sup> Note, *supra* note 45, at 159.

<sup>63</sup> "Whoever, being an officer . . . of the United States . . . discloses, or makes known in any manner or to any extent *not authorized by law* any information . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity,

wrote of what it felt to be a dilemma created by the simultaneous existence of the two statutes, when it alluded to

[T]he difficulty caused by having one statute which directs disclosure of records unless they are otherwise exempted and another statute which prohibits disclosure unless otherwise authorized.<sup>62</sup>

That law need not impede the faithful implementation of the Freedom of Information Act, however, as the former obviously relates to the deterrence of commercial espionage aided and abetted by government employees.

*D. MATTERS THAT ARE TRADE SECRETS AND  
COMMERCIAL OR FINANCIAL INFORMATION OBTAINED  
FROM A PERSON AND PRIVILEGED OR CONFIDENTIAL*

In *Bristol-Myers Co. v. FTC*,<sup>63</sup> the court was presented by the agency with several exemption theories, including that relating to confidential data. In upholding nondisclosure the district court had indicated that it considered this exemption to be quite broad.

In the course of its investigations the Federal Trade Commission frequently obtains information from persons engaged in manufacture or commerce information of a type that these persons do not wish to have disclosed to their competitors.<sup>64</sup>

The Court of Appeals refused to allow a "bare claim of confidentiality" to legitimize nondisclosure. They remanded the case for a "careful consideration" of the requested documents in light of the statutory purpose.<sup>65</sup> The court recognized a conflict between two competing legitimate interests, *i.e.*, the right of the public to know what its government is doing, and the right of individuals and business entities to expect that sensitive commercial and financial data submitted to the Government will be held in confidence.

Similar evidence of concern in the business community may be found in an article by house counsel for a large manufacturing firm:

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confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation or association . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." 18 U.S.C. § 1905 (1964) (emphasis added).

<sup>62</sup> *Consumers Union v. VA*, 301 F. Supp. 796, 802 n.20 (S.D.N.Y. 1969).

<sup>63</sup> 284 F. Supp. 745 (D.D.C. 1968).

<sup>64</sup> *Id.* at 747.

<sup>65</sup> *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

[I]ndividual contractors can secure access to useful records under . . . the Act. . . . But from the Government contractor's point of view there is a negative side to the Act which could outweigh the benefits, namely, the possibility that it will lead to public release of confidential or proprietary business and technical data.<sup>69</sup>

Understandably, that writer cites with approval the Attorney General's position that "Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under [this] exemption."<sup>70</sup>

The Department of Defense offers a reasonable safeguard in providing that commercial and financial data will not be disclosed where received "with the understanding that it will be retained on a privileged or confidential basis."<sup>71</sup> One court stated, in *dictum*, that even an express assurance of confidentiality initiated by the Government, and printed on government invitations to bid, would not bar disclosure to third parties of contractor-supplied data.<sup>72</sup>

The "understanding" concept was adopted by the court in *The Tobacco Institute v. FTC.*<sup>73</sup> The Institute requested access to records revealing the identity of persons who responded to an agency questionnaire. The court granted disclosure of the names and addresses of those individuals who responded and who did not initially request confidential treatment. The court's position was analyzed as follows:

It seems that the Court accepted the Commission's argument that information supplied to the Government on the understanding that it shall be kept in confidence is not governed by the Act. On the other hand, the court did require production in instances in which the request for confidential treatment was made *after* the information was supplied. Possibly the distinction lies in whether confidentiality was made a *condition* to supplying the information at all.<sup>74</sup>

Army regulations require that data be submitted "with the *understanding* that it will be retained on a privileged or confidential basis" in order to prevent disclosure by the Govern-

<sup>69</sup> Cavanagh, *The Freedom of Information Act and Government Contractors—Problems in Protection of Confidential Information*, 2 PUB. CONTRACTS L. J. 225-26 (1969). See also Sobeloff, *The Freedom of Information Act*, 54 A.B.A.J. 709, 712 (1968).

<sup>70</sup> *Attorney General's Memorandum*, 34.

<sup>71</sup> 32 C.F.R. § 256.8(b)(4) (1970) (emphasis added).

<sup>72</sup> *Consumers Union v. VA*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969).

<sup>73</sup> Civil No. 3085-67 (D.D.C., 8 Aug. 1968) (no opinion).

<sup>74</sup> Stewart & Ward, *FTC Discovery: Depositions, The Freedom of Information Act and Confidential Informants*, 37 ANTI-TRUST L. J. 248, 257 (1968) (emphasis added).

ment.<sup>11</sup> Perhaps sufficient protection against the unwarranted release of sensitive commercial information may already be found in the criminal statute discussed earlier,<sup>12</sup> though it is recognized that proof of *mens rea* is required.

The Attorney General has adopted the view that confidential information obtained from "a person" includes data obtained by the agency from within the agency itself.<sup>13</sup> The manifest absurdity of such an interpretation becomes obvious upon a review of the reasons why the Freedom of Information Act was promulgated. In rejecting the Attorney General's position, the court in *GSA v. Benson*<sup>14</sup> ordered the disclosure of data that was created entirely within the General Services Administration. It held that information obtained from "a person" contemplates data that is received from one *outside* the agency. The Attorney General's guidance was further put to rest in *Consumers Union v. VA*,<sup>15</sup> a decision requiring the disclosure of government-generated data concerning the testing of hearing aids. Unfortunately, the Attorney General's construction is reflected in the DOD implementation.<sup>16</sup> If the reasoning in *Benson* and *Consumers Union* survives, the DOD directive will require a revision to reflect the letter and spirit of the Act.

The appellate journey of *Consumers Union v. VA*<sup>17</sup> promises to supply some definitive judicial guidance as to the powers of district courts with regard to this and other exemptions. Plaintiff brought an action to compel production of records concerning hearing-aid tests conducted by the defendant. In referring to the clear inapplicability of the fourth exemption, the court pointed out that the information sought was generated entirely within the government. The court then fell prey to a convoluted notion of the equity responsibilities of district courts in the enforcement of maximum public disclosure. It was found that disclosure of the data sought by the Consumers Union was *not*

<sup>11</sup> AR 345-20, para 10d; 32 C.F.R. § 518.10(d)(4) (1968). For a critical discussion of the AR provision see Dobkin, *The Release of Government-Owned Technical Data Under the Freedom of Information Law: Between Scylla and Charybdis*, 14 VILL. L. REV. 74, 82 (1968).

<sup>12</sup> See text accompanying note 63, *supra*.

<sup>13</sup> *Attorney General's Memorandum*, 34.

<sup>14</sup> 289 F. Supp. 590, 594 (W.D. Wash. 1968); *aff'd*, 415 F.2d 878 (9th Cir. 1969).

<sup>15</sup> 301 F. Supp. 796, 803 (S.D.N.Y. 1969).

<sup>16</sup> ". . . or similar commercial or financial records which the component develops internally, if they are in fact the kinds of records which are normally considered privileged or confidential." DOD Directive sec. VIII B.4, 32 C.F.R. § 286.8(b)(4) (1970).

<sup>17</sup> 301 F. Supp. 796 (S.D.N.Y. 1969).

blocked by any of the statutory exemptions. Incredibly, the court then denied disclosure on the basis of a somewhat mystical and extra-statutory application of "traditional equity principles."

There is considerable controversy as to the types of information exempted, and no authoritative judicial guidance for the practitioner. As usual, the Attorney General takes a restrictive view, stretching this exemption to *all* types of information, "whether or not involving commerce or finance."<sup>81</sup> The Department of Justice concludes that the term commercial and financial information is merely descriptive of one or two of the many kinds of information that are exempted. Most commentaries disagree with this position. It has been argued that only trade secrets and commercial or financial information are exempted by this subsection, and that, conversely, all other information is subject to disclosure, whether or not otherwise privileged or confidential.<sup>82</sup> In order to support the Attorney General's view, one must read "privileged and confidential" both as a separate classification of exempt data, and as modifying "commercial or financial information."<sup>83</sup>

#### E. INTER-AGENCY OR INTRA-AGENCY MEMORANDUMS OR LETTERS WHICH WOULD NOT BE AVAILABLE BY LAW TO A PARTY IN LITIGATION WITH THE AGENCY

One of the more significant dents yet made in unwarranted government secrecy occurred in *American Mail Line, Ltd. v. Gulick*.<sup>84</sup> The Maritime Subsidy Board informed the plaintiff-shipowners that it (the Board) considered that costs incurred for eight crew members employed on each of plaintiff's vessels were unnecessary. The shipowners were ordered to refund \$3,300,000 in excess subsidy payments. The Board stated that it based its ruling upon a "memorandum dated November 26, 1965, revised December 20, 1967." The last five pages of that document were adopted as the Board's own determination. Defendant refused either to produce the memorandum to which it referred or to produce reasons for their decision so that the plaintiff could intelligently prepare and file a petition for reconsideration. The shipowner then filed suit under the Freedom of Information Act to compel disclosure of the memorandum. The court held:

<sup>81</sup> *Attorney General's Memorandum*, 34.

<sup>82</sup> *Stewart & Ward*, *supra* note 73, at 254.

<sup>83</sup> *Schultz, A Primer on the Public Information Act*, 2 PUB. CONTRACTS L. J. 208, 212 (1969).

<sup>84</sup> 411 F.2d 696 (D.C. Cir. 1969).

We do not feel that appellee [Board] should be required to "operate in a fishbowl," but by the same token we do not feel that appellants should be required to operate in a darkroom.<sup>[M]</sup> If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its . . . ruling that its action was based upon that memorandum. . . . When it chose this course of action "as a matter of convenience" the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. Thus, we conclude that the Board's . . . ruling clearly falls within the confines of 5 U.S.C. 552(a)(2)(A)[\*] and consequently it must be produced for public inspection."

Reasoning similar to that of *American Mail Line* was employed by the General Counsel, Department of Army, in an undated memorandum to the Special Assistant to the Under Secretary of the Army. There it was recommended that henceforth petitioners before the Army Board for the Correction of Military Records should have routine access to Army Staff memoranda, including intra-agency legal opinions of The Judge Advocate General. The General Counsel's memorandum is not grounded upon provisions of that Act, but upon "considerations of the fairness and rationality of ABCMR proceedings."

I find the arguments advanced against this proposed policy change unconvincing. First, I do not believe the frankness of staff opinions will be significantly compromised by making copies available to applicants and their counsel, particularly since most of these opinions are presently available for inspection at some point during or after the board proceedings.<sup>4</sup>

Providing counsel with staff opinions *after* board proceedings have terminated sounds quite similar to the secretive procedural practices found by the court in *American Mail Line*.

Maximum disclosure of intra-agency memoranda may assist in avoiding agency embarrassment. *Owings v. Secretary of the Air Force*<sup>5</sup> contained the gratuitous comment that the Air Force Board for the Correction of Military Records might not have

<sup>4</sup> The "fishbowl" reference was a barb aimed at the oft-repeated *non sequitur* that "[T]he exchange of ideas among agency personnel would not be completely frank" were they forced to disclose internal agency communications. See *Attorney General's Memorandum*, 35.

<sup>5</sup> "(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . ."

<sup>6</sup> *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1969).

<sup>7</sup> Attached to JAGA 1969/4540, 7 Oct. 1969.

<sup>8</sup> 298 F. Supp. 849, 853 (D.D.C. 1969).

adopted an erroneous Air Force JAG legal opinion had petitioner's counsel been privy to such opinion at the hearing.

The *American Mail Line* case may have far-reaching implications throughout government in general, and the board structure of the military departments in particular. The thrust of the case is this: if the substance of the memorandum is adopted as the board's decision, such memorandum must be disclosed along with the entire board opinion. This is so whether or not the agency document was specifically cited in the body of the board's opinion. Surely the requirement of disclosure is not contingent upon the board's candor in *admitting* that its decision is based upon intra-agency or inter-agency memoranda.

An important type of document in the disclosure grey area is the intra-agency staff memorandum explaining the agency's internal position with regard to its interpretation of a regulation. This memorandum would appear to be within the exemption. However, if such memorandum were used by agency personnel for guidance when interpreting the regulation in a matter concerning the rights of a citizen, the substance of the memorandum would be an agency interpretation to be indexed and placed in the agency's reading room.<sup>90</sup>

A useful test has been offered for determining whether memoranda would or would not be "available by law to a party in litigation with an agency." The agency must prove that:

[T]here is no type of litigation between the agency and a private party in which the court would order production of the documents in appropriate discovery proceedings. . . . [The agency] can do this by showing that there are actions in which the documents would be sought in discovery proceedings, but in the normal sort of action in which the documents might be of value, courts would not order the documents produced. At this point, the burden would shift to the plaintiff at least to come forward with a theory of an action in which a court would order the documents produced.<sup>91</sup>

This exemption, and the seventh (investigatory files), appear to employ the conventional legal tests for discovery. By referring to the discovery rules as a guide in determining the amenability of records to disclosure, the Act reintroduces the discredited "properly and directly concerned" concept. However, the Act also

<sup>90</sup> Sobeloff, *The Freedom of Information Act*, 54 A.B.A.J. 709, 711 (1968).

<sup>91</sup> *Benson v. GSA*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

requires disclosure to "any person" regardless of his purpose or need.<sup>62</sup> This internal inconsistency defies explanation.<sup>63</sup>

*F. PERSONNEL AND MEDICAL FILES AND SIMILAR  
FILES THE DISCLOSURE OF WHICH WOULD  
CONSTITUTE A CLEARLY UNWARRANTED INVASION  
OF PERSONAL PRIVACY*

The House and Senate reports on the Freedom of Information Act are in substantial agreement as to the kinds of material protected from disclosure.<sup>64</sup> The Attorney General adopted the Civil Service Commission view concerning the essentially public nature of certain personnel data involving government employees. The names, position titles, grades, salaries, and duty stations of federal employees are not exempt.<sup>65</sup>

The Judge Advocate General has held that rosters of staff judge advocates, provost marshals, and other Army personnel would not be released where the applicant desired to obtain such lists for purposes of commercial solicitation.<sup>66</sup> Though convenient for the personnel involved, this position is erroneous for two reasons. First, the release of this information for commercial solicitation would not constitute a "clearly unwarranted invasion of personal privacy." Second, a citizen's right of access to data in the government's possession is not contingent upon his motivation for discovery.

<sup>62</sup> Caron, *supra* note 28, at 283.

<sup>63</sup> Meanwhile, back at the Federal Trade Commission: "The FTC is beginning to interpret almost anything reducible to verbal expression as exempted from the Act under this category." Fellmeth, *supra* note 7, at 361.

"[T]he Summer Project learned that a series of staff memoranda existed providing a rather complete statistical breakdown of complaints received by the FTC. . . . Copies of these memoranda were requested from . . . the administrative officer who prepares them; he stated that he had been told not to give us any information. The Summer Project then approached the Chairman, who denied our request, reciting the 'inter-agency memorandums' exemption. . . . The interviewer responded that these particular memoranda did not seem to contain the sort of information which is purported to justify the exemption, such as critical evaluative comments, notes of plans or tactics, or information which agency personnel would be hesitant to include in memoranda if they were public. This information, in contrast, contained only objective factual data. The Chairman was unimpressed." *Id.*

"Since it would be impossible to name all such files, the exception contains the wording 'and similar records. . . .'" S. REP. NO. 1219, 88th Cong., 2d Sess. 7 (1964).

"A general exemption . . . is much more practical than separate statutes protecting each type of personal record." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966); 2 U.S. CODE CONG. & ADMIN. NEWS 2428 (1966).

<sup>65</sup> *Attorney General's Memorandum*, 37.

<sup>66</sup> JAGA 1969/3907, 23 May 1969; JAGA 1969/3452, 25 Feb. 1969.

The agency is not called upon to consider its own interests when deciding whether to release this type of information. Rather, the personal privacy of the individual citizen<sup>67</sup> is at stake, the Government acting merely as referee in this particular battle of competing interests. The balance to be struck between the public's right to know and the individual's right to confide in his government will be difficult to resolve.<sup>68</sup> The language of this provision indicates that an unwarranted invasion of privacy would not be a bar to disclosure, so long as it would not constitute a *clearly* unwarranted invasion—whatever the means.

The military lawyer called upon to render advice on the applicability of this exemption to a specific request for documents from personnel or other files should consider the following: (1) What sort of personal data do the files contain? (2) Who is the "any person" requesting the file? (3) What purpose does the requestor have in desiring to obtain the records? (4) Will the subject's privacy be invaded if disclosure is effected? (5) If an invasion of privacy would result, what probable consequences would result? and (6) Would the consequences be so harmful that disclosure would "clearly" work unconscionable and irreparable damage to the subject, such harm overriding any otherwise substantial and legitimate public interest in access to such data?

Grey areas will always be encountered in the resolution of the above questions. In every case the attorney should first contact the subject to ascertain his wishes with regard to disclosure of the requested data. An affirmative response will obviate the necessity for engaging in the difficult balancing act required at each step of the aforementioned test.

It is conceded that the third inquiry in the six part test appears to revive the "persons properly and directly concerned" criterion. However, such a procedural approach is unavoidable in the resolution of this type of problem. It would be impossible adequately to weigh the delicate interests involved without a complete view of all circumstances surrounding the request.

<sup>67</sup> "[T]he applicable definition of 'person' which is found in . . . the Administrative Procedure Act, would include corporations and other organizations as well as individuals. The kinds of files referred to in this exemption, however, would normally involve the privacy of *individuals*, rather than of business organizations." *Attorney General's Memorandum*, 36-7 (emphasis added).

<sup>68</sup> See Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1194 (1969).

In rulings under the exemption, The Judge Advocate General has held that there is no basis to withhold an officer's 201 file, medical records and efficiency reports from the officer's attorney when requested by the latter for use at a physical evaluation board.<sup>99</sup> Additionally, since the Act does not permit the withholding of information from Congress,<sup>100</sup> the release of military personnel files to the House Committee on Internal Security has been authorized.<sup>101</sup>

*G. INVESTIGATORY FILES COMPILED FOR LAW  
ENFORCEMENT PURPOSES EXCEPT TO THE  
EXTENT AVAILABLE BY LAW*

Investigatory files constitute a class of information that agents of the Government are loath to divulge. Motivation for non-disclosure may include the desire to insulate agency functionaries from acute embarrassment.<sup>102</sup> Court decisions relating to the investigatory files exemption indicate judicial acceptance of the following language in the Attorney General's guide:

The House Report emphasizes that the term "law enforcement" is used in exemption [G] in its broadest sense, to include the enforcement not only of criminal statutes, but rather of "all kinds of laws, labor and security laws as well as criminal laws." . . . The effect of . . . exemption [G] . . . seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants.<sup>103</sup>

In *Barceloneta Shoe Corp. v. Compton*,<sup>104</sup> the plaintiff was charged by a labor union with having committed unfair labor practices. Defendant, the Regional Director of the National Labor Relations Board, was requested to disclose "any statements or evidence" received from plaintiff's employees during the course of the agency's investigation of the alleged labor violations. The Director declined, stating that such information would be made available during the subsequent Board hearing. The corporation sought an injunction barring the NLRB from commencing its hearing until the Information Act issue was resolved. The court accepted the Attorney General's position that litigants are not

<sup>99</sup> JAGA 1969/3418, 4 Feb. 1969.

<sup>100</sup> 5 U.S.C. § 552(c) (Supp. IV, 1969).

<sup>101</sup> JAGA 1969/4356, 23 Aug. 1969; JAGA 1968/4013, 24 May 1968; JAGA 1968/4184, 27 Jun. 1968.

<sup>102</sup> See text accompanying notes 8 and 9, *supra*.

<sup>103</sup> *Attorney General's Memorandum*, 37-8.

