

MILITARY LAW
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VOL. 43

Articles

THE FREEDOM OF INFORMATION ACT AND
PRETRIAL DISCOVERY

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MUST THE SOLDIER BE A SILENT MEMBER
OF OUR SOCIETY?

ACCEPTANCE OF FOREIGN EMPLOYMENT BY
RETIRED MILITARY PERSONNEL

HEADQUARTERS, DEPARTMENT OF THE ARMY JANUARY 1969

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PREFACE

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MILITARY LAW REVIEW—VOL. 43

| | <i>Page</i> |
|--|-------------|
| <i>Articles:</i> | |
| The Freedom of Information Act and Pretrial Discovery Major Wilsie H. Adams, Jr. | 1 |
| Trial by the Press Major Ronald B. Stewart | 37 |
| Must the Soldier Be A Silent Member of Our Society? Major Michael A. Brown | 71 |
| Acceptance of Foreign Employment by Retired Military Personnel Major Joseph P. Creekmore | 111 |

THE FREEDOM OF INFORMATION ACT AND PRETRIAL DISCOVERY*

By Major Wilsie H. Adams, Jr.**

This article discusses the 1966 amendments to 5 U.S.C. 1002, allowing greater access to government agency records and authorizing federal courts to enjoin agencies from unreasonably withholding such records. Procedure under this Freedom of Information Act, as amended, is compared with discovery proceedings under the Federal Rules of Civil Procedure, including the factors upon which a sound choice between the two may be made by a litigant. The author concludes that the new Act can be a useful discovery tool, provided that the "exemptions" are not interpreted so as to continue the denial of needed information; and he suggests that a new all-encompassing discovery statute be enacted independent of any larger act.

I. INTRODUCTION

One of the most significant aspects of the Freedom of Information Act¹ is the creation of a judicial remedy for the wrongful withholding of Government information from the public. Subsection (c) of the Act provides:

Upon 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 shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant.

This grant of power to the courts adds a new judicial route through which to obtain information. The original route is "pre-

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¹80 Stat. 259 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. § 552 [hereafter referred to as the Act]. The Act, as originally enacted, is set out as an appendix to this paper. All quotations within this paper are from 80 Stat. 250 (1966) for ease of reference to the legislative history.

trial discovery" under the Federal Rules of Civil Procedure,² but that is available only to parties who are actually in litigation. Were a party able to reach the same destination at the same time with either, the difference between the two routes would be insignificant. However, such is not the case; thus it is advantageous to examine the features of each route and to identify the factors to be considered in selecting a route.

II. BACKGROUND OF THE FREEDOM OF INFORMATION ACT

In order to understand the judicial proceedings provided by the Act it is necessary to examine the background of the Act.³ This law is not the first attempt by Congress to provide comprehensive legislation in the area of public access to Government information. This Act is basically an amendment to the "Public Information" section of the Administrative Procedure Act.⁴ While intended to make records available to the public, the broad language of the old statute was used by the executive agencies as authority for withholding information from the public.

² 28 U.S.C. §§ 1-2710 (1964).

³ It is not intended here to provide an exhaustive study of the legislative history of the Act. This has been done in ATTORNEY GENERAL MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967) [hereafter cited as ATT'Y GEN. MEMO.] and in Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

⁴ 5 U.S.C. § 1002 (1964). The text of the old statute provided: "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

Such language as, "in the public interest," "internal management," "good cause," and "to persons *properly* and *directly* concerned" were familiar reasons for refusing to grant access to Government documents.⁵ No judicial procedure for correction of executive abuse of this section was provided. In order to prevent abuses by the executive of the public's right to access to Government information, the Freedom of Information Act changes the law in three significant ways.⁶ First, it eliminates the requirement that one seeking access to Government records be "properly and directly concerned." The law now indicates that "any person" will have access to most records. Secondly, the Act replaces the broad language of the old law quoted above with nine somewhat detailed categories of information which *may* be exempted from disclosure. There is nothing in the Act which prohibits disclosure of any record.⁷ Finally, subsection (c) of the Act provides judicial redress for the wrongful withholding of records by an agency.

III. SIGNIFICANCE OF RELEASE TO ANY PERSON

The radical shift to the "any person" standard may have consequences not foreseen by the drafters of the Act if one of the interpretations⁸ attributed to the act is accepted. It is in the nature of man to disclose certain information to some people that he would not disclose to others. For example, one will naturally disclose more details of his business operations to his accountant than he will to his competitor. The resolution of the question—"What is to be disclosed to whom?"—invariably involves a balancing of the nature of the information to be released and the character of the person who will receive it.

Professor Kenneth Culp Davis has taken the position that the Act precludes "the balancing of the interest of one private party against the interest of another private party."⁹ While this may be true with respect to Government records which do not fall within one of the nine exemptions, it is not necessarily true for those records which can be classified within one or more of the exemptions.

⁵ See H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966) [hereafter referred to as the House Report and cited as HOUSE REP.] (emphasis added).

⁶ See Kass, *The New Freedom of Information Act*, 53 A.B.A.J. 667, 668-69 (1967).

⁷ See Davis, *supra* note 3, at 766.

⁸ Davis, *supra* note 3.

⁹ *Id.* at 765.

Professor Davis reaches his conclusion in this way:

The Act's *sole* concern is with what must be made public or not made public. The Act never provides for disclosure to some private parties and withholding from others. The main provision of section 3 says that information is to be made available "to the public" and the central provision of subsection (c) requires availability of records to "any person."

That required disclosure under the Act can never depend upon the interest or lack of interest of the party seeking disclosure is emphasized by the history. The previous section 3 provided for disclosure "to persons properly and directly concerned." That was changed to "any person."

[U]nder the Act, Uncle Sam's information is either made public or not made public. The Act never *requires* it to be protected from all except those who have a special need for it.

. . . .

[A] consequence of limiting the Act's provisions to disclosure "to the public" and "to any person" is to preclude the balancing of the interest of one private party against the interest of another private party.¹⁰

But there may be flaws in this approach. In the first place there is no "sole" concern of the Act. The Act is as much concerned with who is to make the decision to release information, and how the decision is to be made, as it is in what the ultimate decision will be. Hence Congress provides the guidelines for the executive to follow in carrying out the will of Congress and provides judicial jurisdiction and sanctions to insure compliance. Even if the "sole" concern of the Act were with the decision itself, a more correct statement of the issue to be decided would be what must be made public or *what may be withheld* rather than "what must be made public or *not made public*." It is not true that "under the Act, Uncle Sam's information is either made public or not made public." What is true is that under the Act, "Uncle Sam's" information is either made available to any person, or if an exemption to disclosure can be applied, an agency has the discretion to refuse disclosure to a particular person. As Professor Davis himself points out, "the Act contains no provision forbidding disclosure."¹¹ Thus while the Act may not "[require information] to be protected from all except those who have a special need for it,"¹² it does *permit* disclosure of exempted records to those having a special need for it.

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* at 786.

¹² *Id.* at 785 (emphasis added).

This does not imply that the interest of the party seeking information from the Government still occupies the same position of importance it did before the Act. Obviously it does not. Congress did intend to eliminate this factor in most instances. Consider the following analysis:

As mentioned earlier, the original public information section restricted the availability of government records to persons "properly and directly concerned." The *Attorney General's Manual on the Administrative Procedure Act* interpreted this phrase to apply to "individuals who have a legitimate and valid reason for seeking access to an agency's records." Surely one would think the interested taxpayer or the inquisitive newsman falls in the category of having "legitimate and valid" reasons for seeking information from the Government. But this was not the case, and the Attorney General decided that each agency would be the "primary judge of whether the person's interest is such as to require it to make its official records available for his inspection."

Congress carefully rejected this position by establishing the principle that public records should be available to any person. The nature of the records themselves, rather than the interest of the person seeking the records, is now the controlling test. The Senate report concluded that "for the great majority of different records, the public as a whole has a right to know what its Government is doing."²

Congressional evaluation of the "nature of the records themselves" is to be found in the nine exemptions to compulsory disclosure provided in the Act. Thus where the nature of the information is such that it should be made available to any person regardless of his interest, Congress has provided no exemption to disclosure. Where the nature of the record is such that disclosure to "any person" should not be made, Congress has in the exemptions provided permissive authority to withhold that information. Discretion still remains with the executive, who is not precluded from considering the interest of the person seeking information. In fact, as described more fully below, it may be reasonable to assume that with respect to some of the exemptions, the Act does in fact require consideration of the interest of the party seeking disclosure of Government documents.

IV. INFORMATION AVAILABLE UNDER THE ACT IS LIMITED TO RECORDS

It is necessary here to note that the disclosure required by the Act relates to "records." Subsection (c) of the Act stated: "[E]very agency shall, upon request for *identifiable records*, . . .

² Kass, *supra* note 6, at 668 (footnotes omitted).

make such records available to any person." (Emphasis added.) Two problems are suggested by the phrase "identifiable records." The first, relating to identification and its effect on disclosure is fairly easily disposed of here. As one article has pointed out, "The identification requirement was added at the suggestion of the Senate Judiciary Committee to remove from the agencies what could otherwise have been an intolerable burden."¹⁴ The Senate Report explains what degree of identification is required, namely "a reasonable description enabling the Government employee to locate the requested records."¹⁵ The report goes on to state "This requirement of identification is not to be used as a method of withholding records."¹⁶ What constitutes a "record", however, presents a more difficult problem. The problem arises from the fact that the Act does not define the term "record." It is conceivable, therefore, that an agency could refuse to furnish material on the ground that the material requested does not constitute a record. The problem has received this discussion in one commentary:

It is likely that the term "agency records" like the similarly undefined terms "public records" and "official records" which raised considerable difficulty under the 1946 Act, will cause confusion. Although the phrase "agency records" would itself seem to include all information related to the operation of an agency and all information contained in its files, an agency might conceivably argue that "records" connotes some formal process of recording and does not include certain material in agency files such as letters and memoranda. On the other hand, subsection (e) exempts inter- and intra-agency memoranda and letters, arguably implying that "records" include not only "official" documents but also items such as letters and memoranda. The best solution would be to exclude from the definition of records only items having no relation to the agency's functions (personal letters for example), since the exemption in subsection (e) should provide adequate protection for the agency. To allow a general defense that a regulated document is not a "record" would merely add another exemption and increase the possibility of abuse.¹⁷

The author of the discussion above did not have the advantage of the *Attorney General's Memorandum*, subsequently published, in which a definition of "records" is set out for the guidance of

¹⁴ Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18, 25 (1967).

¹⁵ S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965) [hereafter referred to as the Senate Report and cited as SEN. REP.].

¹⁶ *Id.* The Senate Report also indicates that this standard of identification is similar to that in pretrial discovery. *Id.* at 2. See also ATT'Y GEN. MEMO. 24.

¹⁷ 80 HARV. L. REV. 909, 910-11 (1967) (footnotes omitted).

the agencies in preparing regulations implementing the Act.¹⁸ This definition is generally in line with the one suggested above. However, a recent study of the regulations implementing the statute revealed that while the definition cited by the Attorney General has generally been followed in the regulations, nevertheless, "[t]he regulations are divided on whether research data, designs and drawing are records."¹⁹ In other words, even with an acceptable definition, the problem remains.

Regardless of the definition of "records" which one might prefer, the mere fact that the Act speaks in terms of "records" rather than a more general term such as "information" may be significant when one compares access to Government information through pretrial discovery and by way of the Act.²⁰

V. THE SIGNIFICANCE OF SUBSECTION (f)

Before moving to a consideration of the exemptions²¹ themselves, it would be best to comment on the significance of subsection (f) of the Act. Professor Davis has taken the position that subsection (f) of the Act may seriously restrict the interpretation of the exemptions in subsection (e).²²

Subsection (f) states:

Nothing in this section authorizes withholding of information or limiting the availability of records to the public, except as *specifically stated* in this section . . . (emphasis added).

¹⁸ The definition found in ATT'Y GEN. MEMO. 23 is taken from 44 U.S.C. § 366 (1964) and states: "[T]he word 'records' includes 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 pursuance of Federal law or 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. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stacks of publications and of processed documents are not included within the definition of the word 'records' as used in this Act."

¹⁹ Note, *supra* note 14, at 27.

²⁰ It is the absence in the Act of other means of obtaining information, such as by interrogatories or depositions that is significant. See p. 31 *infra*.

²¹ The exemptions are found in subsection (e) of the Act which is reproduced as an appendix.

²² *Cf.* text at note 24 *infra*.

Professor Davis, after quoting the Senate Report,²³ concludes:

The pull of the word "specifically" is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation.

Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in *narrowing* the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following those habits in *broadening* that meaning. The "specifically stated" restriction operates in only one direction.

. . . [M]y opinion is that [the "specifically stated" clause] is often relevant in determining the proper interpretation of particular exemptions.²⁴

As Professor Davis points out, the *Attorney General's Memorandum* does not apply the "specifically stated" clause in interpreting each exemption.²⁵ The *Attorney General's Memorandum* merely restates the House Report and attaches no independent significance to subsection (f).²⁶

The proper interpretation of subsection (f) and the legislative history referred to would seem to be that this subsection does have independent significance but not that attributed to it by Professor Davis. The writer suggests that subsection (f) is telling the executive and judicial branches that if they wish to withhold a record they must be able to fit the record within one of the exemptions created by Congress. No new exemptions are to be created. In subsection (f), Congress is concerned with the number of exemptions and who is to create them, rather than with the scope of the exemptions created by Congress in subsection (d). For example, subsection (f) should be cited by a district court to disapprove an attempt by an agency to withhold information on the ground that the release of the requested information would serve no useful purpose. This ground does not appear as an exemption in subsection (e) and would represent an attempt by

²³ The quoted language is: "The purpose of this subsection is to make it clear beyond a reasonable doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e)." (SEN. REP. 10).

²⁴ Davis, *supra* note 3, at 783-84.

²⁵ *Id.* at 784.

²⁶ ATT'Y GEN. MEMO. 89. The applicable portion of the language of the House Report as quoted is: "the purpose of this subsection is to make clear beyond doubt that all the materials of [the executive branch] are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. . . ." (HOUSE REP. 11).

the executive branch to create a new exemption. Subsection (f) should not, however, be interpreted, as suggested by Professor Davis, as prohibiting the broad interpretation of a particular exemption found in subsection (e) to produce a sound result in a particular case.

VI. SOME OBSERVATIONS APPLICABLE TO ALL OF THE EXEMPTIONS

As was pointed out above, the exemptions to disclosure to any person represent an attempt by Congress to use the nature of the record as the criteria upon which to base the decision to disclose or withhold a requested document. The exemptions are the key to the Act. Whether the abusive withholding of information which gave rise to the Act is to be eliminated will depend upon the interpretation of the exemptions. If they are interpreted broadly, one could find at least one exemption applicable to practically any Government record. The exemptions, while more detailed than the broad exceptions to disclosure under the old statute, are still quite vague in many areas. It has been shown that the interpretations of the exemptions made by the agencies in the regulations implementing the Act have indeed been quite broad.²⁷ While these interpretations will be subject to judicial scrutiny in a particular case, it would be advisable here to examine the general effect of stating that a particular record falls within one of the classes of exempted material. Note first that as stated above, the Act does not require that exempted material be withheld. Further, subsection (e) begins "The provisions of this section [the Act] *shall not be applicable . . .*" (Emphasis added.) When the Act is "not applicable" the *requirement to disclose imposed by the Act* does not apply to the material within the interpretation of the exemption. *Whether a requirement to disclose may exist independent of that created by the Act remains to be seen.*²⁸

²⁷ See Note, *supra* note 18.

²⁸ This interpretation should not be confused with a closely related proposition set forth by Professor Davis that "the . . . exemptions do not apply, and *when the Act has no effect*, the law is what it would have been without the enactment" (Davis, *supra* note 3, at 785 (emphasis added)). The logical extension of the argument that the "Act has no effect" would be that therefore the district court has no jurisdiction if an exemption applies since its jurisdiction is created by the Act. It is submitted that the jurisdiction of the court will survive the finding that an exemption applies and that court having jurisdiction may order even exempted material to be made available if the principles of common law, equity or another statute might so require. This position will be developed more fully below.

Accepting the premise that an agency may choose to disclose information exempted by the Act, there is nothing in the Act which would prohibit disclosure of exempted material to one person but not to another. Likewise there is nothing to prohibit an agency from disclosing a portion of an exempted record, but not the entire exempted record. Such practices as striking out names from opinions, or separating opinions from facts, or revealing information while withholding the source of that information are not prohibited with respect to exempted material.

VII. THE EXEMPTIONS

A detailed analysis of the legislative history and possible interpretations of each of the nine exemptions is unnecessary since the primary concern here is not so much with whether a particular record will be disclosed, but rather with how a decision on that question will be reached. Nevertheless, it is appropriate at this point to consider a few of the exemptions in order to illustrate what has been said above and to facilitate the discussion of the exercise of its new jurisdiction by a district court.

The exemption which probably has the most significance in an examination of the inter-relationship of the Act and pretrial discovery is exemption 5. This exemption relieves the agencies of the obligation of disclosing "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."

In considering this exemption, the Senate report states:

It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal and policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.²⁹

The House Committee generally followed the Senate in explaining this portion of the bill but added the following:

Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the public.³⁰

²⁹ SEN. REP. 9.

³⁰ HOUSE REP. 10.

INFORMATION ACT

It is this last statement which causes the most difficulty. Without this statement, the language of the Act could be interpreted, within the context of the Senate Report, to mean that "inter-agency or intra-agency memorandums or letters" need not be disclosed to "any person" except a private party who under existing discovery rules would prevail.³¹

Such an interpretation, though admittedly strained, could lead to desirable results in a particular case. Consider this situation proposed by Professor Davis:

The words "a private party" seem to assume that every memorandum or letter would either be available or unavailable to "a private party" under discovery and related law, but that assumption is erroneous. All government records fall into three categories—those which are (1) always, (2) never, and (3) sometimes subject to discovery. The large category is probably the third for the need of the party seeking the information is usually a factor. The fifth exemption is workable for the first and the second categories. But when a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, should the agency disclose it, refuse disclosure, or apply discovery law to the facts about the particular applicant? The last course seems desirable, but the Act seems to forbid that course, for it requires disclosure to "any person"³²

Here then is the predicament. The agency is not likely to disclose the record to "any person" because of the nature of the record itself. The record is presumably one which should not be made public, but under the interpretation of the Act contained in the House Report it must be made public if the Act is not to result in having more information withheld from the individual than would have been withheld before Congress took action to free the information. What can be done now to correct this situation?

³¹ This is not to say that the statement in the House Report is not the correct interpretation of the exemption. In this regard it should be noted that the Senate Committee amended the language of the Act to read, "which would not be available by law to a private party in litigation with the agency," rather than "dealing solely with matters of law or policy" which was the language of the original bill. This change would support the interpretation of the House Report in that if the change were made to "delimit the exception as narrowly as possible . . .", it would necessarily mean that the exception applies to fewer records after the change than it did before. This being the case, the Senate intended the record to be available to "any person" unless it could be shown that "no party" would be given access to the record in pretrial discovery. If this is so, one has reason to wonder why the House Report qualifies its interpretation by referring to records which would "routinely be disclosed" in litigation. (Emphasis added.)

³² Davis, *supra* note 3, at 766.

43 MILITARY LAW REVIEW

One way out of the predicament would be to interpret the exemption in a manner different from that dictated by the House Report. As Professor Davis puts it:

[S]ince the purpose of the exemptions is to cut down the requirement of disclosure to "any person," the purpose of the fifth exemption could be to whittle down the "any person" requirement so that in effect, only a person with a strong enough interest is entitled to disclosure of a memorandum or letter. . . ."

Professor Davis concludes however:

This idea makes practical sense but it is contrary to the words of the fifth exemption. The key words are "a private party." . . . The focus is not on the applicant but on an abstract person, "a private party."

. . . The key is that the disclosure is to "the general public" and not the party requesting disclosure."

Perhaps one way to avoid this problem is to emphasize the single word "routinely" used by the House Committee. One could thus argue that records in category (3) "sometimes subject to discovery" would not be "routinely" disclosed in litigation and were therefore exempt from disclosure "to the general public." *Once one concludes that the record is exempt, there is nothing to prevent selective disclosure based on the standards applied in litigation.*

Such an argument probably puts too much weight on a single word of the House Report, but such reasoning would be available to "[c]ourts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation."³⁵

Another possible way to avoid the predicament described above is to examine carefully the record in question to see if it could be exempted under some provision other than the fifth exemption. For example, one type of record which would not be *routinely* disclosed but would be available on a showing of adequate need is the attorney's work product.³⁶ Some have stated, probably correctly, that the fifth exemption is the proper ground on which to exclude the production of such "work product."³⁷ This does not mean, however, that the same record could not arguably be considered as exempt under the fourth exemption relating to

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 783.

³⁸ *Hickman v. Taylor*, 329 U.S. 495 (1947).

³⁹ Davis, *supra* note 3, at 795; Note, *supra* note 14, at 40; 80 HARV. L. REV. 909, 913-14 (1967); *Panel Discussion on Freedom of Information Act*, 20 ABA TAX SECTION 43, 52 (1967) (remarks of Mr. Rogovin).

privileged information.³⁸ Both the House and Senate Committee Reports refer to the attorney-client privilege as protected under the fourth exemption.³⁹ The "work-product" theory is arguably based on the concept of "privilege."⁴⁰ Again while the argument is weak, a court seeking to strike a proper balance in a particular case might hold that the desired information was exempt from disclosure to the general public under the fourth exemption but available to the particular party because of special need.⁴¹ If it is possible to do justice by classifying work product records as privileged under the fourth exemption, we eliminate a major problem raised under the fifth exemption. This of course would not always relieve the agencies of the requirement for disclosing a memorandum to the public. Purely factual memoranda or letters probably would be "routinely" discoverable and hence not subject to the fifth exemption.⁴² It is relatively clear that the type of information intended to be exempted under the fifth exemption is the same type of information which courts have traditionally refused to disclose as internal government memoranda, namely, records which reflect the mental processes or opinions of Government agents.⁴³ This was the view taken by the Attorney General.⁴⁴ Note, however, that the courts in refusing to order

³⁸ This argument will of course require a broad interpretation of the fourth exemption. The fourth exemption, however, is probably vague enough to support it. The exemption states, "The provisions of this section shall not be applicable to matters that are . . . (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential . . ." This exemption is subject to conflicting interpretations. "It can be read in three different ways: (1) privileged or confidential matters that are both trade secrets and commercial or financial information obtained from a person, (2) trade secrets plus privileged or confidential commercial or financial information obtained from a person, or (3) trade secrets plus commercial or financial information obtained from a person plus privileged or confidential matters." (Note, *supra* note 14, at 84-85).

The third interpretation is preferable, primarily because both the House and Senate Reports refer to the inclusion of the doctor-patient privilege within the matters protected by this exemption. I cannot see the relevance of this privilege to the types of business information included in the more narrow interpretations of the exemption. If Congress meant to include the doctor-patient privilege, they must have meant the broader interpretation. See also, ATT'Y GEN. MEMO. at 32. *But see* Davis, *supra* note 3 at 787-98.

³⁹ SEN. REP. 9; HOUSE REP. 10.

⁴⁰ The practice of the agencies has been to treat "work product" as a privilege under exemption 4. See Note, *supra* note 14, at 40.

⁴¹ This solution assumes that by finding that the record is exempt, the court does not deprive itself of jurisdiction. Compare p. 21 *infra* with note 28 *supra*.

⁴² See, Note, *supra* note 18, at 40-41.

⁴³ *Stiftung v. Zeiss*, 40 F.R.D. 318 (D.D.C. 1966).

⁴⁴ ATT'Y GEN. MEMO. 35.

43 MILITARY LAW REVIEW

production of such records have referred to such records as "privileged".⁴⁵ Perhaps then this type of memorandum⁴⁶ or letter could also be considered as exempt under the fourth exemption.⁴⁷

The seventh exemption should be considered briefly at this point because of its similarity to the language of the fifth exemption. The seventh exemption states:

The provisions of this section shall not be applicable to matters that are . . . (7) investigatory files compiled for law enforcement purposes *except to the extent available by law to a private party.* (Emphasis added.)

The similarity of language does not mean that the result is the same. The question presented by the seventh exemption is whether information which would be available to a *particular person* by virtue of law must be made available to *any member* of the public. For example, must information, made available to a defendant, be available also to a newspaper reporter? The Attorney General takes the position that such disclosure is required not to the public but only to those entitled to it by other law.⁴⁸ Professor Davis's view on this point is a bit confusing. He states:

The Committee reports shed no light on the meaning of the words "except to the extent available by law to a private party." Probably, for reasons explained above in our discussion of the fifth exemption, "a private party" means any party in the abstract and does not mean the particular party who is seeking the information.⁴⁹

⁴⁵ *E.g.*, Executive privilege is a phrase of release from requirements common to private citizens or organizations.—an exemption essential to discharge of highly important executive responsibilities. While it is agreed that the privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such. Whatever its boundaries as to other types of claims not involving state secrets, it is well established that *the privilege obtains with respect to intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.*" (Emphasis added.) See *Stiftung v. Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1966).

⁴⁶ Do not confuse an internal (inter- or intra-agency) memorandum or letter with an "interpretation of general applicability" (Sec. 3(a)(D)), opinions (Sec. 3(b)(A)) and interpretations not of general applicability (Sec. 3(b)(B)).

⁴⁷ See discussion at note 40, *supra*. While Professor Davis would apparently interpret the fourth exemption more narrowly, even he concedes, "The Act's word 'privileged' can hardly be interpreted to exclude what is 'privileged' under the doctrine of executive privilege, even though the committee failed to mention it." (*Supra* note 3, at 792). It seems odd, however, that if Congress intended executive privilege to be continued in exemption 4, exemption 5 (or exemption 1 for that matter) would have been included in the Act. Executive privileges will be discussed briefly at note 99, *infra*.

⁴⁸ ATT'Y GEN. MEMO. 88.

⁴⁹ Davis, *supra* note 3, at 800.

This would seem to be the exact opposite of the Attorney General's position except that Professor Davis goes on to agree with the Attorney General by saying, "The law of the Jencks Act is applicable."⁵⁰ The Jencks Act,⁵¹ however, speaks in terms of making the statements of witnesses available "on motion of the defendant."⁵² The Attorney General takes the position,

[L]itigants who meet the burden of the Jencks statute may obtain prior statements given to an FBI agent . . . but . . . the new law, [Freedom Information Act] like the Jencks statute, does not permit the statement to be made available to the public.⁵³

Thus it is difficult to see how Professor Davis can apply the Jencks Act in exception 7 and still consider the information available to the public.⁵⁴

The interpretation of the Attorney General is preferable because it is not contradicted by the Committee Reports, and leads to the desirable result of avoiding the predicament discussed under exemption 5. Nothing in Professor Davis's examination of exemption 5 can readily be applied to exemption 7, owing to the different structure of the two exemptions. Even if

⁵⁰ *Id.*

⁵¹ 18 U.S.C. § 3500 (1964).

⁵² *Id.*

⁵³ ATT'Y GEN. MEMO. 38.

⁵⁴ One way to justify such a position would be to say that the applicability of the Jencks Act brought into play exception 3, i.e., "matters . . . specifically exempted by statute." Where the party seeking the information was the defendant, and the requirements of the Jencks Act were met, exception 3 would not apply, nor would exception 7 as to this "private party" so they would have to disclose. The next "private party" to request the same information could be refused on the basis of exception 3. While this type of switching of exemptions appears reasonable, Professor Davis probably would feel constrained to do so by his analysis of the "specifically stated" clause. (See p. 8, *supra*). Exemption 3 will be discussed *infra* at p. 17.

One case litigated under exemption 7 (*Barceloneta Shoe Corp v. Compton*, 271 F. Supp. 591 (D.P.R. 1967)) appears to assume that had the requirements of the Jencks Act been met, the material would have been available. The case cannot be interpreted as holding that the records should be available to the public, however, since the party seeking the records was also the defendant in a pending case before the NLRB. The case does appear, however, to assume that exemption 7 was the proper ground for denying disclosure and apparently did not consider the third exemption.

In light of its history the Jencks Act should be considered as a statute limiting, rather than granting disclosure. The Act was passed to limit the holding of *Jencks v. United States*, 353 U.S. 657 (1957), which held that it was reversible error for the trial court to refuse to require disclosure of statements by Government witnesses for use by defense for impeachment. The case was liberally interpreted to grant the defendant access to Government reports. The ruling required dismissal if the reports were not disclosed. The Jencks Act was passed to *limit the disclosure* already required by the courts.

43 MILITARY LAW REVIEW

Professor Davis's interpretation were to be adopted by the courts, the predicament thereby arising could be handled by interpreting exceptions 3 and 4 in the manner described above.

The third exemption states,

... the provisions of this section shall not be applicable to matters that are ... (3) specifically exempted from disclosure by statute. . . ."

There are approximately 100 statutes or parts of statutes which restrict public access to specific Government records.⁶⁶ Dr. Harold L. Cross, whose work may have been responsible for this Act,⁶⁷ classified the statute dealing with Government records as falling into three major types: (1) those which dealt with records in general; (2) those which in some way restrict disclosure; and (3) those which operate in some manner to further freedom of information.⁶⁸ It is this second category to which the statute apparently refers. Dr. Cross further classified the statutes within the second category into five subdivisions:

- [1] Information affecting National Security. . . .
- [2] Confidential information acquired from private citizens under Compulsion of law. . . .
- [3] Information acquired from persons who avail themselves of benefits or services offered by the Government. . . .
- [4] Information of such a nature that premature disclosure would give unfair advantage to some recipients.
- [5] There are a few other[s] . . . which are not readily . . . classified. . . ."

One need not look far to find similarities between the types of records Dr. Cross found Congress exempting in the past and certain classes of records covered by exemptions in this Act. This is pointed out not for the purpose of showing that the Act contains little new in this area but as support for the proposition that Congress is asserting its own view of what should not be disclosed and that in so doing Congress is imposing its own standards on the executive agencies. As Dr. Cross stated in his conclusion in 1953:

⁶⁶ 80 Stat. 250 § 3(e)(3).

⁶⁷ HOUSE REP. 10; see also, ATT'Y GEN. MEMO. 31-32.

⁶⁸ HOUSE REP. 2.

⁶⁹ H. L. CROSS, THE PEOPLE'S RIGHT TO KNOW 231 (1953). A fourth category, "organic or Departmental Legislation" was added by Dr. Cross in H. L. CROSS, THE PEOPLE'S RIGHT TO KNOW 80 (2d Supp. 1959).

⁷⁰ *Id.* at 231-34.

It is submitted, . . . that the mass of enactment clearly is not susceptible of an inference that Congress actually intended any such condition of public dependence for information of government action on honorable exercise of official discretion [by the Executive]. . . .⁶⁰

The third exemption, then, might be said to represent a re-assertion by the Congress of its role in deciding what records are to be furnished.⁶¹ What is probably more significant, however, is that the judicial proceedings of the Act are now available to challenge an executive decision that any of these hundred statutes applies in a particular case.⁶²

The significance of the discussion of exemptions 3, 4, 5, and 7 above can be briefly summarized. In the exemptions, Congress has attempted to use the nature of the records as the basis for determining when the documents should be kept secret. In doing so, however, Congress silently approves the manner in which the courts had handled these questions by exempting "privileged" material and material that courts would not order produced at a pretrial discovery proceeding. Faced with this approval, the courts are likely to go on weighing the same types of factors under the Act that they have in discovery cases such as the need of the individual for the record. This is not to say, however, that Congress has relinquished its role in this area to the judiciary by creating exemptions so broad that practically any record can be exempted. Congress has stayed very much in the field by virtue of exemption three.

Furthermore, the nature of a particular record may be that it could be exempted under more than one of the provisions of the Act. Whether a record is ever disclosed, and, if so, to whom may well depend upon a willingness to choose exemptions and interpretations to reach just results in a particular case.

⁶⁰ *Id.* at 236.

⁶¹ This represents my understanding of the unpublished remarks of Mr. Benny L. Kass at the Briefing Conference on Government-Industry Relationships in Patent and Technical Data Matters, sponsored by the Federal Bar Ass'n and the Foundation of the Federal Bar Ass'n in cooperation with the Bureau of National Affairs, Inc., in Washington, D.C., on Dec. 1, 1967. Mr. Kass who is Asst. Counsel to the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, was formerly with the House of Representatives Committee on Government Operations. See Kass, *supra* note 6.

⁶² See Note, *supra* note 14, at 33.

VIII. THE REMEDY

Judicial review of an agency refusal to provide access to Government records is provided in subsection (c) of the Act which states:

(c) Agency Records.—Except with respect to the records made available under paragraphs (9) and (8) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. Upon 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, shall have jurisdiction to enjoin the agency from withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of non-compliance with the court's order the district court may punish the responsible officers for contempt. Except as to those causes the court considers of greater importance, proceedings before the district court as authorized by this subsection shall 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.⁶³

Probably the best starting place for a discussion of this subsection of the Act is a consideration of the subject matter of the review. Actually the subject matter being reviewed is a decision by the agency.⁶⁴ The Act does not state that it must be a final decision or order as is elsewhere required for judicial review.⁶⁵ However, Congress probably intended that the decision be a final one. The House Report points out:

If a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency.⁶⁶

This statement should be read with emphasis on "prompt review."⁶⁷ It is assumed that the Committee expected or intended the courts to require a final type decision and to apply the doc-

⁶³ 80 Stat. 250 § 3(a).

⁶⁴ The exact nature of the decision is the subject of some controversy and involves the interpretation of the "Except" clause. See, Davis, *supra* note 3, at 775. For purposes of discussion here, the decision in which we are concerned is a decision to refuse to make available a requested record.

⁶⁵ E.g., 5 U.S.C. § 704 (Supp. II 1965-66).

⁶⁶ HOUSE REP. 9.

⁶⁷ Such a reading is consonant with the provision directing these cases to "take precedence on the docket," etc.

trine of exhaustion of administrative remedies.⁶⁸ The quoted passage must point toward preventing delay in the administrative process, because otherwise there would be no need for concern with delay by the executive since the courts would be open. Whether or not the statement will prevent such delay, unfortunately, is doubtful.⁶⁹

The jurisdiction of the court is civil in nature and is governed by the Federal Rules of Civil Procedure. The Department of Justice has taken the position that orders to show cause, temporary restraining orders, and preliminary injunctions are not appropriate under the Act.⁷⁰ The significance of this is that the Government will be allowed the time provided by Rule 12 to respond to the complaint. Attempts to expedite the proceedings aside from those provided in the statute, will probably be unsuccessful.

The remedy which the court is empowered to give is equitable in nature and will be a mandatory injunction directing that records be produced. This stems from the use of the word "enjoin" in the Act.⁷¹

Note that the court is given the power to consider the decision of the agency *de novo*. The exact significance of this term is unclear. Normally, *de novo* implies that the trial court is to start over, receive evidence, hear witnesses, etc. This implies then that these things have been done at the agency level. Should the provision then be interpreted as requiring a hearing at the agency? Probably not. The Committee report would hardly mention review by an agency head from a decision on a request without referring to such a major question as the need for a hearing.

⁶⁸ That Congress expected the doctrine of exhaustion of remedies to apply can also be inferred from the *de novo* provision. Unless it was anticipated that some type of record would be created before going to court, *de novo* has no significance. That is not to say, however, that Congress intended to require a hearing. See 80 HARV. L. REV. 909, 914 (1967).

⁶⁹ The agencies have provided for an intra-agency review of a subordinate's refusal to grant a request for a record. While there is authority for this in the House Report, such time consuming procedures are out of harmony with the emphasis on swift determination evidenced in the Act's provision that section 3 appeals will "take precedence on the district court docket over all other causes and shall be assigned for hearing and trial at the earliest possible date and expedited in every way." (Note, *supra* note 14, at 28).

⁷⁰ DEPT OF JUSTICE MEMO NO. 532, MEMORANDUM FOR UNITED STATES ATTORNEYS, RE: LITIGATION UNDER PUBLIC INFORMATION SECTION OF ADMINISTRATIVE PROCEDURE ACT—PUBLIC LAW 90-23, DEPARTMENT OF JUSTICE (June 12, 1967).

⁷¹ The significance of the equitable nature of the remedy and jurisdiction is discussed *infra* at p. 22.

Further, requiring a hearing would tend to delay the process which Congress desired to expedite.

What then does *de novo* mean? It is submitted that the term is used merely to connote the idea that the court is to reach its decision independently.⁷² The House Report states:

The proceedings are to be *de novo* so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion.⁷³

The Attorney General has not seen fit to comment on the significance of the *de novo* provision by itself, treating it as part of a general scheme to indicate the broad equitable power of the court.⁷⁴

Neither the House Report nor the Attorney General's interpretation seem to attach any other significance to the *de novo* requirement other than that the court act independently.⁷⁵

There are three more aspects of the grant of power to the court which deserve mention, but should not raise any interpretation problems. The first of these aspects is the provision placing the "burden . . . on the agency to sustain its action." As the House Report puts it,

A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.⁷⁶

⁷² "The amendment seems to resolve the question whether the courts or the agencies will determine the propriety of governmental disclosure in favor of the former. Subsection (c) provides that the district courts shall have jurisdiction to enjoin an agency and to order the production of records improperly withheld. Arguably the agency, knowing more about the Government's needs and the circumstances of the particular request for information, can determine what information should be withheld better than the courts. Nevertheless, permitting an interested agency official to decide the extent of his own privilege offends general principles of justice. Agencies are likely to be overly cautious and to withhold more information than necessary; on balance it seems that the courts should make the ultimate decision, since they can make a relatively objective determination while at the same time protecting the information with safeguards such as *in camera* examinations." 80 HARV. L. REV. 909, 914 (1967) (footnotes omitted).

⁷³ HOUSE REP. 9.

⁷⁴ ATT'Y GEN. MEMO. 28.

⁷⁵ It has been suggested that "*de novo* might be interpreted to permit the demandant to go directly to district court rather than requiring him to raise the withholding question as one of the issues on appeal." 80 HARV. L. REV. 909, 915 (1967) (footnote omitted). *Cf.* p. 30 *infra*, and pp. 18-19 *supra*.

⁷⁶ HOUSE REP. 9.

The second aspect worthy of mention is the contempt sanction provided to insure compliance.⁷⁷ The final aspect to be pointed out is the statutory emphasis on expediting these actions. The congressional direction that these cases be "expedited in every way" could be used to support a wide variety of unforeseen results.⁷⁸

Where an agency withholds a clearly non-exempted record from a party, the jurisdiction granted to courts by the Act should be sufficient to enable them to correct the wrong. Where the agency can fit the record under an exemption, however, it is not so clear, because subsection (f) may act to deprive the court of jurisdiction.⁷⁹

IX. TERMINATION OF JURISDICTION

In discussing the exemptions in the Act, it was pointed out that although finding that an exemption applied in a particular case, a court could nevertheless order that the record be produced for the particular party requesting the information.⁸⁰ One could consider this power to be one of the factors which will enable the courts to produce just results under the Act. But as mentioned above, it is conceivable that the jurisdiction of the court could be destroyed on a finding that an exemption applies.⁸¹

Whether such a result obtains will depend upon the interpretation attributed to the preamble of subsection (e), "Exemptions—The provisions of this section shall not be applicable to matters that are . . ." Literally, since "section" refers to the entire act, the judicial review procedure of subsection (c) is not applicable if the record requested is exempted matter under one or more of the exemptions. Such an interpretation would not preclude review of an agency determination that an exemption applied. On the contrary, the court would make this determination in deciding whether it had jurisdiction. Such an interpretation, however, would not be consistent with the language of the House Report or the Act itself. The Act states in subsection (c) :

⁷⁷ The use of this power may present some difficult problems but I mention it here only to be able to compare it with the sanctions provided in the discovery process. For a summary of the problems involved in using this power, see 80 HARV. L. REV. 909, 915 (1967).

⁷⁸ *E.g.*, if a court were inclined to do so it could consider a case without requiring exhaustion of remedies. Other specific uses of this directive will be mentioned *infra*.

⁷⁹ See note 28 *supra*.

⁸⁰ See p. 12, *supra*.

⁸¹ See note 28 *supra*.

[T]he district court . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld. . . .⁸²

And the House Report states:

The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.⁸³

The use of the word "enjoin" in the Act, inferring equity powers, and the terms "equitable and appropriate" in the Report, seem to grant to the court far more power than mere inquiry into the legality of an agency determination that a particular exemption applies. The broad nature of such equitable powers would seem to allow more.⁸⁴ But what is one to do with this statement in the same Report:

Subsection (e).—All of the preceding subsections of S. 1160—requirements for publications of procedural matters and for disclosure of operating procedures, *provisions for court review*, and for public access to votes—are *subject to the exemptions* from disclosure specified in subsection (e).⁸⁵

This would seem to confirm the interpretation that a finding that an exemption applies denies the court jurisdiction to take equitable action in ordering a record produced.

On the other hand, the Attorney General's Memorandum would not seem to reach such an interpretation.⁸⁶ In all honesty, however, the exact problem presented does not appear to have been considered.⁸⁷

⁸² 80 Stat. 250 § 3(c).

⁸³ HOUSE REP. 9.

⁸⁴ Professor Davis has taken the position that the court through its discretionary powers as an equity court can refuse to order production of a record required by the act to be produced. He concludes, "The equity practice is clear and strong. The court that has jurisdiction to enforce the Information Act also has jurisdiction to refuse to enforce it whenever equity traditions so require." (*Supra* note 3, at 767.) Professor Davis apparently has not considered the other side of the coin, the situation where the Act does not require disclosure but an equity court with jurisdiction would.

⁸⁵ HOUSE REP. 9 (emphasis added).

⁸⁶ In a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted. In making such determination the court can be expected to weigh the customary considerations as to whether an injunction or similar relief is equitable and appropriate, including the purposes and needs of the plaintiff, the burdens involved, and the importance to the public of the Government's reason for nondisclosure. (ATT'Y GEN. MEMO. 28.)

⁸⁷ This may be significant however, for although the Attorney General cannot change the law, unless the Justice Department raises the issue in a pleading, a court is not likely to find it has no jurisdiction.

It is preferable to assume that the question of termination of jurisdiction is really one of poor draftsmanship rather than an intentional act of Congress. As the *Attorney General's Memorandum* points out:

Subsection (e) declares that none of the provisions of section 3 shall be applicable to nine listed categories of matters. In its original form, the bill (S. 1160) provided exemptions in each subsection, designed to apply only to that subsection. The Senate subcommittee found that such approach resulted in inconsistencies. After considerable effort to tailor the standards established by the exemptions to the particular subsection to which they were to apply, the subcommittee decided to consolidate all of the exemptions in subsection (e), including in the earlier subsections the several limitations referred to above to meet the special needs of the requirements of each of those subsections.⁸⁸

This explanation is apparently the basis for the later statement:

We have noted above that subsection (e), containing the exemptions, applies to all of the various publication and disclosure requirements of the new section 3. Adoption of this structure, rather than the tailoring of specific exemptions to each of the disclosure requirements contained in subsections (a), (b), (c), and (d), inevitably creates some problems of interpretation.⁸⁹

It is submitted that in this change of structure, the jurisdiction of the court became subject to being destroyed by the application of the exemptions in a manner not contemplated by the Congress. To the extent that Congress did not intend for the court to use its jurisdiction to order that exempted material be disclosed to the public, the "provisions for court review . . . are subject to the exemptions." This need not necessarily mean that the court has no jurisdiction at all.

X. DISCOVERY

Putting the Freedom of Information Act aside temporarily, let us look now at the basic framework of the discovery procedures under the Federal Rules of Civil Procedure.⁹⁰ It has been said that the purpose of discovery is "either to do away with the so-called 'sporting theory of justice' or at least reduce it to its ultimate minimum."⁹¹ Discovery is available to all parties to a

⁸⁸ ATT'Y GEN. MEMO. 3.

⁸⁹ *Id.* at 29.

⁹⁰ 28 U.S.C. §§ 1-2710 (1964).

⁹¹ Holtzoff, *A Judge Looks at the Rules*, 1957 FEDERAL RULES OF CIVIL PROCEDURE AND TITLE OF THE JUDICIARY CODE 7-9 (1957), quoted in The Judge Advocate General's School, U.S. Army, School Text, *Discovery Under the Federal Rules of Civil Procedure* 2-3, 128.

dispute in order to give all sides equal access to the pertinent facts to facilitate a just result. In order to accomplish this goal, the Federal Rules provide a variety of means by which the information may be obtained:

Depositions may be taken of any party to the law suit or of any person who may be a witness . . . A correlative discovery weapon is that of written interrogatories . . . Next come discovery and inspection of records and documents . . . The next mode of discovery consists of medical examination. Finally, there are requests for admissions.²⁴

That aspect of discovery practice which most clearly resembles the quest for "records" under the Freedom of Information Act is the search for "documents and things" under rule 34 of the Federal Rules of Civil Procedure. Rule 34 provides:

Discovery and Production of Documents and things for Inspection, copying, or photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties and subject to the provisions of rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.²⁵

²⁴ *Id.*

²⁵ Fed. R. Civ. P. 34. Rule 30(b) relates to "Orders for the Protection of Parties and Deponents" and is not material to this discussion. Rule 25(b) relating to the "scope of examination" is material. It provides:

"(b) Scope of Examination. Unless otherwise ordered by the court as provided by rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location, of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Note that the scope of discovery is limited in four ways:

- (1) the information sought must be designated;⁸⁴
- (2) the information sought must be relevant;
- (3) the information sought must not be privileged;
- (4) the party seeking discovery has the burden to show "good cause."⁸⁵

The final aspect of the discovery framework we should consider is the procedure by which the courts are able to insure that the discovery scheme will not be frustrated. Sanctions are provided in rule 37 which include punishment for contempt, assessment of expenses,⁸⁶ striking of pleadings, and the entry of a default judgment.

With this framework in mind let us turn now to a consideration of the arguments traditionally used by the Government to avoid discovery.

XI. GOVERNMENT DEFENSES TO DISCOVERY

First it must be noted that as a party to a civil suit the Government has two characters, one private and the other as a sovereign. Consequently it has two sets of defenses, those available to any party and those unique to the sovereign. Recall the four limitations to the scope of discovery which were mentioned above.⁸⁷ Any one of these may be raised as a defense to discovery by the Government in its private capacity.⁸⁸ Also, it is within the framework of these limitations to discovery that the sovereign capacity is raised. In this regard the most important limi-

⁸⁴ Liberal interpretation of this restriction has practically eliminated its significance as a limitation. It is only mentioned as it corresponds to the requirement under the Freedom of Information Act that the request be for "identifiable records."

⁸⁵ Good cause is also interpreted so as to facilitate discovery. It does serve as a limitation however in cases where privilege is an issue. See, *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Weiss v. United States*, U.S. Ct. of Claims Opinion No. 205-65, July 20, 1967.

⁸⁶ The rule specifically prohibits imposition of this sanction against the United States.

⁸⁷ See text accompanying notes 94 and 95 *supra*.

⁸⁸ *E.g.*, the Government may resist discovery by arguing that the information sought is not relevant under rule 26.

tations are the ones regarding privileged material and the requirement that good cause be shown.⁹⁹

In some cases where the Government resists discovery on the ground of privilege, the privilege may be one which would be available to a private party such as the attorney's work product. Those cases must be distinguished in which the sovereign character of the Government has given rise to categories of privilege that are distinct from those available to a private party.¹⁰⁰

Such privilege [has been] said to apply to "secrets of state", "informers," and "Official information." . . . [I]t may be helpful . . . for the purposes of this discussion, to break these down into several additional categories, as follows: (1) secrets of state; (2) identity of informers of violations of law, and in some instances, the contents of the information furnished by informers; (3) information obtained by investigation; and, (4) communications relating to the internal management of agencies. In addition to these common-law subjects, there are the subjects which have been made privileged by statute, which we will identify as (5) information furnished an agency as required by statute.¹⁰¹

A mere claim of "privilege" is insufficient. The courts have looked at the underlying policy of the privileges and weighed the need of the party seeking the document against the policy underlying the privilege. For example, in *Weiss v. United States*,¹⁰² the court, because of the need of the party, allowed discovery of an internal record characterized as "staff advice" which admittedly

⁹⁹ The term "privilege" in this regard is one which has caused a great deal of confusion. When the Government has successfully resisted discovery because the information sought was "privileged", there is a tendency to say that the court applied the doctrine of "executive privilege." A complete analysis of this doctrine is beyond the scope of this discussion. However, Professor Davis is correct; there is such a doctrine and that doctrine plays a vital part in the background of the Freedom of Information Act. (Davis, *supra* note 3, at 763-64.) What is intended here is to point out the more narrow defenses (privileges?) to discovery, which may or may not constitute all or a portion of "executive privilege." For a more complete discussion of "executive privilege" see, Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 68 YALE L. J. 477 (1957); Carrow, *Governmental Non-disclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962) (excellent bibliography in footnote 1); and Taubeneck and Sexton, *Executive Privilege and the Court's Right to Know Discovery Against the United States in Civil Actions in Federal District Courts*, 48 GEO. L.J. 486 (1960).

¹⁰⁰ These privileges are independent of the concept of "separation of powers" which gives rise to additional problems with respect to refusal by one branch of Government to disclose information to another branch. We are concerned here solely with disclosure by the Government to a citizen.

¹⁰¹ Carrow, *supra* note 99, at 176.

¹⁰² U.S. Ct. of Claims Opinions No. 205-65, 20 July 1967.

was privileged under the law of *Kaiser Aluminum & Chemical Corp. v. United States*.¹⁰³ In the same case however, the court, because of a lack of need, refused to order production of a written legal opinion, privileged under *Hickman v. Taylor*.¹⁰⁴

Note the burden which each party has in such a case. The Government must establish the privilege and the one seeking discovery has a burden to show "good cause" why the court should override the privilege.¹⁰⁵

XII. COMPARISON

Having examined, in some detail, the Freedom of Information Act and, more briefly, discovery procedures, let us now compare the two systems. First of all, at least for non-exempt records, the "any person" doctrine precludes any necessity that one seeking access to a record be a party to any litigation or show any "good cause" for the record. In such a case, there can be no "relevance" requirement. On the other hand, discovery procedure is available only to "parties" to litigation.¹⁰⁶ The party seeking access through pretrial discovery does have a burden to show good cause when seeking access to documentary evidence. Under either system the person seeking the record must identify it. Under either system the Government, if it is to resist disclosure, has a burden. Under the Act, the Government must show at least that the record is exempted by one of the nine statutory exemptions. To resist discovery in a conventional pretrial proceeding the Government must establish one of the defenses as discussed above.

With respect to the scope of discovery and the scope of access to records under the Act the only major difference seems to be that discovery requires a showing of relevance. This requirement already is not much of a limitation unless some defense is made which would require a showing of "good cause" beyond the normal relevancy requirement. It is submitted that even under the Act, the court in the exercise of its discretionary equitable power may create a similar "good cause" requirement when a prima facie showing has been made that an exemption is applicable.

One cannot fail to notice the similarity between the exemptions under the Act and the normal defenses to discovery. Ar-

¹⁰³ 157 F. Supp. 989 (Ct. Cl. 1958).

¹⁰⁴ 329 U.S. 495 (1947).

¹⁰⁵ *Id.*

¹⁰⁶ Note that there is no requirement that the Government be a party to be subject to discovery, but only to avail itself of discovery. *E.g.*, *Stiftung v. Zeiss*, 40 F.R.D. 318 (1966).

guably all nine of the exemptions may fall within the scope of the privileges traditionally raised by the Government as defenses to discovery. Further, if one were to ask whether there are any defenses to discovery that are not included within the nine exemptions, one would have to say probably not. The Government is always free to argue in resisting discovery that one of the other limitations to discovery apply, such as that the information sought is neither relevant nor "reasonably calculated to lead to discovery of admissible evidence."¹⁰⁷ However, unless the information sought could also be considered exempt under the Act, one should predict that the Government victory will be short lived, since the party could use the Act to get the information.

It may be said that the sanction of contempt provided under the Act differs from those available to the court under the Federal Rules. One could reasonably argue, however, that powers to strike pleadings, entry of default judgments, and other sanctions¹⁰⁸ of the Federal Rules are included in the equitable nature of the jurisdictional power granted to the courts by the Act.

¹⁰⁷ Consider this evaluation of Government defenses to discovery:

"Four arguments [are] usually advanced by the government in appropriate cases to oppose production of documents:

"1. *That the plaintiff, under, rule 34, FRCP has not shown 'good cause' for the issuance of the order.*' The new Act appears free from any requirement of a showing of 'good cause' before the production of information, except to the extent that 'good cause' may be pertinent in determining under subsection (e) (5) whether records would be routinely available in litigation.

"2. *That the documents sought are, within rule 26, FRCP, not 'relevant to the subject matter involved in the pending action' and are not 'reasonably calculated to lead to the discovery of admissible evidence.'* There are no criteria or standards set forth under Section 3(c) of the Act which would allow for such a defense to disclosure as provided for under rule 26, except to the extent it may be relevant under Subsection (e) (5).

"3. *The documents fall within the 'work product' rule of Hickman v. Taylor, 329 U.S. 495.*' Here the government does find a familiar face in the new Act. The 'work product rule' is a very vital part of the fabric of the Freedom of Information Act and is excepted from disclosure under section 3(e) (5) of the Act. The exception, in effect, codifies the 'work product rule,' recognizing in the Committee Report that "... advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Thus, inter-agency or intra-agency memorandums or letters not available to private litigants are not available under the new Act.

"4. *Finally, the documents sought are protected by a claim of 'executive privilege.'* This historic defense is to be found, in part, in codified form in section 3(e) (1) and (5)." Panel Discussion, *supra* note 37, at 53.

¹⁰⁸ Rule 37 does not permit expenses to be assessed against the Government. It is not clear whether a court under the Act could impose such a sanction based on inherent power to punish for contempt, but the issue would not likely be raised.

XIII. DOES A PROCEDURAL CHOICE EXIST

Obviously, unless one is a party to some type of proceeding, discovery as used in this discussion has no application to him. The person who is a party or who has a cause of action does have a choice. For example, a person with a cause of action against the Government under the Federal Tort Claims Act¹⁰⁰ may choose either to bring his tort action and then use discovery, or to use the Freedom of Information Act and seek the desired records before he files his tort case. Before the action on the merits is begun, there is nothing to preclude his choice.

The commencement of an action, however, gives rise to new problems. The first question concerns the application of the doctrine of election of remedies so as to preclude future access to another remedy. It is submitted that this doctrine does not apply as the remedies are not inconsistent.¹¹⁰ Consequently, if a person, who has a cause of action against the Government in tort, seeks information under the Freedom of Information Act before beginning his tort action, clearly, he would not be prevented from later bringing his tort action simply because he sought access to records first. On the other hand, a party who has commenced a district court suit against the Government before seeking records under the Act may be met by several arguments. First the Government might argue in the suit under the Act that "another action is pending."¹¹¹ Such an argument should not prevail.¹¹² Such a plea by the Government is actually in the nature of a motion for a continuance.¹¹³ In effect, the Government is asking to stay the proceedings until the other is decided. The decision to grant such a motion is solely within the discretion of the judge. It is submitted that in view of the congressional intent that suits under the Act be expedited, it would be an abuse of discretion for the judge to grant such a continuance.

¹⁰⁰ 28 U.S.C. § 1345(b) (1964).

¹¹⁰ 28 C.J.S. *Election of Remedies* §§ 3-4 (1955).

¹¹¹ See *supra* note 37, at 52.

¹¹² There is a basic distinction between the nature of the two judicial proceedings involved. In an action under the Act there is one major issue, namely was the Government correct in refusing to disclose the record requested? In an action giving rise to the use of pretrial discovery, the question whether information should be disclosed is a subordinate issue which may or may not be raised. For purposes of this discussion it is assumed that the same records have been requested in both forums and that therefore the same issue is present in each case. As to whether the issue is in fact the same see the discussion of *res judicata* at note 117 *infra*.

¹¹³ *Mottolese v. Preston*, 172 F.2d 308 (2d Cir. 1949).

The Government could also argue that a suit under the Act is premature because of the doctrine of exhaustion of remedies,¹⁴⁴ *i.e.*, the party must seek the information by discovery before using the Act. In the setting presented, namely a suit under the Act while a tort action is pending, such an argument should not prevail. In effect such a pleading is the same as the plea "action pending" already considered. Congress probably intended that the person exhaust his administrative remedies in the agency before going to court under the Act, but to carry this intent to the point of requiring the exhaustion of discovery proceedings in court would be going too far. In the first place the remedy under the Act is supposed to be expeditious. Exhaustion of discovery is time consuming, especially since ordinarily a ruling on a discovery motion is not final and cannot be appealed until after trial on the merits, unless the appeal is "within the terms of statutes permitting appeals from interlocutory orders under special circumstances."¹⁴⁵ It could also be argued that the *de novo* power indicates that this suit under the Act is to be handled independently of any other proceeding between the parties, and therefore exhaustion is not required.