<sup>104</sup> 271 F. Supp. 591 (D.P.R. 1967).

to obtain special benefits under the Act; and that it was not intended to give a party indirectly any earlier or greater access to investigatory files than he would have directly in litigation. Unfortunately, the court also accepted the Attorney General's attempt to insinuate the Jencks Act<sup>105</sup> into these proceedings. Under the Jencks Act, criminal law enforcement agencies are not required to disclose witness' statements prior to completion of their testimony at trial. In grafting a *Jencks* requirement to the Freedom of Information Act, the court stated that

Congress could not have intended to grant lesser rights of inspection and copying of witnesses' statements to persons who are faced with the deprivation of their life or liberty, than to persons faced only with remedial administrative orders under regulatory statutes.<sup>106</sup>

The court was misdirected by its conception of what Congress intended, by the committee reports and arguments of the Attorney General.<sup>107</sup> Surely the proper test for discovery is what a party may obtain in civil litigation depending upon issues raised in the pleadings. *Barceloneta* creates the impression that the Act incorporates a standard independent of the Act, in allegedly providing a lateral shift to the Jencks criterion.<sup>108</sup>

*Barceloneta* was followed by *Clement Brothers Co., Inc. v. NLRB*.<sup>109</sup> The court relied entirely upon reasoning set forth in the pre-Act case of *Texas Industries, Inc. v. NLRB*, in which discovery of statements was denied on the theory that employees would be uncooperative in labor investigations if they realized that their employers would have access to complaints made to the NLRB.<sup>110</sup>

There may be two separate avenues of approach in obtaining information during the course of litigation. This interesting possibility was volunteered by the General Services Administration Board of Contract Appeals.<sup>111</sup> A government contractor

<sup>105</sup> 18 U.S.C. § 3500 (1964).

<sup>106</sup> *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967).

<sup>107</sup> The text of the opinion provides a clue to the relative weight to be accorded this case as a serious study of the Freedom of Information Act: "[T]he court has had just one working day between the day of the argument on this Petition for an injunction and the day of the hearing before the Board, which Plaintiffs are seeking to enjoin." *Id.* at 593.

<sup>108</sup> *Eaton & Lynch*, *supra* note 29, at 531.

<sup>109</sup> 282 F. Supp. 540 (N.D. Ga. 1968).

<sup>110</sup> *Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 134 (5th Cir. 1964).

<sup>111</sup> *Combustion Associates, Inc.*, GSBICA No. 2366, 23 Sep. 1968, 68-2 B.C.A. para 7253 (1968). See Hoerster, *The 1968 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641, 660-61 n.89 (1969).

brought an action on behalf of its subcontractor to recover the value of extra work, occasioned by specification changes allegedly ordered by the agency. Appellant requested several documents from the contracting officer during the period that the firm's case was pending before the Board. The contracting officer declined to produce the documents on the theory that since the firm's appeal had been docketed, any request for records must be made to the Board under its discovery rules. The Board subsequently denied discovery on conventional grounds. However, the Board announced a position which, if implemented, would substantially expand a litigant's ability to obtain data:

Inasmuch as the Board has ruled that several of the documents sought by Appellant will not be furnished under the Board's discovery rule, the Board calls attention to the [Act], which is implemented by GSA Order ADM 1035.3. . . . It is to be noted that a contractor's request for records under the *Freedom of Information Act* need not assert that the records are relevant to the subject matter of an appeal, and Appellant may be able to obtain a more extensive search under the Act than can be conducted under the Board's discovery procedure.<sup>10</sup>

In light of the above-mentioned case, a potential litigant, or one actually in the process of litigation, may have an election of tactics. When preparing for contemplated litigation one may attempt to gain maximum information by resort to the Act. One consideration is that of time. Delays may occur in pursuing administrative appellate procedures. If agency opposition is anticipated, delay would render the Act an ineffective device. Further, the Act relates only to records. Should a litigant desire to obtain data in other than record form, the discovery technique would be more appropriate. However, the formal discovery route works to the Government's benefit. One may force the release of information, but he subjects himself to the same duty.<sup>11</sup> Should a party desire to preview the Government's evidentiary posture without disclosing his own, he would be well advised to use the nonreciprocal Freedom of Information Act as his primary discovery mode. The ability of a criminal suspect to employ the Act as a discovery tool offers an area for development in the field of military justice.<sup>12</sup>

<sup>10</sup> *Id.* See also *Aries Enterprises, Inc.*, DOTCAR No. 67-20, 13 Dec. 1967, 68-1 B.C.A. para 6761 (1967).

<sup>11</sup> See Adams, *The Freedom of Information Act and Pretrial Discovery*, 43 MIL. L. REV. 1, 31 (1969).

<sup>12</sup> See JAGA 1969 4765, 23 Dec. 1969, concerning refusal of the Provost Marshal General to comply with the order of a military judge to produce CID reading files for examination *in camera*.

An interpretation of the investigatory files exemption became central to the resolution of *Cooney v. Sun Shipbuilding and Drydock Co.*,<sup>113</sup> though the Government was not a party to that action. An administrator filed suit for wrongful death allegedly brought about by the decedent's fall from a ship in defendant's drydock. The plaintiff served a subpoena on the Department of Labor to compel production of an accident investigation report prepared by that agency after the fatal incident. The plaintiff did not mention the Freedom of Information Act. However, the agency employed the Act's investigatory files exemption in opposition to compliance with the subpoena. This was a bizarre tactic, since the Act limits its grant of jurisdiction in district courts to entertaining Information Act issues when raised against the Government "on complaint," and only after the requestor has first been denied the data administratively. The citizen may then file suit against the agency alleging an improper withholding. The court pressed on to resolve the matter, apparently oblivious to the fact that since the Government was not a party it had no standing to raise the Act in opposition to the subpoena.

The court approached the discovery issue by considering two questions. First, it was necessary to decide whether the investigatory file was one compiled for law enforcement purposes. Having found in the affirmative, the court then asked whether that fact *alone* would serve to frustrate plaintiff's right of access to the document. The impact of *Barceloneta*<sup>114</sup> and *Clement Brothers*<sup>115</sup> was considered, but the court distinguished those cases and held against the Government:

. . . [I]n cases in which an agency hearing or judicial litigation is impending, the situation is often rife with possibilities for a defendant to intimidate witnesses, or anticipate and avoid the government's case; thus, a rule limiting disclosure in such cases has an obvious rationality. *But in a situation such as is presented here, long beyond the time in which investigation would have culminated in action, the rationale of the above-cited cases has no relevance.*<sup>116</sup>

The court reasoned that the purpose for which the file was originally compiled was not as important a consideration as was the question:

<sup>113</sup> 288 F. Supp. 708 (E.D. Pa. 1968).

<sup>114</sup> *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

<sup>115</sup> *Clement Bros. Co., Inc. v. NLRB*, 282 F. Supp. 540 (N.D. Ga. 1968).

<sup>116</sup> *Cooney v. Sun Shipbuilding and Drydock Co.*, 288 F. Supp. 708, 712 (E.D. Pa. 1968) (emphasis added).

[W]hether they [files] retain that characterization over four and one-half years after their compilation? It is not argued by the government that there currently is any investigation under way, or that there is contemplated any law enforcement proceedings against the defendant as a result of the accident underlying the plaintiff's suit. Nor is it alleged that the information originally gathered by officials . . . ever culminated in any proceedings against the defendant. The question then arises whether files once classified "investigatory files" may forever after retain that characterization so as to be immune from disclosure under the statute."<sup>119</sup>

The *Cooney* doctrine will doubtless be used by litigants to force compliance with the "no legitimate purpose" provisions of government regulations. The court resisted the Government's attempt to create a fossilized class of automatically-exempt documents merely upon their being identified initially as investigatory-type records.

The releasability of files compiled pursuant to aircraft accident investigations has been the subject of litigation for many years. Government agencies conduct extensive inquiries to ascertain the causes of aircraft accidents. Necessary remedial action is then taken to cure and prevent further instances of engine failure, structural malfunctions, or to improve crew training if error was detected. To insure that manufacturers and their maintenance personnel are completely candid it is necessary and reasonable to guarantee that their testimony will be withheld.<sup>120</sup> The immediate correction of aircraft defects is of greater relative importance than is the assisting of civil tort plaintiffs in the recovery of damages. The Judge Advocate General has taken the position that, absent security considerations, the portion of a military aircraft accident file not containing testimony of manufacturers and their technicians will be released.<sup>121</sup>

In other rulings under the exemption, The Judge Advocate General has authorized the release, on a case-by-case basis, of (1) a murder investigation file, excepting close-up photographs of the deceased;<sup>122</sup> (2) sections A and B, Military Police Traffic

<sup>119</sup> *Id.* at 711.

<sup>120</sup> For the leading case in the withholding of information obtained by the Government from the investigation of aircraft accidents, see *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963). Possible consequences of the Act upon the National Transportation Safety Board (formerly the Civil Aeronautics Board), and the release of aircraft accident files, are discussed in Florsheim, *Administrative Law—Aircraft Accident Investigation Records—Freedom of Information Act*, 33 J. AIR L. & COM. 490, 495-96 (1967).

<sup>121</sup> JAGA 1968/3513, 29 Feb. 1968.

<sup>122</sup> JAGA 1967/4630, 22 Nov. 1967.

Accident Investigation form (DA Form 19-68);<sup>123</sup> (3) summary of evidence from an Inspector General's report of investigation and letters of reprimand pertaining to the heat stroke death of a basic trainee;<sup>124</sup> (4) an investigation conducted pursuant to article 32, Uniform Code of Military Justice;<sup>125</sup> (5) investigatory files for use in civil domestic relations proceedings;<sup>126</sup> and (6) obscene photographs included in an investigatory file.<sup>127</sup> The photographs were also to be used in a domestic relations matter.

*H. MATTERS CONTAINED IN OR RELATED TO  
EXAMINATION, OPERATING, OR CONDITION  
REPORTS PREPARED BY, ON BEHALF OF, OR FOR  
THE USE OF AN AGENCY RESPONSIBLE FOR THE  
REGULATION OR SUPERVISION OF FINANCIAL  
INSTITUTIONS*

This exemption was designed to protect financial institutions from the indiscriminate release of highly sensitive reports developed primarily by government regulatory audit. This is a class of information distinct from the financial data discussed in part D of this section.<sup>128</sup> Although the Freedom of Information Act was created to open government records to anyone, this provision specifically exempts information which, if released, would subject a financial institution to irreparable harm.

*I. GEOLOGICAL AND GEOPHYSICAL INFORMATION  
AND DATA, INCLUDING MAPS, CONCERNING  
WELLS*

Disclosure of seismic reports and other findings filed with government agencies would enable competitors to gain an unfair advantage over a firm that had expended great sums in the exploration and discovery of oil and gas deposits.<sup>129</sup>

**VI. DEPARTMENT OF THE ARMY IMPLEMENTATION**  
*A. EXCLUSIVENESS OF THE REGULATION*

Army Regulation 345-20, coupled with the Armed Services Procurement Regulation and the Federal Personnel Manual, con-

<sup>123</sup> JAGA 1967/4280, 25 Aug. 1967; JAGA 1968/3437, 6 Feb. 1968.

<sup>124</sup> JAGA 1969/3443, 6 Feb. 1969.

<sup>125</sup> JAGA 1968/4384, 13 Sep. 1968.

<sup>126</sup> JAGA 1968/4589, 18 Oct. 1968.

<sup>127</sup> JAGA 1968/4606, 8 Oct. 1968.

<sup>128</sup> *Attorney General's Memorandum*, 38.

<sup>129</sup> *Id.* at 39.

trol the release of all information in the possession of Department of the Army organizations.<sup>130</sup> While other regulations may provide special additional procedures, as in the case of patent data, claims reports and the like,<sup>131</sup> the AR should be consulted regarding the basic question of amenability to disclosure. Thus, it has been held that the AR governs the disposition of requests for the release of proceedings before the Army Board for the Correction of Military Records, regardless of any purported limitations to the contrary in the regulation governing ABCMR matters.<sup>132</sup>

### B. THE "NO LEGITIMATE PURPOSE" RULE

The provisions of paragraph 2b of the AR were noted earlier: "Information within a category which is normally exempt from public disclosure . . . should be made available if no legitimate purpose exists for withholding it. . . ." <sup>133</sup>

As noted, in *Cooney*<sup>134</sup> the court took the position that the Act did not justify a withholding of data where, although a file admittedly was within an exemption, there was no *bona fide* purpose in perpetuating its suppression. Unfortunately, it has been held that such a release determination may be made only by The Judge Advocate General.<sup>135</sup> Thus, if it is found that a record technically falls within an exemption, the military practitioner is compelled to dispatch the matter to the Office of The Judge Advocate General for ultimate resolution.

### C. ADMINISTRATIVE APPELLATE PROCEDURE

Of basic importance is the proposition that only the Secretary of the Army is authorized to render a *final* administrative rejection of an information request.<sup>136</sup> Additionally, when a judge advocate recommends denial, the requesting party must be apprised in writing of the reasons for such denial and of his right to appeal.<sup>137</sup> The citizen must also be informed that his appeal will be submitted to higher authority by the local commander.<sup>138</sup>

<sup>130</sup> AR 345-20, para 3.

<sup>131</sup> *Id.* at 3a-g.

<sup>132</sup> JAGA 1967/4223, 25 Aug. 1967.

<sup>133</sup> See text accompanying note 10, *supra*.

<sup>134</sup> *Cooney v. Sun Shipbuilding and Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968).

<sup>135</sup> JAGA 1967/4283, 29 Aug. 1967.

<sup>136</sup> AR 345-20, para 12.

<sup>137</sup> *Id.* at para 7.

<sup>138</sup> *Id.*

This process should be observed faithfully in every case, since a purported final rejection at the local level, without notification to the requestor of his appellate rights, is in clear violation of the information regulation. Procedural violations have been a source of acute embarrassment in cases where the frustrated citizen was sufficiently astute to seek effective redress elsewhere.<sup>139</sup>

In view of the specific congressional exhortation for preferential docketing of Information Act complaints,<sup>140</sup> commanders should be advised that these appeals deserve like consideration within the Army's appellate system. "All requests for information will be acted upon fairly, completely, and expeditiously. Delay will not be permitted even though requests appear to be minor in nature."<sup>141</sup>

Though the Freedom of Information Act is silent on the matter, it seems proper to require that one initially denied records be forced to exhaust reasonable administrative appellate procedures as a condition precedent to the exercise of the Act's judicial enforcement provisions. Agency dilatoriness could, however, result in such a substantial delay as to be in the nature of an effective final withholding. Regulations of the Internal Revenue Service tend to preclude that situation by creating a presumption of final denial where the IRS fails to rule on an appeal within 30 days.<sup>142</sup> Lengthy agency appellate procedures are clearly at odds with the spirit of the Act, particularly when one considers that complaints are to take precedence on court calendars and be docketed for trial at the earliest practicable date.<sup>143</sup>

#### *D. IMPACT OF THE INFORMATION ACT UPON THE BOARD FOR THE CORRECTION OF MILITARY RECORDS AND OTHER DEPARTMENT OF ARMY DELIBERATIVE BODIES*

In light of the Attorney General's definition of "agency,"<sup>144</sup> the Army Board for the Correction of Military Records is clearly

<sup>139</sup> See JAGA 1969/3350, 10 Mar. 1969.

<sup>140</sup> See 5 U.S.C. § 552(a)(3) (Supp. IV, 1969), and text accompanying note 2 *supra*, as to "precedence on the docket." Note that a complaint, as opposed to a show cause order, is required to vest district courts with jurisdiction. *Farrell v. Ignatius*, 283 F. Supp. 58 (S.D.N.Y. 1968).

<sup>141</sup> AR 345-20, para 2b.

<sup>142</sup> 26 C.F.R. § 601.702(c)(10) (1968).

<sup>143</sup> See Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 468 (1968); and Note, *supra*, note 6, at 27-28.

<sup>144</sup> See text accompanying note 12, *supra*.

subject to the Act. The effect of the records provision will be explored, as well as the applicability of the subsection requiring an indexing of final opinions and other documents for public inspection and copying.<sup>145</sup>

The opinion in *Owings v. Secretary of the Air Force*<sup>146</sup> contained the suggestion that the Air Force Board for the Correction of Military Records should solicit legal opinions from counsel representing petitioners prior to reaching its decisions. Evidently, the AFBCMR referred a case to the Office of The Judge Advocate General of the Air Force for the resolution of a legal matter involved in petitioner's request to have his court-martial set aside. It appears that the Board adopted the resultant JAG opinion in its entirety. Such opinion was not a correct statement of the law, and the petitioner was forced to seek his remedy in the district court.

The General Counsel of the Army has since recommended that petitioners before the Army Board be granted routine access to Army staff memoranda. The Counsel's letter implied the existence of a chaotic situation, due evidently to a lack of basic information available to Board petitioners:

It has been my impression that ABCMR proceedings are to some degree hampered by the fact that they are not adversary hearings. The presentations by applicants and their counsel tend to be unfocused because counsel cannot be sure what they are required to prove, what standards of proof they must meet, and what arguments against their claims they should attempt to answer. Making copies of staff opinions, including those of The Judge Advocate General, available to counsel should enable them to prepare more cogent and informative presentations.<sup>147</sup>

That a pall of uncertainty pervades ABCMR proceedings was confirmed in remarks by the Executive Secretary of the Board. He indicated that many applications were summarily denied due to insufficient documentation; and that written petitions demonstrated that military lawyers are substantially unfamiliar with criteria for the preparation of effective presentations.<sup>148</sup>

<sup>145</sup> See sections II and III, *supra*, concerning publication of data in the Federal Register and the indexing of opinions, orders and statements of policy for public inspection.

<sup>146</sup> *Owings v. Secretary of the Air Force*, 298 F. Supp. 849 (D.D.C. 1969).

<sup>147</sup> Accompanying JAGA 1969/4540, 7 Oct. 1969. That opinion overrules JAGA 1968/4285, 2 Aug. 1968; JAGA 1968/4527, 17 Sep. 1967; JAGA 1967/4479, 10 Oct. 1967; and rejects the view of *Weiss v. United States*, 180 Ct. Cl. 863 (1967), concerning the purported privileged status of TJAG legal opinions.

<sup>148</sup> Address by Mr. Raymond J. Williams, Executive Secretary, ABCMR, to the 18th Advanced Class, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 28 October 1969.

Whether or not in-house opinions are disclosed as a matter of equity, it is submitted that the Freedom of Information Act requires release of Army staff opinions as "records." Further, the Act requires that such opinions be made available for inspection and copying where the Board adopts an intra-agency memorandum as its decision in a case.<sup>149</sup> That this action is required should not be surprising in view of the development of recent case law. The applicability of the rule in *American Mail Line* to proceedings before the ABCMR is required, as evidenced by this statement by the Executive Secretary in a memorandum to the Office of The Judge Advocate General:

Under present procedure opinions of your office which are furnished in response to a request from the Board are not made available for review by counsel. *However, such opinions are considered by the Board in arriving at a decision in each case.*<sup>150</sup>

There are two factual distinctions between what occurred in *American Mail Line* and what happens in proceedings before the ABCMR. First, proceedings before the ABCMR are not adversary in nature. Second, the Executive Secretary did not indicate that the ABCMR necessarily adopted JAG opinions *in toto*, as evidently happened in *American Mail Line* and *Owings*. However, such differences are not of sufficient moment to alter the result required by the Act.

An applicant before the ABCMR is entitled to more than the staff opinion in his particular case. He may obtain opinions and decisions prepared in other cases.<sup>151</sup> While these documents may also be obtained as records, it is suggested that an affirmative duty is placed upon the Board to index and make available for public inspection and copying all final opinions, staff memoranda drafted in prior cases, and previous recommendations forwarded to the Secretary of the Army.<sup>152</sup> Further, should the Board adopt uniform procedures, whether by tradition or formal action, they would fail within the requirement for publication in the Federal Register.<sup>153</sup>

Though the Army Board for the Correction of Military Records is doubtless called upon to correct many different manifestations of error and injustice, it is certain that some matters are presented time and again. One of the strongest bulwarks

<sup>149</sup> 5 U.S.C. § 552(a)(2)(A) (Supp. IV, 1969). See section III, *supra*.

<sup>150</sup> Attached to JAGA 1968/4285, 2 Aug. 1968 (emphasis added).

<sup>151</sup> See *Gruman Aircraft Eng'g. Corp. v. The Renegotiation Bd.*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1970).