It must be noted that the device of either conventional discovery proceedings or discovery under the Act will result in *res judicata* once a final determination on the merits has been made. If a person has requested a record, been refused, sought judicial review under the Act, and been denied again by the court, he should not then be allowed to invoke the discovery proceedings

¹⁴⁴ The exhaustion problem may arise under different circumstances. First the person may attempt to go to court under the Act without going to the agency at all or without exhausting his remedies within the agency. In these circumstances the doctrine should apply. Another situation is presented where the party is seeking discovery under the rules provided for an administrative proceeding. Decisions of boards of Contract Appeals appear to be in conflict as to whether exhaustion of other administrative procedures for obtaining records is required before seeking production under the discovery rules of the particular Board. (Compare, *Winston Bros. Co.*, IBCA 625-2-67, 10 Gov. CONTR. ¶ 5, and *Aries Enterprises, Inc.*, DOTCAB 67-20, 10 Gov. CONTR. ¶ 32.) It is submitted that by requiring exhaustion of the administrative remedies of the Freedom of Information Act (short of demanding that the court proceeding be utilized) much needed uniformity in discovery before the Boards will result. (In regard to the need for uniformity in discovery before the Boards of Contract Appeals, see, *Cuneo and Truitt, Discovery Before the Contract Appeals Boards*, 8 WM. & MARY L. REV. 505 (1967).)

¹⁴⁵ *C.J.S. Appeal and Error* § 120 (1955).

under the Federal Rules to attain the same objective.¹¹⁶ Likewise, if a pretrial discovery motion has been finally adjudicated, the same issue should not be litigated a second time under the Act.

XIV. FACTORS TO CONSIDER IN CHOOSING A PROCEDURE

Having examined the two routes, compared them, and determined when they are both available, it is time now to look at some of the factors to be considered in deciding which route to follow.

One consideration that immediately comes to mind is that of time. Repeatedly throughout this discussion I have referred to the congressional intent that the Information Act route be swift. We have noted, however, that some delays may occur by operation of the implementing regulations and the doctrine of exhaustion of remedies. On the other hand, if one expects executive reluctance or a strong argument on behalf of the Government, the delay in seeking appeal may be a factor mitigating against the discovery route because of the interlocutory nature of the discovery decision.

Another factor is the fact that the Act relates only to records. If what is really desired is an admission or facts, they might be more easily obtained using discovery techniques. One might desire, for example, to use "interrogatories" to identify the records subsequently sought under the Act.

Consider also the concept that discovery is a two-way street. Not only can a person obtain information from the Government, but he subjects himself to the same rules. If a party wanted to know more about the Government's case without disclosing his own, he might try to get as much by the Act as possible. Of course if he later brings his action he will be subject to discovery then. The decision as to whether to bring the action may itself depend upon information obtained through the Act.

¹¹⁶ The application of *res judicata* requires that the issue be identical before each court. I have taken the position above that the scope of information required to be made available under each procedure is the same where the one seeking the record has a need, and therefore the issue will be the same. Otherwise one would have to make an *ad hoc* determination in each case whether, as regards the particular record sought, the issue under each system is the same. The question turns on the extent to which the judge in an action under the Act is willing to consider the need of the individual for the information. For if the courts refuse to consider this factor under the Act, the issue will seldom be the same.

Another consideration which hopefully will not be important is in the selection of the district in which to seek the information. Under the Act, the party seeking records usually will have a choice of districts in which to bring his suit. Another choice of districts may present itself in deciding where to bring an action in which discovery will be sought. The many interpretations possible under the language of the exemptions in the Act may make forum selection a critical decision.

XV. CONCLUSION

After examining the Freedom of Information Act, one can only conclude at this time that many interpretations are still available. The Act can be interpreted in a way which will make it a useful statute. In order to do so it may be necessary to strain to preserve the jurisdiction of the courts after a finding that one of the exemptions applies. This is necessary in order to insure that the shift in the legislative scheme to the "any person" concept does not result in less information being available to "needy" people after the Act than was available before. It is suggested that by judicious interpretation of the exemptions and the proper use by the courts of the broad powers given them, the Act will be effective. One result of such interpretations, however, may be that the scope of information available after the Act will be the same as before. The important thing is that now there is a judicial review in many cases where there was none before. The likely result is not that more information of different types will be available but that the same type of information will be available to more people.

As a result of the similarity of the exemptions of the Act to the traditional Government defenses to pretrial discovery,²¹⁷ it should be expected that in the future, Government attorneys will utilize the language of the Act to resist discovery. Likewise, since irrelevant information may be available under the Act, the Government should cease pleading irrelevancy as a defense to discovery.²¹⁸

The arguments and considerations presented with respect to choosing a procedure are just that and nothing more, until they may be raised and decided by the courts. It is submitted, however, that perhaps many of these arguments could be avoided by a well drafted statute covering access to Government informa-

²¹⁷ See p. 25 *supra* and n. 108 at 28.

²¹⁸ See p. 28 *supra*.

INFORMATION ACT

tion (not merely records), applicable throughout the Government (not merely to agencies), and specifically stated to be applicable to judicial as well as administrative proceedings. Such a statute should be outside the framework of the Administrative Procedure Act. It should incorporate the means of obtaining information provided by the Federal Rules, in addition to the exemptions of the Freedom of Information Act; the burden of showing the application of the exemptions should remain with the Government. Such a statute should clearly express the limitations on the jurisdiction of the courts to avoid the problem of termination of jurisdiction discussed herein. Finally, such a statute should attempt to identify the factors constituting "good cause" in the manner that the present Act identifies the important factors within the nature of Government records. Ultimately, however, the duty of weighing the nature of the information against the "good cause" of the party seeking it should rest in the courts.

APPENDIX

Section 3 of the Administrative Procedure Act, as amended by 80 Stat. 250 (1966).

SEC. 3. Every agency shall make available to the public the following information:

(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) 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 (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is

reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) administrative staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided*, That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

(c) AGENCY RECORDS.—Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person. Upon 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 shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter *de novo* and the burden shall be upon the agency

to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall 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.

(d) **AGENCY PROCEEDINGS.**—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

(e) **EXEMPTIONS.**—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

(f) **LIMITATION OF EXEMPTIONS.**—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

(g) **PRIVATE PARTY.**—As used in this section, "private party" means any party other than an agency.

(h) **EFFECTIVE DATE.**—This amendment shall become effective one year following the date of the enactment of this Act.

TRIAL BY THE PRESS*

By Major Ronald B. Stewart**

This article examines the problem of prejudicial news reporting in criminal trials. The author discusses the reports themselves, the standard of review, the existing safeguards and the possibility of new ones. It is concluded that the best controls, consistent with both fair trial and free press, are those exerted internally by the courts and bar associations.

I. INTRODUCTION

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.¹

The eloquence and correctness of the above evaluation of our system of justice by Mr. Justice Holmes can scarcely be denied.

In *Bridges v. California*² Mr. Justice Black stated the same principle in different language:

The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper.³

Although the above two cases involved contempt of court convictions, and although they reached different results, it would appear that the principle announced leaves little doubt that the administration of justice is the province of the courts, not the news media. Nevertheless, the Supreme Court of the United States in 1966 observed that the problem, far from disappearing, is getting worse:⁴

*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 Sixteenth 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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¹ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

² *Bridges v. California*, 314 U.S. 252 (1941).

³ *Id.* at 271.

⁴ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.⁵

While the "strong measures" referred to might conceivably include the contempt procedure,⁶ the Court pointed to less drastic measures bearing directly upon the conduct of the trial which should have been employed and which may serve to preclude prejudice in future cases.⁷

It is clear that some measures must be taken to provide adequate protection from prejudicial news reports. This may, unfortunately, give rise to a conflict of two cherished constitutional rights. Both the right to a free press⁸ and the right to trial by an impartial jury⁹ are basic ingredients of our form of government.

This conflict is not new. For example, in 1846 one commentator was moved to observe:

Ours is the greatest newspaper reading population in the world. . . . In the case of a particularly audacious crime that has been widely discussed it is utterly impossible that any man of common intelligence, and not wholly secluded from society, should be found who had not formed an opinion.¹⁰

What is new however is the development of modern communication and news distribution techniques to the extent that a crime is no longer a local affair. There is little reason to believe this trend will be reversed. The appalling prospect that, in some cases, it may prove impossible to gather a jury from even the four corners of the earth each of whom can enter the courtroom, "indifferent as he stands unsworn,"¹¹ is difficult to avoid. Of much more immediate and practical concern is the problem of impaneling "an impartial jury of the state and district wherein the

⁵ *Id.* at 382, per Mr. Justice Clark.

⁶ See *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950); Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935).

⁷ *Sheppard v. Maxwell*, 384 U.S. 333 *passim* (1966).

⁸ U.S. CONST. amend. I.

⁹ U.S. CONST. amend. VI.

¹⁰ *Trial by Jury in New York*, 9 L. REP. 193, 198 (1846).

¹¹ The first statement of this ideal but difficult norm is generally attributed to Lord Coke; CO. LITT. (1556); see, e.g., *Rideau v. Louisiana*, 373 U.S. 723 (1963).

crime shall have been committed."¹² The functional utility of long employed protective measures, such as a change of venue, is being seriously threatened; and this threat can reasonably be expected to increase, rather than abate.

It may well be that military trials are more seriously threatened than civilian trials. Whereas only a small percentage of civilian convictions result from jury trials,¹³ in all courts-martial both the findings and sentence are decided by laymen, rather than professional judges, even in guilty plea cases.

Even in civilian jurisdictions, while the percentage may be small, the number is significant.¹⁴ An argument that either is small begs the issue. The right to a fair trial is constitutionally guaranteed in all criminal prosecutions, not just most of them.¹⁵

The purpose of this inquiry is not to discover whether either our right to a fair trial or our right to a free press must prevail at the expense of the other,¹⁶ neither is it intended here to speculate upon whether the activities of the press must be voluntarily restricted.¹⁷ The real purpose is to search for a method whereby those responsible for the administration of justice, through the use of appropriate internal measures and controls, may unilaterally guarantee to every accused an impartial jury.

Those of us involved in the high calling of the administration of justice are often wont to complain of the real, or imagined, excesses of the press. This is certainly an easier task than the examination of our own shortcomings and inadequacies and far easier than the development of workable measures to insure the essential fairness of a jury trial. The problem with this approach is twofold. First, it is non-productive in that it seeks to place the blame for failure on outside forces thus making the acceptance of failure palatable. Second, it tends to justify, on the assumption that the solution is beyond the reach of our corrective powers, the shirking of responsibility by those whose duty it is to insure the impartial administration of justice.

We must, therefore, take it upon ourselves to insure that jury trials will be without undue outside influence. And for those of

¹² U.S. CONST. amend. VI.

¹³ See AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, Tentative Draft 22 (1966) [hereafter cited as REARDON REPORT, Tentative Draft].

¹⁴ REARDON REPORT, Tentative Draft, 23-24.

¹⁵ U.S. CONST. amend. VI.

¹⁶ *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (separate opinion, Frankfurter, J.).

¹⁷ *United States v. Powell*, 171 F. Supp. 202 (N.D. Cal. 1959).

us connected with military justice, it must be determined whether different procedures may be required by the peculiarities of military law, location, and procedure.

Frequently, in both civil and military courts, the burden of showing specific prejudice from published matter has been placed upon the accused.¹⁸ In addition, the response of a jurymen to the effect that he was unmoved by published accounts and could render a fair and impartial verdict has long been accorded almost complete credence.¹⁹ More recently a series of cases,²⁰ culminating in *Sheppard v. Maxwell*,²¹ has indicated a growing concern as to whether this treatment of the problem is adequate or just.

An ancillary problem, conduct of the members of the press²² which interferes with the orderly procedure of the trial, is often injected into cases of this type.²³ For the purpose of clarity it is proposed here to consider not the conduct of the members of the press in and around the courtroom, but the content of the material published²⁴ in the press, and the tendency it may have to affect the jury²⁵ in their decision of the case.

PREJUDICIAL NEWS REPORTS DEFINED

A. SUBJECT MATTER OF REPORT

Not all news reports are prejudicial, even if they reach the jury.²⁶ In the vast majority of the cases reported by the news

¹⁸ *Beck v. Washington*, 369 U.S. 541 (1962); *Irvin v. Dowd*, 366 U.S. 717 (1961); *United States v. Carter*, 9 U.S.C.M.A. 108, 25 C.M.R. 370 (1958); CM 412871, *Thomas*, 37 C.M.R. 519 (1966), *aff'd*, 17 U.S.C.M.A. 103, 37 C.M.R. 367 (1967); ACM 8768, *Doyle*, 17 C.M.R. 615 (1954); CM 411935, *Swenson*, 35 C.M.R. 645 (1965).

¹⁹ *Beck v. Washington*, 369 U.S. 541 (1962); *Holt v. United States*, 218 U.S. 245 (1910); *Spies v. Illinois*, 123 U.S. 131 (1887).

²⁰ *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Marshall v. United States*, 360 U.S. 310 (1959); *Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955).

²¹ 384 U.S. 333 (1966).

²² The use of the term press herein is not intended to exclude other than printed news media but is adopted as a term of convenience to be used in the broadest sense to include the entire news gathering and distribution industry.

²³ *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962).

²⁴ The use of the term publish in its various forms herein is intended to include all means of publication whether by print, broadcast, or other means.

²⁵ The term jury is intended to mean the finders of fact. In military law this body is called the court. This use, however, has a tendency to be confusing as it is applied to both judges individually and to the decision making body as a whole in civilian cases.

²⁶ *McHenry v. United States*, 276 Fed. 761 (D.C. Cir. 1921); *Miller v. Kentucky*, 40 F.2d 820 (6th Cir. 1930); ACM 8768, *Doyle*, 17 C.M.R. 615 (1954).

TRIAL BY THE PRESS

media in any jurisdiction, the report amounts to no more than and account that a certain crime has been reported to authorities and that the accused has been arrested and charged with its commission. It is readily apparent to the jury, from the fact that the accused appears before them, that such is the case. This type of report presents no real problem, especially if the report has been couched in terms of "alleged crime" and "suspect."²⁷ On the other hand, a report that the accused had confessed to the crime charged might be a serious cause for concern.²⁸

A televised confession to all elements of the offense,²⁹ or a publication of a copy of the text of a confession,³⁰ would normally be considered prejudicial, unless the publication was clearly made at the insistence of the accused.³¹ Failure of the trial court to take corrective action in such a case may, however, be waived by the accused.³²

Editorial comment of a derogatory nature is clearly more suspect than factual reporting, for it may be both incorrect and inflammatory.³³ The contrary, however, may be shown, where the editorial comment had no direct relation to an issue in the case or to the accused.³⁴

Additionally, reports purporting to be factual but actually false have a clear tendency to be prejudicial;³⁵ and even true reports may be prejudicial where the facts reported about either the case, or the accused's background, would be inadmissible under the rules of evidence.³⁶ Even reports of matters which are apparently true and admissible can raise serious questions where for some reason they have not been presented at trial.³⁷ It may well be that even the placing of undue emphasis upon certain facts

²⁷ *Maryland v. Baltimore Radio Show*, 388 U.S. 912 (1950).

²⁸ *Shepherd v. Florida*, 341 U.S. 50 (1951); *United States v. Powell*, 171 F. Supp. 202 (N.D. Cal. 1959).

²⁹ *Rideau v. Louisiana*, 373 U.S. 723 (1963).

³⁰ *Irvin v. Dowd*, 366 U.S. 717 (1961). But see, CM 412871, *Thomas*, 37 C.M.R. 519 (1966), *aff'd*, 17 U.S.C.M.A. 102, 37 C.M.R. 367 (1967).

³¹ *United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960).

³² *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967); *Geagan v. Gavin*, 181 F. Supp. 466 (D. Mass. 1960).

³³ *Babb v. State*, 18 Ariz. 505, 163 Pac. 259 (1917); *State v. Jackson*, 9 Mont. 508, 24 Pac. 213 (1890).

³⁴ CM 411683, *Raily*, 35 C.M.R. 597 (1965).

³⁵ *Griffin v. United States*, 295 Fed. 437 (3d Cir. 1924).

³⁶ *Marshall v. United States*, 360 U.S. 310 (1959).

³⁷ *Id.* at 312-13: "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence . . . It may indeed be greater for it is then not tempered by protective procedures."

43 MILITARY LAW REVIEW

properly before the jury would in a given case operate to the prejudice of the accused.³⁸

Reports of the proceedings in out-of-court hearings are particularly dangerous, as the reading of such accounts by the jurors operates to nullify entirely the protective procedure employed.³⁹ Such reports, however, are not automatically prejudicial, but must be weighed as to their contents.⁴⁰ Likewise the reports of trials of co-accused, which may, and frequently do, present a troublesome area, must be tested as to their content and probable impact.⁴¹

B. TIME OF REPORT

Certain factors other than the content of the reports must be considered in determining whether the reports are prejudicial. For example, the time of the report in relation to the time of trial is an important factor.⁴² A report made on the eve of the trial⁴³ is considerably more suspect than one appearing months⁴⁴ or even years⁴⁵ before the date of trial.

While it is undeniable that in some instances both pre-arrest and post-trial publicity may create a prejudicial atmosphere, the danger to an accused's right to a fair trial may, in such situations, be balanced against the legitimate interest of the public that an offender be apprehended or that the disposition of his case be made known. No such argument can reasonably be made during the period from arrest to completion of the trial, yet this is the prime time for development of the most dangerous kind of reports.⁴⁶

C. SOURCE OF REPORT

Perhaps of even greater concern is the source of the report. A report generated by the prosecutor,⁴⁷ the sheriff,⁴⁸ or the judge⁴⁹

³⁸ *Rideau v. Louisiana*, 373 U.S. 723 (1963).

³⁹ *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *United States v. Powell*, 171 F. Supp. 202 (N.D. Cal. 1959).

⁴⁰ ACM 17411, *Cook*, 31 C.M.R. 609 (1961).

⁴¹ *Paschen v. United States*, 70 F.2d 491 (4th Cir. 1934); *Sims v. State*, 177 Ga. 266, 170 S.E. 58 (1933).

⁴² *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

⁴³ *United States v. Milanovich*, 303 F.2d 626 (4th Cir. 1962); *Henslee v. United States*, 246 F.2d 190 (5th Cir. 1957).

⁴⁴ *Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76 (1879).

⁴⁵ *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

⁴⁶ REARDON REPORT, Tentative Draft, 52.

⁴⁷ *United States v. Milanovich*, 303 F.2d 626 (4th Cir. 1962); *Henslee v.*

is a greater cause for concern than one generated by the news reporter himself,⁵⁰ and certainly more so than one generated by the accused.⁵¹ Reports caused by the action of other arms and agencies of the government have been considered an equally serious problem.⁵²

It would appear that reports in a government controlled newspaper distributed to most or all of the prospective jurors should be seriously suspect, although no case has been found to so hold. Such a situation might readily arise in overseas areas where the U.S. military forces are employed. In such cases the government controlled *Stars and Stripes* and *Armed Forces Radio and Television Network* are frequently the only English language news media of general availability to those from whom the jury will be drawn.

The analogy to cases involving unlawful command influence, while not direct, is too inviting to overlook in cases of this nature. Where the issue of command influence has been raised, military courts have uniformly sought to avoid even the appearance of evil.⁵³ It is submitted that the refusal of military courts to apply a similar rule in cases involving news reports in government controlled media⁵⁴ has been generally due to the relatively innocuous form and content of the reports involved, and that the possibility has not been foreclosed in an appropriate case.

United States, 246 F.2d 190 (5th Cir. 1957); *Massicot v. United States*, 254 F.2d 58 (5th Cir. 1958).

⁵⁰ *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Shepherd v. Florida*, 341 U.S. 50 (1951); but see, CM 412871, *Thomas*, 37 C.M.R. 519 (1966), *aff'd*, 17 U.S.C.M.A. 103, 37 C.M.R. 367 (1967).

⁵¹ *Briggs v. United States*, 221 F.2d 636 (8th Cir. 1955); *United States v. Powell*, 717 F. Supp. 202 (N.D. Cal. 1959).

⁵² *Shepherd v. Florida*, 341 U.S. 50 (1951).

⁵³ *United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960). It is worthy of note that while arguably the prosecution is equally entitled to a fair trial, the actions of the accused in this regard are not likely to become an appellate issue in the absence of the employment of the contempt procedure. It must also be remembered that the right to a fair opportunity to prosecute is not constitutionally guaranteed. See, e.g., REARDON REPORT, Tentative Draft, 175-76, and Reardon, *Standards Relating to Fair Trial and Free Press*, 54 A.B.A.J. 343, 347 (1968) [hereafter cited as REARDON REPORT].

⁵⁴ *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952).

⁵⁵ See, e.g., *United States v. Wright*, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967); *United States v. Johnson*, 14 U.S.C.M.A. 548, 34 C.M.R. 328 (1964); *United States v. Kitchens*, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1962).

⁵⁶ *United States v. Vigneault*, 8 U.S.C.M.A. 247, 12 C.M.R. 3 (1963); ACM 8768, *Doyle*, 17 C.M.R. 615 (1954); CM 411935, *Swenson*, 35 C.M.R. 645 (1965).

D. DEGREE OF SATURATION

Many, if not most of the cases in the area of prejudicial news reporting, have been concerned with the degree of saturation. This point, however, is perhaps misleading, for it is not the number of articles or reports that should be determinative of the issue, but the probability that the reported matter has come to the attention of the jury.³⁵ Whenever a court reduces the question to a mere head count of articles without concern to the possible effect, there is serious danger that the real issue will be missed.

In summary, the prejudice in prejudicial news reporting lies in bringing to the attention of the jury that which it ought not to consider in reaching its determination, or in unduly emphasizing that which, while proper for consideration, should be given only that degree of importance accorded to it by a particular juror based upon the evidence presented in the trial of the case.

III. APPELLATE REVIEW

A. DISCRETION OF THE TRIAL JUDGE

In determining whether to grant a motion, the trial judge must utilize his sound discretion. While he enjoys considerable latitude in this respect, he may not decide the issue in derogation of the constitutionally protected rights of the accused.

Traditionally, cases arising from the state courts have been treated as involving only "rock bottom" due process of law.³⁶ Appeals from lower federal courts, on the other hand, have required a higher standard of discretion. The distinction depends basically upon whether the sixth or fourteenth amendment³⁷ is applicable. Additionally, the Supreme Court has been more willing to question the discretion of the trial judge in furtherance of its supervisory powers over the federal court system.³⁸ This distinction between the standard applicable to appeals from federal and state convictions was pointed up in *Rideau v. Louisiana*,³⁹ where no showing of specific prejudice was required. The two dissenting judges pointed out that while they would agree with such treatment of a case arising in a federal court in the exercise

³⁵ *Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955).

³⁶ See, e.g., *Rideau v. Louisiana*, 373 U.S. 723 (1963).

³⁷ U.S. CONST. amend. VI, XIV.

³⁸ U.S. CONST. art. III.

³⁹ *Rideau v. Louisiana*, 373 U.S. 723 (1963).

of the supervisory powers of the Supreme Court,⁵⁰ they did not feel the same standard was applicable to a case coming on appeal from a state court. State court decisions have shown little uniformity of standard, varying from holding the discretion of the trial judge to be beyond review,⁵¹ to allowing the mere possibility of prejudice to serve as a basis for reversal.⁵²

Military courts have consistently refused to reverse any case on the basis of prejudicial news reporting, and have applied in their reasoning the requirement that specific prejudice be shown by the accused before relief might be granted.⁵³ While one Air Force board of review expressed the opinion that mere knowledge of the facts of a case gained from reading a newspaper would be grounds for reversal, this opinion was pure dictum, as the court members having such knowledge had been excused on challenge for cause.⁵⁴

The position of the military courts is in full accord with that taken until recently by the United States Supreme Court on appeals from state court convictions. In view of the latest decisions of the Supreme Court on this subject, however, we must question whether the requirement of proof that the trial judge abused his discretion to the *specific prejudice* of the accused continues to be applicable in military trials.

In a sense, the court-martial system is neither fish nor fowl, as it is a federal jurisdiction but not a part of the Federal Judiciary System. The constitutional basis of the military system is found in article I,⁵⁵ while the provision for creation and supervision of the interior courts of the Federal Judiciary System is found in article III.⁵⁶ Military courts are required to conform to military due process of law; nevertheless, as the military court system is not under the direct supervisory power of the Supreme Court, a holding which relates only to the latter is not necessarily controlling.⁵⁷ The question as to whether the basis of the decision in the *Sheppard* case⁵⁸ was a constitutional one, and if so, what

⁵⁰ *Id.* at 727.

⁵¹ *Commonwealth v. Harrison*, 137 Pa. Super. 279, 8 A.2d 733 (1939).

⁵² *State v. Barille*, 111 W.Va., 567, 163 S.E. 49 (1932).

⁵³ *United States v. Vigneault*, 3 U.S.C.M.A. 247, 12 C.M.R. 3 (1953); CM 411935, *Swenson*, 35 C.M.R. 645 (1965); CM 412871, *Thomas*, 37 C.M.R. 519 (1966), *aff'd*, 17 U.S.C.M.A. 103, 37 C.M.R. 367 (1967).

⁵⁴ *See ACM 17411, Cook*, 31 C.M.R. 607 (1961).

⁵⁵ U.S. CONST. art. I.

⁵⁶ U.S. CONST. art. III.

⁵⁷ *Burns v. Wilson*, 346 U.S. 137 (1953); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁵⁸ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

standard is applicable, therefore, assumes paramount importance in military as well as state criminal trials.

B. THE SHEPPARD STANDARD

As may be seen from the preceding chapter, it is not the routine case in which the danger of prejudice is encountered. Though perhaps it may be argued that no criminal case is ordinary, and certainly never routine to the accused, the vast majority of those cases with which the courts deal are not so unusual as to command the attention of the community, whether it be military or civilian.⁴⁹ Concomitantly, it is not this type of case which is widely published because news editors are, of necessity, conscious of those items which captivate the public fancy. Just such a case was the trial of Dr. Sam Sheppard.⁵⁰

Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine week trial, circulation conscious editors catered to the insatiable interest of the American Public in the bizarre. . . . In this atmosphere of a "Roman Holiday" for news media, Sam Sheppard stood trial for his life.⁵¹

It is obvious to even the most unsophisticated that a fair trial and judicial treatment of a person accused of a criminal offense should be anything but a Roman Holiday.

It has been noted that every court called on to comment on this case save the one that tried it has deplored the activities of the press.⁵² In fact, the press itself has gone on record as questioning whether a fair trial could be held under such circumstances.⁵³ The remarkable thing is that in spite of such patent problems, the accused, Dr. Sam Sheppard, spent 12 years in prison and a considerable fortune in appellate battles before his conviction was finally set aside and a new trial ordered.⁵⁴ It is not the purpose of this paper to ponder which jury verdict was correct for in either event the cause of justice was not well served.

⁴⁹ With the increasing focus of the press upon the trial of Vietnam war dissenters, however, many of what would otherwise be ordinary trials in military courts are being transferred into sensational ones. The effect of such treatment by the press is difficult to assess but equally difficult to discount.

⁵⁰ *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956).

⁵¹ *Id.* at 294, 135 N.E.2d at 342.

⁵² *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

⁵³ *Id.* at 356, n.10.

⁵⁴ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

The appalling accumulation of mistakes on the part of all concerned tends to rob the case of the force and clarity which it might otherwise have had. This situation led the court to reverse on the whole record rather than rule as to each specific area.⁷⁵ There are, however, many interesting points to be gleaned from the case, although some of them may be construed as nothing more than interesting dicta.

The most important concerns the standard to be applied in determining whether the discretion of the trial judge has been soundly exercised. Without searching for specific prejudice, the court concluded with only one dissent that Sheppard was deprived of due process of law under the fourteenth amendment.⁷⁶ In the face of the evidence this holding is not remarkable, even though only the minimum standards of state due process are involved.

The failure to distinguish between state and federal cases,⁷⁷ on the other hand, is of considerable significance. This lack of distinction could scarcely have been accidental in view of the fact that the author of the majority opinion also wrote the dissent in *Rideau*.⁷⁸ Further, it is clear from the language of the court that the underlying basis of the decision is the increasing prevalence of cases involving this precise problem.⁷⁹

In failing to require Sheppard to undertake the burden of showing either essential unfairness or demonstrable prejudice,⁸⁰ the court has set as a constitutional standard of judicial discretion even in state court trials the avoidance of the *probability* of prejudice.⁸¹ Clearly no lesser standard can apply in federal cases whether military or civilian.

C. MEETING THE STANDARD

The degree of proof required to meet even this standard is, however, somewhat unclear, because of the confusion of pretrial publicity, trial publicity, and the activities of the press in and around the courtroom.

⁷⁵ *Id.* at 354, 363.

⁷⁶ *Id.* at 335.

⁷⁷ *Id.* at 351-53.

⁷⁸ *Rideau v. Louisiana*, 373 U.S. 727, 729 (1963), wherein Mr. Justice Clark, in dissent, stated: "There is a very significant difference between matters within the scope of our supervisory powers and matters which reach the level of constitutional dimension."

⁷⁹ *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). See also concurring opinion of Mr. Justice Frankfurter, *Irvin v. Dowd*, 366 U.S. 717, 729, 730 (1961).

⁸⁰ 384 U.S. 352.

⁸¹ *Id.* at 352.