<sup>152</sup> 5 U.S.C. § 552(a)(2)(A) (Supp. IV, 1969).

<sup>153</sup> 5 U.S.C. § 552(a)(1)(C) and (D) (Supp. IV, 1969).

against haphazard adjudication is the practice of consistently applying the same rule to cases having substantially identical facts.<sup>154</sup> This is particularly critical where, as in proceedings before the ABCMR, information as to substance or procedure is alleged to be unavailable.

In view of the statement by the General Counsel that Board proceedings are "unfocused" because advocates have no guidance as to what they are to allege and prove,<sup>155</sup> and considering the statement by the Executive Secretary that even military practitioners are in the dark,<sup>156</sup> one perceives the requirement for disclosure as a matter of fundamental due process of law. It is true that the ABCMR is a channel for extraordinary relief, and a petitioner is not a defendant. However, it would seem that an applicant should not be required to operate in a situation of substantive and procedural helplessness, due to lack of available information as to what to prove and how to proceed. Though beyond the scope of this article, it might prove interesting to review the statutory board system in Department of the Army to examine circumstances in which a petitioner has no means to determine how to plead his case, and no way to learn whether he is treated in the same manner as like cases brought before such boards.

If implemented, the following provision of the Act will provide disclosure and publication of much helpful data: "Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding."<sup>157</sup> The Attorney General has interpreted this subsection of the Act as applying to final votes of multi-headed agencies in any regulatory or adjudicative proceeding.<sup>158</sup>

## VII. CONCLUSION

The Department of the Army has been relatively faithful to the letter and spirit of the Freedom of Information Act. Other

<sup>154</sup> "I see little danger that release of the opinions will enable counsel to tie the Board unduly to prior precedent: the Board is quite capable of protecting itself from any such attempt to the degree that it is unwarranted. In any event, there is surely nothing wrong in treating like cases in a like manner." (Emphasis added.) Memorandum from the General Counsel, Department of the Army, to the Special Assistant to the Under Secretary of the Army (undated), attached to JAGA 1969/4540, 7 Oct. 1969. See text accompanying note 88, *supra*.

<sup>155</sup> See text accompanying note 147, *supra*.

<sup>156</sup> See text accompanying note 148, *supra*.

<sup>157</sup> 5 U.S.C. § 552(a)(4) (Supp. IV, 1969).

<sup>158</sup> *Attorney General's Memorandum*, 29.

agencies, such as the Federal Trade Commission, have demonstrated an extraordinary contempt for the Act's disclosure requirements.

In summary, while disclosure may be the stated rule and Congress has provided judicial remedies to the citizen:

[I]t is not enough today merely to mouth the principles and clichés of freedom of information. The new law will only provide the framework for making Government information available. It will not insure its availability. This depends equally on the attitude of government officials and on the vigilance of newsmen, lawyers and other interested citizens.<sup>109</sup>

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<sup>109</sup> Kass, *supra* note 5, at 669.



## INTRUSION INTO THE BODY\*

By Major William G. Eckhardt\*\*

*The thesis of this article is that the rights of servicemen should be protected with the search and seizure concepts of the fourth amendment rather than with the fifth amendment protection against self-incrimination when intrusive bodily searches are required. The Supreme Court enunciated standard for intrusion into the body found in *Schmerber v. California*, 384 U.S. 757 (1966). The subsequent application of this standard in the federal courts, and its adoption in the Manual for Courts-Martial, United States, 1969, (Rev.) are explored. Federal court decisions discussing the privilege against self-incrimination are contrasted with opinions of the Court of Military Appeals and with the new self-incrimination section of the 1969 Manual. The purpose of this study is to give the practicing judge advocate a basis for predicting the law in this embryonic yet rapidly developing legal area.*

### I. INTRODUCTION

Public concern over the increase in drug traffic and usage and over the carnage on our highways had led to a re-examination of the right of the Government to use the body as a source of evidence. The evidence sought may be located on the body, may be hidden in bodily cavities, or may be found within the body itself. The legal pronouncements involving this expression of concern are found in *Schmerber v. California*<sup>1</sup> in which the

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\*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup>384 U.S. 757 (1966).

United States Supreme Court in 1966 decided to "write on a clean slate"<sup>2</sup> in the area of intrusion into the body. Ideas enunciated by the Supreme Court in *Schmerber* were used by the drafters of the *Manual for Courts-Martial, United States, 1969 (Rev.)*, in setting forth rules for searches and seizures<sup>3</sup> and for self-incrimination.<sup>4</sup> The importance of study in this area is amplified by the clarification of the constitutional boundaries of the privilege against self-incrimination,<sup>5</sup> by the apparent reinvestigation of the requirement for probable cause,<sup>6</sup> by the growing concept of constitutionally protected zones of privacy,<sup>7</sup> and by the abolition of the mere evidence rule.<sup>8</sup> The purpose of this article is to examine civilian and military law concerning intrusion into the body to give the practicing judge advocate a

<sup>2</sup> *Id.* at 768.

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REV.), para 152 [hereinafter cited as MCM, 1969 (Rev.)]; Draft Analysis of Contents Manual for Courts-Martial, United States, 1969 (1968), para 152.

<sup>4</sup> MCM, 1969 (Rev.), para 150b; Draft Analysis of Contents Manual for Courts-Martial, United States, 1969 (1968), para 150b.

<sup>5</sup> *United States v. Wade*, 388 U.S. 218 (1967). The Court held that it was not a violation of the privilege against self-incrimination to require an accused to exhibit his physical characteristics in a line-up, to wear strips of tape arranged on his face, or to utter selected words for voice identification. *Gilbert v. California*, 388 U.S. 263 (1967). A handwriting exemplar, like the body and voice, is an identifying physical characteristic outside the protection of the fifth amendment.

<sup>6</sup> *Camara v. Municipal Court*, 387 U.S. 523 (1967). The concept of area probable cause is enunciated in allowing inspectors enforcing health, safety, and welfare codes to obtain housing inspection warrants on the basis of the conditions of the area as a whole rather than showing that a particular building violates the code. *Terry v. Ohio*, 392 U.S. 1 (1968). This "stop and frisk" case indicates that something less than probable cause is needed for a policeman to stop and frisk a suspect. However, probable cause is required for a more detailed search. Probable cause, in this instance, may be a two step process. *Davis v. Mississippi*, 394 U.S. 721 (1969). In order to protect against unreasonable intrusion or interference with private life, the probable cause protection of the fourth amendment was extended to fingerprinting suspects in a "drag net" type criminal investigation. Yet the Court seemed to be "backtracking" when it stated: "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728.

<sup>7</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court struck down a statute forbidding use of contraceptives, because that statute constitutionally intruded upon the right of marital privacy.

<sup>8</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). The Court abolished the mere evidence rule by refusing to make a distinction between the seizure of mere evidence and instrumentalities of crime, fruits of crime, or contraband.

basis for predicting the law in this embryonic yet rapidly developing legal area."

## II. ROCHIN, BREITHAUPT, AND SCHMERBER

An examination of intrusive bodily searches must begin with the famous "shock the conscience"—stomach pumping case—*Rochin v. California*.<sup>10</sup> State officers, possessing "some information" that Rochin was selling narcotics, forced their way into his occupied bedroom. When asked about two capsules on a nearby night stand, Rochin attempted to swallow them. Three policemen immediately pounced upon him and a struggle ensued. The capsules could not be forced from Rochin's mouth, so he was taken to a hospital where, against Rochin's will, a physician administered an emetic solution. The capsules thus recovered contained morphine and were admitted into evidence, over objection, at trial. The intermediate state appellate court found that the police officers were guilty "of unlawfully breaking into and entering" the room, "of unlawfully assaulting and battering" Rochin while in his room, and "of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital."<sup>11</sup> Justice Frankfurter, in reversing the conviction, decided that such conduct "shocks the conscience" and violates the due process clause of the fourteenth amendment.<sup>12</sup>

<sup>10</sup> Sources found to be of particular importance are: McIntyre & Chabreja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L. C. & P.S. 18 (1967); Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007 (1968); Note, *The Status of Implied Consent Legislation Since Schmerber v. California*, 11 UTAH L. REV. 168 (1967); J. MUNSTER & M. LARKIN, *MILITARY EVIDENCE* § 8.5 (1959); Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 MIL. L. REV. 1 (1964); and M. Drucker, *Self-Incrimination and Violation of Due Process*, May 1955 (unpublished thesis presented to The Judge Advocate General's School and located in the University of Virginia Law School Library).

<sup>11</sup> 342 U.S. 165 (1952).

<sup>12</sup> *Id.* at 166-67.

<sup>13</sup> In a much quoted passage, Justice Frankfurter stated: ". . . we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism: about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. 165, 172 (1952). It is submitted that the forcible extraction of evidence alone did not lead to the constitutional violation. Rather it was a totality of events—forcible extraction of evidence, illegal invasion of privacy, and assaults upon his person. See Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 PA. L. REV. 276, 280-81 (1966).

A balancing approach was used by the Supreme Court in *Breithaupt v. Abram*.<sup>14</sup> Breithaupt was involved in an automobile accident in which he was injured seriously and three occupants of another car were killed. The police found a partially empty whiskey bottle in his truck glove compartment. While he lay unconscious in the hospital emergency room, liquor was detected on his breath. Acting upon the request of a state policeman, the attending physician took a sample of blood with a hypodermic needle. An analysis of the evidence thus obtained was admitted into evidence. An involuntary manslaughter conviction resulted. The Court felt that there was no violation of the due process clause of the fourteenth amendment, for there was nothing "brutal" or "offensive" in the taking of a sample of blood from an unconscious patient by a physician. The slight intrusion into the body involved in a blood test did not overcome the interest of society in a scientific determination of intoxication.<sup>14</sup>

The landmark case in the area of intrusion into the body is *Schmerber v. California*.<sup>15</sup> Following his arrest for drunken driving, a blood sample was taken from Schmerber by a hospital physician at the direction of the arresting officer. The police officer had no search warrant. Schmerber, upon the advice of counsel, objected to the taking of his blood. A drunken driving conviction resulted when a report of the chemical analysis of the blood sample was admitted over objection at trial.<sup>16</sup> Schmerber contended that the taking and use of his blood violated his fifth amendment self-incrimination rights, his sixth amendment counsel rights, and his fourth amendment search and seizure rights. He argued that compulsion, for the purposes of the fifth amendment privilege against self-incrimination, was present when the physician, at the direction of the police officer and over the objection of the patient, took the blood sample. The Court held that Schmerber was not compelled to be a witness against himself, for the privilege applies to compelling "communications" or "testimony" and not to making the accused a source of "real or physical evidence" as in the taking of a blood sample.<sup>17</sup> In announcing this interpretation, the Court warned

<sup>14</sup> 352 U.S. 432 (1957).

<sup>15</sup> *Id.* at 439.

<sup>16</sup> 384 U.S. 757 (1966).

<sup>17</sup> *California*, at the time of trial, had no implied consent legislation.

<sup>18</sup> *Schmerber v. California*, 384 U.S. 757, 761 (1966). In elaborating upon the distinction between "communications" or "testimony" and "real or physical evidence" the Court stated at 764: ". . . both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak

of possible constitutional difficulties in the use of testimonial by-products obtained while procuring real evidence,<sup>17</sup> in the use of tests involving extreme pain, danger, or severity,<sup>18</sup> and in the use of tests, such as the lie detector, which elicit essentially testimonial responses to determine guilt or innocence.<sup>20</sup> Subject to these caveats, the Government may obtain nontestimonial evidence from an accused in lawful custody without infringing upon the privilege against self-incrimination.

The argument concerning sixth amendment counsel rights was quickly decided. Schmerber argued that compelling him to submit to the blood test when his objection was based upon the advice of his lawyer deprived him of his right to assistance of counsel. However, the Court reasoned that since Schmerber was not entitled to assert the privilege against self-incrimination, he gained no greater right because his refusal was based upon erroneous advice given by counsel.<sup>21</sup>

In discussing the search and seizure issue, the Court noted that the function of the fourth amendment is "to protect personal privacy and dignity against unwarranted intrusion by the State."<sup>22</sup> The amendment should constrain intrusions "which are not justified in the circumstances" or "which are made in an improper manner."<sup>23</sup> The fourth amendment forbids any intrusion "on the mere chance that desired evidence might be obtained."<sup>24</sup> There must be a "clear indication" that evidence will be found. The importance of a search warrant was underscored,<sup>25</sup> but the Court realized that the issue would usually arise as a search incident to an arrest without a warrant and under circumstances in which prompt action would be necessary

for identification, to appear in court to stand, to assume a stance, to walk, or to make a particular gesture."

<sup>17</sup> *Id.* at 765 n.9. "If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any testimonial products of administering the test—products which would fall within the privilege." (Emphasis in original.)

<sup>18</sup> *Id.* "Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case."

<sup>20</sup> *Id.* at 764. "To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."

<sup>21</sup> *Id.* at 765-76.

<sup>22</sup> *Id.* at 767.

<sup>23</sup> *Id.* at 768.

<sup>24</sup> *Id.* at 770.

<sup>25</sup> *Id.*

to prevent destruction of the evidence. The blood test itself was found to be reasonable and to have been performed in a reasonable manner "by a physician in a hospital environment according to accepted medical practices."<sup>46</sup>

### III. SEARCH AND SEIZURE

#### A. CIVILIAN PRACTICE

As *Schmerber* so carefully points out, the primary function of the fourth amendment<sup>47</sup> is to protect personal privacy and dignity against unwarranted governmental intrusion. Only *unreasonable* searches and seizures are prohibited. Normally an impartial magistrate issues a warrant based upon probable cause. The important role of "informed, detached and deliberate determinations of the issue whether or not to invade another's body

<sup>46</sup>*Id.* at 771-72. Yet the Court went on to state: "We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the station-house."

There were four dissents in *Schmerber*. Chief Justice Warren adhered to his dissent in *Breithaupt* where he stated: "We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth." *Breithaupt v. Abram*, 352 U.S. 432, 442 (1952). Justice Black, joined by Justice Douglas, thought that the blood test was testimonial in nature and thus protected. In his dissent he stated: "But I disagree with the Court's holding that California did not violate the petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime." *Schmerber v. California*, 384 U.S. 757, 773 (1966). In a separate opinion, Justice Douglas felt that the Government had invaded *Schmerber's* constitutionally protected right of privacy by this "forcible blood-letting." *Id.* at 778-79. Justice Fortas would not allow the State to use an act of violence to obtain evidence. In his view, extraction of blood over protest is such an act. *Id.* at 779. With the possible exception of Justice Black, the dissenters in the absence of consent would never permit governmental intrusion into the body. See generally Note, *The Status of Implied Consent Legislation Since Schmerber v. California*, 11 UTAH L. REV. 168, 173-74 (1967).

<sup>47</sup>The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.)

in search of evidence of guilt is indisputable and great."<sup>28</sup> In shaping his decisions, this magistrate uses the common law standard of probable cause—something more than mere suspicion yet less than sufficient evidence to prove guilt. Search incident to a valid arrest<sup>29</sup> is a long recognized exception to the warrant requirement. This exception was born of the necessity to protect the arresting officer from harm, to deprive those arrested of means of escape, and to prevent the destruction of incriminating evidence. The factual posture of most cases involving governmental intrusion into the body arises under this exception.

Therefore, in approaching the problem of intrusive bodily searches, one begins with the premise that a valid arrest has been made and that some form of search is permissible. In determining the reasonableness of the subsequent search, a practitioner must examine both the scope and the method used by the police.<sup>30</sup> If the police desire a test that requires bodily intrusion, that "test must be made in a reasonable manner and there must be a strong showing of its necessity."<sup>31</sup>

Yet, not every post-arrest activity associated with the body involves an intrusive bodily search. The restraints of the fourth amendment are upon the Government and not upon private individuals. Thus there is no search when a laboratory technician obtains a blood sample and does not act at the direction of or by prearrangement with the police.<sup>32</sup> Furthermore, to observe that which is open to view is not generally considered a search.<sup>33</sup> There was no search when police examined the hands of a defendant to see if he had touched stolen money bags which had been dusted with fluorescein powder.<sup>34</sup> Following arrest police officers may remove and confiscate articles of cloth-

<sup>28</sup> *Schmerber v. California*, 384 U.S. 757, 770 (1966).

<sup>29</sup> Except where changed by statute, a police officer or a private individual may make a valid arrest without a warrant if a misdemeanor amounting to a breach of the peace is committed in his presence or if he has probable cause to believe that a felony has been committed and that the person to be arrested committed it. See *Carroll v. United States*, 267 U.S. 132 (1923).

<sup>30</sup> *McIntyre & Chabreja, The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L.C. & P.S. 18 (1967).

<sup>31</sup> 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 667 (1969).

<sup>32</sup> *Walker v. State*, 244 Ark. 1150, 429 S.W.2d 121 (1968); *Commonwealth v. Gordon*, 481 Pa. 512, 246 A.2d 325 (1968), cert. denied, 394 U.S. 937 (1969).

<sup>33</sup> *Miller v. United States*, 356 F.2d 63 (5th Cir. 1966), cert. denied, 384 U.S. 912 (1966).

<sup>34</sup> *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968).

ing,<sup>35</sup> may remove particles from the body,<sup>36</sup> and may clip a few strands of hair.<sup>37</sup> Such police activity does not constitute intrusion into the body.

When the body structure is invaded, the *Schmerber* tests for reasonableness must be applied: (1) there must be a clear indication that evidence will be found; (2) the test itself must be reasonable; and (3) the test must be performed in a reasonable manner.<sup>38</sup> Clear indication that evidence will be found is the most provocative requirement of this three-pronged test. Litigation involving intrusive bodily searches has arisen primarily in Ninth Circuit border-crossing cases where suspects concealed narcotics in bodily cavities in an attempt to smuggle this contraband into the country.<sup>39</sup> Prior to 1966, intrusive bodily searches at the border could be undertaken without probable cause, however, the methods used by customs agents were required to be reasonable and not shocking.<sup>40</sup> In *Rivas v. United States*,<sup>41</sup> the Ninth Circuit purported to adopt the *Schmerber* "clear indication" test. In defining "clear indication," the court stated:

Appellant urges "that there must be a clear indication of the possession of narcotics" before a search at a border may be made, using the language of the Supreme Court in *Schmerber*. . . . We agree. While we know of no accepted meaning of that term in law or as a word of art, it can be readily defined.

Indication" is defined as "an indicating; suggestion." "Clear" is defined as "free from doubt", "free from limitation", "plain".

An honest "plain indication" that a search involving an intrusion beyond the body's surface is justified cannot rest on the mere chance that desired evidence may be obtained. Thus we need not hold the search of any body cavity is justified merely because it is a border search, and nothing more. There must exist facts creating a clear indication, or plain suggestion, of the smuggling. Nor need those facts reach the dignity of . . . "probable cause" necessary for an arrest and search at a place other than a border.<sup>42</sup> [Emphasis in original.]

<sup>35</sup> *McClard v. United States*, 386 F.2d 495 (8th Cir. 1967) (boots); *State v. Herring*, 77 N.M. 232, 421 P.2d 767 (1966) (socks).

<sup>36</sup> *Etheridge v. State*, 44 Ala. App. 323, 208 So.2d 232 (1968). (Police had a suspect rub his head with a paper towel to collect aluminum particles from his hair.)

<sup>37</sup> *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969).

<sup>38</sup> *Schmerber v. California*, 384 U.S. 757, 766-72 (1966).

<sup>39</sup> See generally Note, *At the Border of Reasonableness: Searches By Customs Officials*, 53 CORNELL L. REV. 871 (1968); Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007 (1968).

<sup>40</sup> *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); *Henderson v. United States*, 390 F.2d 805, 806 n.1 (9th Cir. 1967).

<sup>41</sup> 368 F.2d 703 (9th Cir. 1966), cert. denied, 388 U.S. 945 (1967).

<sup>42</sup> *Id.* at 710.