At one point the court observed:

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against . . . pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held.⁴¹

Although no great purpose is served by a distinction between pretrial and trial publicity, as it is the poisoning of the minds of the jury which is of primary concern, it is surprising in this case that the court felt it could not say the pretrial publicity alone was sufficient denial of due process to require reversal. A few of the excerpts from the pretrial publicity, as reflected in the opinion of the court, read as follows:

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon—later the chief prosecutor of Sheppard—sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. . . .

The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks at Lie Test; Retells Story." . . .

On the 20th the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "Friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected. . . ." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do it now, Dr. Gerber." . . .

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. . . .

During the inquest on July 26, a headline in large type stated: Kerr (Captain of the Cleveland Police) Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extra marital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. . . .⁴²

Without going into further detail, it is sufficient to note that

⁴¹ *Id.* at 354, 355.

⁴² *Id.* at 338-41.

the publicity grew in intensity until the date of his indictment,⁵⁴ and it is fair to observe that it simply exploded at the time of trial with five volumes of news articles from the Cleveland newspapers alone being submitted in evidence and no account at all being made of radio and television coverage, although the court assumed their coverage was equally large.⁵⁵ While some of the publicity was favorable and even generated by the Sheppard family, this only serves to point up that the forum of his trial was, in reality, the press.

At this point one is led to doubt whether the court really meant that it could not say that the pretrial publicity alone was sufficient to amount to a denial of due process. Perhaps the court meant only to say that had the normal remedial measures been exercised at trial, a denial of due process could have been avoided; or perhaps they simply wanted to point out the other glaring shortcomings of the case.

These were many. There was no real effort made to insulate the jury, once selected, from further exposure to press reports:⁵⁶

Much of the material printed or broadcasted during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation . . . ; was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument."

In addition, no change of venue or continuance was granted, voir dire examination was unduly restricted, and little if any effort was made to control the statements of parties, officials, and witnesses to the press. The use of such measures will be considered in subsequent chapters.

Inasmuch as the conduct of the press within the courtroom is intentionally excluded from consideration here, it is sufficient to note that this aspect of the case alone would likely have been sufficient to require reversal. The court pointed to the disruption

⁵⁴ *Id.* at 341.

⁵⁵ *Id.* at 342.

⁵⁶ *Id.* at 352.

⁵⁷ *Id.* at 356-57.

of the proceedings and noted that the coverage was more massive than in *Estes v. Texas*,⁸⁹ which had been previously reversed on similar grounds.

The court outlined at considerable length procedures which could and should have been taken. In so doing they set forth guidelines which should be followed and perhaps improved upon to prevent a similar miscarriage of justice in future cases. In view of the constitutional basis of the decision, these guidelines are applicable to military trials.

IV. PREVENTIVE MEASURES

A. RELEASES BY COUNSEL

Were it not for the number of cases involving precisely this point it would seem almost unnecessary to state that counsel for both parties to a trial should avoid the initiation of news reports which might be considered prejudicial. It seems patently absurd that either the prosecutor or the defense counsel would take any action which might cause additional problems in the presentation of his case. Certainly the attorneys for both sides should avoid the instigation of unnecessary publicity, if not by their interest in the ultimate result, at least by the Canons of Professional Ethics.⁹⁰

The opportunity to bask for a brief moment in the bright light of public attention, however, is an alluring temptress. This may be particularly true of elected officials or those who seek public office,⁹⁰ but it is not limited to them. For example, counsel for the accused may be tempted to build up their reputation and hence, ultimately, their practice by releasing information and making statements to the press. More often than not, however, the justification advanced for such tactics is that they are required to counter releases by the police or prosecution.

Even where these reasons do not exist it is axiomatic that seeing one's name in public print is truly one of life's greatest satisfactions. The need for recognition is basic to all humans. Not only parties and attorneys, but all who have anything to do

⁸⁹ 381 U.S. 532 (1965).

⁹⁰ A.B.A., CANONS OF PROFESSIONAL ETHICS, No. 20; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 42b [hereafter referred to as the Manual and cited as MCM].

⁹¹ In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), it was noted that both the prosecutor and the judge were candidates for election within weeks of the case.

with a newsworthy case, may be drawn by the lure of the spotlight. The practice of self-restraint by all concerned could obviously do much to lessen both the incidence and the impact of prejudicial news reporting.

Perhaps such restraint is too much to hope for in light of human fallability. To aid in this regard methods of enforcement need to be devised. With regard to attorneys, bar associations should not be hesitant to spot infractions of ethical principles, and should take vigorous action to discipline those who fail to abide by professional standards.

The American Bar Association at the annual meeting of its House of Delegates, held recently in Chicago, adopted the recommendations of the *Special Advisory Committee on Fair Trial and Free Press*, which provided:

1.1 REVISION OF THE CANONS OF PROFESSIONAL ETHICS

It is recommended that the [Canons of Professional Ethics be revised to contain] *substance* of the following standards, relating to the public discussion of pending or imminent criminal litigation, *be embodied in the Code of Professional Responsibility*:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the [defendant] *accused*, except that the lawyer may make a factual statement of the [defendant's] *accused's* name, age, residence, occupation, and family status, and if the [defendant] *accused* has not been apprehended, a *lawyer associated with the prosecu-*

tion may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the [defendant] *accused*, or the refusal or failure of the [defendant] *accused* to make any statement;

(3) The performance of any examinations or tests or the [defendant's] *accused's* refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) [The defendant's] *Any opinion as to the accused's* guilt or innocence or *as to* [other matters relating to] the merits of the case or the evidence in the case [except that . . .]. *The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest [including time and place of arrest, resistance, pursuit, and use of weapons], the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the [describing any] evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process, from requesting assistance in obtaining evidence; or from announcing [on behalf of his client] without further comment that the [client] accused denies the charges made against him.*

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial of the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and [while the matter is still pending in any court] *prior to the imposition of sentence*, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect [judgment or] *the imposition of sentence* [or otherwise prejudice the due administration of justice].

Nothing in this Canon is intended to preclude the formulation or application of more restrictive rules relating to the re-

lease of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

1.2 RULE OF COURT

In any jurisdiction in which Canons of Professional Ethics have not been adopted by statute or court rule, it is recommended that the substance of the foregoing section be adopted as a rule of court governing the conduct of attorneys.

1.3 ENFORCEMENT

It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment [or punishment for contempt of court]. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of [contempt] disciplinary proceedings, and that the court have discretion to initiate such proceedings, either on the basis of such a petition or on its own motion.²¹

B. RELEASES BY OTHERS

It is not only attorneys, however, who may be tempted, but witnesses, friends, policemen, and other public officials. In the military community we find additionally that commanders, investigating officers, information officers, fellow soldiers and civilian employees are frequently privy to the type of information which may give rise to prejudicial news reporting. It is obvious that to the extent such talk about a case can be minimized, the possibility of prejudicial reports, and thereby the threat to a fair trial, can be avoided.

Most of the guidelines set forth in the *Sheppard* case²² relate to precautions to be taken during the progress of the case which are under the exclusive province of the court. It was pointed out, however, that being advised of the nature and extent of pretrial coverage, the court should have requested city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees.

An indication of the scope of such a regulation is provided in the REARDON REPORT:

²¹ REARDON REPORT, *supra* note 51 at 347-48; see also Tentative Draft, 2-4. (Material inclosed in brackets deleted from tentative draft and material underlined added in final draft. For ease of comparison, the same treatment will be used in all quotations from final report rules contained herein.)

²² *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

2.1 DEPARTMENTAL RULES

It is recommended that law enforcement agencies in each jurisdiction adopt the following internal regulations:

(a) A regulation governing the release of information, relating to the commission of crimes and to their investigation, prior to the making of an arrest, issuance of an arrest warrant, or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself and to investigative procedure shall not be disclosed except to the extent necessary to aid in the investigation, to assist in the apprehension of the suspect, or to warn the public of any dangers.

(b) A regulation prohibiting (i) the deliberate posing of a person in custody for photographing or television by representatives of the news media and (ii) the interviewing by representatives of the news media of a person in custody unless, in writing, he requests or consents to an interview after being adequately informed of his right to consult with counsel and of his right to refuse to grant an interview.

(c) A regulation providing:

From the time of arrest, issuance of an arrest warrant, or the filing of any complaint, information, or indictment in any criminal matter, until the completion of trial or disposition without trial, no law enforcement officer within this agency shall release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the officer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement, except that the officer may announce without further comment that the accused denies the charges made against him;

(3) The performance of any examination or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the officer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

It shall be appropriate during this period for a law enforcement officer:

TRIAL BY THE PRESS

(1) To announce the fact and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons;

(2) To announce the identity of the investigating and arresting officer or agency and the length of the investigation;

(3) To make an announcement, at the time of seizure of any physical evidence other than a confession, admission, or statement, which is limited to a description of the evidence seized;

(4) To disclose the nature, substance, or text of the charge, including a brief description of the offense charged;

(5) To quote from or refer without comment to public records of the court in the case;

(6) To announce the scheduling or result of any stage in the judicial process;

(7) To request assistance in obtaining evidence.

Nothing in this rule precludes any law enforcement officer from replying to charges of misconduct that are publicly made against him, precludes any law enforcement officer from participating in any legislative, administrative, or investigative hearing, or supersedes any more restrictive rule governing the release of information concerning juvenile or other offenders.

(d) A regulation providing for the enforcement of the foregoing by the imposition of appropriate disciplinary sanctions.⁹

It is not clear from the *Sheppard* case what the court would be expected to do if its request were not heeded. With commendable foresight the REARDON REPORT provides an alternative method of enforcement by rule of court.^{9a} Whether such action will in fact be taken, of course, remains to be seen.

All agencies engaged in legislation or associated with the administration of justice have a responsibility to insure the right of an accused to fair trial. Clear and enforceable regulations should be developed and applied as standard operating procedure to all cases. This approach is far preferable to the ad hoc approach of waiting until a serious threat is manifested. By the time a case has come under the purview of a court and the threat has become clear, any regulations, no matter how strict and well intentioned, may be, if not too lenient, at least too late. In civilian jurisdictions, in the absence of statutory control, such an ap-

⁹ REARDON REPORT, *supra* note 51 at 348.

^{9a} *Id.* at 348. Rule 2.2 provides:

"RULE OF COURT OR LEGISLATION RELATING TO LAW ENFORCEMENT AGENCIES. It is recommended that if within a reasonable time a law enforcement agency in any jurisdiction fails to adopt and adhere to the substance of the regulation recommended in section 2.1(c), as it relates to both proper and improper disclosures, the regulation be made effective with respect to that agency by rule of court or by legislative action, with appropriate sanctions for violation."

proach may require a multitude of regulations, and thus uniformity of treatment may not be achieved.

The military services, having central control of all personnel within their respective departments, are in a particularly advantageous position to take such precautions. With the exception of civilian defense counsel and perhaps the accused,⁹⁵ one Army regulation can proscribe the release of all information. On 17 June 1966, just eleven days after the Sheppard case was decided,⁹⁶ a revised Army regulation⁹⁷ was issued which contained for the first time detailed regulations as to the information which could be released about persons accused of offenses. Paragraph 4 of the present regulation provides:

4. RELEASE OF CERTAIN INFORMATION TO THE PUBLIC CONCERNING ACCUSED PERSONS PRIOR TO CONCLUSION OF TRIAL. . . .

- a. *Information subject to release.* Subject to b below, the following information concerning persons accused of offenses may be released by the convening authority to public news agencies or other public news media:
- (1) The accused's name, grade or rank, age, residence or unit, regular assigned duties, marital status, and other similar background information.
 - (2) The substance or text of the offenses of which he is accused.
 - (3) The identity of the apprehending and investigating agency and the length of the investigation prior to apprehension.
 - (4) The factual circumstances immediately surrounding the apprehension of the accused, including the time and place of apprehension, resistance, and pursuit.
 - (5) The type and place of custody, if any.
- b. *Prohibited information.* The release of information before evidence thereon has been presented in open court will include only incontrovertible factual matters and will not include subjective observations. In those instances where background information or information relating to the circumstances of an apprehension would be prejudicial to the best interests of an accused and where the release thereof would serve no law enforcement functions, such information will not be released except as provided in c(3) below. . . .
- (1) Observations or comments concerning an accused's character and demeanor including those at the time of apprehension and arrest or during pretrial custody.
 - (2) Statements, admissions, confessions, or alibis attributable to an accused.

⁹⁵ United States v. Henderson, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960).

⁹⁶ 6 Jun. 1966.

⁹⁷ Former Army Reg. No. 345-60 (17 Jun. 1966), superseded by Army Reg. No. 345-60 (7 May 1968).

TRIAL BY THE PRESS

(3) References to confidential sources, investigative techniques and procedures, such as fingerprints, polygraph examinations, blood tests, firearms identification tests, or other similar laboratory tests.

(4) Statements concerning the identity, credibility, or testimony of prospective witnesses.

(5) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at the trial.

c. *Other considerations.*

(1) *Photographing or televising accused.* Personnel of the Army should take no action to encourage or volunteer assistance to news media in photographing or televising an accused or suspected person being held or transported in military custody. Departmental representatives should not make available photographs of an accused or suspect unless a law enforcement function is served thereby. For guidance concerning the handling of requests from news media for permission to take photographs during the period of a trial by court-martial see paragraph 22, AR 360-5.

(2) *Fugitives from justice.* The provisions of this paragraph are not intended to restrict the release of information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice.

(3) *Exceptional cases.* Requests for permission to release information prohibited under b above to public news agencies or media may be directed to The Judge Advocate General. Requests for information from Army records that may not be released under b above will be processed in accordance with AR 345-20.

The provisions of this regulation are in full accord with the *Public Information Section of the Administrative Procedure Act*⁸⁵ and the Attorney General's memorandum thereon.⁸⁶ Although the general tenor of both are to encourage rather than prohibit the release of information, subsection (e) of the act provides in part:

(e) EXEMPTIONS—The provisions of this act shall not be applicable to matters that are . . .

(6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; . . .

It should be noted that exemption (7) above is to be construed

⁸⁵ 80 Stat. 250 (1966), codified by 5 U.S.C. § 552, 81 Stat. 54 (1967), formerly 5 U.S.C. § 1002 (1964).

⁸⁶ ATTORNEY GENERAL MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967).

broadly to cover all kinds of laws, and that the language "except to the extent available by law to a private party" is not intended to convey a new privilege to non-parties, but merely to insure that parties otherwise entitled by law are not denied access on the basis of this section.¹⁰⁰

While strict adherence to such a regulation cannot be expected to eliminate prejudicial news reporting, it would not only reduce the amount of information available for publication, but more important it would remove much of the sting of the information that is published by precluding the enterprising reporter from labeling his story as "official" or "authorities report . . ." Since anything "official" tends to be accepted as correct, the impact of an "unofficial" article upon a potential jurymen would be greatly reduced. The prompt adoption and enforcement of a similar regulation by all federal, state, and local law enforcement and related agencies, or in the absence of such action by rule of court, would be highly commendable as an initial step toward what I have referred to earlier as the internal solution to the problem.

C. CONTROL BY COURT

The measures considered above must be supplemented by strict judicial control and supervision once the case has reached the trial stage.

It is an accepted fact in this country that justice cannot survive behind a wall of silence.¹⁰¹ Nothing contained herein is intended to contradict that proposition. The court has, however, not only the right, but the duty to control the proceedings. The courtroom and the court house are subject to the control of the court¹⁰² and therefore subject to rules of necessity to insure fairness of the trial. In military courts the trial may be held in closed session where the security interests of the government are involved.¹⁰³ Clearly the right to a fair trial of an accused must be of equal importance. In the exercise of this responsibility the court can control not only the conduct of the press within the courtroom, but also their access to items of evidence, certain testimony, and, if necessity dictates, the courtroom itself.

Witnesses should be insulated from both receiving and giving information.¹⁰⁴ It is common practice in most courts, both civilian

¹⁰⁰ *Id.*

¹⁰¹ *Re Oliver*, 333 U.S. 257 (1948).

¹⁰² *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

¹⁰³ MCM ¶ 53e; *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

¹⁰⁴ *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1962).

and military, to exclude the witnesses during the testimony of other witnesses. This may be done either automatically as a standard procedure,¹⁰⁵ upon motion by either party,¹⁰⁶ or sua sponte by the judge.¹⁰⁷ This precaution was in fact taken in the *Sheppard* case, but was really to no avail, as the witnesses were permitted to read the accounts of previous testimony published in the press, listen to broadcasts of the proceedings, and talk freely with representatives of the news media.¹⁰⁸

Additional precautions which might be taken during the trial include instructions to the jury not to read accounts of the case or listen to the same;¹⁰⁹ or, if instructions are deemed inadequate, sequestration of the jury.¹¹⁰ In this regard it must be remembered that the judge does not advise or ask the jury to avoid reading about the case; he must tell them to do so.¹¹¹ Sequestration of the jury is to be utilized, especially in an extended case, only when all other controls appear inadequate. The danger of sequestration is that the resentment engendered in the minds of the jury members by their virtual imprisonment might prove a far more serious threat to the fair trial of the accused than the prejudicial news reporting it seeks to avoid.

Other persons subject to the jurisdiction of the court should be instructed to avoid furnishing grist for the news mill. This would include parties, counsel, police, and other officials, as well as witnesses.¹¹² While it should be obvious, it must not be overlooked that the judge himself must scrupulously avoid becoming a tool in the building of prejudice.¹¹³

The means of enforcement of such instructions would include the use of the contempt power. As originally envisioned in the REARDON REPORT, this would have applied to both dissemination by public communication of an extrajudicial statement and release of a statement with the expectation that it be so disseminated.¹¹⁴ The final version has, however, been so diluted by allowing contempt only for an intentional violation that it is of little

¹⁰⁵ MCM § 63f.

¹⁰⁶ *Ray v. Commonwealth*, 241 Ky. 286, 43 S.W.2d 694 (1931).

¹⁰⁷ REARDON REPORT, *supra* note 51 at 350.

¹⁰⁸ *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966).

¹⁰⁹ REARDON REPORT, *supra* note 51 at 350.

¹¹⁰ *Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955); REARDON REPORT, *supra* note 51 at 350.

¹¹¹ *Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966).

¹¹² *Id.* at 361; REARDON REPORT, *supra* note 51 at 350.

¹¹³ *United States v. Powell*, 171 F. Supp. 202 (N.D. Cal. 1959); *Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955).

¹¹⁴ REARDON REPORT, Tentative Draft, 14.

functional utility.¹¹⁵ While the original version may have led to actual news censorship, the current version entails an impossible standard of proof. A far more preferable solution would have been simply to eliminate the prohibition on dissemination and attempt to control the source.

There is serious doubt, however, that even the latter course of action could be effectively utilized by military courts abroad.¹¹⁶ It may well be that only administrative sanctions are available in such situations.

V. REMEDIES AT TRIAL LEVEL

Whenever the above precautions are either not taken or fail to prevent prejudice, there are five standard remedies which may be invoked.

¹¹⁵ REARDON REPORT, *supra* note 51 at 351:

"PART IV. RECOMMENDATIONS RELATING TO THE EXERCISE OF THE CONTEMPT POWER:

"4.1 LIMITED USE OF THE CONTEMPT POWER.

"(The use of the contempt power against persons who disseminate information by means of public communication, or who make statements for dissemination, can in certain circumstances raise grave constitutional questions. Apart from these questions, indiscriminate use of that power can cause unnecessary friction and stifle desirable discussion. On the other hand, it is essential that deliberate action constituting a serious threat to a fair trial not go unpunished and that valid court orders be obeyed). It is [therefore] recommended that the contempt power should be used only with considerable caution but should be exercised [in at least, the following instances, in addition to those specified in sections 1.3, 2.1, above] *under the following circumstances:*

"(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

"(i) Disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case [if the statement is reasonably calculated] *that is willfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or*

"(ii) Makes such a statement [with the expectation] intending that it [will] be [so] disseminated *by any means of public communication.*

"(b) Against a person who knowingly violates a valid judicial order not to disseminate, until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing [from which the public is excluded under] *closed pursuant to §§ 3.1 or 3.5(d) of these recommendations.*" Compare REARDON REPORT, Tentative Draft, 14-15, 150-154.

¹¹⁶ United States *ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

A. CHANGE OF VENUE

The purpose of a change of venue, *inter alia*, is to remove the trial from a saturated area to one of comparative calm. While military procedure does not include a change of venue as such,¹¹⁷ the Court of Military Appeals has long recognized a motion for appropriate relief called, for want of a better name, a motion for a change of place of trial.¹¹⁸

The distinction between the two apparently arises from the fact that world-wide jurisdiction is conferred by the Uniform Code of Military Justice.¹¹⁹ Practically, however, there is no real distinction and the two can be used interchangeably.¹²⁰

The advent of modern, world-wide communications, unfortunately, lessens the effect of a change of venue to remove a case from a prejudicial environment. Where indeed, for example, would one have transferred the case of Sam Sheppard,¹²¹ Jack Ruby,¹²² or even Richard Speck.¹²³ This precise point was noted in *Delaney v. United States*,¹²⁴ where the accused was not required to move for a change of venue in order to avoid waiver.

The frequently expressed fear that in some cases which have gained widespread publicity a fair trial by jury may be impractical, if not impossible, cannot be dismissed. Even in cases well short of this extreme an accused might well prefer to elect a trial before a judge rather than run the risk of being subjected to the not so tender mercies of a possibly inflamed jury. The REARDON REPORT recognizes this possibility and recommends that in jurisdictions where an accused does not under the present law have a right to waive jury trial, he be allowed to do so upon showing that the waiver is voluntary and that there is reason to believe such action is required because of widespread publicity.¹²⁵ If the local law conflicts with the waiver of jury trial in such a case, it is submitted that such local law be amended.

¹¹⁷ *United States v. Carter*, 9 U.S.C.M.A. 108, 25 C.M.R. 370 (1958); *United States v. Gravitt*, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

¹¹⁸ *Id.*

¹¹⁹ *United States v. Johns*, 66 B.R. (Army) 169 (1947).

¹²⁰ *United States v. Carter*, 9 U.S.C.M.A. 108, 25 C.M.R. 370 (1958); *United States v. Gravitt*, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

¹²¹ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

¹²² Convicted of murder of Lee Harvey Oswald, committed on live national television.

¹²³ Convicted in 1967 of murder of eight student nurses in Chicago, the previous year; a change of venue to Peoria, Illinois, was granted, but its effectiveness appeared doubtful.

¹²⁴ 199 F.2d 107 (1st Cir. 1952).

¹²⁵ REARDON REPORT, *supra* note 51 at 349.

In addition, the change of venue remedy presents practical problems of availability of witnesses and expense to parties and counsel.¹²⁵ This problem is especially acute where the motion is for a change to a different country from that in which the offense occurred, and where no lesser change would effect a cure.¹²⁷ Such a situation might well be encountered in military cases arising in foreign countries.

A novel approach, which has apparently never been tried, but to which no legal objection is foreseen, might well prove a solution to this problem in military trials. While the military system suffers from certain weaknesses from the standpoint of the remedies discussed in this chapter, it also has certain advantages, not the least of which is the manner of selection of the court. In most civilian jurisdictions, the handpicking of a jury is not merely frowned upon, but illegal.¹²⁸ In military practice, however, it is both the prerogative and the duty of the convening authority to select the court.¹²⁹

Thus, in the military, by proper exercise of the power to appoint, an eminently practical and workable alternative to a change of venue may be effected in those instances where the probability of prejudice is apparent prior to trial.

As mentioned previously, it is appropriate in such cases to raise the issue by motion for appropriate relief to the convening authority.¹³⁰ Upon receipt of a motion requesting such action, the convening authority would be empowered to select a court of persons who have not been exposed to any pre-existing publicity because, for example, of their recent arrival in the area, and to incorporate in their appointing orders special instructions directing the members to avoid reading or listening to future accounts of the case. Obedience to such an order would be enforceable in the same manner as any other lawful order.¹³¹ In addition,

¹²⁵ In Illinois recently, two appointed counsel in a prison riot case wherein a change of venue was granted became so severely pressed financially that they were forced to petition the legislature for relief to avoid bankruptcy. See Dowling & Yantis, *Defense of the Poor in Criminal Cases in Illinois*, 47 CHICAGO BAR REC. 216 (1966).

¹²⁶ CM 411935, Swenson, 35 C.M.R. 645 (1965).

¹²⁷ While no purpose would be served by a survey it is sufficient to note that most civilian jurisdictions have created by statute elaborate procedures to insure that jury selection be accomplished in an objective manner.

¹²⁸ Uniform Code of Military Justice art. 25d(2) [hereafter referred to as the Code and cited as UCMJ]; but see *United States v. Hedges*, 11 U.S.C.M.A. 642, 29 C.M.R. 458 (1960).

¹²⁹ FED. R. CRIM. P. 12(b); MCM ¶ 67.

¹³⁰ UCMJ art. 92.

failure to obey such an order might be utilized as a basis of a challenge for cause.

A strong argument can be made that a member who has not complied with the orders appointing him to sit is not eligible to sit as a member. In this event the challenge would lie under the first ground for challenge, as enumerated in the *Manual*,¹³² and as such would be a mandatory ground for challenge, thereby avoiding the problem of the members voting on whether it should be sustained.¹³³ Even if it should be determined that only a discretionary challenge is involved,¹³⁴ the members would nevertheless be much more inclined to sustain a challenge to one of their number who had violated the clear intent of the convening authority.

An interesting approach of the same general nature has been recommended for use in civilian courts in appropriate cases.¹³⁵ This plan, however, calls for the importation of jurors from other areas of the state or jurisdiction. While it might work well in many cases, it will not serve to protect an accused in any case involving widespread publicity. This solution appears to have many of the same advantages as a simple change of venue and may avoid some of the problems in complicated cases, but it is merely a variation in method, rather than a new remedy.

B. CONTINUANCE

A far more workable and perhaps more effective remedy is the continuance of the trial to a later time. This remedy is premised upon the fallability of human memory. The drawback is, of course, that the passage of time has its effect on witnesses as well as jurors. Additionally, there is always the chance that the publicity may continue unabated or be reborn at the time of trial.

This remedy also conflicts with the constitutional right of speedy trial.¹³⁶ But as both the speedy and fair trial protections spring from the same basic constitutional guarantee,¹³⁷ there is little doubt that the accused must elect between these forms of protection.¹³⁸

The use of a continuance in military practice presents a particular problem. There is no provision for bail, as is customary

¹³² MCM ¶ 62f.

¹³³ MCM ¶ 62A(3).

¹³⁴ *Id.*

¹³⁵ REARDON REPORT, *supra* note 51 at 350.

¹³⁶ U.S. CONST. amend. VI.

¹³⁷ *Id.*

¹³⁸ *Geagan v. Gavin*, 181 F. Supp. 466 (D. Mass. 1960).

in civilian jurisdictions, and a soldier charged with a serious offense, as in most newsworthy cases, is normally held in pretrial confinement. Before requesting a continuance, the accused must choose between a possibly unfair trial and the certainty of extended pretrial confinement at his own request.

While he may make such a motion for the first time at trial,¹³⁹ the accused is normally well advised to do so by pretrial motion to either the court, in civilian cases, or the convening authority¹⁴⁰ in military trials. To do otherwise is particularly risky in military trials, as the court will have been appointed, and the possible benefit of newly arrived and presumably unexposed court members will have been lost.

C. VOIR DIRE

Properly handled, the voir dire examination of jurors, coupled with an adequate challenge procedure, can be an effective protection. It is especially effective where the procedure of individual questioning is employed¹⁴¹ with challenges for cause being decided by the judge. Even more effective is the use of a large number of peremptory challenges.¹⁴² In one such case a judge was commended for having allowed unlimited peremptory challenges.¹⁴³ While such a drastic measure seems unnecessary, certainly a liberal attitude can do much to enhance the cause of justice.

Even under the most perfect conditions, however, the procedure is subject to serious limitations, as the jurors' answers must be relied upon as the basis for a challenge for cause and to some extent to discover a need for a peremptory challenge. Unfortunately, people are frequently unaware of their subconscious prejudices; and the questioning procedure itself, especially if conducted en banc, may be such as to set such prejudices in motion. Furthermore, the consciously prejudiced juror may be tempted not to reveal his bias.

The problem is compounded in military trials by several factors. The first of these is the so-called military attitude. A good officer or noncommissioned officer is trained and conditioned to avoid prejudice and to form decisions on the basis of fact. With

¹³⁹ FED. R. CRIM. P. 12(b); MCM ¶ 67.

¹⁴⁰ *Id.*

¹⁴¹ *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962); REARDON REPORT, *supra* note 51 at 349.

¹⁴² *Irvin v. Dowd*, 366 U.S. 717 (1961); *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962).

¹⁴³ *Shaffer v. United States*, 291 F.2d 689 (7th Cir. 1961).

this background it becomes almost impossible for such a person to admit, in the presence of his peers, that he harbors any pre-conceived opinion or prejudice on any issue. In spite of this attitude, military jurors are not supermen, but fallible humans who, while unwilling to admit the existence of what they consider a weakness, are no less affected than any other persons.

That this propensity likewise infects civilian jurors was noted in *Irvin v. Dowd*,¹⁴⁴ where the court stated:

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.¹⁴⁵

An analysis from an independent survey of jury members lends further support to the existence of a similar attitude on the part of civilian jurors.¹⁴⁶ The difference between military and civilian jurors, however, appears to be one of degree and directness.

Coupled with this, in military trials, is the procedure employed in deciding a challenge for cause. The court members themselves, rather than the judge or law officer, make this most important decision.¹⁴⁷ As the existence of prejudice is considered a weakness, a challenge is often considered an attack upon the integrity of the challenged member and consequently upon those who must decide the issue while only too aware that one of them may be the next to be challenged.

The importance of this problem becomes clear when it is considered that the accused under military procedure is entitled to only *one* peremptory challenge.¹⁴⁸ When such a situation is compared with *Irvin v. Dowd*,¹⁴⁹ it becomes readily apparent that this remedy affords insufficient protection in military trials.

¹⁴⁴ *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁴⁵ *Id.* at 728.

¹⁴⁶ Broeder, *Voir Dire Examination: An Empirical Study*, 38 So. CAL. L. REV. 503, at 526 (1965). "Once in court, almost all veniremen wanted to be selected, and, in addition, most felt that being challenged would adversely reflect upon their ability to be fair and impugn their good faith."

¹⁴⁷ MCM § 62h(3); but see *United States v. Jones*, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956).

¹⁴⁸ UCMJ art. 41b.

¹⁴⁹ 366 U.S. 717 (1961). A breakdown of jurors questioned in this case shows: 267 excused due to fixed opinion of guilt; 103 excused due to conscientious objection to death penalty; 20 excused due to defense peremptory challenge; 10 excused due to prosecution peremptory challenge; 12 selected (8 of whom had formed opinions of guilt of accused but stated they could overcome it); 2 alternate jurors questioned; 415 total jurors questioned.

D. CAUTIONARY INSTRUCTIONS

The remedy of cautionary or even directive instructions is likewise fraught with human frailty. While the judge may instruct the jury to disregard any previous information or opinion, it is doubtful whether any juror can do so.¹⁵⁰

Nevertheless, the appearance of such instructions in records of trial has been held to be sufficient protection, provided they are clear and mandatory.¹⁵¹ It must be remembered that to satisfy the requirements, the judge must tell the jury, not merely advise them.¹⁵²

E. MISTRIAL

The final remedy is the declaration of a mistrial. Obviously the judicious but liberal use of this remedy may preclude an unfair trial, but it is costly and burdensome as well as non-productive. The declaration of a mistrial does not insure a fair trial. To the contrary, it is an admission of failure to do so. While preferable to the completion of an unfair trial, it is merely a destructive, as opposed to a constructive remedy.¹⁵³

VI. PROBLEMS OF COUNSEL

A. RAISING THE ISSUE

One of the major problems confronting counsel in cases of this nature is that of raising the issue of prejudicial news reporting. While counsel has considerable latitude in presenting evidence as to the extent of publicity, by motion either before trial or during trial out of the hearing of the jury, such evidence is difficult for even the most fairminded judge to assess without reference to the jury themselves. While motions for appropriate relief, such as a change of venue or continuance, are normally

¹⁵⁰ *Krulewitsch v. United States*, 336 U.S. 440, 453 (1949). As Mr. Justice Jackson succinctly stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

¹⁵¹ *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

¹⁵² *Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966).

¹⁵³ It has been suggested, however, that where a mistrial is intentionally produced, *e.g.*, to save a weak case, jeopardy will be deemed to have attached, hence acquittal. *See, e.g.*, *United States v. Ivory*, 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1958); *United States v. Johnpier*, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961); U.S. DEPT OF ARMY, PAMPHLET No. 27-173, MILITARY JUSTICE—TRIAL PROCEDURE 144, 148 (1964).

considered interlocutory matters addressed to the sound discretion of the trial judge,¹⁵⁴ the accused bears the burden of proving not merely that the prejudicial publicity exists, but also that it will operate to deprive him of a fair trial.¹⁵⁵ The mere possibility of such a result will not suffice.¹⁵⁶ In the words of Mr. Justice Holmes:

If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.¹⁵⁷

The showing of more than a possibility of prejudice may be accomplished in one of two ways. The first is difficult and the second is dangerous. In the first method extraneous evidence may be employed to show such a high degree of likelihood of prejudice as to remove the matter from the area of mere possibility of prejudice to at least the area of probability. While this procedure, taking place entirely out of the presence of the jury, involves no great risk, it does involve considerable difficulty in the accumulation of extraneous evidence. For example, a public opinion poll has been attempted as a device for showing by implication the existence of a hostile atmosphere in the area from which the jury is to be selected.¹⁵⁸

Recognizing this problem, the REARDON REPORT recommended the following procedure and standards with respect to raising the issue by motion for change of venue or continuance:

3.2 CHANGE OF VENUE OR CONTINUANCE

It is recommended that the following standards be adopted in each jurisdiction to govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.

(a) WHO MAY REQUEST.

Except as federal or state constitutional provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) METHODS OF PROOF.

In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition of the granting of a motion for change of venue or continuance,

¹⁵⁴ *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

¹⁵⁵ *Beck v. Washington*, 369 U.S. 541 (1962); *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

¹⁵⁶ *Holt v. United States*, 218 U.S. 245 (1910).

¹⁵⁷ *Id.* at 251.

¹⁵⁸ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

qualified public opinion surveys shall be admissible as well as other materials having probative value.

(c) STANDARDS FOR GRANTING MOTION.

A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

(d) SAME TIME OF DISPOSITION.

If a motion for change of venue or continuance is made prior to the impaneling of the jury, the motion shall be disposed of before impaneling. If such a motion is permitted to be made, or if reconsideration or review of a prior denial is sought, after the jury has been selected, the fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in subsection (c) has been met.¹⁵⁰

The second and more direct method is simply to ask the jurors by means of voir dire the extent to which they have been affected. In addition to the problems discussed in the previous chapter concerning the reliability of the answers and information received in such a procedure, the counsel utilizing this procedure runs the risk of accomplishing by his voir dire the very thing he seeks to avoid.¹⁵⁰ His examination under such conditions must be extremely well planned and discreet. This is especially true where, as in many jurisdictions, the procedure of examination of the jurors en banc is employed. In such a situation he may not only fail to locate and establish the pre-existing prejudice on the part of some members, but may actually create prejudice in the minds of those previously unaffected. This risk is largely avoided where jurors are questioned individually, out of the presence of the other jurors.¹⁶¹

In military trials, such a procedure would be error, even though not prejudicial.¹⁶² With the increasing stature and expertise of the military law officer,¹⁶³ the time has come to abolish the out-

¹⁵⁰ REARDON REPORT, *supra* note 51 at 349.

¹⁶⁰ *Briggs v. United States*, 221 F.2d 636 (6th Cir. 1955).

¹⁶¹ See, e.g., REARDON REPORT, Tentative Draft, 135-137 (1966).

¹⁶² *United States v. Jones*, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956).

¹⁶³ See, e.g., Miller, *Who Made the Law Officer a Federal Judge*, 4 MIL. L. REV. 89 (1959).

moded procedure of allowing the members to determine a challenge for cause.¹⁶⁴

B. PRESERVING THE ISSUE

The problem of preserving the issue is equally difficult. Acquiescence at any point may be construed as waiver, as may be failure to exercise all available remedies.¹⁶⁵ For example, failure of counsel to utilize voir dire and all available challenges may be construed as a waiver of an earlier motion for change of venue or continuance.¹⁶⁶ Counsel should not, however, have to make patently useless motions, such as for continuance, where the case is already two years old,¹⁶⁷ or for change of venue, where the publicity is general and nationwide.¹⁶⁸ Additionally, the accused has not been required in every case to exhaust his challenges where to do so would be no more than an exercise in guesswork.¹⁶⁹ Such instances are, however, the exceptions rather than the rule; and unless counsel can show positively why he failed to exhaust all available remedies, he runs a serious risk of waiver.¹⁷⁰ Such waiver might not affect the actual trial at that point, but it could be grounds for denying an appeal.¹⁷¹

The application of the more liberal standard of "probability of prejudice,"¹⁷² together with the use of the soundest discretion by the judiciary, could relieve counsel from this dilemma. An effort in this direction is suggested in the REARDON REPORT,¹⁷³ but it is anticipated that this will afford little relief.

VII. CONCLUSION

From the foregoing it is clear that the incidence of prejudicial news reporting and activity is not likely to decrease unilaterally. The news industry is dependent for its existence upon satisfaction of the insatiable appetite of the public for comprehensive coverage of the more unusual and bizarre activities of society. Criminal conduct has always been, and will continue to be, in this category. We may anticipate, therefore, that as modern

¹⁶⁴ UCMJ arts. 41, 51a, 52.

¹⁶⁵ *Shaffer v. United States*, 291 F.2d 689 (7th Cir. 1961).

¹⁶⁶ *Id.*

¹⁶⁷ *Koolish v. United States*, 340 F.2d 513 (5th Cir. 1965).

¹⁶⁸ *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952).

¹⁶⁹ *Id.*

¹⁷⁰ *Geagan v. Gavin*, 181 F. Supp. 466 (D. Mass. 1960).

¹⁷¹ *Irvin v. Dowd*, 366 U.S. 717 (1961).

¹⁷² *Sheppard v. Maxwell*, 384 U.S. 33 (1966).

¹⁷³ *Supra* note 51 at 349.

technology makes possible the instant distribution of any newsworthy event to all corners of our country, or even the world, the competitive nature of the industry will require even more minute inquiry and reporting of crimes, their solution, and the disposition of the offender than we have yet experienced. With its very existence at stake, it is folly to call upon the industry for restraint and to hope for voluntary compliance.

Only two courses are open if we are to preserve the right of an accused to a fair trial. The first involves governmental or judicial regulation of the press. It is clear that the right to a free press belongs not only to the press but to the people as a whole.¹³⁴ Whether one chooses to look at history or at the contemporary experiences of the Communist Bloc countries, the unacceptable and oppressive consequences to our form of government from governmental regulation of news distribution are manifest. Such a solution does not justify the risk involved. Even the less direct route of the contempt power poses the threat of oppression. Although judicial regulation has been successful in other free societies, it does not appeal to the minds of free men where another alternative is available.

The alternative, while indirect, can still be effective. This method requires the courts, in addition to the agencies and administrative bodies who serve them, to control internally the sources of information which might result in prejudicial news reports and to exercise sound judicial discretion by the courts in applying both accepted remedies and new remedies where the accepted remedies are insufficient. It requires above all judicial honesty and willingness to recognize the potential threat to a fair trial when it appears. This solution places the burden of insuring justice where it properly belongs, on those whose task it is to administer justice.

Only if we fail in this responsibility will more direct action be required. With individual liberty at stake, the assumption of this burden is not unduly onerous. After all, the price of justice, like that of liberty, is eternal vigilance; and, as in all commercial transactions, those who must pay the price are those who would have the product.

¹³⁴ United States v. Powell, 171 F. Supp. 202, 205 (N.D. Cal. 1959).

MUST THE SOLDIER BE A SILENT MEMBER OF OUR SOCIETY?*

By Major Michael A. Brown**

The author compares the rights of the individual soldier with the rights of the private citizen in the area of constitutionally protected speech. In addition, the author analyzes congressional and executive restraints upon freedom of speech and Department of the Army regulations implementing such restraints. He then compares these restraints with those extant in the civilian community. Conclusions are then proffered as to whether substantial differences in the freedom of speech rights exist between the civilian and military spheres.

I. INTRODUCTION

"One of the things that I don't like about the Army is not being able to say what I'm thinking."

"If you always speak out for what you believe in the military service your career is finished."

"I'm not staying in the service because I want to be my own boss and say what I feel."

How many times have these statements, and a thousand like them, been heard in conversations among all members of our society, both civilian and military. Does the soldier¹ really have more restraints upon his speech than the ordinary employee? Does a member of the armed forces of the United States forego some of the constitutional rights he is defending because he is a soldier? Certainly the average civilian feels that he has more freedom in his speech than his military counterpart. Is this just because of the less regimented life in the civilian society as opposed to the well disciplined life in the military service? Does

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¹The term "soldier" is used in this instance and throughout this article, unless otherwise indicated, to indicate a member of the armed forces, either officer or enlisted.

the first amendment's right to freedom of speech extend farther for a civilian than for a soldier? To answer this question is the purpose of this article.

In pursuit of this answer the area of freedom of speech under the first amendment will first be explored generally, and then a specific comparison between the civilian and military practices in the major areas of free speech will be made. From this comparison the soldier's rights to freedom of speech will be determined. Hopefully, a conclusion will then be reached as to whether the civilian has rights that his uniformed counterpart does not.³

II. DOES THE CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH APPLY TO THE SOLDIER?

In discussing freedom of speech under the first amendment in relation to the soldier, first it must be determined whether the constitutional guarantee of freedom of speech extends to members of the armed forces. The applicability of the Constitution and, in particular, the Bill of Rights⁴ to the military has occupied the thoughts of legal scholars for many years. Colonel William Winthrop, the famous authority on military law, was of the opinion that the Bill of Rights did not have application to the military community.⁵

Contemporary writers may generally be grouped into three categories. The first group, in support of Colonel Winthrop, con-

³ U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

⁴ The conclusions drawn from this comparison of military and civilian rights must be put into proper perspective. Comparing a civilian's rights to free speech in general to those of a soldier is much like a comparison of apples and oranges. The rights of all citizens are being compared with those of a specific class. It should be noted that a civilian's rights may change when he is considered not as a member of the general category but as a member of a specific category, e.g., labor union or large corporation, where he may have assumed certain restrictions upon his right to free speech.

⁵ U.S. CONST. amend. I-X [hereinafter cited as "Bill of Rights"].

⁶ This conclusion is based upon comments by Colonel Winthrop in his book, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920 reprint). In discussing the right to counsel set forth in U.S. CONST. amend. VI, he said that the right did not bind the military court but that the military courts were within the spirit of the provision (*id.* at 165 n. 38). In discussing the right to confrontation of witnesses guaranteed by the same source he said that the right applied only to federal civil courts and not to military courts (*id.* at 287 n. 27). Finally, in discussing, cruel and unusual punishments he observed that the U.S. CONST. art. VIII prohibition against such punishments did not bind military courts-martial but should be followed as a rule of practice (*id.* at 398).

tend that the first amendment right to freedom of speech does not extend to the military.⁶ The second group seems to be of the opinion that the first amendment does apply, but in a partially restricted fashion.⁷ Finally, the third group takes the position that the Constitution's protections were intended to apply to the armed forces fully and without restriction.⁸

A. THE VIEW THAT IT DOES NOT APPLY

The supporters of the view that the soldier is afforded no constitutional rights generally analyze three essential points: the history of the early military criminal codes in relation to the Constitution; the provisions of the present *Uniform Code of Military Justice*⁹ and its historical antecedents; and the wording of the Constitution itself.

Illustrative of this view is Frederick Bernays Wiener.¹⁰ As to the first point he notes that shortly after the adoption of the Bill of Rights, then Secretary of War Knox stated that the military code then in effect¹¹ had to be changed to conform to the Constitution.¹² Mr. Wiener further shows that no change was forthcoming and reasons that the present Code, as the successor to the earlier military codes, still does not provide constitutional protections.

As to the second point generally referred to by those taking the "no constitutional rights for the military" approach, Mr.

⁶ Sabel, *Civil Safeguard Before Courts-Martial*, 25 MINN. L. REV. 323 (1941); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

⁷ Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME LAWYER 491 (1960); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957); Warren, *The Bill of Rights and the Military*, 37 N.Y. U. L. REV. 181 (1962).

⁸ Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Note, *Due Process in Criminal Courts-Martial*, 20 U. CHI. L. REV. 700 (Summer 1953); Note, *Military Law—The Constitution v. Congress*, 12 N.Y. L. F. 459 (1966). See also Creech, *Congress Looks to the Serviceman's Rights*, 49 A.B.A.J. 1070 (1963).

⁹ 10 U.S.C. §§ 801-940 [hereafter called the Code and cited as UCMJ].

¹⁰ See *supra* note 6.

¹¹ *The Continental Articles and Rules for the Better Government of the Troops*, adopted 20 Sep. 1776, 1 JOUR. CONG. 4, 82 (1776).

¹² 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 6 (Lowrie & Clark Eds. 1832). The comment was contained in a report by Secretary Knox on the troops in the service of the United States. No reasons or specifics are given by Secretary Knox why the adoption of the Bill of Rights would necessitate a change in the military code.

Wiener goes on to point out that the soldiers at the time of the adoption of the Bill of Rights were volunteers and their military codes proscribed military offenses only, civil criminal offenses being handled by civilian courts of appropriate jurisdiction. From this he concludes that the military codes were never intended to conform to constitutional standards or to afford constitutional protections.

Concerning free speech in particular Mr. Wiener believes that some restrictions upon free speech in the military are unconstitutional.¹³ Specifically, article 88, prohibiting a soldier from expressing "contemptuous words against the President, Vice President, Congress, Secretary of Defense or a Secretary of a Department, a Governor or a legislature of any State, Territory, or other possession of the United States in which he is on duty or present"; article 89, prohibiting disrespect towards a superior officer; and article 91, insofar as it prohibits contempt or disrespect towards a warrant officer, noncommissioned officer or petty officer in the execution of his office, are, in Mr. Wiener's opinion, abridgements of free speech in violation of the first amendment right to free speech. Mr. Wiener reasons that it is the right of every citizen to use contemptuous or disrespectful words towards the President or Congress. When this right of the individual citizen was impinged on by the Sedition Act of 1798¹⁴ President Jefferson opposed it as unconstitutional. However, President Jefferson did sign a similar bill that first enacted this same restraint on the soldier.¹⁵ Since article 88, 89 and 91 do not conform to the Constitution, Mr. Wiener reasons, it is evident that the freedom of speech guarantee was not intended to apply to the armed forces. Consequently, the unconstitutional nature of these articles is of little import since the right of constitutionally protected speech is not extended to the soldier.

With respect to the third point mentioned above, one writer reasons that because of the wording of the Constitution "constitutional guarantees only apply to persons who are entitled to indictment under the fifth amendment."¹⁶ Since the military services are specifically excluded from this right in the Constitution he then reasons that it is an express exclusion of the military from all constitutional rights.

¹³ See Wiener, *supra* note 6. Mentioned as constitutional restraints on free speech are the articles punishing provoking speech (UCMJ art. 117), soliciting desertion or absence (UCMJ art. 82), corresponding with the enemy (UCMJ art. 104), and betraying a countersign (UCMJ art. 101).

¹⁴ Act of 14 Jul. 1798, 1 Stat. 596.

¹⁵ Code of 1806, Act of 10 Apr. 1806, ch. 20, 2 Stat. 359.

¹⁶ See Sabel *supra* note 6.

Also emphasized in this third area is the wording of the Constitution, article I, clause 14, giving Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" which, it is reasoned, shows that the rules for the armed forces are beyond constitutional protections since they are specifically stated in the Constitution to be dictated by the whim of Congress.

B. THE VIEW THAT IT DOES APPLY

Proponents of both the "restricted" and the "unlimited" application of free speech rights analyze three points to arrive at their view: the history of the early military codes in relation to the Constitution; the wording of the Constitution itself; and the relationship of the soldier's duties to his rights. One writer¹⁷ agrees that the original military codes provided only for military offenses and left civilian offenses to be tried by the civilian courts. However, in his opinion this is the major reason to believe that because soldiers were guaranteed the constitutional protections for their civil offenses when tried by civilian courts prior to the incorporation of these offenses into the military codes,¹⁸ they are still guaranteed these rights when tried by the military under the codes.

When looking at the language of the Constitution itself the proponents of the "constitutional protection" theories generally reason that the specific exception to the right to presentment or indictment by a grand jury mentioned in the fifth amendment¹⁹ and the implication therefrom that the right to a jury trial is also forfeited indicates that *only* the excepted portion of the Bill of Rights does not apply and all other portions must therefore apply.²⁰ This conclusion is reached because if the Bill of

¹⁷ Collins, *Constitutional Rights of Military Personnel*, May 1957 (unpublished thesis presented to The Judge Advocate General's School in the University of Virginia Law Library) (available on loan).

¹⁸ Civil type offenses were first made triable by either the military or civil authority during wartime by the Act of 3 Mar. 1863, ch. 30, 12 Stat. 736. This "operational" provision continued in our military codes to be limited to wartime until the adoption of UCMJ art. 14(a). In this article the military is empowered to try civil type offenses in time of peace and war and delivery of the offenders to civil authority for trial was made optional with the military.

¹⁹ U.S. CONST. amend. V.

²⁰ See *Burns v. Lovett*, 202 F. 2d 335, 341 (D.C. Cir. 1952), *aff'd*, 346 U.S. 137 (1953), where the court said: "It seems to us to be clear upon the face of the text that the specific exception of cases arising in the land or naval forces from the first clause [U.S. Const. amend. V.] relating to the indictment before prosecution, conclusively shows that the exception does not apply to the other clauses."

Rights was not intended to apply to the soldier there would be no reason to exclude one specific portion thereof.

In explaining the reason for the exception to the fifth amendment writers have mentioned three bases:²¹

(1) Recognition that discipline in the armed forces required prompter action with respect to offenses committed therein than ordinary civilian process and procedures permitted;

(2) Acknowledgment that the civilian jurisdictions could not try such offenses with either convenience or understanding;²² and

(3) Acceptance of the idea that military courts are the proper ones to deal with military offenses.²³

1. *Restricted Application of Free Speech Rights.*

Among the writers claiming direct constitutional protections for the military, some are of the opinion that there cannot be an unlimited application of constitutional rights to the military because of the nature of the mission of the military.²⁴ These writers state that some areas of military life justify less freedom of speech for soldiers. The limitations mentioned vary and have been said to be allowed in case of national security matters, disrespect toward superiors, contemptuous language towards governmental leaders,²⁵ or because of the need for discipline within an armed force, necessity of the military to present a solid front to the public and belief in civilian domination of the military.²⁶ One writer, Detlev Vagts, favors the extension of allowable restraints on speech in the military to include military statements that would "strain" foreign relations, degrade the other armed services, oppose established Presidential policy or call for the displacement of civil authority to military authority.²⁷ Writers favoring more restraint on a soldier's right to free speech than a civilian's maintain that the extra restraint is allowable when the soldier's rights are "balanced" against the need for a strong, well disciplined armed force.²⁸

2. *Unlimited Application of Free Speech Rights.*

Finally, as indicated above, some writers are of the opinion

²¹ See Collins, *supra* note 17.

²² See also Warren, *supra* note 7.

²³ *Id.*

²⁴ See articles cited at note 7 *supra*.

²⁵ See Warren, *supra* note 7.

²⁶ See Vagts, *supra* note 7.

²⁷ *Id.* For a regulation that accomplishes all these goals see Department of Defense Directive 5230.9, 24 Dec. 1966, discussed at p. 94 *infra*.

²⁸ See Warren and Quinn, *supra* note 7.

that freedom of speech must extend to the military without limitation.²⁹ The reasoning of these proponents is that either the Bill of Rights applies and all rights are applicable or it doesn't apply and no constitutional rights are present for the soldier. Therefore, once the conclusion is reached that the Bill of Rights has application to the soldier all rights included therein apply fully.

The main reason for the wide divergence of opinion in this area is the hazy, ill-defined character of the judicial decisions in this area. Most of the quoted language in the decisions concerning constitutional rights of the soldier is in the nature of confusing dicta.³⁰ However, both the approach that all constitutional rights apply equally to both soldiers and civilians and the view that no constitutional rights are guaranteed to the soldier appear to have been repudiated by the recent opinion of the Court of Military Appeals in *United States v. Howe*.³¹ In this case the appellate defense counsel alleged, *inter alia*, that article 88 violated the freedom of speech portion of the first amendment. In a unanimous opinion setting out the court's reasons for denying Lieutenant Howe's petition for reconsideration of his case, the Court of Military Appeals accepted the principle that the first amendment applied to the military but held that the above-mentioned article did not violate the Constitution. For the first time a direct opinion specifically recognized the applicability of the freedom of speech right to the soldier thereby confirming the dicta from many preceding cases.³² In recognizing this right, however, the court recognized an allowable military restriction upon freedom of speech without a civilian counterpart.³³

²⁹ See articles cited at note 8, *supra*.

³⁰ See, e.g., *Burns v. Wilson*, 346 U.S. 137 (1958), an opinion passing on an application for a writ of habeas corpus from a military court-martial which contains the following two quotes in the majority opinion by Chief Justice Vinson, each quote being cited by a different "side" in support of its views:

a. "Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Id.* at 140.

b. "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142.

³¹ 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

³² E.g., *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); and *United States v. Sutton*, 8 U.S.C.M.A. 220, 11 C.M.R. 220 (1958) (dissent).

³³ See p. 100 *infra* for a discussion of this allowable restraint. It should be noted here that when the speech critical of the President amounts

III. STANDARDS USED TO MEASURE FREEDOM OF SPEECH

Before a comparison can be made between military and civilian rights to freedom of speech the history of the military and civilian standards used to measure these rights should be briefly recalled.²⁴

A. CIVILIAN STANDARDS

In the civilian cases that arose after ratification of the Bill of Rights the first amendment free speech right was generally believed to apply only to prevent prior restraints on speech,²⁵ i.e., speech could not be censored in advance, it could only be punished after it was uttered. In 1919 the Supreme Court began to change this interpretation with its landmark decision in *Schenck v. United States*²⁶ in which Justice Holmes, writing for the court, said that something other than previous restraints on speech may be protected by the first amendment.²⁷ In this opinion he set forth his famous "clear and present danger" standard and gave the oft quoted example of a person falsely shouting fire in a theater as being speech that could be punished because of the time, place, and circumstances in which the words were uttered. His test was that the words sought to be punished must constitute a "clear and present danger" that a legislatively defined evil may result. This approach was accepted by a unanimous

to a threat or advocates a violent overthrow of the government there are also formal judicial sanctions for the civilian (18 U.S.C. § 871 (1964)). Further, informal sanctions such as questioning by federal investigative agencies and being placed on a list of people to be observed may result from any criticism of the President that is considered threatening, even if such speech is not formally punishable. See Report of the President's Commission on the Assassination of President John F. Kennedy 429 (1964).

"The brief recapitulation of cases and principles in this area is a "broad brush" treatment of this very complicated and important area intended to give a historical background to the rules discussed. It is not intended to be an exhaustive analysis of this area of the law. For a more detailed discussion of these areas see Lewis, *A Soldier's Right to Freedom of Speech*, 41 MIL. L. REV. 55 (1968); The Constitution of the United States of America, Analysis and Interpretation (1964 ed.). See generally 16 Am. Jur. 2d, *Freedom of Speech and Press* §§ 241-52 (1964). 16 C.J.S. *Freedom of Speech and of the Press* § 213(1) (1956). Annot. 11 L. Ed. 2d 1116 (1964); Annot. 16 L. Ed. 2d 1058 (1967); Annot. 2 L. Ed. 2d 1706 (1958); Annot. 93 L. Ed. 1151 (1948).

²⁴ See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (dicta) quoting from earlier cases in this area.

²⁵ 249 U.S. 47 (1919).

²⁶ *Id.* at 51-52.

court in *Debs v. United States*³⁸ where he referred to the "natural," "intended" and "probable" effect of the words used to cause the prohibited result. Later that same year in *Abrams v. United States*³⁹ Justice Holmes' interpretation of his "clear and present danger" test was too severe for his fellow court members. There he and Justice Brandeis were the sole dissenters on the basis that the speech punished did not, in fact, present an immediate "clear and present danger" of impeding the war effort.

The Supreme Court's broad interpretation of constitutionally permissible punishment of speech was again apparent in *Gitlow v. New York*⁴⁰ where the majority, again differing with Justices Holmes and Brandeis, said that the need for a genuine causal connection between the language used and a threat to the organized government was not the criteria, rather the determination by a state legislature that certain language tends to incite a violent overthrow of the organized government was enough. This remained the view of the majority of the Supreme Court until 1940. In *Thornhill v. Alabama*⁴¹ and *Cantwell v. Connecticut*,⁴² the majority adopted the "clear and present danger" interpretation previously urged by Justices Holmes and Brandeis. This interpretation prevailed until *Dennis v. United States*.⁴³ Chief Justice Vinson stated in this case that the success or probability of success of the language to accomplish its goal was not the governing criteria, rather the determination that must be made is whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger created by the speech. In a concurring opinion, Justice Frankfurter foreshadowed the "balancing of interests" test, saying that the proper standard was achieved by an "informed weighing of the competing interests [national security and an individual's right to freedom of speech] within the confines of the judicial process."⁴⁴

Prior to *Dennis*, the majority of the Supreme Court's decisions had been in the area of national security. The 1950's and early 1960's saw the invocation of first amendment freedom of speech rights in cases involving civil rights, obscenity, and libel. Starting with *Dennis*, Justice Frankfurter and the "balancing"

³⁸ 249 U.S. 211 (1919).