In this border search context, probable cause is never required, for crossing the border triggers the process in the same manner an arrest would elsewhere. This "border gloss" of *Schmerber* has been severely criticized.<sup>43</sup> At least one state court has equated "clear indication" with "probable cause."<sup>44</sup>

In border searches the standard necessary to conduct the search varies. A customs officer need have only a "mere suspicion" to search vehicles, baggage, purses, wallets and pockets. In practice, the mere crossing of the border supplies sufficient reason to search. In order to justify a strip search or a casual examination of the naked body, a "real suspicion directed toward a specific individual" is needed. This "real suspicion" was recently defined as a

subjective suspicion supported by objective, articulable facts that would reasonably lead experienced, prudent customs officers to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment.<sup>45</sup>

It is only when there is more than a casual examination of the nude body that the *Rivas-Schmerber* standard is applied.<sup>46</sup> The standard necessary for police action varies with the severity of the search: it is not uniform. A two-step standard of probable cause is not a new or a foreign concept. The "stop and frisk" cases indicate that a police officer, in order to protect himself, may "pat down" a suspect if the policeman has reasonable cause to believe he might be armed.<sup>47</sup> This standard does not reach the plateau of probable cause. Such a "frisk" is limited to weap-

<sup>43</sup> Note, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007, 1008-09 (1968). The author felt that the *Schmerber* "clear indication" requirement rests on top of or is in addition to the probable cause needed to make the original arrest. The court in effect lessened the *Schmerber* standard by engrafting that test onto the traditional loose standards of reasonableness used in border searches.

<sup>44</sup> *Simms v. State*, 4 Md. App. 160, 171-72, 242 A.2d 185, 192 (1968).

<sup>45</sup> *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

<sup>46</sup> *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967). See also *Huguez v. United States*, 406 F.2d 366 (9th Cir. 1968).

<sup>47</sup> *Terry v. Ohio*, 392 U.S. 1 (1968). See also *Sibron v. New York*, 392 U.S. 40 (1968).

ons.<sup>28</sup> An officer would have to possess additional or different information to "search" after he has "frisked."<sup>29</sup>

Is the *Schmerber* "clear indication" standard less than, equal to, or greater than the common law concept of "probable cause"? Probable cause deals with nontechnical *probabilities* or, stated differently, with factual and practical considerations upon which reasonable and prudent men act.<sup>30</sup> "Clear" and "indication" are strong words when read together. "An indication" is arguably less than probable cause: "some indication" is perhaps as strong as probable cause. Yet the Court used *clear* indication. The combination of these words with the idea of "two step probable cause" produces some interesting results.

One could argue that "clear indication" is less than "probable cause." After all, probable cause was originally necessary to arrest the suspect. The Supreme Court is saying that one needs *some* facts upon which to base an intrusive search. For example, facts surrounding an arrest for robbery normally would not be relevant to support the taking of a blood test. By the use of "clear indication," the Court merely is saying that the police must have some relevant information, less than probable cause, to support the later intrusive search.

It can be argued with equal vigor that "clear indication" is another way of expressing probable cause. The Court chose different words, because the same facts which support the probable cause for arrest by themselves automatically should not support the intrusive search. The examination of the facts must start afresh. This is a two step process: "probable cause" for the arrest and "probable cause—clear indication" for the intrusive search. The two are the same, but their equality is stressed by requiring a separate factual examination. Statutory construction supports this view. Probable cause has been equated to "reasonable grounds," "cause to believe," and "reasonable cause."<sup>31</sup> Thus,

<sup>28</sup> The "stop and frisk" power is quite limited: "There must be (a) some reason for the officer to confront the citizen in the first place, (b) something in the circumstances, including the citizen's reaction to the confrontation, that gives the officer reason to suspect that the citizen may be armed and thus dangerous to the officer or others, and (c) the frisk must be directed at discovery and appropriation of the weapon, and not at evidence in general." B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 61 (1969).

<sup>29</sup> *Sibron v. New York*, 392 U.S. 40 (1968).

<sup>30</sup> *Brinegar v. United States*, 338 U.S. 160 (1949).

<sup>31</sup> *Draper v. United States*, 358 U.S. 307, 310-11 (1959); *United States v. LaMacchio*, 362 F.2d 383, 384 (3d Cir. 1966), *cert. denied*, 385 U.S. 992 (1966); R. DAVIS, FEDERAL SEARCHES AND SEIZURES § 7.1 (1964).

probable cause is a standard which can be expressed using other phrases.

Finally, an equally persuasive argument can be made that "clear indication" is a higher standard than probable cause. Facts supporting step one—the arrest—by themselves will not support step two—the intrusive search. In protecting the interest of human dignity and privacy, will we not protect the inviolability of the human body to an even greater extent than the sanctity of the home which is mere property? There is insufficient case law to resolve this debate, but this writer believes the better view is that "clear indication" is at least equal to the standard of probable cause.

Test employed by the police should be reasonable to provide the facts sought.<sup>52</sup> Such tests should involve no experimentation, should require the minimum intrusion possible, and should avoid risk, trauma, or pain.<sup>53</sup> Certainly no test should be employed in which an individual would feel compelled to confess rather than to undergo the requested examination.<sup>54</sup> Whether a suspect would be able to select an alternate, less intrusive test because of fear, concern for health, or religious scruple has never been decided.<sup>55</sup>

The professional atmosphere in which a test is given is of the utmost importance. Courts expect lawyers to protect the rights of accused at the station house, but when intrusive bodily searches are involved, that reliance shifts to physicians and experienced technicians. The *Schmerber* Court felt that such tests should be conducted in a hospital atmosphere by a physician according to accepted medical practices.<sup>56</sup> In a border-crossing case involving a forceful rectal search, the court indignantly declared that the accused was taken to a baggage area—"not a medical room or even a room . . . equipped with any of the usual hygienic and sterilized equipment found in the physician's customary office. . . ."<sup>57</sup> The author of the opinion took great pain to note that prior to the rectal search the customs agents did not supply the doctor with the information that they possessed.<sup>58</sup> Another judge in reciting the facts in a similar narcotics case stated that the physician verified the suspicions of the law enforcement agents.

<sup>52</sup> *Simms v. State*, 4 Md. App. 160, 171 n.8, 242 A.2d 185, 192 n.8 (1968).

<sup>53</sup> *Schmerber v. California*, 384 U.S. 757, 771 (1966).

<sup>54</sup> *Id.* at 765 n.9.

<sup>55</sup> *Id.* at 771.

<sup>56</sup> *Id.*

<sup>57</sup> *Huguez v. United States*, 406 F.2d 366, 371 (9th Cir. 1968) (emphasis in original).

<sup>58</sup> *Id.*

The physician finally decided whether or not a test would be administered.<sup>50</sup> Perhaps in this area, the doctor is, for practical purposes, performing many of the functions of a magistrate. An excellent example of the importance courts place upon attending personnel is found in *Brent v. White*.<sup>51</sup> In a search involving the scraping of menstrual blood from the penis of a rape suspect and the taking of a sample of his blood, the court noted that the "sample was taken by a laboratory technician with a master's degree in biochemistry."<sup>52</sup> Yet the medical supervision necessary in administering some tests may not be necessary for other less intrusive tests involving less risk of infection such as urine specimens<sup>53</sup> or breath samples.<sup>54</sup>

### B. MILITARY PRACTICE

Military apprehensions<sup>55</sup> and searches must meet the civilian standards of reasonableness.<sup>56</sup> Intrusive bodily searches arise in the context of searches following lawful apprehension. An apprehension may be made with or without a warrant under circumstances which indicate to a prudent man that an offense has been or is being committed.<sup>57</sup> No distinction is made between a felony and a misdemeanor. In setting forth examples of lawful searches, the 1969 Manual records the following rule for searches incident to lawful apprehension:

A search conducted as an incident of lawfully apprehending a person . . . may include a search of his person, of the clothing he is wearing, and of property which, at the time of apprehension, is in his immediate possession or control, and a search of the place where the apprehension is made; but a search which involves an intrusion into his body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only when there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction

<sup>50</sup> *Rivas v. United States*, 368 F.2d 703, 705 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967).

<sup>51</sup> 398 F.2d 503 (5th Cir. 1968), cert. denied, 393 U.S. 1123 (1969).

<sup>52</sup> *Id.* at 505. *Contra United States v. Townsend*, 151 F. Supp. 378 (D.D.C. 1957) (evidence obtained when the penis of a suspect was swabbed by a law enforcement official at a police station despite oral and physical protestation was held to be inadmissible).

<sup>53</sup> *Davis v. District of Columbia*, 247 A.2d 417 (D.C. Ct. App. 1968).

<sup>54</sup> *State v. Swiderski*, 94 N.J. Super. 14, 226 A.2d 728 (1967).

<sup>55</sup> Military apprehension can be equated to civilian arrest. "Apprehension is the taking of a person into custody . . ." MCM, 1969 (Rev.), para. 18 (emphasis in original).

<sup>56</sup> *United States v. Williams*, 28 C.M.R. 736 (AFBR 1958).

<sup>57</sup> *United States v. Ward*, 2 C.M.R. 688 (AFBR 1951).

*of the evidence, and the method of conducting the search is reasonable. . . .*"

This Manual rule was written in *Schmerber* language to incorporate the rule announced in that decision into military law.<sup>68</sup>

To date there has been no judicial guidance for interpreting or applying this provision of the new Manual. Except for occasional dicta,<sup>69</sup> military courts have rarely addressed themselves to the problem of the intrusive body search.<sup>70</sup> The search and seizure aspects were not reached, for the cases were decided on self-incrimination issues. The new Manual language is reflected in the recent revision of the Army regulation concerning traffic supervision. The new regulation permits medical examinations of military personnel "who are involved in traffic violations or motor vehicle accidents."<sup>71</sup> The prior regulation had required a warning of rights and consent by the subject before bodily fluids could be drawn.<sup>72</sup>

### C. SUMMARY

Concerning the search and seizure aspects of intrusive bodily searches, the more seasoned civilian rule contained in *Schmerber* and the untested military law prescribed by paragraph 152 of the *Manual for Courts-Martial, United States, 1969* (Rev.) appear to be in harmony. The military standard is stated slightly differently, because it is given in the limited context of a search incident to lawfully apprehending a person which usually occurs without command authorization. Thus, the military requires that there be reason to believe that delay will threaten destruction of the evidence. If such were not the case, command authorization would be needed. By directing that the method of conducting the search be reasonable, the military has combined the two *Schmerber* requirements that the test itself be reasonable and

<sup>68</sup> MCM, 1969 (Rev.), para 152 (emphasis added).

<sup>69</sup> Draft Analysis of Contents Manual for Courts-Martial, United States, 1969 (1968), para 152.

<sup>70</sup> *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

<sup>71</sup> Several cases which approach intrusive searches have been decided. A visual inspection of the person of an accused does not violate any constitutional rights or article 31 of the Uniform Code of Military Justice. *United States v. Morse*, 9 U.S.C.M.A. 799, 27 C.M.R. 67 (1958). Requiring the emptying of pockets is a search. *United States v. Cuthbert*, 11 U.S.C.M.A. 272, 29 C.M.R. 88 (1960); *United States v. Weston*, 28 C.M.R. 571 (ABR 1959). A polygraph examination does not constitute a search and seizure of the mind. *United States v. Haynes*, 24 C.M.R. 881 (AFBR 1957).

<sup>72</sup> Army Reg. No. 190-5, para 4-4 (29 Sept. 1970).

<sup>73</sup> Army Reg. No. 190-5.

that the test be performed in a reasonable manner. All courts, of course, demand clear indication that evidence will be found. Therefore, for practical purposes, the standards required for intrusive bodily searches are the same in both the civilian and the military communities.

#### IV. SELF-INCRIMINATION

##### A. CIVILIAN PRACTICE

Perhaps *Schmerber's* greatest legal contribution is its pronouncement concerning the constitutional boundaries of self-incrimination.<sup>74</sup> Prior to this clarification, three views of self-incrimination vied for acceptance. The majority and traditional view was that the privilege protected only testimonial disclosure forbidding the use of the legal process to extract from the person's own lips an admission of guilt. The second view distinguished between active and passive acts performed by an accused. Any involuntary affirmative action or testimony was prohibited. The third, most extreme, view was that evidence of either passive or active acts which an accused must perform was violative of the privilege.<sup>75</sup> The *Schmerber* Court chose the traditional view in distinguishing between impermissible compulsion of "communications" or "testimony" and lawful reasonable compulsion of "real or physical evidence." Compulsion alone is not the test: it must be *testimonial* compulsion. Although Professor Wigmore is one of the chief advocates for the traditional view,<sup>76</sup> the Court

<sup>74</sup> *Schmerber v. California*, 384 U.S. 757, 760-65 (1966).

<sup>75</sup> See generally Note, *Blood Alcohol Tests and the Fourth and Fifth Amendments*, 17 *DRAKE L. REV.* 231, 237-38 (1968).

<sup>76</sup> Professor Wigmore lists eleven categories of possible self-incrimination:

- "(1) Routine fingerprinting, photographing or measuring of a suspect.
- "(2) Imprinting of other portions of a suspect's body (e.g., foot in mud, nose and cheek on window) for purposes of identification.
- "(3) Examination of the body of a suspect for identifying characteristics.
- "(4) Examination of the body of a suspect, including his private parts, for evidence of disease or crime.
- "(5) Extraction of substance from inside the body of a suspect for purposes of analysis and use in evidence.
- "(6) Removing from or placing on a suspect shoes or head coverings or other clothing.
- "(7) Requiring a suspect to speak for identification.
- "(8) Requiring a suspect to write for identification.
- "(9) Requiring a suspect to appear in court, stand, assume a stance, walk or make a particular gesture.
- "(10) Requiring a suspect to submit to an examination for sanity.

carefully explained that *Schmerber* was not a complete adoption of the Wigmore formulation.<sup>50</sup> In reciting the judicial history of the privilege against self-incrimination, the Court in *Schmerber* stated that ". . . both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."<sup>51</sup>

After *Schmerber*, the privilege against self-incrimination continued to evolve. The introduction into evidence of a fingerprint card with the defendant's signature on it was held not to violate the privilege.<sup>52</sup> One federal district court found that the taking of fingerprints in open court in the presence of the jury was constitutionally permissible.<sup>53</sup> In addition to obtaining fingerprint evidence during the booking process, the police may obtain other evidence such as hair samples provided the means employed are reasonable.<sup>54</sup> The Supreme Court itself has held that an accused may be compelled to participate in a lineup, to wear strips of tape on his face, and to utter specific words for voice identification.<sup>55</sup> Handwriting exemplars are considered to be nonprotected identifying physical characteristics.<sup>56</sup> Such exemplars require the use of motor functions and do not necessitate a disclosure of knowledge. The communicative content is irrelevant, for it is the shape and direction of the lines and marks along with the peculiarity of the words themselves that identify the writer.<sup>57</sup> Where the phys-

<sup>50</sup>(11) Requiring a suspect to submit to the use of truth serum or the lie detector."

In Wigmore's opinion, categories 1-6 pose no problems, because the accused may remain passive and may not be forced to disclose knowledge. Categories 7-10 are slightly more difficult, for the accused must cooperate and, in exceptional cases, communicate knowledge. Category 11 is questionable because affirmative participation and extraction of knowledge result. 8 J. WIGMORE, EVIDENCE § 2265 (McNaughton ed. 1961).

<sup>51</sup>*Schmerber v. California*, 384 U.S. 757, 763 n.7 (1966). *But see id.* at 774-75.

<sup>52</sup>*Id.* at 764.

<sup>53</sup>*United States v. Braverman*, 376 F.2d 249 (2d Cir. 1967), *cert. denied*, 389 U.S. 885 (1967).

<sup>54</sup>*United States v. Rundle*, 266 F. Supp. 178 (S.D. Pa. 1967), *cert. denied*, 392 U.S. 860 (1968).

<sup>55</sup>*Grimes v. United States*, 405 F.2d 477 (5th Cir. 1968).

<sup>56</sup>*United States v. Wade*, 388 U.S. 218 (1967).

<sup>57</sup>*Gilbert v. California*, 388 U.S. 263 (1967).

<sup>58</sup>*Lewis v. United States*, 282 F.2d 817 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 962 (1967). Chief Justice Burger was the author of the opinion and stated: "An exemplar is relevant only for the shape and direction of some lines and marks which may identify the writer, as fingerprints and photographs do. Words can be used as physical evidence, apart from their

ical size of the defendant is important, he may be required by the prosecutor to stoop, bend, assume a stance, and submit to measurement.<sup>64</sup>

Yet the taking of nontestimonial evidence is not without limitation. An example of judicial flexibility is found in *United States v. Green*.<sup>65</sup> The court denied the request of the Government to compel the accused, charged with filing a false and fraudulent claim against the United States, to produce a handwriting exemplar containing selected phrases germane to the prosecution. The Government contended that handwriting exemplars were identifying physical characteristics like the voice and body and therefore were not protected by the fifth amendment. The defense, on the other hand, argued that even in *Gilbert*<sup>66</sup> the defendant voluntarily gave a sample of his handwriting. Furthermore, the defense continued, the Government was really seeking to prove the corpus of the crime with this exemplar, and such action goes far beyond using it for a mere identifying physical characteristic. In deciding the case, the judge hypothesized that an accused had been charged with forgery of a gasoline sales receipt. Under the protection of the fifth amendment, he could refuse to answer whether or not he had forged the receipt. He could also refuse to write a reply to such a question. Yet, can he be required to write his name exactly as it appears on the sales slip? That was the question in the case, and the court answered it in the negative.<sup>67</sup> Similarly, compulsory physical "performance tests"—such as walking, turning, retrieving coins, and placing a finger to the nose—required to be completed at the station house to determine intoxication have been held to bear directly upon the question of guilt and to be violative of the privilege against

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communicative content; even if an accused were coerced to write out a full confession, random words of that confession could be used as an example of the accused's handwriting, provided of course the jury did not learn they were from a confession." *Id.* at 818.

<sup>64</sup> *Battese v. Alaska*, 425 P.2d 606 (Alaska 1967). *But see Karcher v. United States*, 404 F.2d 343 (5th Cir. 1968), cert. denied, 395 U.S. 922 (1969), where the Fifth Circuit condemned the conduct of a prosecutor in raising the right hand of the defendant so that a prosecuting witness could see the ring that the defendant was wearing.

<sup>65</sup> 282 F. Supp. 378 (S.D. Ind. 1968).

<sup>66</sup> *Gilbert v. California*, 388 U.S. 263 (1967).

<sup>67</sup> *But see United States v. Devlin*, 405 F.2d 436 (2d Cir. 1968) in which Judge Friendly upheld the constitutionality of a handwriting exemplar taken at the direction of the foreman of a grand jury investigating theft of postal money orders. These exemplars were required to be written on a form resembling a money order.

self-incrimination." These cases clearly demonstrate that judges will not mechanically apply rules in this important constitutional area.

Several interesting issues have arisen in the application of the *Schmerber* self-incrimination rule. One of the most interesting is the right of the prosecutor to comment upon the refusal of an accused to submit to a test. Refusal is analogous to such other evidentiary areas as flight to avoid prosecution, silence when confronted by an accusation, escape, fabrication or destruction of evidence, and concealment of identity.<sup>30</sup> Former Chief Justice Traynor of California believes it is constitutionally permissible for the prosecution to comment upon the refusal of a suspect to submit to a breathalyzer test. He reasons that a suspect has no constitutional right to refuse a test designed to produce physical evidence. A wrongful refusal to cooperate with the police is not constitutionally protected. Furthermore, allowing a person to refuse to submit to a test with impunity would encourage suppression of evidence, for such evidence often disappears with the passage of time.<sup>31</sup> Other courts have reached similar conclusions.<sup>32</sup> However, a few courts consider questions<sup>33</sup> and testimony<sup>34</sup> concerning refusal to submit to a test to be impermissible testimonial byproducts.

Another issue of interest involves possible conflict between a constitutional warning and a requested police action. An accused cannot be condemned for following a *Miranda*-type warning.<sup>35</sup> If a suspect is informed of his right to remain silent and if he does in fact remain silent when asked to speak for purposes of voice identification, his refusal to speak may not be used as

<sup>30</sup> This questionable result was reached in *People v. McLaren*, 55 Misc. 676, 285 N.Y.S.2d 991 (Dis. Ct. 1967).