³⁹ 250 U.S. 616 (1919).

⁴⁰ 268 U.S. 652 (1925).

⁴¹ 310 U.S. 88 (1940).

⁴² 310 U.S. 296 (1940).

⁴³ 341 U.S. 494 (1951), *rehearing denied*, 342 U.S. 842 (1951).

⁴⁴ *Id.* at 524-525.

wing of the Supreme Court⁴⁵ prevailed in the decisions concerning freedom of speech. Very simply stated, their standard was that the public interest sought to be protected was measured against the individual's first amendment rights to free speech and the infringement thereof. The remaining members of the court⁴⁶ favored an "absolutist" approach where any infringement of free speech rights was critically examined and usually condemned.

As the composition of the Supreme Court changed and Justices Frankfurter and Whittaker were succeeded by Justices White and Goldberg, the majority of the court shifted to the "absolutist" view. With the recent replacement of Justices Goldberg and Clark with Justices Fortas and Marshall it appears that the liberal "absolutist" approach has been even more strengthened.

There is presently an even more pronounced trend in the Supreme Court's decisions to jealously safeguard the first amendment speech rights. A greater burden of justification for restrictions or limitations has been placed on those who would seek to restrain speech. Although a balancing approach apparently still prevails, a change has occurred in the weights given the values measured. The individual's right to freedom of speech has assumed a greater position or weight in the balancing of interests. What the Supreme Court will do in the future no one can predict with certainty, but the past actions and views of the present members of the majority indicate that any infringement, prohibition or inhibition of free speech will have to satisfy a searching and critical examination.

B. MILITARY STANDARDS

The present approach to a soldier's right to freedom of speech has developed along with the approach to the civilian's right. Although there are no Supreme Court decisions directly on point there are dicta⁴⁷ and opinions of individual members of the Supreme Court⁴⁸ that soldiers retain their constitutional rights. The problem has been to determine within this general statement to what extent these rights apply. The chief judicial body in

⁴⁵ *Converse v. United States*, 62 U.S. 463 (1859).

⁴⁶ See DIG. OPS. JAG 1912, *Office* para IV A 1 at 808; 2 COMP. DEC. 7, 9 (1895); 44 COMP. GEN. 830 (1965).

⁴⁷ 23 COMP. GEN. 173, 175 (1948).

⁴⁸ 20 COMP. GEN. 288, 289 (1940).

this area has been the Court of Military Appeals. In its decisions prior to *United States v. Howe*⁴⁹ this court has often stated, in dicta, that the right to constitutionally protected freedom of speech applies to the soldier.⁵⁰ The practical problem has been to ascertain what test is used by the court in determining when the right to freedom of speech has been infringed. In its past decisions concerning freedom of speech the court has touched on censorship,⁵¹ orders of a commander prohibiting speech to certain individuals concerning a specific incident,⁵² and, most recently, use of contemptuous language towards the President.⁵³ In all of these decisions the test used has been a balancing of the interests of the military against the soldier's right to freedom of speech. The name or label placed upon this test may not be "balancing," but the current standards are the same as those mentioned in the discussion of the Supreme Court, as evidenced by Judge Kilday in his opinion for the court in *Howe* where he said:

That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.⁵⁴

In weighing the interests during this "balancing" the process is much like that followed by the Supreme Court, with the addition of one element—military necessity⁵⁵—which the Supreme Court does not consider in civilian cases. In first considering whether an action is violative of the first amendment protection of speech besides looking to the reasonableness of the action in general, the Court of Military Appeals must weigh the element of military necessity. Utilizing these two guides either the law in question is evaluated⁵⁶ or the application of the law is tested.⁵⁷

⁴⁹ 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

⁵⁰ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

⁵¹ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

⁵² *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

⁵³ *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

⁵⁴ *Id.* at 174, 37 C.M.R. at 438 (emphasis supplied).

⁵⁵ In determining the question of military necessity the courts are reluctant to intrude into the executive's field and will normally term an executive determination of military necessity a political question outside the jurisdiction of the court. See *Luftig v. McNamara*, 252 F. Supp. 819 (D. D.C. 1966).

⁵⁶ See, e.g., *Carlson v. California*, 310 U.S. 106 (1940), and *Thornhill v. Alabama*, 310 U.S. 88 (1940), where statutes prohibiting picketing were held to attempt to control activities that in ordinary circumstances consti-

This additional element of military necessity, present at all times in the consideration of both the Court of Military Appeals⁵⁸ and civilian court review of military action,⁵⁹ has no peacetime civilian equivalent. As will be discussed later, the presence of this element is the deciding factor in many decisions, administrative as well as judicial,⁶⁰ concerning free speech for the soldier.

IV. A COMPARISON OF THE MILITARY AND CIVILIAN RULES

To aid the discussion of the specific areas of free speech this general topic has been divided into the following five subtopics:

- (1) Speech that affects the national security;
- (2) Speech that incites or provokes unlawful acts;
- (3) Speech that expresses a personal opinion;
- (4) Speech that alleges some misfeasance or nonfeasance upon the part of a superior; and

(5) Speech that is disrespectful towards either high level government officials or direct superiors. At times the boundaries of these subtopics cannot remain well defined and there may be an overlap, but these divisions will facilitate discussion and comparison. Within each of the above enumerated subtopics the military and civilian rules will be set out and compared. An attempt will then be made to show all the similarities and differences between the two rules plus the reasons for any differences.

tute an exercise of free speech, whereas the action punished in *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), was held not to be his picketing but his expression of contempt for his Commander in Chief.

⁵⁸ See, e.g., *Whitney v. California*, 274 U.S. 357, 378 (1927), where it was held that a statute may be valid on its face but may become invalid because of its application. See also *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958), where the power of a commander to give an order limiting a soldier's right to speak was upheld but the order actually given was held to be so broad as to infringe upon speech that is protected by the U.S. CONST., amend. I.

⁵⁹ See *Quinn*, *supra* note 7.

⁶⁰ See *Warren*, *supra* note 7.

⁶¹ See, e.g., JAGA 1966/8692, 23 Mar. 1966, containing a letter from Paul Warnke, General Counsel, Department of Defense, to Samuel Ervin, Chairman, U.S. Senate Committee on the Judiciary, 24 Feb. 1967, where Mr. Warnke cited as one of the authorities for military power to restrain freedom of expression an opinion of the General Counsel, Department of Defense, which said that: "[R]estrictions on freedom of expression by members of the armed forces should be limited to those that are reasonably necessary to preserve security and to prevent undue and significant interference with the performance of the mission assigned to the armed forces." (Emphasis supplied.)

A. SPEECH THAT AFFECTS NATIONAL SECURITY

The first area of speech to be considered is speech that directly affects the national security.⁶¹ In this subtopic the term national security information is used to describe classified defense material.

The military community is faced with many prohibitions against speech that can possibly endanger the national security. Starting with the Code a soldier finds that he is prohibited from disclosing a countersign to an enemy,⁶² communicating with an enemy,⁶³ and imparting information to the enemy gained by espionage.⁶⁴ The general constitutional basis for these prohibitions is found in the Constitution, article 3, section 3, containing the prohibition against treason.⁶⁵

In addition to the restrictions explicitly contained in the Code, all federal laws pertaining to restrictions on speech to protect national security⁶⁶ are made applicable to the soldier through the provisions of the "general" article.⁶⁷

Apart from the statutory restrictions the soldier encounters administrative regulations restricting his speech in this area.⁶⁸ The Secretary of Defense has set out specific rules requiring submission of all proposed speeches and writings by Department of Defense personnel to the Director of Security Review of his office or a delegated subordinate office.⁶⁹ The content of the speeches or writings are reviewed to prevent possible compromise of national security and conflict with established governmental policy.⁷⁰ If there is a disagreement as to whether an item is to

⁶¹ Speech that impedes a war or defense effort or counsels collaboration with an enemy will be discussed in the subtopic dealing with incitement of unlawful acts.

⁶² UCMJ art. 101.

⁶³ UCMJ art. 104.

⁶⁴ UCMJ art. 106.

⁶⁵ However, the offense of communicating with the enemy does not require a specific intent to commit a treason. Therefore, the application of this offense when the speech concerned is not a direct breach of national security will be discussed below in the subtopic dealing with expression of personal opinion at p. 89 *infra*.

⁶⁶ See statutes cited at notes 76 and 77 *infra*.

⁶⁷ UCMJ art. 134 provides for punishment of "crimes and offenses not capital" not otherwise provided for in the UCMJ. This includes all acts and commissions denounced as crimes by Congress or under authority of Congress and made triable in the federal civil courts. See *Manual for Courts-Martial, United States*, 1951, ¶ 213c.

⁶⁸ Army Reg. No. 380-5 (24 May 1965), the general security regulation of the Army, prohibits divulgence of national security information.

⁶⁹ Dep't of Defense Directive No. 5230.9 (24 Dec. 1966).

⁷⁰ Review for conflict with established governmental policy is discussed at length at p. 94 *infra*.

be withheld from a speech or writing on the basis that it is detrimental to national security, the directive established appeal channels from the office of Director of Security Review, to the Director himself. If the matter cannot be resolved at that level then the appeal is taken to the Assistant Secretary of Defense for Public Affairs and, if no satisfactory solution is reached, to the Deputy Secretary of Defense or the Secretary of Defense.¹¹

Review of this type for the protection of national security has been specifically approved by the Court of Military Appeals in *United States v. Voorhees*.¹² The Army has implemented this Department of Defense directive with Army Regulation No. 360-5 (27 Sep. 1967).¹³ This regulation requires, *inter alia*, that proposed speeches or writings be reviewed prior to publication to prevent the release of information which could compromise national security. It was a predecessor version of this regulation¹⁴ in which security review of proposed writings was given approval in *Voorhees*.

Connected with the obligation of the soldier to submit proposed speeches and writings to governmental review is the possibility that a writing or speech will not be submitted for review. Even if the publication does not, in fact, contain security information the failure to submit it is an offense.¹⁵ The offense is the violation of the general regulation requiring submission of the material for clearance. So long as the basis for requiring the submission is within the Army's constitutional powers (*i.e.*, protection of national security), the failure to submit the writing completes the offense. The requirement for this submission is two-fold: first, obedience to orders must be enforced; and, secondly, the soldier is not always aware that his particular utterance could constitute a breach of national security. All too often familiarity with a subject breeds a relaxed attitude towards its importance in relation to national security.

Similarly, the civilian in the United States is also subject to numerous laws governing his speech in the area of national security. The transmission of defense information by a civilian is prohibited by several federal statutes.¹⁶ Besides these general prohibitions government officials and employees have an addi-

¹¹ Dep't of Defense Directive No. 5230.9, § VIII (24 Dec. 1966).

¹² 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

¹³ Because of space limitations, the regulations of the Army will be the only ones discussed in this article although the other armed forces have similar implementing regulations.

¹⁴ Army Reg. No. 360-5 (20 Oct. 1950) (superseded 27 Sep. 1967).

¹⁵ See UCMJ art. 92.

¹⁶ 18 U.S.C. §§ 793, 794, 798, 799 (1964).

tional statutory restriction against communication of classified information.⁷⁷

The constitutionality of a restriction upon speech protecting national security has been recognized several times by the Supreme Court utilizing all the different tests and standards applied by that Court for determining constitutionality.⁷⁸ Although there are those who feel that all governmental acts must be subject to full public scrutiny, most authorities appear to recognize the right of the sovereign to protect itself from disclosure of information inimical to its national security.⁷⁹ Among most writers the major points of conflict in this area are the effect of the speech on the national security and how severe or immediate the threat to the national security must be to warrant repression of, or punishment for, the speech.

The above discussion reveals that the soldier is generally subject to the federal statutes that apply to civilians plus additional statutes and administrative regulations which have application only to the soldier. From this, one is immediately prompted to think that the soldier has fewer free speech rights in the area of national security than a civilian. However, the additional restrictions, when examined, apply only to areas wherein the soldier, by the nature of his work, has knowledge not available to a civilian (*e.g.*, a countersign). Insofar as the regulatory restrictions restrain release of material for public dissemination, they apply only to areas in which the soldier wishes to write or speak involving possible disclosures of national security information. As to the possibility of punishment for failure to obtain advance clearance before publication of a speech or writing, these censorship provisions have their counterpart in the wartime offices established to serve the same functions for the civilian community⁸⁰ plus the existing similar review procedures for civilian governmental officials and employees.⁸¹ Like the soldier, the civilian in a position to have safeguarded information is naturally more restricted than the ordinary civilian. However,

⁷⁷ 18 U.S.C. § 798 (1964).

⁷⁸ See *Scales v. United States*, 367 U.S. 203, *rehearing denied*, 366 U.S. 978 (1961); *Dennis v. United States*, 341 U.S. 494 (1950); *Near v. Minnesota*, 283 U.S. 697 (1931); *Abrams v. United States*, 250 U.S. 616 (1919).

⁷⁹ See *Rosenberg v. United States*, 195 F. 2d 588 (1952), where it was held that the communication of items adverse to the interests of the United States is not protected by the first amendment right to free speech.

⁸⁰ *E.g.*, Office of Censorship established during World War II by Exec. Order No. 8985, 6-248 Fed. Reg. 6625 (23 Dec. 1941). See Price, *Government Censorship in Wartime*, 36 AM. POLIT. SCI. REV. 837 (1942).

⁸¹ *E.g.*, applicability of Dep't of Defense Directive No. 5230.9, *supra* note 69, to civilian employees of the Department of Defense.

the soldier's profession of arms gives him one basic mission—the preparation for war. Because of this mission he is subject, both in time of peace and in time of war, to the security measures that apply to civilians only during wartime.²³

In summary, it can be said that generally all direct divulgences of security information are punishable and may be restricted whether the violator is military or civilian. The only additional restriction upon the soldier (and certain civilian employees of the government) is that his utterances must be cleared for security before publication to protect against an inadvertent disclosure of security information. In *Voorhees* the Court of Military Appeals accepted the right of the armed forces to require this submission for security clearance almost without question. However, the general theory that all soldiers will have knowledge that could possibly be disclosed and that the reviewer has the training and talent to know what items should be safeguarded is not always realized in actual practice. The practical application of this requirement has soldiers with no knowledge of national security matters being forced to have their utterances censored *prior to publication* while civilians outside government employment can be punished only *after* publication. This practice is allowed apparently on the basis that the restraint upon many soldiers is necessary to insure that there are no inadvertent disclosures by a few. Therefore, it can be charged that this requirement for censorship has no practical value and requires the soldier to take additional steps that are not really necessary before he exercises his right to speak. However, it is this writer's opinion that this system is reasonable. The admitted inefficiencies and errors in the practical application of this regulation do not detract from the government's right to protect the national security. The theory that the soldier, in general, has access to national security, or national security related, matter can still be maintained. Therefore, the regulations requiring the soldier, and civilians involved in national security matters, to submit to censorship not applicable to the ordinary civilian are justified on the same basis that overall wartime censorship is justified.

²³ "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right." See *Schenck v. United States*, 249 U.S. 47, 52 (1919); see also *Pelley v. United States*, 132 F. 2d 170, cert. denied, 318 U.S. 764, rehearing denied, 318 U.S. 801 (1943); *Abrams v. United States*, 250 U.S. 616 (1919).

B. SPEECH THAT INCITES OR PROVOKES
UNLAWFUL ACTS

As to speech that incites or provokes unlawful acts, rights of the soldier are governed basically by the restrictions of the Code. The most general prohibition is that contained in article 117⁸³ prohibiting the use of provoking or reproachful words against another person subject to the Code. Also prohibited is the communication of a threat,⁸⁴ incitement of a breach of the peace or a riot,⁸⁵ and solicitation of certain specific crimes⁸⁶ and other unlawful acts.⁸⁷

In general, the constitutional basis for the military offenses mentioned above is the same as that for similar civilian offenses. The military prohibition against provoking speech and gestures recognizes the rule enunciated by the Supreme Court in *Chaplinsky v. New Hampshire*,⁸⁸ *Beauharnais v. Illinois*,⁸⁹ and *Cantwell v. Connecticut*⁹⁰ that epithets and personal abuse directed at another are not in any sense proper communication of information or opinion protected by the first amendment. The military rule prohibiting the communication of threats and the incitement to riot or breach of the peace recognizes the principle of *Chaplinsky* and *Winters v. New York*⁹¹ that "fighting words" are also outside the ambit of free speech. The Supreme Court has also recognized that solicitation of unlawful acts and incitement thereto is punishable in *Schenck v. United States*,⁹² *Gitlow v. New York*,⁹³ *Whitney v. California*,⁹⁴ *De Jonge v. Oregon*,⁹⁵ and others.⁹⁶

⁸³ This provision traces its origin back to art. 34 of the military Code of James II which derived that provision from art. 84 of the military Code of Gustavus Adolphus (Winthrop, *supra* note 5, at 590). This provision first appeared in art. 11 of the Code of 1775, adopted on June 30, 1775, 1 JOUR. CONG. 90, as part of the prohibition against dueling. It was separated in the Code of 1776, *supra* note 11, and has remained substantially the same since that time.

⁸⁴ UCMJ art. 134.

⁸⁵ UCMJ art. 116.

⁸⁶ UCMJ art. 82, which prohibits the solicitation of the offenses of desertion (UCMJ art. 85) or mutiny (UCMJ art. 94).

⁸⁷ UCMJ art. 134.

⁸⁸ 315 U.S. 568, 572 (1942).

⁸⁹ 343 U.S. 250, *rehearing denied*, 343 U.S. 988 (1952).

⁹⁰ 310 U.S. 296 (1940).

⁹¹ 333 U.S. 507 (1948) (dictum).

⁹² 249 U.S. 47 (1919).

⁹³ 268 U.S. 652 (1925).

⁹⁴ 274 U.S. 357 (1927).

⁹⁵ 299 U.S. 353 (1937) (dictum).

⁹⁶ Free speech is "dependent upon the power of the constitutional government to survive and if it is to survive it must have the power to protect

However, the Supreme Court has also recognized limits to the authority of the government to restrict "provoking" speech. In *Terminello v. Chicago*,⁸⁷ it pointed out that public inconvenience, unrest or annoyance alone is not enough to warrant the restriction of free speech. The Court has also recognized that the views expressed by someone publicly need not be popular nor must they be shared by the majority of an audience.⁸⁸

The limits of governmental authority in restricting inflammatory speech are more easily determined in civilian life than in the military community. In the civilian community the results of the speech can be more leisurely examined and measured. In the military society, however, the need for a strict discipline which provides instantaneous military response is ever attendant and presents a military necessity not present in the civilian situation. For example, a wildcat strike of short duration caused by an inflammatory speech has relatively mild, and basically economic, effects in civilian life. The offender cannot generally be restrained from speaking but can only be punished afterwards if his speech exceeded the court's determination of protected speech. However, the same action aboard a warship could have disastrous consequences. Further, the erosion of the discipline of the crew of such a vessel by inciteful or inflammatory speech cannot be allowed. To this degree the "clear and present danger" element is present more often in a military situation than in a civilian one. The importance that the military's mission not be jeopardized by such speech is recognized by two statutory provisions⁸⁹ which prohibit civilians, in both peacetime and wartime, from causing or attempting to cause disloyalty, insubordination, mutiny or refusal of duty among members of the armed forces. Any attempt to interfere with, impair or influence the loyalty, morale or discipline of the armed forces in time of war is also punishable. By comparison it can be seen that the mili-

itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts." *American Com. Ass'n. C.I.O. v. Douds*, 339 U.S. 382, 394, *rehearing denied*, 339 U.S. 890 (1950). See also, Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L. J. 234 (1966-1967).

⁸⁷ 337 U.S. 1, *rehearing denied*, 337 U.S. 934 (1948).

⁸⁸ See *Kingsley Corp. v. Regents of U. of N.Y.*, 360 U.S. 684 (1959). However, if the views expressed lead to a breach of the peace and this is the intended result: this is an aspect of speech not protected by the first amendment right of free speech, *Edwards v. South Carolina*, 372 U.S. 229 (1963) (dictum). For an explanation of the English view that the speaker must take the crowd as he finds it and govern his remarks accordingly, see Williams, *Threats, Abuse, Insults*, 1967 CRIM. L. REV. 385 (1967).

⁸⁹ 18 U.S.C. §§ 2387-88 (1964).

tary statutes in this area are no more restrictive or stringent than the ones applicable to civilians.

As noted above, the standards applied to the soldier and the civilian in this area of speech rights are the same. The conditions and circumstances in which they must be applied, however, are different. The rules applied work equally in both the civilian and military communities and the extent to which the government may go in punishing allegedly inflammatory speech is the same; but the military situation and its need for discipline present more "opportunity" for the effect of such speech to pose a "clear and present danger" of resulting in an evil which the government is allowed to suppress.

C. SPEECH THAT EXPRESSES A PERSONAL OPINION

Easily the most disputed area of military free speech is speech by members of the military establishment which purports to express personal opinion. So long as the expression of personal opinion coincides with or supports the publicly expressed opinions of superior governmental authority no particular concern or notice is made of it. However, when the personal opinion is contrary to an announced government policy immediate concern is aroused. There are generally two broad reasons why such expressions of opinion cause concern. First, governmental authorities are alarmed at the prospect of the opinion expressed being accepted as a pronouncement of the policy of the military establishment or the government, and the resultant effect on public opinion or international relations is feared. Secondly, when it is clear that the opinion is solely that of the individual speaking, then the monolithic front of the military is broken and dissension in the ranks is spread before the public. Either of these reasons is cause for some concern, varying in degree and level of concern in direct proportion to the relative rank and position of the person expressing the opinion and the gravity of the area touched upon.

1. Statutory Restraints.

The only statutory prohibition in the area of expression of personal opinion is article 104(2) of the Code, which prohibits corresponding with or intercourse with the enemy. A direct attack against the constitutionality of this article on the grounds that it infringed the constitutional right of free speech occurred in CM 388545, *Bayes*.¹⁰⁰ The Army board of review in this case

¹⁰⁰ 22 C.M.R. 487 (1956), *petition denied*, 23 C.M.R. 421 (1957).

upheld the constitutionality of the article and observed that the right to free speech is not an unlimited one. It quoted Judge Latimer's opinion in *United States v. Voorhees*¹⁵¹ where, in setting out the standard by which the right of free speech is to be judged in the military, he said:

... Undoubtedly we should not deny to servicemen any right that can be given reasonably. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully . . .¹⁵²

2. *Administrative Restraints.*

The soldier is also subject to a variety of administrative regulatory provisions concerning the expression of personal opinion. General regulatory provisions, as discussed above,¹⁵³ have the force and effect of law. These regulations cover the areas of communication with members of Congress, participation in public demonstrations, involvement in political activities and publication of written or spoken personal opinions.

a. *Communication with members of Congress.* The current regulatory provisions dealing with communications with members of Congress are set forth in paragraph 41, Army Regulation No. 600-20 (31 Jan. 1967). This paragraph paraphrases the contents of 10 U.S.C. 1034 which states that a soldier cannot be prevented from communicating with any member of Congress unless such communication is unlawful or violates national security. This right first appeared in a predecessor regulation in 1953.¹⁵⁴ Prior to this time, appearance before congressional committees and testimony expressing a personal opinion was allowed if the soldier was requested to appear.¹⁵⁵ At the same time that this right to appear before congressional committees was first expressed there remained in force an order that had been in existence since 1873 expressing a policy against soldiers lobbying.¹⁵⁶ This order and its successors prohibited soldiers from attempting to influence legislation affecting the Army. This prohibition remained in force until dropped in 1958.¹⁵⁷ However, as early as 1938 the regulations provided that Secretarial

¹⁵¹ 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

¹⁵² 22 C.M.R. at 490.

¹⁵³ See p. 84 *supra*.

¹⁵⁴ Army Reg. No. 600-10 (15 Dec. 1953).

¹⁵⁵ This was first allowed by Sec. V, Gen. Order No. 25, War Department, 30 Apr. 1920.

¹⁵⁶ Gen. Order No. 32, War Department (15 Mar. 1873).

¹⁵⁷ Army Reg. No. 600-10 (19 Dec. 1958).

approval could be obtained to allow some lobbying upon pending legislation and efforts to procure private relief were allowed.¹⁰⁸

At the present time a soldier and a civilian have the same rights to communicate with a member of Congress, procure private legislation on his behalf and influence legislation affecting the Army. Some of the faults in the mechanics of correspondence with members of Congress will be discussed below.

b. *Participation in public demonstrations.* A more recent area of regulatory interest is that concerning public demonstrations.¹⁰⁹ This provision first appeared in a 1965 change to the then current regulation.¹¹⁰ In recognition of the actions in many parts of our country involving public demonstrations the Department of the Army established guidelines for its members to insure that the soldier's actions in demonstrations were not construed to be the opinion of the Army and were orderly.¹¹¹ Some of these restrictions are no more severe than those that may be lawfully imposed upon a civilian. The restrictions concerning the use of duty time, appearances in uniform and actions on a military reservation are not without civilian counterpart because an employer generally has the right to demand that his employees not use company time, not use company uniforms and not demonstrate on company property.¹¹² Instead of the simple civilian expedients of fining, suspending or discharging the employee the Army utilizes its disciplinary system.

Where the military and civilian control differs is in the control of the off-duty actions in a foreign country or where the demonstration involves a breach of law and order or where violence is likely to result. Here the civilian employer has no direct control. The military's control in this area is not that of an employer but that of the sovereign. In a foreign country the military prohibits all participation in public demonstrations

¹⁰⁸ Army Reg. No. 600-10, subpara 4a (6 Dec. 1938).

¹⁰⁹ Army Reg. No. 600-20, para 46 (31 Jan. 1967).

¹¹⁰ Army Reg. No. 600-20, para 46.1 (3 Jul. 1962) (Change No. 8, Oct. 1965).

¹¹¹ Soldiers are prohibited by Army Reg. No. 600-20, para 46 (31 Jan. 1967), from participation in a demonstration if it takes place: (a) during duty hours; (b) in uniform; (c) on a military reservation; (d) in a foreign country; (e) if the acts constitute a breach of law and order; and (f) if violence is likely to result.

¹¹² Generally, the wearing of company uniform is controlled by the employment agreement. Protection of company property is accomplished through trespass statutes. As to use of duty time the general rule is "work time is for work." BNA, PRIMER OF LABOR RELATIONS (1967, 18; C.C.H., GUIDEBOOK TO LABOR RELATIONS (1967), para 605; C.C.H. LABOR LAW REPORTS, para 3825.11, .27.

by military personnel. This prohibition apparently resulted from a determination that the soldier's right to freedom of expression is outweighed by the harm involved in allowing participation in demonstrations aimed at some local grievance or at some matter affecting the United States' relations with the host country. No violations of this portion of the regulation's provisions have been reported in decisions of the Court of Military Appeals and it is not yet known whether the general sweep of the prohibition against all participation in demonstrations in a foreign country will be upheld. The element of military necessity will weigh heavily in the balance; but a peaceable demonstration in a foreign country meeting all the other regulatory standards concerning demonstrations could be the Waterloo for this particular provision of the regulation.

The remaining two restraints placed on a soldier's participation in a demonstration¹¹³—that he cannot participate where the demonstration violates the law or where violence is likely to result—are attempts by the Army to prohibit criminal conduct or conduct likely to incite unlawful acts.

c. Involvement in political activities. Although a civilian may express himself on political issues at any time and with as much force as he desires,¹¹⁴ one of the fears of all civilian-oriented governments is that the military, either through force or influence, will usurp the power of the civilian executive and gain control of the government. As part of the controls to insure civilian domination of the military in this country, Congress enacted several laws dealing with political activities and the military.¹¹⁵ In addition, Congress recognized that all government civilian employees should be kept apart from the political arena while working or acting in an official capacity and therefore passed several acts prohibiting such activities,¹¹⁶ the most well known of which is the so-called Hatch Act.¹¹⁷ However, the provi-

¹¹³ See note 111 *supra*.

¹¹⁴ See *American Com. Ass'n., C.I.O. v. Douds*, 339 U.S. 382 (1950); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹¹⁵ 18 U.S.C. § 592 (1964) (prohibition against maintaining troops at polls); § 593 (prohibition against interference with elections by the Armed forces); and § 596 (prohibition against polling the armed forces).

¹¹⁶ 18 U.S.C. § 602 (1964) (prohibits solicitation of political contributions); § 603 (prohibits solicitation of specified government property); § 606 (prohibits intimidation to secure political contributions); § 607 (prohibits the making of political contributions by government officials; and § 1913 (prohibits lobbying with appropriated money).

¹¹⁷ 5 U.S.C. §§ 1501-08, 7321-27 (1964).

sions of this act have been recently held not to apply to the soldier.¹¹⁸ Instead the military relies on other statutory¹¹⁹ and regulatory restraints which, in fact, are more restrictive than the Hatch Act. The current regulatory provisions affecting the Army prohibit all public participation of any kind in political activities.¹²⁰ Private expressions of opinion are allowed, but any public political involvement is condemned.¹²¹ This has been held to extend to the use of "bumper stickers" on automobiles owned by servicemen¹²² although the Civil Service Commission, in construing the Hatch Act, allows the use of "bumper stickers."¹²³ Further, speaking or writing on political subjects, so long as it is disconnected with a political campaign, is allowed government employees under the aegis of the Civil Service Commission,¹²⁴ but soldiers are prohibited from this type activity.¹²⁵ Restrictions on political activity by government employees is allowed because "a professional career service is indispensable to effect government" and "political neutrality" is essential to that service.¹²⁶ The extra restraint placed upon the military is justified on the theory that actions by high ranking military authorities could very easily affect the outcome of political campaigns and, if allowed, would form the basis for undue military influence in a civilian government. The "private in the rear ranks" suffers the burden of the restriction equally because local, as well as national, political campaigns and activities are to be considered. It is a practical impossibility to draw a meaningful line where activity by a soldier or group of soldiers of a certain position or rank will or will not have some effect on a political issue.

In light of the above-mentioned restrictions it is easily seen that, as to political activities, the soldier has fewer rights to freedom of speech than his civilian counterparts. Whether this additional restriction is in violation of the Constitution is an-

¹¹⁸ Letter from Dep. Atty. Gen. to the Gen. Counsel, Dep't of Defense, 3 Jul. 1962, Opinion No. 3657, JAGA 1962/4431, 22 Aug. 1962.

¹¹⁹ See 5 U.S.C. § 2195 (1964), which prohibits commissioned, noncommissioned and warrant officers from influencing voting of other members of the armed forces or marching members of the armed forces to polling places.

¹²⁰ Army Reg. No. 800-20, para 42 (31 Jan. 1967). This provision had its origin in Gen. Order No. 47, War Dep't (10 Aug. 1920).

¹²¹ JAGA 1960/3572, 10 Feb. 1960, expresses the view that a soldier may attend a local or national political meeting or convention but not as a delegate, officer or official of a political party.

¹²² JAGA 1964/4684, 7 Oct. 1964.

¹²³ U.S. Civ. Ser. Com. Pam. No. 20, March 1963.

¹²⁴ *Wilson v. United States Civ. Ser. Com.*, 136 F. Supp. 104 (D. D.C. 1955); 40 Op. Atty Gen. 405 (1945).

¹²⁵ JAGA 1962/3482, 19 Feb. 1962.

¹²⁶ Esman, *The Hatch Act—A Reappraisal*, 60 YALE L. J. 986 (1951).

other question. I think not, because the Constitution itself provides for the separation of the military from the civilian portion of our government and the subordination of the former to the latter. What appears harsh when viewed from the standpoint of the inductee becomes more reasonable when viewed from the standpoint of the "man on a white horse."

d. *Publication of personal opinion.* In the area of expression of personal opinion, the most controversy occurs when the soldier expresses an opinion contrary to governmental policy, yet not expressed as part of an unauthorized political campaign or public demonstration. This is to be distinguished from an alleged expression of official policy, which is generally recognized as within the right of the government to control.

In the civilian community there is no control of expression of personal opinion of this type so long as it does not amount to incitement of unlawful conduct, to include the impairment of the military mission, already discussed above,¹²⁷ violations of national security, obscene or provoking language, or libel.¹²⁸

In the military community this right is somewhat limited. Insofar as expression of personal opinion on matters which do not touch on established governmental policies, particularly defense and foreign policies, there are no major differences between the rights of a soldier and those of a civilian. However, when expressing an opinion publicly that is contrary to an established governmental policy the soldier runs afoul of a Department of Defense directive¹²⁹ and its implementing regulations. This directive requires review of all speeches or writings of Department of Defense employees on items of national interest, subjects of potential controversy between the services, material concerning significant policy within the purview of other agencies of the Federal Government, and other categories not important to this discussion. As can be readily seen from the above-mentioned categories virtually any expression of opinion on any governmental policy is covered in one or more of these broad categories. A proposed speech or writing is released for use "only after it has been reviewed for security and for conflict with established Department of Defense and Government policies and programs."¹³⁰ This review criterion allows suppression of views not in accord with established policies for no other reason than

¹²⁷ See p. 88 *supra*.

¹²⁸ See p. 97 *infra* for a more detailed discussion of libel.

¹²⁹ Dep't of Defense Directive No. 5230.9 (24 Dec. 1966). This is the same directive governing security review, discussed at p. 83 *supra*.

¹³⁰ *Id.* sec. VI.A.

the fact that they are in conflict. The reason for this is seen in an earlier Department of Defense directive where Secretary of Defense McNamara set out the principles of public information policy and said:

In public discussions, all officials of the Department [of Defense] should confine themselves to defense matters. They should particularly avoid discussion of foreign policy matters, a field which is reserved for the President and Department of State. This long established principle recognizes the danger that when Defense officials express opinions on foreign policy, their words can be taken as the policy of the Government.¹²¹

This criterion for the discussion of foreign policy by Defense officials has now been extended to all Department of Defense personnel on all governmental policies.

No matter how understandable and reasonable the desire for complete harmony within the Department of Defense may be, the broad, sweeping criterion of Department of Defense Directive 5230.9, *supra*, is censorship and suppression of opinion for other than security reasons. This issue was never directly considered in *United States v. Voorhees*¹²² because the directive of Secretary of Defense Johnson that was in force at that time provided for review of material to be published for security purposes only. This was found to be a legitimate exercise of his powers and the Army's attempt¹²³ to extend the review to "policy and propriety" matters was struck down on the basis that it conflicted with the limiting Department of Defense memorandum. The question of whether the Secretary of Defense could constitutionally provide for review on policy and propriety grounds was never directly answered. There is interesting dicta in the opinion for support of both sides of this question. The composition of the Court of Military Appeals has changed since this three opinion decision, so the current outcome of a case with a direct attack on the constitutionality of the Secretary of Defense's powers of censorship is not certain.¹²⁴ However, the censorship of personal opinions just because they conflict with government policy does not appear to have the support of the decisions of the Supreme Court when no clear and present danger or military necessity can be shown. Whether the presentation to the public of an appearance of apparent military harmony and

¹²¹ Dep't of Defense Directive No. 5230.13 (31 May 1961).

¹²² 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

¹²³ Army Reg. No. 360-5 (20 Oct. 1950) (superseded 27 Sep. 1967).

¹²⁴ JJ. Latimer and Brosman have since been succeeded upon the Court of Military Appeals by JJ. Ferguson and Kilday.

agreement with all government policies can supply the necessary element to weight the scales in favor of the government, particularly in light of the vague, indefinite and sweeping standards established to permit suppression of personal opinion, is doubtful.

In the Army implementation of this directive the standards are more sharply defined.¹³⁵ It is clearly stated that material that does not touch on military matters or foreign policy does not require any clearance.¹³⁶ Even matters such as "Letters to the Editor" concerning military matters or foreign policy need not be cleared, but the author is cautioned that he is responsible for insuring that such publications do not violate national security.¹³⁷ Also, fictional works are required to be reviewed only as to security content.¹³⁸ The broad sweeping review for conflict with government policies is confined to public writings or speeches of key civilian and military officials¹³⁹ plus those personnel who speak or write concerning matters as to which they occupy a policy-making role as part of their official duties.

The only restriction imposed by the current Army implementation of the Department of Defense directive that presents constitutional questions is that part requiring review for possible conflict with government policy of materials submitted by key officials of the Defense Department. In this case the possibility that these officials may have access to more important material or that their disagreement will cause concern is easily seen. However, the question of whether an individual's lawful disagreement with government policies may be suppressed by a regulation that carries with it the possibility of criminal sanctions still remains. Another potential problem remains in the background—what is there to prevent the Army from expanding the coverage of the implementing regulation to that of the source directive and covering all soldiers?

Until the portion of the Department of Defense directive that allows suppression of materials solely because they conflict with established government policies is changed, the soldier is subject to either an actual or potential, depending on his rank, sup-

¹³⁵ Army Reg. No. 360-5 (27 Sep. 1967).

¹³⁶ *Id.* subpara 9b(1).

¹³⁷ *Id.*

¹³⁸ *Id.* subpara 9b(3)(2).

¹³⁹ *Id.* subpara 9b(3)(b). An interesting question presented by this apparent conflict between the Dep't of Defense Directive and the Army Regulation is whether acts in apparent violation of the directive, while clearly not in contravention of the regulation, may be the subject of administrative or criminal sanctions.

pression of his views without a civilian equivalent, and, seemingly, without a legitimate military necessity or constitutionally certain standard.

D. SPEECH THAT ALLEGES SOME MISFEASANCE OR NONFEASANCE ON THE PART OF A SUPERIOR

An allegation of misfeasance or nonfeasance by a subordinate against his superior is more than an expression of personal opinion, as discussed above, since it involves an accusation. In the civilian community an employee is theoretically free to make any allegation that he desires, short of libel. Except for the possibility that his employer may discharge him, he is free of any restrictions upon his speech.¹⁴⁰

A soldier has no restraints upon his allegations, short of Code provisions punishing disrespect¹⁴¹ and libel laws. He is free to communicate them to members of Congress¹⁴² or the public at large. The Department of Defense directive which establishes the procedures through which all materials to be released to the public must go specifically states that otherwise releasable material will not be refused clearance "because its release might tend to reveal administrative error or inefficiency."¹⁴³

Although the right exists for the serviceman, the exercise of the right can be the cause of informal sanctions that are practically impossible to control.¹⁴⁴ This practice has equivalent civil-

¹⁴⁰ The right of an employer to discharge an employee for statements critical of the employer was unsuccessfully challenged by a labor union in *NLRB v. Local 1229 Elec. Workers*, 346 U.S. 465 (1953). In that case an employee was discharged because of statements critical of the programming quality of the radio station where he was employed.

¹⁴¹ UCMJ arts. 89, 91.

¹⁴² 10 U.S.C. § 1034 (1964).

¹⁴³ See Dep't of Defense Directive No. 5230.9. See also Army Reg. No. 360-5, subpara 9b(3)(e) (27 Sep. 1967), which provides that revelation of administrative error or inefficiency, alone, is not grounds for withholding clearance.

¹⁴⁴ For a compilation and short discussion of some of the earlier notable instances in the use of informal sanctions see Vagts, *supra* note 7, at 211-12. More recent instances involve the relief from command of Maj. Gen. Edwin Walker because of his "Pro-Blue" troop information program, *N.Y. Times*, 18 Apr. 1961, at 1, col. 5; the relief of Maj. Gen. Jerry D. Page from command of the Air War University because of his statements concerning alleged shortages of war materials in Vietnam, *N.Y. Times*, 17 Feb. 1967, at 15, col. 3; and the change in assignment of Navy CPT Richard G. Alexander from commander of the newly recommissioned battleship *New Jersey* to a relatively obscure post in Boston because he publicly spoke out against the relief of LCDr Marcus A. Arnheiter, *N.Y. Times*, 9 Jan. 1968, at 1, col. 2. LCDr Arnheiter was relieved of command of the Navy ship *Vance* because of controversial charges concerning his exercise of command. Equally con-

ian practices just as severe, if not more so, since the military cannot summarily discharge a soldier for a truthful, even though unpleasant, allegation of misfeasance against a superior.¹⁴⁵ The problem for the soldier arises in the two primary means available to the serviceman to voice these types of complaints—letters to a member of Congress¹⁴⁶ and complaints to the Inspector General.¹⁴⁷

Members of Congress are either unaware of the practical operations of an inquiry by them based upon a soldier's complaint or else they don't care. Most of them merely attach a referral slip to the communication and send it back through military channels for the commander concerned (many times also the alleged offender) to examine and reply to. Where the complaint by the soldier necessitates his identity and a revelation of the contents of his letter this is an adequate procedure. However, when the complainant, even if not the Congressman, is aware of the possible consequences of his allegation and does not want to be identified, this procedure pinpoints the soldier and, in some cases, discourages further seeking of assistance of members of Congress. To explain away the adverse effects of such a procedure by saying that the letter of transmittal forwarding the congressional inquiry directs that no disciplinary action will be taken against the soldier making the complaint or allegation is to blind oneself to the practicalities of life. Certainly anonymity of all complainants and protection of the "poison pen" is not the desired goal; but a consideration of the practicalities of human relationships dictates the use of a general inquiry by the

troversial charges were made about the procedure of effecting his relief from command. For a summary of this incident and the letters exchanged see *Navy Times*, 7 Feb. 1968, at 1, col. 1.

¹⁴⁵ When informal sanctions affect the status of the soldier in a more formal way he can resort to his judicial remedies. See *Roberts v. Vance*, 343 F. 2d 236 (D.C. Cir. 1964), where MAJ Archibald Roberts sued for a declaratory judgment and injunctive relief to set aside his release from active duty by the Secretary of the Army. The court set aside the Secretary of the Army's actions because, although he appears to have the plenary power to release a reserve officer from active duty pursuant to 10 U.S.C. 681 as contended by the Army, he did not follow the procedures prescribed by his own regulations (Army Reg. No. 135-173, 31 Mar. 1961). This regulation required that processing of a release under the regulation be initially approved by the Secretary, then screened by headquarters and reviewed by the Army Active Duty Board prior to being presented to the Secretary again for final approval. The cause of removal in this case was remarks made by MAJ Roberts in an address before the D.A.R. The issue of violation of first amendment rights was also raised in this case but it was not reached because relief was granted on the above-mentioned grounds.

¹⁴⁶ 10 U.S.C. § 1034 (1964).

¹⁴⁷ Army Reg. No. 20-1 (27 May 1966).

member of Congress concerned whenever such would suffice without the identity of the soldier being disclosed. In some cases, the soldier's veracity or his motives for making the complaint are sometimes helpful in explaining the complaint or its basis.

Perhaps the best way to insure a fair disposition of soldiers' complaints to members of Congress would be a change in the Army's procedures for handling them. When a congressional transmittal slip with a soldier's letter attached is received by the appropriate military legislative liaison staff agency, the regulations of that staff could provide that the Congressman's inquiry be reviewed to determine whether it is necessary to reveal the identity of the complaining soldier to provide an answer to the inquiry. Should the agency deem the identity to be nonessential, then a synopsis of the complaint or allegation could be forwarded to the commander concerned without revealing the soldier's identity.

The second method of solving problems allegedly brought about by misfeasance of a superior available to the soldier is by consulting the local Inspector General. However, the one time that the soldier may need help the most the Inspector General may not be able to provide it. This is the occasion where the complaint or allegation concerns the commander who is also the direct superior of the Inspector General. The present command structure makes the Inspector General the tool of the commander since he is a member of the commander's staff and under the commander's immediate direction and control.¹⁴⁸ Accordingly, the Inspector General's ability to uncover or remedy a misfeasance of his commander is limited. To change the Inspector General's function would divest the commander of an invaluable staff member; but there is a need for some individual who can function more as an ombudsman and less as an instrument of command in order to bring complaints with substance to the attention of the proper authorities. This could be accomplished either by creation of a new position of "military ombudsman" or by changing the Inspector General's current field organization to give each local Inspector General a status similar to that of a law officer. He could then be assigned tasks by the local commander, but he would be supervised directly by a Department of the Army activity. His loyalties and responsibilities would therefore be to the higher headquarters activity.

As has been noted by writers in the area of complaints by

¹⁴⁸ U.S. DEPT OF ARMY, FIELD MANUAL NO. 101-5, subpara 3.40g (19 Jul. 1960).

employees, both military and civilian, the use of institutionalized channels of communication for bringing ideas and complaints to the attention of the leaders of any large organization has generally proved unsatisfactory.¹⁴⁹ Whether it is a civilian or a military institution, complaints that include an allegation of misfeasance against a superior will not be presented unless the complainant has some assurance that the allegation will be heard by the proper authorities and that his rights will be protected. The use of a "company man" with loyalties primarily to the person against whom the allegations are made is not the best practice to present an atmosphere conducive to free exchange of information.

In summary, it may be said that both soldiers and civilians have the right generally to allege misfeasance against their superiors, but both groups are faced with the practicalities concerning the informal sanctions that may follow such action.

E. SPEECH THAT IS DISRESPECTFUL

Disrespectful speech toward superiors could include an allegation of misfeasance, as discussed above, but the essence of the offense is the manner of the conduct more than the content of the speech. The areas of disrespect to be discussed will be subdivided into disrespect toward high-level government officials and disrespect toward immediate superiors.

1. Towards High-Level Government Officials.

As regards disrespect towards high-level government officials the soldier has a prohibition without a current civilian parallel. This prohibition is article 88, UCMJ,¹⁵⁰ which makes punishable the use of "contemptuous words against the President, Vice President, Congress,¹⁵¹ Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of any State, Territory or other possession of the United States in which [a soldier] is on duty or present."¹⁵² It is this provision of the Code which was utilized to punish Lieutenant Henry Howe for his actions in a public demonstration where he carried a

¹⁴⁹ See Duffield, *Organizing for Defense*, HARV. BUS. REV. 29, 41 Sep.—Oct. 1953; Whyte, *IS ANYBODY LISTENING?* *passim* (1952).

¹⁵⁰ 10 U.S.C. § 888 (1964).

¹⁵¹ This is construed to mean Congress as a body and not the individual members of Congress. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1961, § 167.

¹⁵² See *United States v. Howe*, 17 U.S.C.M.A. 165, 170, 37 C.M.R. 429, 434 (1967), for an excellent outline of the historical development of art. 88 where J. Kilday traces and discusses the history of the article.

poster denouncing President Johnson as a "petty, ignorant fascist."¹⁵³ As noted earlier, at least one noted author feels that this article is an unconstitutional abridgement of free speech,¹⁵⁴ whereas the Chief Judge of the Court of Military Appeals specifically cites this provision as one of the constitutionally permissible areas of free speech restriction in the military based upon military necessity.¹⁵⁵ At this point it should be noted that this article is specifically directed at the "man on a white horse" because its prohibition is limited to officers. The reason for the exclusion of enlisted personnel in the enactment of the Code¹⁵⁶ is not specifically stated, but it is probable that the drafters of the Code realized that the detrimental effect upon morale and discipline because of an enlisted man's contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey. The complaint that this article violates an officer's right to free speech overlooks the specific wording of the article itself. The use of inciteful or provoking words and libelous references has been recognized by the courts as areas of speech which are outside the protections of the first amendment. Added to this constitutional rationale is the fact that the military establishment is held together by the chain of discipline which must run unbroken from the private in the rear ranks to the President as Commander in Chief. To allow an officer to make use of the position which his government has given him to break or impair this line of authority is to allow the breakdown of the entire system of discipline. The whole principle of military subordination to the civilian government, so clearly established in the Constitution, depends upon the discipline and respect of the military as regards their civilian superiors. If an officer is allowed to go unpunished for holding his

¹⁵³ The sign read on one side, "LET'S HAVE MORE THAN A 'CHOICE' BETWEEN PETTY, IGNORANT FACISTS IN 1968" and on the other side, "END JOHNSON'S FACIST [sic] AGGRESSION IN VIET NAM."

¹⁵⁴ See Wiener, *supra* note 6.

¹⁵⁵ Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME LAWYER 491, 497 (1960).

¹⁵⁶ Prior to the enactment of the UCMJ the predecessor military codes had prohibited both officers and enlisted personnel from displaying the prohibited contempt. The hearings before the House of Representatives and Senate Sub-Committee revealed differing ideas as to whether this article should be enacted at all, whether it violated the first amendment, and why it was limited to officers. See Hearings before a subcommittee of the Committee on Armed Services, House of Representatives, 81st Congress, 1st Session on H.R. 2498, pp. 814, 823; Hearings before a subcommittee of the Committee on Armed Services, United States Senate, 81st Congress, 1st Session, on S. 857 and H.R. 4080, pp. 380, 1226.

civilian superiors up to contempt and ridicule, it would not be long before the military establishment would become an island within our government looking only to its military leaders. The success of the United States in resisting a military takeover¹⁵⁷ throughout the years of its existence has been primarily because of the idea of military subordination to the civilian government. To allow unpunished contempt for our civilian officials is to allow the first step away from that subordination.¹⁵⁸

It should be understood that the punishment of an officer for contempt towards the above-mentioned civilian officials does not take away that officer's right to express opinions contrary to these officials nor does it prevent his criticizing them.¹⁵⁹ As pointed out by a member of the board of review in *Howe*, it was not the expression of Lieutenant Howe's political views that constituted his offense, but his public display of contempt for his Commander in Chief.¹⁶⁰

The civilian rule in this area is vastly different. In the civilian community there is no need for discipline nor any other necessity for a restraint upon contemptuous language against high government officials. The last prohibition of this type was the Sedition Act of 1798 which expired on March 3, 1801.¹⁶¹ The current rule is that criminal libel laws are allowable only if they punish statements uttered with actual malice. Under the *New York Times*¹⁶² standard, statements may be punished only if made with knowledge of their falsity or in reckless disregard of whether they are true or false.¹⁶³

In summary, it may be said that the enlisted soldier enjoys the same rights as his civilian brethren with regard to using

¹⁵⁷ The term "military takeover" is used to mean an outright seizure of control by the armed forces. Military men have headed our government in the past by election as President.

¹⁵⁸ See also Warren, *supra* note 7.

¹⁵⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 167.

¹⁶⁰ For further explanation of the rationale of the board of review's decision in *United States v. Howe*, see the speech made by LTC Jacob Hagopian before the Brooklyn Bar Association, 25 Oct. 1967, reproduced in 118 CONG. REC. 853. A5434 (daily ed. 6 Nov. 1967).

¹⁶¹ Act of 14 Jul. 1798, 1 Stat. 596. Although this act was passed by Congress after the adoption of the Bill of Rights its peacetime validity under present constitutional interpretation is doubtful. Free speech has been interpreted as including the right to criticize public men including foolish criticism. *Baumgartner v. United States*, 322 U.S. 665 (1944).

¹⁶² *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁶³ See *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964). The minority (JJ. Black, Douglas and Goldberg) would hold that the presence of actual malice is not controlling and the right of free speech in this area is absolute.

contemptuous words towards high-level civilian authority. However, in accepting officer status, always a volunteer act, the member accepts the responsibility for his speech in referring to his civilian governmental leaders. Therefore, he surrenders a right to free speech in this area by accepting this officer status.

2. Towards Immediate Superiors.

In cases of disrespect for more immediate superiors the soldier is faced with the restrictions of articles 89 and 91 of the Code. The provisions of article 89 punish disrespect to superior officers, and article 91 punishes contempt or disrespect towards warrant officers, noncommissioned officers or petty officers while in the execution of their office.¹⁶⁴

The main difference between articles 89 and 91 is that disrespect towards an officer out of his sight and hearing or when he is not in the execution of his office is punishable, whereas the prohibited conduct towards warrant officers, noncommissioned officers and petty officers must be within their sight and hearing and while they are in the execution of their office.

Ordinarily in the punishment of the conduct prohibited by these articles the issue of free speech does not arise because the breach is usually a face to face insult outside the protection of the first amendment.¹⁶⁵ Also, the discussion of these articles in the *Manual for Courts-Martial, United States, 1951*, states that

¹⁶⁴ Historically the coverage of article 89's predecessors was gradually expanded from "generals and chief commanders" (Art. 20, Code of 1775, adopted 30 Jun. 1776, 1 JOUR. CONG. 90. See Winthrop, *supra* note 4 at 568), to all commanding officers (Revision of 1874, adopted 22 Jun. 1874, §§ 1342 and 1343, Revised Statutes) to the present coverage of all superior officers. This present coverage recognizes the increased size and complex organization of the modern fighting force with many officers in highly specialized fields where a soldier is apt to work for several different officers besides his commanding officer. When the soldier works away from the direct control of his commanding officer and with many other officers respect for these officers with whom he comes into contact must be maintained to insure discipline.

Article 91 is of more recent origin, having its first appearance in the revision of 1874. The same theory applies here, *i.e.*, respect for superiors must be enforced to maintain the discipline necessary to operate an effective large armed force. The warrant, noncommissioned and petty officers are the mainstays of our armed forces in carrying out the orders of their superiors and respect for them must be maintained.

¹⁶⁵ Epithets, personal abuse, fighting words and profane, lewd and obscene language are not protected by the first amendment right to free speech. See *Beauharnais v. Illinois*, 348 U.S. 250 (1952); *Winters v. New York*, 333 U.S. 507 (1948) (dictum); *Chaplinsky v. New Hampshire*, 316 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

remarks in a purely private conversation are not the subject of these prohibitions.¹⁶⁵

In the civilian community generally there are no similar restraints.¹⁶⁷ However, some classes of civilians voluntarily assume conditions of employment or a position which restricts their ordinary rights to freedom of speech. The only remedy normally available to an employer when disrespect has been shown by an employee is to discharge that employee.¹⁶⁸

¹⁶⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 168. When the question of freedom of speech has arisen the Court of Military Appeals has utilized the "time, place and circumstances" test from *Schenck v. United States*, 249 U.S. 47 (1919). For example, the court held that disrespectful language towards an officer who was acting as a bartender at a unit sponsored party did not violate article 89. See *United States v. Noriega*, 7 U.S.C.M.A. 196, 21 C.M.R. 322 (1956).

¹⁶⁶ However, the dignity and position of civilian judges are protected by criminal contempt laws. These laws and their application are generally upheld if they punish language or actions outside the protection of the first amendment. See *Sacher v. United States*, 343 U.S. 1 (1952); *Bridges v. California*, 314 U.S. 252 (1941). To what extent the judge's traditionally protected position will be affected by the recent libel cases of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964), is not yet certain. Whether the contempt powers of a judge will be evaluated on a separate scale is still unknown.

¹⁶⁷ Two classes of employees—civil servants and members of labor unions—have attempted to insure both their right to freedom of speech and the retention of their jobs. The deciding factor in these areas is whether the speech or acts are, in fact, within the protection of the first amendment. In *U.P.W. v. Mitchell*, 330 U.S. 75 (1947), the provisions of the Hatch Act prohibiting taking an "active part in political management or in political campaigns" (sec. 9a of the Hatch Act, now found in 5 U.S.C. § 7324 (1964)) were held constitutional. The first amendment rights alleged to have been violated were held not to be absolute because the Federal Government has the right to balance those rights against the evil of partisan politics by government employees. Congress here was held, *inter alia*, to have the power to regulate political conduct in order to promote the integrity of public service. In the case of *Turner v. Kennedy*, 332 F.2d 304 (D.C. Cir.), *cert. denied*, 379 U.S. 901 (1964), a civil servant's right to free speech and communication with a member of Congress was held not to extend to false and malicious statements about his superiors and his discharge based on these false allegations was upheld.

Labor unions present a twofold problem of free speech by a union member—speech that is punished by the employer and speech that is punished by the labor union. In the first category the cases of *NLRB v. Local 1229, Elec. Workers*, 346 U.S. 465 (1953) (discussed in note 136 *supra*), and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), illustrated that a union member's speech must be within the protected limits of the first amendment to be protected. The libel suit stemming from a labor dispute in the *Linn* case was upheld on the basis that false and malicious statements, even though made in an atmosphere of dispute, are still punishable. The decision was five to four and since that time one of the Justices in the majority has been replaced so now this issue may still be in dispute.

A union member's right to free speech in relation to his union is protected by the so-called Landrum-Griffin Act, 101(a)(1) and

In summary, it can be seen that as regards comments to or about immediate superiors, the soldier's rights to freedom of speech are subject to greater restraints than are the civilian's. Comments which are punishable only by discharge from employment in a civilian situation can conceivably result in imprisonment for the soldier.¹⁰⁹ However, the soldier is protected in that a court-martial or administrative board procedure must be followed before discharge or any other serious sanction may be imposed. As mentioned above, most comments punishable under the Code are beyond the protections of the first amendment since they usually involve personal epithet or invective. The ordinary civilian cannot be imprisoned for general disrespectful statements to or about his employers although he may be discharged from employment. Practically speaking, the restraint on freedom of speech imposed by the Code in the military is no more than the restraint dictated by common sense in civilian life—the desire to remain on good relations with the “boss.”

V. TRENDS IN THE MILITARY RIGHT TO FREE SPEECH

Up to this point the emphasis has been on the past and current status of the soldier's right to freedom of speech. What of the future of this right? Two broad areas must be discussed to ascertain this future—the trends in the judicial interpretations

(a)(2), Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 (1964). Assumption of membership in a union imposes upon the member the constitution of the union which many times includes a system of trial boards and offenses unrelated to the general civilian law. The same portion of the so-called Landrum-Griffin Act, *supra*, which provides that employees have a right to free speech within their unions allows the unions to adopt and enforce rules as to the responsibility of the member to the union. See 29 U.S.C. § 411(a)(2) (1959). To the extent that these constitutions restrict or punish a member's right to speak on certain issues he has given up these rights.