<sup>31</sup> Comment, *Chemical Tests and Implied Consent*, 42 N.C.L. Rev. 841, 848 (1964).

<sup>32</sup> *People v. Sudduth*, 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966).

<sup>33</sup> *State v. Esperti*, 220 So.2d 416 (Dis. Ct. App. Fla. 1969) (test for presence of nitrates); *City v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968) (chemical test for intoxication); *State v. Holt*, 156 N.W.2d 884 (Ia. 1968) (chemical test for intoxication).

<sup>34</sup> *Shilling v. State*, 484 S.W.2d 674 (Ct. Crim. App. Tex. 1968) (blood test).

<sup>35</sup> *Gay v. City of Orlando*, 202 So.2d 896 (Dis. Ct. App. Fla. 1967), cert. denied, 390 U.S. 958 (1967) (breathalyzer test).

<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). A person in custody, prior to interrogation, must be informed that he has a right to remain silent, that anything he says can be used against him in court, that he has a right to consult with a lawyer and to have that lawyer present during the interrogation, and that a lawyer will be appointed to represent him if he is indigent.

evidence of a consciousness of guilt unless he is clearly informed that he has no right to refuse to speak for purposes of voice identification.<sup>10</sup> An uneducated suspect could not be expected to distinguish between communication and speaking for voice identification.

### B. MILITARY PRACTICE

The military application of the principle of self-incrimination is both varied and confusing. An examination of the legal basis and development of this principle is necessary for evaluating current military law and for formulating an intelligent prognosis for the future. Article 24 of the 1920 Articles of War provided that no "witness" before certain enumerated investigatory bodies "shall be compelled to incriminate himself."<sup>11</sup> Both the 1928 and 1949 Army Manuals for Courts-Martial stated unequivocally that the principle embodied in the fifth amendment privilege against self-incrimination applies to trials by courts-martial.<sup>12</sup> The self-incrimination provision of the *Uniform Code of Military Justice* is contained in article 31 which states in part that "[n]o person subject to this code shall compel any person to incriminate himself."<sup>13</sup> The legislative history of the first sub-

<sup>10</sup> *People v. Ellis*, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).

<sup>11</sup> Article 24 of the Articles of War states:

"Art. 24. Compulsory Self-Incrimination Prohibited.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him." (Emphasis added.)

<sup>12</sup> Both Manual provisions are identically worded:

"Compulsory self-incrimination.—The Fifth Amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled 'to be a witness against himself.' The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. . . ." Manual for Courts-Martial, United States Army, 1928, para 122b. Manual for Courts-Martial, United States Army, 1949, para 136b.

<sup>13</sup> The full text of article 31 of the UNIFORM CODE OF MILITARY JUSTICE provides:

"(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

"(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him: of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused

division of this article asserts that the privilege against self-incrimination is to be extended to persons other than witnesses.<sup>99</sup> There is no indication that Congress in any way intended to broaden the substantive scope of the privilege itself.<sup>100</sup> Indeed, the 1951 Manual indicated that the concept of the fifth amendment privilege against self-incrimination was to be used in trials by courts-martial.<sup>101</sup>

Without examining in depth the substantive scope of the privilege against self-incrimination,<sup>102</sup> the Court of Military Appeals has guarded jealously this right of servicemen. The court has moved from a position in which article 31 was a mere codification of the fifth amendment<sup>103</sup> to a position in which article 31 is interpreted more broadly than the fifth amendment.<sup>104</sup> This

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or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

"(c) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

"(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial."

"The legislative analysis of article 31a of the UNIFORM CODE OF MILITARY JUSTICE states: "Subdivision (a) extends the privilege against self-incrimination to all persons under all circumstances. Under present Army and Navy provisions only persons who are witnesses are specifically granted the privilege." S. REP. NO. 486, 81st Cong., 1st Sess. 16 (1949). H. R. REP. NO. 491, 81st Cong., 1st Sess. 19 (1949).

<sup>99</sup> See Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 984-98 (1949).

<sup>100</sup> Manual for Courts-Martial, United States, 1951, para 150b. Wording of the pertinent provisions of this paragraph, except for certain grammatical changes, are identical with the comparable provisions of the 1928 and 1949 Manuals cited *supra* note 97.

<sup>101</sup> *E.g.*, United States v. Aronson, 8 U.S.C.M.A. 525, 529, 25 C.M.R. 29, 33 (1957); United States v. Musguire, 9 U.S.C.M.A. 67, 68, 25 C.M.R. 329, 330 (1958); United States v. Minnifield, 9 U.S.C.M.A. 373, 378, 26 C.M.R. 153, 158 (1958).

<sup>102</sup> *E.g.*, United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953); United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953); United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954).

<sup>103</sup> *E.g.*, United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); United States v. Minnifield, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958); United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

Wording similar to UNIFORM CODE OF MILITARY JUSTICE article 31a is found in the state constitutions of eleven states: Alabama, Connecticut, Delaware, Kentucky, Maine, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, and Utah. 8 J. WIGMORE, EVIDENCE § 2252 (McNaughton ed. 1961). None of these states have interpreted their constitutions as restrictively as the Court of Military Appeals has interpreted article 31. Maine, for example, equates its constitutional provision with the federal constitutional provision for purposes of precedent and construction. Gendron v. Burnham, 146 Me. 387, 82 A.2d 773 (1951). A few other states liberally interpret their

liberalized concept was designed to protect service personnel who, unlike their civilian counterparts, have a duty to obey superior authority.<sup>105</sup>

Prior to the 1951 Manual for Courts-Martial, Army boards of review held that the privilege against self-incrimination was not violated by execution of handwriting exemplars,<sup>106</sup> by exhibition before a complaining witness for purposes of identification,<sup>107</sup> by compulsory examination of body and clothing,<sup>108</sup> and by an order to submit to a blood test.<sup>109</sup> The 1951 Manual provided:

The prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a verbal or other communication in which he expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material. Consequently, it is not a violation of the prohibition to order a person (including an accused) to expose his body for examination by the court or by a physician who will later testify as to the results of his examination. Upon refusal to obey the order, the person's clothing may be removed by force. Also, the prohibition is not violated by requiring a person (including an accused) to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice identification, or to submit to having fingerprints or a sample of his blood taken.<sup>110</sup>

Between 1951 and 1969, the evolution of the concept of self-incrimination in the military can be seen in the continual erosion of this Manual provision by the Court of Military Appeals. The handwriting exemplar provision was the first to fail. One Rosato refused, upon advice of counsel, to obey an order to produce samples of his handwriting by printing the alphabet. The court reasoned that it was a violation of article 31 to compel a soldier to produce handwriting exemplars. The furnishing of such exemplars involves an impermissible "conscious exercise of both mind and body, an affirmative action."<sup>111</sup> Yet the court, in in-

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constitutions to prohibit the taking of physical evidence or to require consent for the taking of bodily fluids. See Note, *The Status of Implied Consent Legislation Since Schmerber v. California*, 11 UTAH L. REV. 168, 172 (1967).

<sup>105</sup> See generally, J. MUNSTER & M. LARKIN, *MILITARY EVIDENCE* § 8.3 (1959).

<sup>106</sup> *United States v. Atkinson*, 55 B.R. 21 (1945).

<sup>107</sup> *United States v. Parker*, 64 B.R. 345 (1946).

<sup>108</sup> *United States v. Bowen*, 74 B.R. 1 (1947).

<sup>109</sup> *United States v. Kindall*, 75 B.R. 313 (1948). See generally M. Drucker, *Self-Incrimination and Violation of Due Process* 30-1, May 1955 (unpublished thesis presented to The Judge Advocate General's School and located in the University of Virginia Law School Library).

<sup>110</sup> Manual for Courts-Martial, United States, 1951, para 150b.

<sup>111</sup> *United States v. Rosato*, 3 U.S.C.M.A. 143, 147, 11 C.M.R. 143, 147 (1953).

dicating permissible law enforcement activity, clearly noted that "compulsory production of a handwriting specimen goes far beyond the taking of a fingerprint, placing a foot in a track, an examination for scars, forcibly shaving a man or trimming his hair, requiring him to grow a beard, or try on a garment."<sup>112</sup> *Rosato* thus departed from the prior law which only recognized and protected testimonial utterances.<sup>113</sup> In both *Rosato* and a companion case,<sup>114</sup> the court laboriously sought guidance from state and federal case law which, unfortunately at that particular time, could provide little precedent.

Compulsory speaking for voice identification at a lineup<sup>115</sup> as well as at the actual trial<sup>116</sup> requires, according to the Court of Military Appeals, an active exercise of mental and physical faculties and violates article 31. Thus another Manual provision was overruled. Urine samples were next. However, the court in *United States v. Williamson*,<sup>117</sup> initially found that the hygienic extraction by a qualified physician of urine from the bladder of an unconscious soldier did not violate self-incrimination rights. The attention of the court was focused upon the manner of the taking, for they applied a *Rochin*-shock-the-conscience test.<sup>118</sup> No force and violence, brutal methods, or improper medical techniques were used. The concurring opinion pointed out that creation of urine involves "only involuntary and unavoidable physiological functions" and not the creative performance necessary for both writing and speaking.<sup>119</sup> In a subsequent case<sup>120</sup> involving voluntary use of a catheter to obtain a urine sample, the accused complained that he had received no warning under article 31b of the Code. The court held that only testimonial utterances—not real evidence—were protected by article 31b. Therefore, the conscious and affirmative act of which the court speaks is found in article 31a. Case law continued to develop. Catheterization over the active protest of an accused was held to be a denial of military due process making the evidence secured thereby inadmissible.<sup>121</sup> Compelling a person to act and ordering him to act are

<sup>112</sup> *Id.* at 146-47.

<sup>113</sup> *M. Drucker, supra* note 109.

<sup>114</sup> *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

<sup>115</sup> *United States v. Thomas*, 12 C.M.R. 385 (ABR 1953).

<sup>116</sup> *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

<sup>117</sup> *United States v. Williamson*, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

<sup>118</sup> *Rochin v. California*, 342 U.S. 165 (1952). Discussed *supra* in section II.

<sup>119</sup> *United States v. Williamson*, 4 U.S.C.M.A. 320, 330, 15 C.M.R. 320, 330 (1954).

<sup>120</sup> *United States v. Booker*, 4 U.S.C.M.A. 335, 15 C.M.R. 335 (1954).

<sup>121</sup> *United States v. Jones*, 5 U.S.C.M.A. 537, 18 C.M.R. 161 (1955).

practically the same. Two years later the court decided that a soldier lawfully could not be ordered to submit a sample of his urine, for such an order is illegal.<sup>127</sup>

The Government may not interrogate or request a "statement" from an accused without informing him of the offense of which he is suspected and without informing him of his right to remain silent and his right to counsel.<sup>128</sup> Military courts have given the word "statement" a broad application to include not only language but conduct as well.<sup>129</sup> This expanded interpretation of the warning requirement has affected the area of self-incrimination, for the police must warn a suspect and gain his intelligent consent before blood samples<sup>130</sup> and handwriting exemplars<sup>131</sup> may be taken. Note the progression from noncompulsion to full, intelligent consent. A semiconscious accused cannot voluntarily give a sample of his blood if he is not able to understand a request for that sample.<sup>132</sup> Yet if bodily fluids are taken primarily for "diagnostic purposes" under sanitary conditions by surgical personnel, there is no violation of the privilege against self-incrimination.<sup>133</sup> The emphasis on intelligent consent was underscored in *United States v. White*<sup>134</sup> which was decided after the United States Supreme Court held in *Gilbert v. California*<sup>135</sup> that handwriting exemplars were not within the protection of the privilege against self-incrimination. If, of course, civilian courts consider handwriting exemplars to be outside the protection of the fifth amendment, no requirement would exist for a *Miranda*-type

<sup>127</sup> *United States v. Jordan*, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957). In his concurring opinion, Judge Ferguson differentiated the problem of the legality of the order from the problem of the admissibility of the evidence obtained as a result of such an order. He stated the issue in this manner: "The problem now before us is simply whether an order by a superior to submit a urine specimen for the sole purpose of obtaining incriminating evidence against the accused violates Article 31(a) and is, therefore, illegal." *Id.* at 456, 22 C.M.R. at 246. A military order to be lawful must pertain to military duty. *United States v. Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961). *But see United States v. Haskins*, 11 U.S.C.M.A. 365, 29 C.M.R. 181 (1960), where the custodian of public funds may be lawfully ordered to produce his incriminating records.

<sup>128</sup> UNIFORM CODE OF MILITARY JUSTICE art. 31, *supra* note 98; *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>129</sup> *E.g.*, *United States v. Bennett*, 7 U.S.C.M.A. 97, 21 C.M.R. 223 (1956). Pointing to a locker and clothing at the request of official investigators is conduct which constitutes a "statement."

<sup>130</sup> *United States v. Musguire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958).

<sup>131</sup> *United States v. Minnifield*, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958).

<sup>132</sup> *United States v. McClung*, 11 U.S.C.M.A. 754, 29 C.M.R. 570 (1960).

<sup>133</sup> *United States v. Miller*, 15 U.S.C.M.A. 320, 35 C.M.R. 292 (1965).

<sup>134</sup> 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

<sup>135</sup> 388 U.S. 263 (1967).

warning<sup>111</sup> prior to executing such exemplars. Handwriting exemplars were involved in *White*. In refusing to follow *Gilbert*, the Court of Military Appeals stated: ". . . we . . . reaffirm the rule that an accused must be apprised of his rights under Article 31, before he can be asked for samples of his handwriting."<sup>112</sup> The court in *United States v. Mewborn*<sup>113</sup> also reaffirmed prior case law and refused to follow *United States v. Wade*<sup>114</sup> which held that uttering words or phrases for voice identification did not violate the fifth amendment. Both decisions are based upon a broad reading of article 31 which interprets that article as affording even greater protection against self-incrimination than the fifth amendment.

In *White* and *Mewborn* the Court of Military Appeals possibly indicated that it would ignore developments in the federal law of self-incrimination. Such may not, in fact, be the case. Relying heavily upon federal precedent, the court in *United States v. Babbidge*<sup>115</sup> and in two subsequent cases<sup>116</sup> decided that an accused as a condition precedent to presenting psychiatric evidence must cooperate with a government psychiatrist. Using psychiatric evidence constituted a qualified waiver of the right to remain silent under article 31. This opinion is written in terms of an equitable state-individual balance, and the court did not re-examine its position concerning self-incrimination. May this not in fact be compelling "a conscious exercise of both mind and body, and affirmative action"?<sup>117</sup> In the proper case, will other federal precedent be followed? These questions for the present must remain unanswered.

It is against the background of a "whittled-down" earlier Manual provision and a "propped-up" warning requirement that the current law contained in the 1969 *Manual for Courts-Martial* must be examined. That provision states:

The privilege against compulsory self-incrimination protects a person only from being compelled to testify against himself or to

<sup>111</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). Discussed *supra*, note 94. See *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969); *United States v. Holcomb*, 18 U.S.C.M.A. 202, 39 C.M.R. 202 (1969).

<sup>112</sup> *United States v. White*, 17 U.S.C.M.A. 211, 216-17, 38 C.M.R. 9, 14-15 (1967).

<sup>113</sup> 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

<sup>114</sup> 388 U.S. 218 (1967).

<sup>115</sup> 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969).

<sup>116</sup> *United States v. Wilson*, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969); *United States v. Schell*, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969).

<sup>117</sup> *United States v. Rosato*, 3 U.S.C.M.A. 143, 147, 11 C.M.R. 143, 147 (1953).

provide the Government otherwise with evidence of a testimonial or communicative nature and does not protect him from being compelled by an order or force to exhibit his body or other physical characteristics as evidence. The privilege is therefore not violated, for example, by the use of compulsion in taking the fingerprints of an accused or other person, in exhibiting or requiring him to exhibit a scar on his body, in placing his feet in tracks or trying clothing or shoes on him or requiring him to do so. . . .<sup>128</sup>

The first sentence states the *current civilian* law. Indeed it was the intention of the drafters to codify the self-incrimination aspects of *Gilbert, Wade, and Schmerber*.<sup>129</sup> Yet a reading of the second sentence indicates that the drafters used current military law in giving safe, settled examples. None of these examples relate specifically to an intrusive bodily search situation. However, the first sentence protects "testimonial" or "communicative" evidence and not real or physical evidence. There are no cases indicating how the court will interpret this paragraph. Since this provision is a codification of civilian law, it should be interpreted according to the application given that law by the federal courts.

### C. SUMMARY

Federal civilian courts and military courts differ dramatically in their application of the privilege against self-incrimination. Federal civilian courts prohibit compulsion of "communication" or "testimony." Reasonable compulsion of real or physical evidence is constitutionally permissible. Compulsion itself is not prohibited but testimonial compulsion is improper. It would not be a violation of the fifth amendment privilege to require a suspect to speak for voice identification, to produce handwriting exemplars for analysis, or to submit to the taking of bodily specimens for laboratory examination. Since the taking of real or physical evidence is not protected by the privilege against self-incrimination, a prosecutor may comment upon the failure of a suspect to furnish such requested evidence. The Court of Military Appeals holds exactly the contrary point of view. If production of evidence involves a conscious exercise of mind and body or if affirmative actions is required, the military privilege against self-incrimination found in article 31 of the Uniform Code of Military Justice will be violated. A suspect must consent to the production of a sample of his hand-

<sup>128</sup> MCM, 1969 (Rev.), para 150b.

<sup>129</sup> Draft Analysis of Contents, Manual for Courts-Martial, United States, 1969 (1968), para 150b.

writing, or to the requirement that he speak for voice identification. To compel a suspect to do these things would violate the military privilege against self-incrimination. Since such nonconsensual activity is considered to be within the military privilege, a prosecutor may not comment upon a failure to produce evidence. At the present time, therefore, civilian federal courts and military courts are nearly one hundred and eighty degrees apart in their treatment of the protection against self-incrimination.

## V. UPDATING MILITARY PRACTICE

Military judicial bodies are charged with the grave responsibility of protecting the constitutional rights of men in uniform. No one expects our citizen-soldiers or even our regular soldiers to shed more of their constitutional rights when they enter the service than military necessity requires.<sup>140</sup> There may be many differing methods within the military legal framework to protect those rights. Two such differing means are found in the area of intrusive bodily searches. Intrusive searches effectively can be blocked by a restrictive reading of self-incrimination protections rooted in the fifth amendment or such searches can be judicially and judiciously monitored using search and seizure concepts found in the fourth amendment. The military needs to loosen its self-incrimination prohibitions. Yet, at the same time, there should be a development of stringent standards for intrusive searches and seizures. In days of modern science, justice demands the maximum accuracy possible consistent with time honored constitutional safeguards. Accuracy requires that intoxication not be determined from opinion testimony based on observation, that authorship not be decided from a few handwriting exemplars found in official records, and that identification at a lineup not be made with less than the maximum information available. There is plenty of room within the law to accommodate science. The highest court of the land is leading the way. Courts-martial should respectfully follow.

*Schmerber* obviates the need for traditional consent. Yet at the same time it may impose an even higher standard, for one could consent to an intrusive bodily search that would not fulfill

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<sup>140</sup> See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).

*Schmerber* standards.<sup>141</sup> Subjective consent should be replaced, at least partially, with the objective standards of requiring that "there is a clear indication that evidence of a crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable."<sup>142</sup>

Military tribunals should re-examine the concept of self-incrimination. Unfortunately, the military "backed into" its pre-1969 Manual status. "Difficult cases make bad law" was never more accurate than in the self-incrimination area. Hard cases involving handwriting exemplars, voice identification, and military orders shaped the law and forced its development into rigid, inflexible principles. Yet, courts-martial generally follow federal criminal practice.<sup>143</sup> The Supreme Court has spoken and the federal judiciary is following that lead. The President, in exercising his right to prescribe courts-martial procedure, has stated that the federal self-incrimination rule shall be followed. The argument that the language of article 31 requires it to be interpreted more broadly than the fifth amendment lacks both historical perception<sup>144</sup> and substantial judicial foundation.<sup>145</sup> Such an argument, it is submitted, is a smoke screen for camouflaging individual theories regarding the privilege against self-incrimination.

The law of search and seizure in the area of intrusive bodily

<sup>141</sup> The concept of consent may have lost some of its usefulness in the area of intrusive bodily searches. Consent under traditional legal concepts would obviate any need for establishing a clear indication that evidence of crime will be found. An individual who would clearly be competent to grant the police permission to invade his property may not be competent to grant permission to invade his body due to lack of technical medical knowledge. In other words, a suspect would be competent to give the police permission to invade his body but incompetent to consent to the method used. For example, an individual gives consent to the taking of his blood. However, the method used clearly does not meet acceptable medical standards, and the suspect contracts hepatitis. A prosecutor would probably not be required to prove that there was clear indication that evidence of crime would be found. Yet even with "consent," would the judge admit evidence taken in obvious violation of the requirement that the method of conducting the search be reasonable?

<sup>142</sup> MCM, 1969 (Rev.), para 152.

<sup>143</sup> UNIFORM CODE OF MILITARY JUSTICE art. 36a provides: "The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." See also MCM, 1969 (Rev.), para 137.

<sup>144</sup> Discussed p. 159, *supra*.

<sup>145</sup> Discussed note 104, *supra*.

## BODY SEARCHES

searches should be allowed to develop using federal cases as models. The presence of skilled physicians and medical technicians, who may in fact perform certain magisterial functions, should do much to alleviate fears of police overzealousness. Medical science and accepted practice will dictate what tests are reasonable. Judicially monitored common sense will indicate when delay will threaten the destruction of evidence. But the greatest safeguard of all is that the police must have a clear indication that evidence of crime will be found before an intrusive bodily search can be legally initiated.

In conclusion, when intrusive bodily searches are required, the rights of servicemen should be protected with the concepts of the fourth rather than the fifth amendment. By restricting self-incrimination to federally recognized nontestimonial utterances, military courts will once again be in harmony with their federal counterparts. Application of the "*Schmerber*-intrusion-into-the-body" criteria will protect soldiers from possible overanxious law enforcement officials. A mere shift in emphasis can place the military on the well lighted constitutional pathway to permissive intrusive bodily searches.



## RECENT DEVELOPMENTS

*Relford v. Commandant*, — U.S. — (24 February 1971):  
On-Post Offenses and Military Jurisdiction\*

### I

Isaiah Relford was convicted by general court-martial in December 1961 of two counts of rape and two counts of kidnapping.<sup>1</sup> Both incidents occurred on the United States military reservation at Fort Dix and the contiguous McGuire Air Force Base while Relford was on active duty but on pass and dressed in civilian clothes. One victim was the 14-year-old sister of a serviceman stationed at Fort Campbell, Kentucky. The second victim was the wife of a serviceman stationed at McGuire and employed as a PX waitress on the base. At the time of her abduction she was driving to work from her home on base.

Relford's conviction was sustained by the normal military appellate channels although the sentence of death was reduced to confinement at hard labor for 30 years.<sup>2</sup> In 1967 Relford applied to a United States district court for a writ of habeas corpus. His claims were found without merit and the application was denied. The Tenth Circuit affirmed the denial of relief.<sup>3</sup> Although the issues were not raised before the lower federal courts,<sup>4</sup> the Supreme Court granted certiorari "limited to retroactivity and scope of *O'Callahan v. Parker*. . . ."<sup>5</sup>

Writing for a unanimous Court Justice Blackmun noted the ferment caused by the Court's June 1969 decision in *O'Callahan v. Parker*,<sup>6</sup> but noted: "We thus do not reconsider *O'Callahan*. Our

\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

<sup>1</sup>UNIFORM CODE OF MILITARY JUSTICE, arts. 120 and 134.

<sup>2</sup>United States v. Relford, 14 U.S.C.M.A. 678, denied a petition for review on 24 September 1963, thus completing the direct appellate process.

<sup>3</sup>Relford v. Commandant, 409 F.2d 824 (10th Cir. 1969).

<sup>4</sup>The Circuit opinion was filed on 23 April 1969, a little over two months before the Supreme Court decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>5</sup>Relford v. Commandant, 397 U.S. 934 (1970).

<sup>6</sup>Justice Blackmun cited virtually all of the Court of Military Appeals cases, several lower federal court cases, and a wealth of scholarly commentary.

task here concerns only its application." Justice Blackmun summarized Relford's contentions as follows: (1) *O'Callahan's* requirement of "service connection" necessitated that "the crime itself be military in nature, that is, one involving a level of conduct required only of servicemen and, because of the special needs of the military, one demanding military disciplinary action."<sup>8</sup> (2) *O'Callahan* stands for the proposition that courts-martial are seriously deficient as impartial dispensers of justice. (3) Because of these considerations the location of Relford's offense was of slight significance and Relford could not be punished by military authorities.

In evaluating these contentions the Court found "the facts of *O'Callahan* and the precise holding in that case possess particular significance."<sup>9</sup> Emphasis was placed on the fact that *O'Callahan's* offense took place "in a civilian hotel while he was on leave and not in uniform."<sup>10</sup> In all, twelve factors in the *O'Callahan* case were noted.<sup>11</sup> Justice Blackmun viewed the enumeration of factors in *O'Callahan* as evidence that that Court "chose to take an *ad hoc* approach to cases where trial by court-martial is challenged."<sup>12</sup> Turning to Relford's case it was found that elements 4, 6, 8, 11, and 12 and perhaps 5 and 9 were similar to *O'Callahan*. However, elements 1, 2, 3, 7, and 10 were not. Stretching to make its point, the Court noted that the waitress-victim was returning to work at the PX and that in the course of the kidnapping two automobiles were unlawfully entered.<sup>13</sup> The comparison of the facts of the two

<sup>8</sup> *Relford v. Commandant*, 39 U.S.L.W. 4240, 4241 (24 Feb. 1971).

<sup>9</sup> *Id.* at 4242.

<sup>10</sup> *Id.* at 4243.

<sup>11</sup> *Id.*

<sup>12</sup> "1. The serviceman's proper absence from the base.  
2. The crime's commission away from the base.  
3. Its commission at a place not under military control.  
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.  
5. Its commission in peace time and its being unrelated to authority stemming from the war power.  
6. The absence of any connection between the defendant's military duties and the crime.  
7. The victim's not being engaged in the performance of any duty relating to the military.  
8. The presence and availability of a civilian court in which the case can be prosecuted.  
9. The absence of any flouting of military authority.  
10. The absence of any threat to a military post.  
11. The absence of any violation of military property. . . .  
12. The offense's being among those traditionally prosecuted in civilian courts." *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

cases led the Court to "readily conclude" that Relford was properly tried by a military court. Nine factors were listed as compelling this result. Distilled to their essence they were: (1) The military has a responsibility to preserve order at its facilities; (2) Article I, section 8, clause 14, of the Constitution and implementing statutes grant to the military the power to punish servicemen offenders in certain cases; (3) The civil courts may be less interested than the military in prosecuting military cases; (4) Language in *O'Callahan* suggests the military significance of onpost offenses; and (5) Meaningful lines cannot be drawn between military and non-military areas on post and defendants' on-duty and off-duty activities there.

In summary, the court held "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial."<sup>14</sup> Alternatively stated, "a serviceman's crime against the person of an individual upon the base or against property on the base is 'service connected' within the meaning of that requirement as specified in *O'Callahan*. . . ."<sup>15</sup> By this standard Relford's offenses were "service connected" and properly tried by court-martial.

Having upheld court-martial jurisdiction, the court did not reach the retroactivity issue. Nor did the court define the outer boundaries of the *O'Callahan* opinion: "*O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time."<sup>16</sup>

## II

The *Relford* opinion marks the Supreme Court's initial re-examination of the "service connection" requirement of *O'Callahan v. Parker*.<sup>17</sup> In brief factual summary, *O'Callahan* was tried by court-martial for an off-post housebreaking, assault, and attempted rape, involving a civilian victim. The offense was committed while *O'Callahan* was on leave from the military. The crimes had no relation to military duties and could have been tried in the

<sup>14</sup> *Id.* at 4244.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 395 U.S. 258 (1969). The Court previously denied certiorari in *United States v. Swift*, 396 U.S. 1028 (1970), and *United States v. Gallagher*, 27 L.Ed. 2d 86 (1970), cases involving offenses committed overseas.

Hawaiian civilian courts. By five to three vote the Supreme Court ruled that O'Callahan was not subject to court-martial jurisdiction. Writing for the majority, Justice Douglas held that a "service connection" must exist before a military man could be tried by court-martial. The ruling was ostensibly grounded on the failure of courts-martial to provide fifth amendment protections of indictment by grand jury and trial by a jury of one's peers.<sup>18</sup> Aside from these specific constitutional objections, however, the majority opinion evinced a strong distaste for the entire system of military justice.<sup>19</sup> Thus, while the majority opinion took note of the particular facts of O'Callahan's situation, it gave ample indication that its holding was of possibly much greater scope.

Prior to the *O'Callahan* decision, a succession of Supreme Court decisions had steadily contracted courts-martial jurisdiction over non-soldiers. Discharged servicemen,<sup>20</sup> dependents overseas,<sup>21</sup> and civilian employees in peacetime<sup>22</sup> were found immune from military trial. As in *O'Callahan* the Court expressed a need to limit military jurisdiction to an essential minimum.<sup>23</sup>

In the eighteen months since *O'Callahan*, the Court of Military Appeals has provided considerable guidance as to the meaning of "service connection."<sup>24</sup> In general the court has been reluctant to deny the existence of court-martial jurisdiction.<sup>25</sup> Foreign of-

<sup>18</sup> *Id.* at 278.

<sup>19</sup> Among the Court's comments on military justice: "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." (*Id.* at 265.) Court-martial practices are generally "less favorable to defendants." (*Id.*) "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 265-66.

<sup>20</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

<sup>21</sup> *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>22</sup> *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960).

<sup>23</sup> "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955); *Reid v. Covert*, 354 U.S. 1, 23-29 (1957).

<sup>24</sup> For a comprehensive review of the *O'Callahan* case and the ensuing Court of Military Appeals interpretations, see Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971).

<sup>25</sup> In particular, Chief Judge Quinn has made little effort to hide his profound disagreement with the language and holding of *O'Callahan*. See, for the most outstanding example, his dissenting opinion in *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

## RECENT DEVELOPMENTS

fenses,<sup>26</sup> petty offenses,<sup>27</sup> drug use and possession offenses,<sup>28</sup> military security offenses,<sup>29</sup> offenses involving a serviceman victim,<sup>30</sup> and offenses involving civilian reliance on military status<sup>31</sup> have all been held triable by court-martial, regardless of their occurrence on or off post. All cases involving on-post offenses have been held triable by court-martial.<sup>32</sup> In some multiple offense cases the court used the "on post-off post" distinction to determine amenability to court-martial jurisdiction.<sup>33</sup>

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<sup>26</sup> *United States v. Hargrave*, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970); *United States v. Davis*, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970); *United States v. Ortiz*, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970); *United States v. Blackwell*, 19 U.S.C.M.A. 196, 41 C.M.R. 196 (1970); *United States v. Bryan*, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970); *United States v. Gill*, 19 U.S.C.M.A. 93, 41 C.M.R. 93 (1969); *United States v. Higginbotham*, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969); *United States v. Stevenson*, 19 U.S.C.M.A. 69, 41 C.M.R. 69 (1969); *United States v. Easter*, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969); *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1970); *United States v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969).

<sup>27</sup> *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

<sup>28</sup> *United States v. Rose*, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); *United States v. Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>29</sup> *United States v. Stafford*, 19 U.S.C.M.A. 33, 41 C.M.R. 33 (1969); *United States v. Harris*, 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969).

<sup>30</sup> *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); *United States v. Everson*, 19 U.S.C.M.A. 70, 41 C.M.R. 70 (1969); *United States v. Huff*, 19 U.S.C.M.A. 56, 41 C.M.R. 56 (1969); *United States v. Nichols*, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969); *United States v. Allen*, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969); *United States v. Plamondon*, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); *United States v. Cook*, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969); *United States v. Camacho*, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969); *United States v. Rego*, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969).

<sup>31</sup> *United States v. Haagenson*, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970); *United States v. Peterson*, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970); *United States v. Fryman*, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969); *United States v. Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); *United States v. Frazier*, 19 U.S.C.M.A. 40, 41 C.M.R. 40 (1969); *United States v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969); *United States v. Morisseau*, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969).

<sup>32</sup> *United States v. Wills*, 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970); *United States v. Fields*, 19 U.S.C.M.A. 119, 41 C.M.R. 119 (1969); *United States v. Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); *United States v. Allen*, 19 U.S.C.M.A. 31, 41 C.M.R. 31 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Smith*, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969); *United States v. Paxio*, 18 U.S.C.M.A. 608, 40 C.M.R. 320 (1969); *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969).

<sup>33</sup> *United States v. Wills*, 20 U.S.C.M.A. 8, 42 C.M.R. 200 (1970); *United States v. Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969).

## III

On its face, the *Relford* decision is rather disappointing. Absent is the broad scope and ringing language of *O'Callahan*. The decision does validate a significant fraction of Court of Military Appeals decisions. It is now clear that on-post crimes of violence and crimes against property committed by servicemen are subject to court-martial jurisdiction regardless of the victim's or the crime's relation to military activity. But the decision leaves a greater number of issues unresolved with its tantalizing "perhaps not the limit" language. Further, it avoids deciding the significant retroactivity issue.

The significance of *Relford* may well be in matters left unsaid by the Court. Examined broadly, the decision is significant in several regards:

(1) After a consistent contraction of military jurisdiction over the last fifteen years, the Court has refused to go further.<sup>31</sup> In fact *Relford* may have expanded jurisdiction by clarifying a previously grey area of *O'Callahan*.

(2) The decision was unanimous, again breaking precedent with a series of bitterly disputed decisions. Coming less than two years after the acrimonious five to three split in *O'Callahan* the unanimity is both amazing and suggestive of a compromise among broadly divergent points of view.

(3) The Court selected an easily definable jurisdictional standard. While emphasizing the service related position of the two rape victims, the holding was not restricted to such a narrow ground and one so difficult of distinction. Having chosen not to force a "service connected victim" test on military judges, the Court did require that a crime be "violative of the security of a person or of property [on post]."<sup>32</sup> No elaboration is provided on the significance of this restriction. Are marijuana or narcotic offenses violative of persons or property? Is consensual sodomy?<sup>33</sup> Illegal gambling? What of an offense initiated on post but victimizing someone off post? For example, various fraud offenses making use of the mails or the telephone.

(4) The decision made only slight mention of the great constitutional issues of *O'Callahan*. Instead the Court's juggling of numbers suggests a matter of administrative convenience rather than a matter of grave constitutional deprivation. The Court is

<sup>31</sup> See cases cited in footnotes 20-22, *supra*.

<sup>32</sup> *Relford v. Commandant*, 39 U.S.L.W. 4240, 4244 (24 Feb. 1971).

<sup>33</sup> The issue of "crimes without victims" was raised but not decided in *Hooper v. Laird*, 19 U.S.C.M.A. 829, 41 C.M.R. 829 (1970).

simply not convincing in its disclaimer that *O'Callahan* is not being reconsidered. In essence, Relford's crime mirrors *O'Callahan's* except for its occurrence on post. Accepting *O'Callahan's* view of military justice, this distinction hardly legitimates subjecting Relford to a system of justice that denies many elements of basic fairness.<sup>37</sup> No objective evidence supports the Court's contention that Relford's trial in the New Jersey civilian courts would have seriously harmed the base.<sup>38</sup> In short, if we accept *O'Callahan's* characterization of military justice, the Court has chosen to deny a capital defendant a fair trial on the basis of mere speculation.

On the other hand, if the Court is tacitly retreating from its *O'Callahan* view of military justice, its decision in *Relford* makes more sense. The defendant's trial is no longer unfair, but merely constitutionally different. Under either system a fair determination of guilt can be had. Therefore, the factors arguing against a military trial are substantially reduced.

#### IV

Taken together, *O'Callahan* and *Relford* provide a basis for re-examining "service connection" questions not decided by the Supreme Court and decided prior to *Relford* by the Court of Military Appeals. Given the limited holding of *Relford*, few positive answers can be provided. With this in mind, the various "service connection" categories set out by the Court of Military Appeals will be briefly discussed. (1) Overseas offenses and petty offenses will likely both withstand jurisdictional challenge. As pointed out by the Court of Military Appeals neither area would enjoy constitutional protections in civilian courts.<sup>39</sup> (2) Military security offenses, even if occurring off post, would involve obvious connections between defendant's military duties and the crime (factor 6) and the violation of military property (factor 11), ele-

<sup>37</sup> See Justice Douglas' comments in *O'Callahan v. Parker*, 395 U.S. 258 (1969), cited in footnote 19, *supra*.

<sup>38</sup> Only two sources are cited to support the contention that the civil courts will have less than complete interest and ability to handle a case such as *Relford*, W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 725 (2d ed. 1896, 1920 reprint), and Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction: O'Callahan v. Parker*, 9 WASHBURN L. J. 193, 208 (1970). Neither authority cites statistical evidence for its conclusion and certainly the passage of better than a half century casts doubt on the continuing validity of Colonel Winthrop's premise. Given the increasing contact between the military and civilian worlds it would seem doubtful that a conscientious state prosecuting attorney would regard a *Relford* as a threat only to the military community.

<sup>39</sup> See, e.g., *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

ments clearly absent in *Relford's* case. *Relford* thus solidifies an already strong case for military jurisdiction. (3) Drug offenses involve more difficult considerations. The Court of Military Appeals has noted that "use of marihuana and narcotics by military persons . . . has special military significance"<sup>40</sup> in view of the alleged debilitating effect on health, alertness and morale. Accordingly, military jurisdiction attaches to use and possession offenses regardless of the place of occurrence. By contrast, a United States district court has refused to find military significance in an off-post possession offense.<sup>41</sup> As noted *Relford* does not necessarily resolve even the on-post issue. Depending on one's definitions of the twelve jurisdictional factors, most on-post possession or use cases could suggest court-martial jurisdiction only because of their place of location (factors 1, 2 and 3). An off-post offense would meet all twelve factors for civilian jurisdiction. The strongest case for military jurisdiction under *Relford* would appear to be the on-post manufacture, sale or distribution of drugs. Here, "flouting of military authority" (factor 9) and "threat to a military post" (factor 10) can convincingly be argued. In all probability the Supreme Court would uphold court-martial jurisdiction for such offenders. Jurisdictional decisions in other areas are harder. Of significant effect is the recent change in Department of Defense guidelines regarding drug abuse.<sup>42</sup> The implied distinctions between the confirmed addict, the supplier and the casual user to some extent undermine the Court of Military Appeals' position that all contact with drugs is equally harmful and has equal military significance. However, given the *Relford* Court's dislike for drawing imprecise jurisdictional lines and its recognition of the "enlightened" military attitude the Court may adopt the Court of Military Appeals guidelines and allow the military to handle disciplinary as well as rehabilitative aspects of the problems. (4) The off-post injury of military personnel could also lead to close factual distinctions. Significantly, this issue has divided the Court of Military Appeals. Judge Ferguson has taken the minority position that the military status of the victim of an off-post offense is by itself insufficient to con-

<sup>40</sup> *United States v. Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969).

<sup>41</sup> *Moylan v. Laird*, 305 F. Supp. 551 (D.C. R.I. 1969). The court did concede, however, that a marihuana use offense might have special military connection either on or off post.

<sup>42</sup> See Army Reg. No. 600-32 (23 Sep. 1970).

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fer court-martial jurisdiction.<sup>43</sup> Judge Ferguson's position was expressed in *United States v. Nichols* "[i]f the offense tends realistically towards some direct *deleterious* effect on military matters or discipline, then the offense is 'service connected.' If, however, the effect of the offense on military matters or discipline is *remote*, then military jurisdiction may not constitutionally attach."<sup>44</sup> Returning to the dozen jurisdictional guidelines the flouting of military authority (factor 9) and the victim's engagement in the performance of military duties (factor 7) are the only factors supporting court-martial jurisdiction over off-post offenses against servicemen. Yet the significance the court attached in *Relford* to one victim's being en route to duty as a PX waitress suggests that the court might lay heavy emphasis on the seventh factor.

A variety of factual situations could challenge the Supreme Court in this area. Consider, for example: (1) a planned assault on an on-duty military police or shore patrolman; (2) a bombing of the off-base home of a commander by men in his unit; (3) a racially motivated knifing occurring outside of a post experiencing severe racial difficulties; (4) an off-post shooting of one soldier by another inspired by nothing more than personal animus; (5) a theft from a soldier's off-base home perpetrated by a serviceman ignorant of his victim's military ties. In all probability the *Relford* court and a unanimous Court of Military Appeals would find at least the first two offenses clearly service connected. The third could be viewed in its larger context as posing a threat to the military installation. The fourth and fifth cases would offer the fewest reasons for the exercise of military jurisdiction.<sup>45</sup> However, it can plausibly be argued that a commander may have a greater interest in the security of his men than the theoretical security of his installation. It seems frankly incongruous to allow the commander to court-martial a serviceman who assaults a transient civilian on-post and yet deny him court-martial power when a member of his command is attacked by a fellow serviceman outside the gates of the base. Again given the *Relford* court's admitted reluctance to draw lines, a future decision might uphold jurisdiction in any case involving a serviceman victim.

<sup>43</sup> See, e.g., *United States v. Nichols*, 19 U.S.C.M.A. 43, 41 C.M.R. 43 (1969); *United States v. Plamondon*, 19 U.S.C.M.A. 22, 41 C.M.R. 22 (1969); *United States v. Camacho*, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

<sup>44</sup> *United States v. Nichols*, 19 U.S.C.M.A. 43, 45, 41 C.M.R. 43, 45 (1969).

<sup>45</sup> A majority of the Court of Military Appeals has found service connection in the fifth case, *United States v. Camacho*, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969).

(5) Similar considerations might govern the resolution of "service representation" offenses. The majority of these have involved forged or non-sufficient-fund checks cashed with the aid of service identification or references.<sup>14</sup> Again Judge Ferguson has taken the minority position on the Court of Military Appeals arguing that reliance on military status is immaterial to the offense and "service discredit" can only be examined under article 134 of the Code.<sup>15</sup> Like the "serviceman victim" offenses, there is room for great factual variety. Unfortunately, however, this category of offenses gives no easy jurisdictional answer.<sup>16</sup> Relying on the twelve jurisdictional factors, particular factual situations may suggest connection between the defendant's military duties and the crime (factor 6), the victim's being engaged in performance of a military-related duty (factor 7), or the flouting of military authority (factor 9). Even absent any of these factors the Court might adopt some variant of the "service discredit" test to sustain military jurisdiction. Given the Court's recognition of a military commander's responsibility for maintenance of order in his command and the harmful effects of servicemen's crimes on the reputation and integrity of the base, the court may grant jurisdiction to the military to punish such image discreditors.<sup>17</sup>

## V

In summary, *Relford* will probably little change the attitude of the Court of Military Appeals. With the occasional exception of Judge Ferguson, that court has not given an expansive interpretation to *O'Callahan*. *Relford* will most certainly not cause any contraction of service connected jurisdiction. On the other hand, the Supreme Court's language is probably not strong enough to allow Chief Judge Quinn to gain a second adherent to his "differentiate *O'Callahan* whenever possible" approach. The next move remains with the Supreme Court.<sup>18</sup>

<sup>14</sup> *United States v. Haagenson*, 19 U.S.C.M.A. 332, 41 C.M.R. 332 (1970); *United States v. Peterson*, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970); *United States v. Hallahan*, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969); *United States v. Frazier*, 19 U.S.C.M.A. 40, 41 C.M.R. 40 (1969); *United States v. Morisseau*, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969); *United States v. Williams*, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969).

<sup>15</sup> *Id.* See also *United States v. Fryman*, 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969).

<sup>16</sup> The victim of a crime either is or is not a serviceman. The distinction is usually clear and susceptible of rapid determination. By contrast, what constitutes "representation of military status" or what acts bring "discredit on the military?"

<sup>17</sup> See *Relford v. Commandant*, 39 U.S.L.W. 4240, 4243-44 (24 Feb. 1971).

<sup>18</sup> Future military jurisdiction decisions must take into account the changed

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The *Relford* decision assures further Court consideration of the contours of military jurisdiction.<sup>51</sup> Quite possibly the limited terms of the decision indicate a desire to mark time until a better assessment of the 1968 revisions of the Uniform Code of Military Justice can be made. At a minimum, however, the opinion clarifies one aspect of "service connection" and removes some of the stigma of *O'Callahan*. While the victory for military justice is not a great one, it does offer promise of a more sympathetic hearing in cases to come.

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composition of the Supreme Court since June 1969. The new "Burger majority" has already shown a willingness to temper earlier decisions of the Court in the areas of federal intervention in state court proceedings (see *Younger v. Harris*, 39 U.S.L.W. 4201 (23 Feb. 1971)), confrontation rights (see *Dutton v. Evans*, 39 U.S.L.W. 4015 (15 Dec. 1970)), and the use of improperly obtained evidence (see *Harris v. New York*, 39 U.S.L.W. 4281 (24 Feb. 1971)).

Also of significance is Chief Justice Burger's position in military related cases while a member of the District of Columbia Circuit Court of Appeals. On several occasions the now-Chief Justice joined in opinions upholding various military activities. See *Brown v. Gamage*, 377 F.2d 154 (D.C. Cir. 1967); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir. 1966) ("In the Uniform Code of Military Justice, enacted since World War II, establishing the new civilian Court of Military Appeals, Congress has been at great pains to afford to all members of the armed services review and correction of error or injustice." At 305); *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965). Justice Blackmun's one significant military opinion as a Court of Appeals Judge is *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969). While of limited predictive value, the opinion suggests a willingness to give thorough consideration to constitutional issues.

"One of the first areas to be resolved will doubtless be the retroactivity of *O'Callahan*. Present Supreme Court decisional law examines three factors to determine whether a decision will be given retrospective application: "(a) the purpose to be served by the new standards; (b) the extent of the reliance of law enforcement authorities on the old standards; and (c) the effect on the administration of justice of the retroactive application of the new standards." *Stovall v. Denno*, 388 U.S. 293 (1967). The first factor is treated as the most important. *Desist v. United States*, 394 U.S. 244, 249 (1968). Typically this factor has been examined in terms of the extent to which the overruled standards prevented a fair determination of guilt or innocence. The Court of Military Appeals in *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970), denied a retrospective application to *O'Callahan*. However, a strict Supreme Court reading of its retroactivity standards, based solely on *O'Callahan*, might find the jurisdictional and "fairness of the fact finding process" infirmities discussed in *O'Callahan* as requiring full retroactive application. *Relford's* down-playing of the unfairness issue may allow the Court to decide the retroactivity issue on the basis of the potentially massive effect on the administration of military justice.

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*Harris v. New York*, — U.S. — (24 February 1971):  
The Re-Vitalization of *Walder*\*

### I. THE HARRIS CASE

Harris was charged in a two-count indictment with selling heroin to an undercover agent on 4 and 6 January 1966. On 7 January 1966, the defendant was arrested and made a pretrial statement without benefit of what later became known as *Miranda* warnings. In this statement he admitted that on both dates he had acted as a middleman in purchasing heroin from a third person and selling it to the undercover agent. At trial the government presented the testimony of three officers, two of whom testified as to the sale and the third as to the results of a chemical analysis performed on the narcotics. The case was tried after the effective date of *Miranda v. Arizona*<sup>1</sup> and for this reason, the defendant's unwarned statements were not a part of the prosecution's case in chief. Harris took the stand and flatly denied that he sold heroin on 4 January. Regarding the alleged sale on 6 January, he testified that he sold a glassine bag to the officer on that date but that the bag was filled with baking powder and was part of a scheme to defraud the purchaser.

In cross-examining the defendant, the government read parts of the pretrial statement taken on 7 January 1966 asking him whether this statement contradicted his direct testimony. The accused replied that he had made a statement but could remember virtually none of the questions and answers recited by the prosecutor. The jury convicted petitioner of the 6 January sale. The New York Court of Appeals affirmed *per curiam*.<sup>2</sup> Harris sought and was granted review by the Supreme Court.

The Court affirmed the counts below, deciding that it was proper for the government to use the defendant's unwarned statement to impeach him. Writing for a five man majority, Chief Justice Burger relied upon several factors to sustain the conviction. First, Harris made no claim that the statement was involuntary in the traditional sense. Second, *Miranda's* prohibition of the introduction of *any* unwarned statement "was not at all necessary to the Court's holding and cannot be regarded as controlling." Third, the trustworthiness of the evidence satisfied legal stand-

\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

<sup>1</sup> 384 U.S. 486, decided 13 Jun. 1966.

<sup>2</sup> *Harris v. New York*, 25 N.Y.2d 175, 250 N.E.2d 349 (1969).

ards.<sup>3</sup> Fourth, citing language in *Walder v. United States*,<sup>4</sup> even though the impeaching evidence bore directly on the issue of guilt or innocence, there was a sharp contrast between Harris' in-court testimony and the pretrial statement. Fifth, the impeachment process is a valuable tool and should not be lost "because of the speculative possibility that impermissible police conduct will be encouraged thereby" (emphasis added). Sixth, "[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Seventh, when the defendant took the stand, he was under an obligation to speak truthfully and accurately. Finally, "the shield provided by *Miranda* [could not] be perverted into a license to use perjury [as] a defense free from the risk of confrontation with prior inconsistent utterances."

Three dissenters<sup>5</sup> indicated that reliance upon *Walder v. United States* was misplaced. They argued: (1) in *Walder* the defendant was impeached on matters collateral to the offense charged, (2) *Miranda* prohibits the use of an unwarned statement for any purpose, and (3) *Griffin v. California*<sup>6</sup> established an absolute privilege not to incriminate one's self by prohibiting the prosecutor from commenting on the failure of the accused to testify. The majority decision "cuts down on that privilege by making its assertion costly."

## II. THE WALDER CASES

In *Walder v. United States*,<sup>7</sup> the Supreme Court ratified the use of the fruits of an unlawful search in order to impeach an accused. Walder was on trial for illicit transactions in narcotics. When the prosecution rested, Walder testified on direct examination that he had never sold narcotics to anyone in his life nor had he ever illegally possessed narcotics. Over defense objection, the government cross-examined the defendant about his possession of a grain of heroin two years before. Petitioner had been indicted for this possession but his motion to suppress the narcotics as seized in violation of the fourth amendment had been granted and the case had been dismissed. Walder denied that any narcotics had been taken from him at the earlier time. The government then

<sup>3</sup> There is an indication in a footnote that defendant was undergoing narcotic withdrawal when he gave the pretrial statement to the police.

<sup>4</sup> 347 U.S. 62 (1954).

<sup>5</sup> Mr. Justice Black dissented separately.

<sup>6</sup> 380 U.S. 609 (1965).

<sup>7</sup> 347 U.S. 62 (1954).

took testimony from one of the officers who participated in the unlawful search and the chemist who analyzed the seized heroin capsule.

The court decided that the defendant's assertion on direct examination that he had never possessed any narcotic opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized in connection with the earlier proceeding. The court thought two elements of the case were important. First, the defendant of his own accord went beyond a mere denial of the offenses charged and made the sweeping claim that he had never dealt in or possessed narcotics. Second, the court distinguished the *Walder* situation from that in *Agnello v. United States*.<sup>9</sup> In *Agnello* the government, after failing to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the defendant, "Did you ever see narcotics before?" In determining that *Agnello* did not waive his fourth and fifth amendment rights, the court stated:

. . . the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, *Agnello* was not asked and did not testify concerning the can of cocaine.<sup>10</sup>

In summary, *Walder* stands for the proposition that when the defendant of his own accord makes a sweeping claim going beyond a mere denial of the offense charged, he may be impeached by evidence inadmissible on the merits of the case.

An early case giving a liberal interpretation to *Walder* was *Tate v. United States*.<sup>11</sup> Although *Walder* was impeached by introduction of physical evidence seized, *Tate* extended the rule to use of a pretrial statement taken in violation of Federal Rule of Criminal Procedure 5a. Furthermore, the illegally obtained evidence was directly related to the offense being tried.<sup>12</sup> In an opinion by the present Chief Justice, it was pointed out that the impeaching evidence was not "per se inculpatory." Following the decision in *Tate*, several circuit and state courts employed a liberal test in allowing impeachment of a defendant both in relation to a

<sup>9</sup> 269 U.S. 20 (1925).

<sup>10</sup> *Id.* at 35.

<sup>11</sup> 283 F.2d 377 (D.C. Cir. 1960).

<sup>12</sup> Defendant testified at trial he had come to the crime scene alone and did not know the person who actually committed the offense. Impeachment consisted of questioning him on the basis of an inadmissible pretrial statement which indicated he came to the scene with an accomplice.

pretrial statement and matter directly related to the crime charged.<sup>12</sup> If *Walder* was expanded by these decisions,<sup>13</sup> the distinctions were based upon the impeachment involving "collateral matters,"<sup>14</sup> matters not "per se inculpatory" or "lawful proper acts."<sup>15</sup> Some cases seemed to disregard the *Walder* parameters entirely.<sup>16</sup>

The subtle distinctions involved in defining collateral matters, central issues, and sweeping claims, caused the District of Columbia Circuit and other courts to read *Walder* restrictively after the *Tate* decision. In *Johnson v. United States*,<sup>17</sup> the defendant testified at his robbery trial that the victim had paid him to engage in an act of sodomy and that a fight occurred subsequently. The court disallowed impeachment with a pretrial statement taken in violation of Federal Rule of Criminal Procedure 5a in which the defendant admitted his intent was improper. The court stated that the defendant had merely testified to his version of the facts and had not gone into collateral matters. Furthermore, the impeaching evidence directly challenged the innocence, not the credibility of the defendant.

Similarly, in two earlier cases the circuit held impeachment improper because it either "bore on the central issue" of the case or related directly to the raising of an affirmative defense.<sup>18</sup>

### III. THE IMPACT OF *MIRANDA*

The *Walder-Tate* decisions were rendered prior to *Miranda*.<sup>19</sup> The language of *Miranda* was seen by many to foreclose the use

<sup>12</sup> See *Curry v. United States*, 358 F.2d 904 (2d Cir. 1966); *United States v. Grosso*, 358 F.2d 154 (3d Cir. 1966); *State v. McClung*, 66 Wash.2d 654, 404 P.2d 460 (1965); *State v. Odom*, 353 S.W.2d 708 (Mo. 1962); *Commonwealth v. Wright*, 415 Pa. 55, 202 A.2d 79 (1964); *Commonwealth v. Reginelli*, 208 Pa. Super. Ct. 344, 222 A.2d 605 (1966).

<sup>13</sup> *Walder* involved a sweeping claim. The court stated the defendant must be free to deny all elements of the case against him without giving leave to the government to introduce evidence gained in violation of his constitutional rights.

<sup>14</sup> *United States v. Curry*, 358 F.2d 904 (2d Cir. 1966).

<sup>15</sup> *Tate v. United States*, 283 F.2d 377 (D.C. Cir. 1960).

<sup>16</sup> *United States v. Grosso*, 358 F.2d 154 (3d Cir. 1966); *State v. McClung*, 66 Wash.2d 654, 404 P.2d 460 (1965).

<sup>17</sup> 344 F.2d 163 (D.C. Cir. 1967).

<sup>18</sup> In *Inge v. United States*, 356 F.2d 345 (D.C. Cir. 1966), accused claimed loss of memory regarding the facts of the assault. Allowing impeachment with a pretrial statement contradicting this loss was improper. In *White v. United States*, 349 F.2d 965 (D.C. Cir. 1965), accused testified that the victim had come at him with his hand in his pocket. Impeachment with an inadmissible pretrial statement omitting this fact was improper. *State v. Brewton*, 247 Ore. 241, 522 P.2d 581 (1967), cert. denied, 387 U.S. 948 (1967).

<sup>19</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

of pretrial statements taken in violation of the warning requirements for impeachment purposes:

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any statement* made by the defendant. . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.<sup>20</sup>

Typical of post-*Miranda* thought is the opinion in *Groshart v. United States*.<sup>21</sup>

[I]f statements are obtained from a defendant in violation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, those statements . . . may not be used against the defendant at the trial for any purpose whatsoever. Whether the objective be to show guilt or to attack credibility, at the trial the prosecution must first show that the statements have been obtained in compliance with constitutional requirements as defined by our highest court. Insofar as *Walder* would compel a different result, it has, we believe, been undermined by the Supreme Court's *Miranda* decision.

#### IV. IMPEACHMENT IN THE MILITARY

##### A. PRE-MIRANDA

For fifteen years prior to *Miranda* a variety of military sources barred the use of improperly obtained prior inconsistent statements for impeachment. The 1951 Manual for Courts-Martial stated it was improper to impeach an accused with a prior inconsistent statement taken in violation of article 31.<sup>22</sup> The Court of Military Appeals decided early in its existence that this prohibition included a prior statement taken in order to determine

<sup>20</sup> *Id.* at 476-77.

<sup>21</sup> 392 F.2d 172 (9th Cir. 1968). Other cases limiting *Walder* in the area of pretrial statements are *Proctor v. United States*, 404 F.2d 819 (D.C. Cir. 1969); *Blair v. United States*, 404 F.2d 387 (D.C. Cir. 1968); *United States v. Fox*, 403 F.2d 97 (2d Cir. 1968); *Wheeler v. United States*, 382 F.2d 998 (10th Cir. 1967). *Contra*, *People v. Kulis*, 18 N.Y.2d 318, 221 N.E.2d 541 (1966).

<sup>22</sup> Manual for Courts-Martial, United States, 1951, para. 153b(2)(c). "An accused who has testified as a witness may not be cross-examined upon, or impeached by proof of, any statement which was obtained from a violation of Article 31 or through the use of coercion, unlawful influence, or unlawful inducement."

whether the accused's actions were within the "line of duty."<sup>23</sup> The Court of Military Appeals has applied article 31d<sup>24</sup> strictly and has held that its violation is inherently prejudicial.<sup>25</sup> A portion of the 1951 MCM which attempted to except false official statements from the application of article 31 was held to be inconsistent with article 31d.<sup>26</sup> Even though the defendant "opened the door" and used the provisions of article 31 as a "sword rather than a shield," its violation was not tolerated.<sup>27</sup>

The foregoing should not be construed as indicating that *Walder* is inapplicable to military practice. The Court of Military Appeals has utilized that doctrine extensively since its emergence in 1954.<sup>28</sup> In *Brown v. United States*,<sup>29</sup> the accused testified he had never used narcotics. The government was allowed to present evidence of a urinalysis revealing traces of morphine taken on a prior occasion to impeach the accused. In another case, the defendant was asked: "Weren't you suspected of narcotics use by your commanding officer at another time?" Even assuming the accused's testimony on direct to be as broad as *Walder's* the court held that rebuttal was erroneous:

All that appears in this case is suspicion. Suspicion of wrongdoing cannot be substituted for the fact of wrongdoing as a basis for impeachment.<sup>30</sup>

The *Walder* rationale has been utilized to destroy the anti-marital privilege when the defendant initially brought out the communication to his spouse.<sup>31</sup> Similarly when the accused charged with sodomy testified in direct examination that he was "as normal as

<sup>23</sup> See *United States v. Pedersen*, 2 U.S.C.M.A. 263, 8 C.M.R. 63 (1953). Accused was suspected by the officer taking the earlier statement but that officer did not indicate to accused that his statement could be used against him in a subsequent court-martial.

<sup>24</sup> UNIFORM CODE OF MILITARY JUSTICE art. 31d [hereafter cited UCMJ]. "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial" (emphasis added).

<sup>25</sup> See, e.g., *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952); *United States v. Berry*, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

<sup>26</sup> *United States v. Price*, 7 U.S.C.M.A. 590, 23 C.M.R. 54 (1957).

<sup>27</sup> See, e.g., *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

<sup>28</sup> See, e.g., *United States v. DeLeo*, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954), where accused's own testimony as to the reasons for his confession were used to show lack of causal connection between an assumed unlawful search and his subsequent confession.

<sup>29</sup> 6 U.S.C.M.A. 237, 240-41, 19 C.M.R. 363, 366-67 (1955).

<sup>30</sup> *United States v. Hubbard*, 5 U.S.C.M.A. 525, 529, 18 C.M.R. 149, 153 (1955).

<sup>31</sup> *United States v. Trudeau*, 8 U.S.C.M.A. 22, 23 C.M.R. 246 (1957).

anyone else," was "not a queer," and that his religious background would prevent this type of activity, it was permissible for the government to cross-examine about evidence of juvenile homosexual acts "some five to seven years prior to trial."<sup>33</sup>

### B. POST-MIRANDA

In *United States v. Lincoln*,<sup>34</sup> the Court of Military Appeals decided that *Miranda* required:

... proof by the United States of the proper warning as to accused's right to remain silent and to a lawyer, as the predicate for the use of any pretrial statement, obtained during custodial interrogation, whether it be inculpatory or exculpatory, or used on the merits or merely to impeach the accused.<sup>35</sup>

Lincoln was charged with premeditated murder. He defended on the basis of self-defense. Lincoln testified he had no intention of stabbing the victim Long but, in fear of that individual's assault, sought to use his knife to ward off harm to himself. His fear was said to be predicated on Long's advance upon him and the fact that his earlier blows in the orderly room had had no effect on his assailant, leaving him entirely unmarked. Long was said to have, in effect, impaled himself on the knife during the struggle. On cross-examination, trial counsel referred to Lincoln's improperly obtained pretrial statement to criminal investigators that "you blacked out and don't remember what happened." Accused admitted he had made the statement but, in what the board of review termed "nice forensic footwork," declared that he had been able to overcome the failure of his memory by subsequent reconstruction of the scene. Referring to the same statement, trial counsel further impeached the accused by obtaining his admission that he had informed investigators of an earlier argument with Long, which he had denied in his testimony. The majority opinion cited *Walder* without comment. It also noted this was not a case wherein the defendant on cross-examination denied making any pretrial statement at all in reliance upon the non-compliance with the *Miranda* warnings.<sup>36</sup>

In *United States v. Caiola*,<sup>37</sup> *Walder* was applied to the sentencing stage of a court-martial. The defendant, upon his pre-

<sup>33</sup> This kind of evidence was held inadmissible on the merits in *United States v. Roark*, 8 U.S.C.M.A. 279, 24 C.M.R. 89 (1957).

<sup>34</sup> See *United States v. Kindler*, 14 U.S.C.M.A. 394, 34 C.M.R. 174 (1964).

<sup>35</sup> 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967).

<sup>36</sup> *Id.* at 333, 38 C.M.R. at 131.

<sup>37</sup> See *United States v. Armetta*, 378 F.2d 658 (2d Cir. 1967).

<sup>38</sup> 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969).

trial confinement, had been furnished a questionnaire. One of the questions on the form inquired whether he desired to remain in the service. Accused had answered this question in the negative; no warnings had been given him prior to asking for his answers. In mitigation the defendant testified that he desired to remain in the service. The trial counsel cross-examined the defendant about his earlier pretrial statement. Notwithstanding the *Miranda* case, Judge Darden settled the question relying upon *Walder*:

*Walder v. United States* . . . is authority that illegally obtained evidence relevant to guilt or innocence of an accused may nevertheless be used at trial if restricted to the impeachment of accused's credibility regarding matter he had affirmatively introduced that goes beyond denial of the commission of the offense. Since *Miranda*, the efficacy of *Walder* in the usual trial proceeding has been placed in doubt. Cf. *Groshart v. United States*, 392 F.2d 172 (CA 9th Cir) (1968). Because on this occasion we are concerned with post-finding proceedings, however, I am constrained to hold that under the circumstances of this case, *Walder* has sufficient vitality to permit the use of Calola's statement. Consequently, on this basis, the law officer correctly permitted the use of Calola's statement to be used in the post-finding proceeding for purposes of impeachment.<sup>38</sup>

The concepts enunciated in *Miranda* were held applicable to military practice in *United States v. Tempia*.<sup>39</sup> The MCM 1969 and MCM 1969 (Rev.) incorporated the required warnings.<sup>40</sup>

The view of the *Lincoln* case has been incorporated into the Manual in the following terms:

. . . an accused who has testified as a witness may not be cross-examined upon, or impeached by evidence of, any statement which was obtained from him in violation of Article 31 or any of the warning requirements in 140a(2) or through the use of coercion, unlawful influence or unlawful inducement.<sup>41</sup>

## V. THE HARRIS RULE IN MILITARY PRACTICE

There are several impediments to adopting the *Harris* rule in the military. The *Lincoln* holding is perhaps the least of these obstacles. There the Court of Military Appeals read *Miranda* as precluding the use of an unwarned statement to impeach an accused. The Supreme Court in *Harris* held otherwise. It is clear that article 31 itself requires exclusion of *any* statement obtained

<sup>38</sup> *Id.* at 339-40, 40 C.M.R. at 51-52.

<sup>39</sup> 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>40</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 140a(2) [hereafter cited MCM, 1969 (Rev.)].

<sup>41</sup> MCM, 1969 (REV.), para. 153b(2)(c).

in violation of its warning requirements.<sup>12</sup> Assuming an adequate article 31 warning but an inadequate counsel warning, the Court of Military Appeals could adopt the same rationale as they did in the "handwriting exemplar cases."<sup>13</sup> These cases stand for the proposition that the counsel warning required in military cases is co-extensive with that required in civilian cases. If civilians are not required to warn of the right to counsel, the military similarly should not be required to do so. Article 31, of course, must be complied with. The result would be that an article 31 warning would be required in order to use the pretrial statement for impeachment because article 31 is broader than the fifth amendment and by its terms prohibits the use of the statement.<sup>14</sup> However, since a counsel warning is not constitutionally required and since the bounds of *Tempia's* warnings are no greater than *Miranda's*, no counsel warning need have been given in order to use the statement to impeach a testifying defendant. This rationale would allow the Court of Military Appeals to find a way around *Lincoln*.

The more serious impediment to adoption of *Harris* is the Manual. Article I, section 8, of the Constitution, empowers Congress to make laws for the government of the land and naval forces. The Uniform Code of Military Justice is the principal legislative enactment setting forth these rules. Article 36, Uniform Code of Military Justice, provides that the President may prescribe rules of procedure and modes of proof for trials by courts-martial.<sup>15</sup> The delegation of authority from Congress to the President has been continually upheld.<sup>16</sup> The Manual for Courts-Martial is an Executive Order signed by the President. In this Executive Order he has directed that unwarned statements are not competent for use in impeaching a testifying accused.<sup>17</sup> The Court of Military

<sup>12</sup> See art. 31d, UCMJ; *United States v. Pedersen*, 2 U.S.C.M.A. 263, 8 C.M.R. 63 (1963); *United States v. Price*, 7 U.S.C.M.A. 590, 23 C.M.R. 54 (1957).

<sup>13</sup> *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969); *United States v. Holcomb*, 18 U.S.C.M.A. 202, 39 C.M.R. 202 (1969).

<sup>14</sup> See *United States v. Minnifield*, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958); *United States v. Musquire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

<sup>15</sup> "The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

<sup>16</sup> *United States v. Villasenor*, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955); *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

<sup>17</sup> MCM, 1969 (REV.), para. 153b(2)(c).

Appeals should follow this provision for the following reasons. First, the rule regarding impeachment in the Manual is a rule formulating a "mode of proof." As a mode of proof it is a rule susceptible of promulgation by the President.<sup>49</sup> Second, since the provision does not conflict with the Code, the court may very well consider itself bound by the Manual rule:

... We have consistently recognized that where a Manual provision does not lie outside the scope of the authority of the President, offend against the Uniform Code, conflict with another well-recognized principle of military law, or clash with other Manual provisions, we are duty bound to accord it full weight.<sup>50</sup>

Third, after the determination has been made that promulgation of the Manual provision is proper, the question becomes one of its effect. In essence, the Manual has given the defendant a right to which he is not constitutionally entitled. At least three Supreme Court cases involving administrative procedures dictate that in cases where the right is given, it cannot be arbitrarily ignored.<sup>51</sup> The most recent explication of this rationale in a criminal case is found in *United States v. Leahey*.<sup>52</sup> In *Leahey* the court faced the issue of whether it should exclude evidence obtained from an interview where an Internal Revenue Service Special Agent failed to give warnings required by I.R.S. procedures. These warnings were not constitutionally required.<sup>53</sup> In determining that the evidence should be excluded, the First Circuit noted that the regulation was published as a general guideline, was deliberately devised in order to gain uniform conduct from I.R.S. agents and was announced in a way that would cause the public to rely on the procedures. The court summed it up:

... [w]e hold that the agency had a duty to conform to its procedure, that citizens have a right to rely on conformance, and that the courts must enforce both the right and the duty.<sup>54</sup>

<sup>49</sup> See UCMJ, art. 36(a).

<sup>50</sup> This was one of the issues which divided the court in the area of corroboration of confessions. See *United States v. Smith*, 13 U.S.C.M.A. 105, 111, 32 C.M.R. 105, 111 (1962). Judge Ferguson put the matter this way in his separate concurrence in *United States v. Mims*, 8 U.S.C.M.A. 316, 319, 24 C.M.R. 126, 129 (1957): "The test for proof of the corpus delicti is in the area of legal sufficiency and therefore subject to approval by this Court. The Manual treatment of questions of criminal law has never been considered to be binding on this Court. . . . This Court, as the court of last resort in the military, has the exclusive jurisdiction to set the law in such areas in the absence of action by the Congress."

<sup>51</sup> *United States v. Villasenor*, 6 U.S.C.M.A. 3, 7, 19 C.M.R. 129, 133 (1955).

<sup>52</sup> *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Schaugnessy*, 347 U.S. 260 (1954).

<sup>53</sup> 434 F.2d 7 (1st Cir. 1970).

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 11.

In the event the Court of Military Appeals decided to follow the holding of *Harris*, there are three possible means to this end. The simplest way around the Manual provision is to ignore it. The Manual provisions have been ignored before. In *United States v. Hart*, the defendant objected to the adequacy of warnings based upon the fact that his interrogator made no specific reference to "civilian counsel." The Court of Military Appeals held the warnings sufficient because neither *Miranda* nor *Tempia* mentioned "the word 'civilian' in spelling out necessary lawyer-warning requirements."<sup>55</sup> The Manual paragraph which required that the accused be warned of his right to consult ". . . and to have with him at the interrogation, civilian counsel provided by him . . ." <sup>56</sup> was ignored by the Court.

A second way around the Manual which runs afoul of *Accardi, Service*, and *Vitarelli* is to create an analogy between a gratuitous instruction to the jury and a regulation more stringent than is constitutionally required.

An instruction that requires the court-martial to find more than the law requires imposes an unjustified burden upon the Government and constitutes an "advantage" to the accused. . . . a deficient, gratuitous instruction is not prejudicial to an accused.<sup>57</sup>

This argument is tenuous at best. There is no authority for a judge to overburden the government with an overly stringent instruction. There is authority for the President to prescribe rules of procedure, including rules not constitutionally required, for trials by courts-martial. In the area of impeachment by improperly obtained evidence he has clearly exercised that authority.

A third possible argument for departing from Manual provisions was first enunciated in *United States v. Moore*.<sup>58</sup> In that case, the court held that a Manual provision, even though the history of the provision indicated to the contrary, did no more than comment on a rule of evidence prevailing in federal courts. If the Manual can be read as not enunciating a rule of law but rather commenting on a rule applicable in another forum it retains a certain elasticity. If the rule changes in the other forum the Manual provision will accommodate the change. Thus, it might be urged that *Miranda* and *Tempia* prompted the 1969 Manual drafters to include their prohibition on impeachment in the Manual.

<sup>55</sup> *United States v. Hart*, 19 U.S.C.M.A. 438, 441, 42 C.M.R. 40, 43 (1970).

<sup>56</sup> MCM, 1969 (REV.), para. 140a(2).

<sup>57</sup> *United States v. Holcomb*, 18 U.S.C.M.A. 202, 207, 39 C.M.R. 202, 207 (1969).

<sup>58</sup> 14 U.S.C.M.A. 635, 34 C.M.R. 415 (1964).

If this can be interpreted as comment on the law as it was thought to exist, there is room to give a changing concept legal viability.<sup>59</sup>

## VI. EFFECTS OF *HARRIS*

The majority of the court in *Harris* felt that the exclusion of evidence had a "speculative" effect on police conduct.<sup>60</sup> But it has been persuasively argued that a deterrent type rationale is not applicable to involuntary confessions. The fourth amendment exclusionary principle was judicially created to control the police.<sup>61</sup> By its own terms, the fifth amendment is directed to the exclusion of evidence.

. . . to use an involuntary confession for the purpose of impeaching the defendant is as much a violation of the privilege against self-incrimination as to use it during the prosecution's case in chief, since in both situations the defendant is compelled to be a "witness" against himself.<sup>62</sup>

Police officers could deliberately violate the *Miranda* rules and gain a confession. This confession would, of course, be inadmissible on the merits of the case. After a brief period of time the police could administer proper warnings thus "rebagging the cat" and obtain an admissible confession.<sup>63</sup> Indeed, before the decision in *Harris*, the 9th Circuit Court of Appeals predicted that a two-step interrogation process would probably evolve if the *Miranda* rules were relaxed.<sup>64</sup> Statements may not be obtained involuntarily in the traditional sense. Any statement which is unreliable will

<sup>59</sup> *Id.* United States v. Rener, 17 U.S.C.M.A. 65, 71, 37 C.M.R. 329, 335 (1967); United States v. Smith, 18 U.S.C.M.A. 105, 121, 32 C.M.R. 105, 121 (1962).

<sup>60</sup> Chief Justice Burger has been opposed to the exclusionary rule for some time. "Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally take notice and be deterred. As I see it, a fair conclusion is that the record does not support a claim that police conduct has been substantially affected by the suppression of the prosecution's evidence. . . ."

"I suggest that the notion that suppression of evidence in a given case effectively deters the future action of the particular policeman or of policemen generally was never more than wishful thinking on the part of the courts." Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 11-12 (1964).

<sup>61</sup> See *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>62</sup> Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1030 (1966).

<sup>63</sup> See *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962).

<sup>64</sup> *Groshart v. United States*, 392 F.2d 172 (9th Cir. 1968).

probably be inadmissible even though used for impeachment only.<sup>66</sup>

Following *Miranda* a greater percentage of defendants pleaded not guilty.<sup>67</sup> The first effect of *Harris* will probably be a diminution of not guilty pleas and a proportionately higher sentence in return for a plea.

The defendant is of course still free to testify in his own behalf. He does not have a license to commit perjury. Those who would charge that *Harris* exacts a penalty in that it may keep the defendant from taking the stand are told that only perjury is deterred. If there is an inhibition, it is against testifying *falsely*.

Few would argue with the concept that *Harris* allows the government to capitalize on its own wrongdoing. This capitalization may be in the form of keeping the defendant off the stand altogether. It may take the form of allowing the government to control what the defendant will testify to when he does take the stand. Very few accused will be able to testify 180° contra to their pretrial statements. Stories which are so divergent leave an unsavory impression on juries.

If the defendant does nothing more than deny that he committed the offense, will his pretrial statement, gained in violation of *Miranda*, in which he admits committing the offense be admitted? Although *Walder* would indicate that use of the pretrial statement in this situation would be impermissible, because of its non-collateral nature, it is submitted that the *Harris* case is broad enough to admit the statement.

What is the effect of gross misstatements as opposed to minor errors in testimony? In *Harris*, the court stressed there was a sharp contrast between the in-court testimony and the out-of-court statement. Under the case law prior to *Harris*, this in itself would have been enough to keep the statement from being used as a tool of impeachment.<sup>68</sup> Is there any room for judicial discretion within this area? Will the actions of the government be

<sup>66</sup> Whether or not the *Harris* statement was voluntary even under the traditional tests is raised by the dissenters' first footnote. The defendant *Harris* was a heroin addict. Under questioning regarding his making of the January 7th statement he testified he did not "remember giving too many answers." When asked about his bad memory the petitioner stated that "my joints was down and I needed drugs." One might wonder whether an addict undergoing withdrawal is capable of exercising the free intellect required to conform to traditional voluntariness standards. See *Townsend v. Sain*, 372 U.S. 293 (1963).

<sup>67</sup> U.S. CODE CONG. & ADMIN. NEWS, 90th Cong., 2123-2139.

<sup>68</sup> *United States v. Inge*, 356 F.2d 345 (D.C. Cir. 1966), defendant may only be impeached through use of inadmissible statement on "minor points."

judged on the basis of whether there was a valid need for the impeachment?<sup>68</sup> These and many other questions will hopefully be answered in the cases yet to be decided.

## VII. CONCLUSION

There is little doubt that *Harris* has a "chilling effect" on the defendant's testimonial rights. There is little difference between a defendant who exercises his right not to take the stand,<sup>69</sup> a defendant who must testify a certain way to gain standing to suppress evidence,<sup>70</sup> and the defendant *Harris*. Each exercised a right guaranteed him under the Constitution. In *Griffin* and *Simmons* the court struck down prosecutorial conduct which had a chilling effect on the assertion of the right.

The most serious objection to the *Harris* holding is that it is unnecessary. Initially what can possibly be more laudable and fair than the *Miranda* rationale, telling a suspect the effect of waiving his right not to incriminate himself? It seems to place the rich and the poor, the ignorant and the wily all on the same plane. Second, for the defendant who makes sweeping claims not related to the offenses charged, the *Walder* case can be employed to place his testimony in its proper perspective through the use of impeachment. Third, anyone who feels that a criminal trial is a battle between equals is under a misconception. Although some progress has been made in affording investigative assistance to an indigent federal defendant,<sup>71</sup> the military man has no such assistance.<sup>72</sup> Fourth, there are several valid means of impeaching a defendant. The confirmed felon will probably have admissible convictions or a reputation as an incredible person. Fifth, when the defendant does testify, he is always an interested party, he usually has less inclination to speak the truth, and he is the one party who will be greatly affected by the verdict. These factors are laid before the jury in the form of instructions to them in assessing the defendant's credibility.<sup>73</sup>

It is indeed unfortunate that a defendant who may be doing no more than explaining his version of the facts may trigger intro-

<sup>68</sup> See, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963); *Spano v. New York*, 360 U.S. 315 (1959); *United States v. Schaible*, 11 U.S.C.M.A. 107, 28 C.M.R. 331 (1960).

<sup>69</sup> *Griffin v. California*, 380 U.S. 609 (1965).

<sup>70</sup> *Simmons v. United States*, 390 U.S. 377 (1968).

<sup>71</sup> 18 U.S.C. § 3006A. The maximum amount is usually \$300,000.

<sup>72</sup> *United States v. Hutson*, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970).

<sup>73</sup> See *Branson Instructions to Juries*, §§ 3359, 3379 (3d ed., Reid, ed. 1952); U.S. DEPT. OF ARMY, PAMPHLET NO. 27-9, THE MILITARY JUDGES' GUIDE, paras. 9-19 (1969).

duction of an involuntary pretrial statement. He is not free to deny all elements of the offense charged. With *Harris* a regressive step has been taken which allows the government to control the result of a trial by its own unlawful activities long before that trial ever occurs.

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2. *G. Galvin and B. Bittker, The Income Tax: How Progressive Should It Be?*, American Enterprise Institute for Public Policy Research, Washington, D.C., 184 pp. (1970), \$5.75.

3. *A. Thomas and A. J. Thomas, Jr., Legal Limits on the Use of Chemical and Biological Weapons*, Southern Methodist University Press, Dallas, 332 pp. (1970), \$10.00. The authors provide a thorough study of this century's efforts to regulate CB weapons.

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\*Mention of a work in this section does not preclude later review in the *Military Law Review*.

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