¹⁰⁹ The Table of Maximum Punishments, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127c, provides that a violation of UCMJ, art. 89, involving disrespect to a commissioned officer can be punished by bad conduct discharge, confinement at hard labor for six months, forfeiture of two-thirds pay per month for six months and reduction to the lowest enlisted grade and that violation of UCMJ, art. 91, involving disrespectful or contemptuous words towards a warrant officer while in the execution of his office can be punished by bad conduct discharge, confinement at hard labor for six months, forfeiture of two-thirds pay per month for six months, and reduction to the lowest enlisted grade. Under the same article disrespectful or contemptuous words towards a noncommissioned officer or petty officer while in the execution of his office can be punished by three months' confinement at hard labor, forfeiture of two-thirds pay per month for three months, and reduction to the lowest enlisted grade.

of the laws affecting a soldier's right to free speech and the trends in the military administrative implementation and enforcement of these laws.

A. JUDICIAL

In the judicial area two court systems must be observed—the civilian and the military. Civilian courts are showing an increasing awareness of the soldier and his constitutional rights. The traditional review of the court-martial on petition for habeas corpus is now being extended beyond the tests of jurisdiction, *i.e.*, whether the court-martial was properly convened and constituted, whether it had jurisdiction over the person and the offense, and whether it acted within its lawful powers in adjudging the sentence¹⁷⁰ to include the test of whether the military has dealt “fully and fairly” with an accused.¹⁷¹ Some federal courts when presented with an allegation of an infringement on constitutional rights have gone even further and re-examined the facts and rulings of the court-martial,¹⁷² and others have stated that the final arbiters of constitutional rights of the soldier are the civilian courts and finally the Supreme Court.¹⁷³

The court-martial system's highest body is the Court of Military Appeals. Its view is exemplified by the statement of Judge Kilday in *Howe*¹⁷⁴ making it clear that the soldier will be governed by the pronouncements of the Supreme Court insofar as the standards for determining and evaluating the extent of constitutional rights are concerned.¹⁷⁵ There can be no doubt that the tests and standards prescribed by the Supreme Court with respect to all constitutional rights, including free speech, will be utilized by the Court of Military Appeals in measuring military restrictions on the soldier's right to free speech.

The key, however, to the future disposition of cases involving

¹⁷⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 214c.

¹⁷¹ See *Burns v. Wilson*, 346 U.S. 137 (1953), *aff'd sub nom.*

¹⁷² See, *e.g.*, *Le Ballister v. Warden*, 247 F. Supp. 349 (D. Kan. 1965), and *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965).

¹⁷³ *E.g.*, *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir. 1966).

¹⁷⁴ See p. 81 *supra*.

¹⁷⁵ *E.g.*, shortly before the decision of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court of Military Appeals decided in *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966), that the warning procedures then being followed in the military met the standards of the U.S. Const. amend. V. Shortly after *Miranda*, *supra*, the Court of Military Appeals reversed its decision in *Wimberley*, *supra*, in *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), on the grounds that the procedures approved in *Wimberley*, *supra*, did not conform to the standards established by *Miranda*, *supra*.

restraints upon a soldier's right to "speak his mind" lies in the courts' (both civilian and military) interpretation of military necessity. The expanded armed force of the present is largely composed of draftees who serve but a short time and return to civilian life, and the potential effect on their lives that the present restrictions and interpretations impose will have a profound effect upon the future validity of these restraints.¹⁷⁶ What has been a legitimate military necessity in the past may be either increased (*e.g.*, security violations when viewed with the relative ease of transmission of this information by use of modern communication techniques) or decreased (*e.g.*, expressions of contempt for state legislatures or the Congress in light of modern mass media and the attacks on these bodies so prevalent during election years). As our nation's ideas of what constitutes free speech change, so the soldier's right to free speech follows, balanced by the military necessities involved.

Generally, the trend has been to liberalize the soldier's right to speak. As more "citizen soldiers" have an opportunity to live under the current restrictions, the trend will continue to operate in favor of the soldier. Liberalization of speech rights should continue only until a point is reached where further permissiveness would impair the discipline and efficiency necessary to maintain the strategic effectiveness of the armed forces. Of necessity, this point will always place the soldier's rights short of those enjoyed by civilians. Whether we have now reached that point on the scale of free speech rights, or whether there yet remains an appreciable distance to be traversed, are matters that the future will decide. What is certain is that so long as our military is composed largely of inducted personnel its practices will be subject to the scrutiny of the public and a constant evaluation of the restrictions.

B. ADMINISTRATIVE

The second general area is administrative restraint of speech. In this area also an increasingly liberal trend is evident. The history of the regulation of such items as communication with members of Congress, testimony before Congress, and expressions of private opinion in general shows a liberalization that parallels a liberalizing trend in other areas of speech regulation.

¹⁷⁶ *E.g.*, shortly after World War II the dissatisfaction of the returning veterans with the system of military justice was made known and the then current Articles of War (Code of 1920, Act of 4 Jun. 1920, ch. II, 41 Stat. 787), were amended by the so-called Elston Act (Act of 24 Jun. 1948, title II, 62 Stat. 604), and this was then replaced by the UCMJ.

43 MILITARY LAW REVIEW

The trend of relaxing the restrictions on speech is partly a reflection of judicial decisions¹⁷ and partly a relaxation of the "traditional" military feeling that the soldier must be an automaton without feeling or opinion. This concept of a machine, rather than an individual, is alien to American military thinking because of our national reluctance to maintain a large standing force and the individual character of the United States citizen as a soldier. Because our military philosophy has reached the point that the soldier is to be informed of not only what he is to do but also why, the next step of allowing the soldier to freely express his views follows naturally. It is a realization that the thousands of dollars spent to train a soldier in his specialty will pay more dividends if the soldier can speak up, thereby making the soldier happier and at the same time keeping his superiors better informed.

The only recent setback of this expansion of the soldier's rights to free speech appears to be in Department of Defense Directive 5280.9, discussed above. This restraint of speech by requiring conformance to governmental policy is dangerous in many ways. First, it breeds an overcautiousness in the person reviewing the material to be released. The reviewer tends to reject anything that he feels might be disagreeable to his superiors. To stifle controversy in ideas is to throttle the exchange of information that comes from different ideas, even if they are offered in disagreement. Secondly, this restraint breeds dogmatism. Any large organization must stay abreast of modern ideas and thinking in order to move ahead. Any new concept or policy is at one time in disagreement with an established one. If a new idea can be suppressed at the point of its inception, there is no chance that it will come to the attention of the higher level commanders who may see its value. Lastly, the suppression of anti-establishment views keeps the civilian government and the civilian population uninformed about new ideas that may be of benefit to the country. Also, a distorted picture of military acceptance or support of policies may be presented. It is hard to see where any deviation from official policies can be released under a literal interpretation of the present directive. Fortunately for the soldier the Army implementation of this directive has been more liberal, but this is by the grace of the officials of the Department of the Army and not because of guidance set out in the directive.

¹⁷ *E.g.*, the change in the then current Army Reg. No. 360-5 was a result of the decision in *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

C. CONCLUSION

It is evident that there are greater restraints imposed on the soldier's rights to freedom of speech than are placed on civilians in general. It is submitted, however, that these restraints, when viewed from the standpoint of the mission of the armed forces, are reasonable and necessary for both the soldier and his country. So long as the soldier's right to express himself freely is limited only by recognized military necessity, this is all that the soldier and the nation can ask.

ACCEPTANCE OF FOREIGN EMPLOYMENT BY RETIRED MILITARY PERSONNEL*

By Major Joseph P. Creekmore**

This article discusses the applicability of constitutional provisions and executive opinions to employment opportunities for retired military personnel. These provisions are historically developed, analyzed, and explained. The author concludes that these provisions were made applicable to retired military personnel by mistake, and that they should be amended to exclude them from their restrictions.

I. INTRODUCTION

Article I, section 9, clause 8, of the Constitution of the United States of America provides:

No Title of Nobility shall be granted by the United States: And no person holding any Office or Profit or Trust under them, shall without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

It has been stated that "this clause is of little practical importance. Apparently it has never been construed by the Supreme Court of the United States, as no litigation has arisen under it. . . ."¹

Nevertheless, because of various interpretations placed on these words by officials, that portion of this clause providing that:

[N]o person holding any office of Profit or Trust under them, shall without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State,

is of vital importance to retired members of the military forces of the United States. Such official opinions have influenced administrative offices to hold that Executive Order Number 5221²

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¹E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 217 (1964).

pertains to a sizable portion, if not all, of United States retired military personnel. This Order provides:

It is hereby ordered that no officer or employee in the Executive branch of the United States Government, regardless of whether he is on annual leave or leave without pay, shall be employed with or without remuneration by any foreign government, corporation, partnership, or individual in competition with American industry.¹

The application of this order and the above provision of the Constitution is the subject of this paper.

II. HISTORICAL BACKGROUND OF ARTICLE I, SECTION 9, CLAUSE 8, OF THE CONSTITUTION OF THE UNITED STATES

The fountainhead of article I, section 9, clause 8, of the Constitution of the United States appeared in the Articles of Confederation as section 1 of article VI, which provided:

No state, without the consent of the United States in Congress, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any King, prince, or state; nor shall any person holding any office at profit or trust under the United States, or any of them, accept of any present, emolument, office, or title, of any kind whatever, from any King, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of Nobility.²

This section of the Articles was inserted by the framers, not from any apprehension of usurpation, but to insure greater security for the United States by preventing corruption.³ During this period of history, there prevailed among European sovereigns the custom of bestowing presents of jewelry or other articles of pecuniary value upon the minister of a power with which a treaty was negotiated. This same practice was followed upon the termination of a minister's mission. In England, it was customary for the King to offer a minister, at his option, a sum of money, graduated according to his rank, or a gold box or other trinket of equal value.⁴

The perpetual union sought to be established by the Articles of Confederation failed to become a reality. On 12 February 1787,

¹ See National Archives, 16 WAR DEP'T BULL. (6 Dec. 1929). See also 1 W.P.A. Historical Records Survey, PRESIDENTIAL EXECUTIVE ORDERS 436 (1944).

² *Id.*

³ 1 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 80 (1901) [hereafter cited as ELLIOTT'S DEBATES]. See also M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 146 (1922).

⁴ M. FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION 327 (1911).

⁵ F. WHARTON, DIGEST OF INT'L LAW OF U.S. § 110 at 757 (1886).

Congress called for a convention to propose for the states a constitution adequate to the exigencies of government and the preservation of the union.⁷

Among the delegates to the Constitutional Convention was Benjamin Franklin of Pennsylvania, who had returned to America in 1785 after an absence from America of almost nine years. During his European stay he served as diplomatic representative for the Continental Congress in various posts, including Paris and London, where he acted as a member of the Peace Commission. While in Europe, Dr. Franklin fell into disfavor with such American's as John Adams,⁸ Arthur Lee,⁹ and Ralph Izard.¹⁰ Upon his departure from France in June of 1785, Franklin was presented by the French Government with a miniature snuff box, encrusted with 408 diamonds, containing a portrait of King Louis XVI.¹¹ Franklin fully expected Congress to reward him with at least a tract of land for the services he had rendered in Europe, and he became embittered when Congress failed to do so.¹² Reports were circulated in the states that Franklin was indebted to the United States for large sums received from European allies and that he had refused to turn these sums over to the Congress.¹³ Delegates to the Constitutional Convention from both Massachusetts and Virginia thought Franklin was too fond of France.¹⁴

For more than two months, as the Constitutional Convention debated various proposals, the only portion of what is now article I, section 8, clause 9, considered by the Convention was the provision that "The United States shall not grant any title of Nobility." This provision appeared as section 7 of article VII of the draft submitted to the Convention by the Committee on Detail.¹⁵ On 23 August 1787, after the Convention had passed

⁷ 1 ELLIOT'S DEBATES 120.

⁸ VAN DOREN, BENJAMIN FRANKLIN 600, 622, 624, 725 (1957) [hereafter cited as VAN DOREN].

⁹ *Id.* at 601, 765.

¹⁰ *Id.*

¹¹ *Id.* at 722. M. FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION 327 (1911).

¹² VAN DOREN, *supra* note 8 at 765. At the time of his death in 1790, Franklin's fortune exceeded \$200,000.00. In disposing of his estate, he inserted a clause in his will which provided that the miniature of Louis XVI would go to his daughter, along with a request "that she would not form any of those diamonds into ornaments either for herself or daughters, and thereby introduce or countenance the expensive, vain, and useless fashion of wearing jewels in this country. . . ." *Id.* at 761, 763.

¹³ *Id.* at 764.

¹⁴ *Id.* at 765.

¹⁵ M. FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION 182 (1911).

the proposed article VII, section 7, Mr. Charles Pinckney urged the necessity of preserving foreign ministers, and other officers of the United States, independent of external influence, and moved to insert, after article VII, section 7, the following clause:

[N]o person holding any office of trust or profit under the United States, shall, without the consent of the legislature, accept of any present, emolument, office or title, of any kind whatsoever, from any King, prince, or foreign state.¹⁴

Mr. Pinckney's motion was passed.¹⁵

Governor Edmund Randolph, a delegate to the Constitutional Convention from Virginia, attributes the passing of Mr. Pinckney's motion to the "accident" of Franklin's receiving the miniature snuff box from the King of France.¹⁶ In discussing the matter before the Virginia Convention on 17 June 1778, Governor Randolph stated:

This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the King of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emolument from foreign states. I believe, that if at that moment, when we were in harmony with the King of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war. . . .¹⁷

It thus appears that the framers of the Constitution considered this provision applicable primarily to diplomatic representatives and persons holding active office subject to be influenced by foreign emissaries accredited to our government.¹⁸ Joseph Story in his commentaries on the Constitution expresses the belief that the prohibition:

[I]s founded in a just jealousy of foreign influence of every sort.

¹⁴ Mr. Pinckney's motion used the term "legislature" rather than "Congress" as was finally approved. Also, in the final document his reversal of the phrase "office of trust or profit" was changed to conform with the Articles of Confederation where the phrase appeared as "office of profit or trust."

¹⁵ 5 ELLIOT'S DEBATES 467. G. HUNT & J. B. SCOTT, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, REPORTED BY JAMES MADISON 455 (1920). M. FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION 381 (1911).

¹⁶ M. FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION 327 (1911).

¹⁷ *Id.*

¹⁸ 1 ELLIOT'S DEBATES 486.

Whether, in a practical sense, it can produce much effect, has been thought doubtful. . . . Still, however, the provision is highly important, as it puts it out of the power of any officer of the government to wear borrowed honors, which shall enhance his supposed importance abroad by a titular dignitary at home. . . .²¹

Indeed, throughout the first one hundred years of this nation's existence it was considered that this prohibition was designed primarily to control the activities of our diplomatic officials,²² and a proposed constitutional amendment, recommended by Congress, to establish a similar general prohibition against any citizen whatever, whether in public or private life, accepting any foreign title of nobility, failed to receive ratification by the requisite number of states, probably because such action was deemed wholly unnecessary.²³

Several other constitutional amendments dealing with this article were proposed, but not adopted. Among the amendments proposed by the Massachusetts Convention in 1788 was one seeking to deny Congress the power to consent to a person holding office of trust or profit accepting title or office from any King, prince, or foreign state.²⁴ This amendment, if passed, would have had the effect of the forerunner provision in the Articles of Confederation where Congress was not empowered to consent to any exception to the prohibition. Samuel Adams considered this proposed amendment highly important, but it failed to obtain the necessary congressional consent for submission to the states for ratification.²⁵ A similar amendment, proposed by the New York Convention,²⁶ met an identical fate.

²¹ 2 STORY ON THE CONSTITUTION OF THE UNITED STATES 202, §§ 1350, 1351, 1352 (1851).

²² See 6 OP. ATT'Y GEN. 409 (1854); 13 OP. ATT'Y GEN. 537 (1871); 24 OP. ATT'Y GEN. 116 (1902); see also Wharton, *supra* note 6.

²³ 2 STORY, *supra* note 21, § 1352.

²⁴ E. DUMBAULD, THE BILL OF RIGHTS 177 (1957).

²⁵ *Id.* at 16, 44, 48. Perhaps the most interesting point made in the Massachusetts proposal was the same reversal of the phrase "office of trust or profit" which was used by Pinckney in proposing the inclusion of the prohibition in the Constitution, even though the phrase appeared originally as "office of profit or trust" in the Articles of Confederation. It thus appears highly likely that Pinckney received the motivation for introducing his proposal from the Massachusetts delegation. If this be true, it appears even more likely that the prohibition was aimed directly at Franklin in view of the deep hatred of Franklin held by members of the Massachusetts delegation.

However, lest one become unduly sympathetic for Franklin, consideration should be given to the fatefulness of justice and its strange ways of manifesting itself. "In the session of 1788 a resolution passed the Senate authorizing Mr. Thomas Pinckney [second cousin of the introducer of the prohibition into the Constitution] to receive certain presents tendered to

Thus, from this auspicious beginning, the prohibition against the acceptance of office, title, present or emolument from a foreign state by officers of the government of the United States has stood as a bastion and bulwark for some one hundred and eighty-two years. In the minds of contemporary scholars who have considered the subject, it is dismissed as being of little practical importance, and more consideration is given to its violation than to its observance.²⁷ Indeed, the most that one constitutional scholar could find to say about it was that the

[P]rovision has never been interpreted as preventing the wives and daughters of those holding office from accepting all sorts of presents, even gold crowns, from foreign potentates.²⁸

III. THE NATURE OF "OFFICE UNDER THE UNITED STATES"

Persons other than scholars have also had occasion to consider the constitutional prohibition contained in article I, section 9, clause 8, and have been loathe to dismiss the subject so lightly, especially in cases involving retired military personnel. Almost two hundred years after this prohibition stumbled its way into our Constitution, The Judge Advocates General of the Army, Navy, and Air Force, the Comptroller General of the United States, and the Attorney General of the United States are of the opinion that the prohibition applies to retired officers and enlisted men of regular components of the armed forces, and most likely to retired reserve officers, also. These opinions, combined with Executive Order No. 5221, have reached immense proportions and have profound implications on the future employment of career military personnel.

A chronological approach to these opinions leads to a consideration of their validity. Initially, it must be noted that the constitutional prohibition is limited to "person holding any office of profit or trust under [the United States]," and that the prohibition found in Executive Order No. 5221 is limited to "officer or employee in the Executive branch of the United

him by the Courts of Madrid and London, respectively, on the termination of his missions to those places. The resolution was rejected in the House, though a resolution was subsequently unanimously adopted stating that the ground of this rejection was public policy and disclaiming any personal reference to Mr. Pinckney [which must have been small consolation, indeed, for his cousin's prior act]." Wharton, *supra* note 6.

²⁷ E. DUMBAULD, *THE BILL OF RIGHTS* 29, 198 (1957).

²⁸ E. DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 217 (1964).

²⁹ E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 76 (10th ed. 1948).

States Government, regardless of whether he is on annual leave or leave without pay." Thus, the question arises whether retired military personnel of the United States are either or both of these.

An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The duties are continuing and permanent, not occasional and temporary, and are defined by rules prescribed by the government and not by contract.²⁹ A definite term is not a necessary attribute of an office.³⁰ "Tenure" and "term" are not necessarily synonymous, tenure being the right to hold office for an indefinite time,³¹ subject to its termination by some contingency such as age, limitations, resignation, death, removal,³² or the appointment of a successor.³³

An officer of the United States within the meaning of the Constitution is one appointed by the President, by and with the advice and consent of the Senate, or by the President alone, or by the courts of law, or by the head of some executive department of the government.³⁴ Strictly speaking, there can be no offices of the United States except those which are created by the Constitution itself, or by an act of Congress;³⁵ and before an "officer" may be appointed, Congress must have by specific legislation created such office,³⁶ or the office must be one existing under the Constitution. Even Congress may not authorize an official, not specified within the terms of article II, section 2,

²⁹ See *United States v. Hartwell*, 6 Wall. 385, 393 (1868); *Hall v. Wisconsin*, 103 U.S. 5 (1880); 37 COMP. GEN. 138 (1957); DIG. OPS. JAG 1912 *Office*, para I, at 796.

³⁰ *Commissioner v. Harlan*, 80 F.2d 660, 662 (9th Cir. 1935).

³¹ *State ex rel. Daly v. City of Toledo*, 142 Ohio St. 123, 129, 50 N.E.2d 338, 342 (1943).

³² *People ex rel. Bagshaw v. Thompson*, 55 Cal. App.2d 147, 153, 130 P.2d 237, 241 (1942).

³³ *Fletcher v. United States*, 26 Ct. Cl. 541, 562 (1891). The President, with the advice and consent of the Senate, may remove an officer, notwithstanding the statutes, by the appointment of his successor; but filling a vacancy on the active list is too remote an exercise of the appointing power to be regarded as dismissal of an officer on the retired list. In order for an appointment of one to office to vacate the office of another, it must appear that the specific intent existed to take an office from one man and give it to another. *Id.* at 562.

³⁴ U.S. CONST. art. II, § 2, cl. 8. See also *United States v. Mouat*, 124 U.S. 303 (1888); *United States v. Germaine*, 99 U.S. 508 (1879); 37 COMP. GEN. 138 (1957).

³⁵ See *Scully v. United States*, 193 Fed. 185, 187 (1910); 9 BULL. JAG 66 (1950), citing *Cain v. United States*, 73 F. Supp. 1018, 1020-21 (1947); *Ms. Comp. Gen. B-88872*, 10 Mar. 1950.

³⁶ See *State v. Spaulding*, 72 N.W. 288, 291 (Sup. Ct. Iowa 1897).

clause 8, of the Constitution, to appoint "officers," even though the position to be filled is one specifically created by Congress.³⁷ A person working for the United States Government who has not been appointed in one of the ways mentioned in the Constitution is an employee and not an officer. The fact that the position is a relatively inferior one, carrying a relatively low salary, is not determinative. The distinction between officer and employee does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties, and appointment thereto. If the appointment is made by those given the power to appoint inferior officers by the Constitution, the appointee is an officer; if not, he is an employee.³⁸

Only one military office is created by the Constitution, and that is the office of Commander in Chief.³⁹ All other military offices within the meaning of the Constitution must be created by Congress.⁴⁰

It is here that the problem of retired military personnel with respect to the constitutional prohibition against accepting office or emolument from foreign states has its inception. In statutes, Congress sometimes uses the word "officer" in its more general or popular sense—to include all persons employed by the United States—rather than in its strict constitutional sense.⁴¹ Therefore, it would appear that any statute which is punitive or restrictive upon "officers" must be construed as limiting the application of the term "officers" to those meeting the constitutional definition of the term.⁴² By the same token, it should also be the case that in interpreting and applying acts of Congress which might result in punitive or restrictive action, or loss of entitlements otherwise provided by act of Congress in statutes pertaining to "officers," construction of the term "officers" should be limited to its constitutional meaning unless otherwise clearly established by the act that the meaning of the term "officers" shall be

³⁷ *Burnap v. United States*, 252 U.S. 512 (1920); *United States v. Germaine*, 99 U.S. 508 (1879).

³⁸ *Rains v. United States*, 160 Ct. Cl. 535 (1963).

³⁹ U.S. CONST. art. II, § 2, cl. 1.

⁴⁰ U.S. CONST. art. I, § 8, cl. 12, 13, 14.

⁴¹ See *United States v. Hendee*, 124 U.S. 309 (1888); *Rains v. United States*, 160 Ct. Cl. 535 (1963); 1 COMP. GEN. 700 (1922).

⁴² See *United States v. Germaine*, 99 U.S. 508 (1879).

applied in its general or popular sense. Such, however, has not been the practice, much to the regret of many retired military personnel.

A. THE "OFFICE" OF RETIRED REGULAR ARMY OFFICERS

At least seven times between 1895 and 1901, The Judge Advocate General of the Army considered the question of whether retired Army officers continued to hold an office under the United States. In his opinion they did not continue to hold public office,⁴³ because:

They are in fact pensioners. The position and pay given them constitute a form of pension. They exercise no functions and receive no emoluments of office, but are pensioned for past faithful services or disabilities contracted in the line of duty. Their condition and a public office have no characteristics in common."

It is important to recognize that each of these opinions was rendered in a situation where a question has arisen under the various statutes prohibiting one from holding more than one public office.

The Supreme Court of the United States in 1859 ruled that in the absence of a statutory prohibition a person may hold two distinct offices, or employments, which were not incompatible, and receive the compensation attributable to each office.⁴⁴ However, it was also recognized that in cases where the performance of duties of the different offices were incompatible, one abandoned and vacated the first office in entering the second.⁴⁵ A half a century later the Comptroller General of the United States announced a variation of these rules:

[W]here the *holding* of two offices is forbidden by a constitutional or statutory provision the acceptance of a second office is regarded as a resignation or relinquishment of the first office . . . is not for application where the constitutional or statutory provisions involved declare that persons holding one office shall be *ineligible* for appointment to another, the rule for application in this latter situation being that such a prohibition incapacitates or disqualifies the incumbent of the first office, [in the absence of some affirmative action effectively

⁴³ See DIG. OPS. JAG 1912 *Retirement* para I G at 992, I G 3c at 994. Citations to the Tyler and Winthrop cases, omitted in fn. 1 at 994, DIG. OPS. JAG 1912, may be found in DIG. OPS. JAG 1901, in fn. 1 at 623 (McClure ed.).

⁴⁴ See DIG. OPS. JAG 1901, §§ 2209-10 at 622-23 (McClure ed.).

⁴⁵ *Converse v. United States*, 52 U.S. 463 (1859).

⁴⁶ See DIG. OPS. JAG 1912, *Office* para IV A 1 at 808; 2 COMP. DEC. 7, 9 (1895); 44 COMP. GEN. 830 (1965).

43 MILITARY LAW REVIEW

and legally terminating the first office]" from holding the second, and that any attempted appointment to . . . the second office is without legal effect."

However, not everyone who considered the question of whether or not a retired military officer continued to hold public office agreed with The Judge Advocate General of the Army. In 1882 the Supreme Court of the United States took the contrary view in *United States v. Tyler*.⁴⁹ Captain Tyler had retired from the Army in 1870, because of wounds received in battle. Congress had provided for the increase in the pay of officers by ten per cent for every period of five years' service. Captain Tyler contended that he was entitled to a ten per cent raise for each five-year period of military service, including the time served in a retired capacity. His contention had been favorably considered by the Court of Claims.⁵⁰ In deciding the case upon appeal from the Court of Claims, the Supreme Court recognized that military retirement is a creature of statute and that Congress may provide for more than one method upon which an officer of the armed forces may be retired. In considering Captain Tyler's contention, the Supreme Court found applicable statutes which provided that: officers on the retired list were part of the Army; officers retired from active service were entitled to wear the uniform of the rank upon which they were retired; retired officers should be continued to be borne on the Army Register; retired officers should remain subject to the Rules and Articles of War, and to trial by general court-martial for any breach thereof; and, retired officers could be assigned duties at the Soldiers' Home or detailed as college professors. The Court also noted that: the retirement statutes did not require the consent of the officer to be retired; retirement need not be based upon absolute incapacity for further service; retirement may be based upon age, which, in the mind of the court, did not infer incapacity for future service; or, retirement may be based upon wounds received in battle, leaving the officer, in the opinion of the court, "for many purposes, a very useful officer." In language which has become landmark, Mr. Justice Miller, speaking for the Court said:

It is impossible to hold that men who are by statute declared to be a part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers . . . duties by detail as other officers are, who are

⁴⁹ 23 COMP. GEN. 173, 175 (1943).

⁵⁰ 20 COMP. GEN. 288, 289 (1940).

⁵¹ *United States v. Tyler*, 105 U.S. 244 (1882).

* *Tyler v. United States*, 16 Ct. Cl. 223 (1880).

FOREIGN EMPLOYMENT

subject to the rules and articles of war, and may be tried, not by a jury, as citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their obligations as part of the Army of the United States . . .

We are of the opinion that retired officers are in the military service of the government. . . ."

Of signal importance in the case is the fact that the Supreme Court did not find Captain Tyler to be an "Officer of the United States," but rather found "retired officers" to be "in the military service of the government."

If a fine distinction existed, or still exists, on this point, Captain Tyler certainly was not content to have the matter left for someone else to argue. Being an attorney, Captain Tyler, by now familiar with practice before the Court of Claims, presented himself before that body and requested permission to practice before it. As one would expect, a statute forbade "every officer of the United States" from acting as agent or attorney in presenting any claim against the United States. In denying the application, the Court said:

In *Tyler v. The United States* . . . it was decided by this court that the claimant, retired captain in the Army, was *in the service of the United States*, and the decision of this court was affirmed by the Supreme Court on appeal."

In this, the Court was quite correct, but later in the opinion it was stated:

As before remarked, it has been decided by this court and by the Supreme Court of the United States that Captain Tyler is "*an officer of the United States.*" "

A matter of retired pay gave rise to the next occasion for the Supreme Court of the United States to consider the question of "office" as it pertains to persons retired from the military service. In 1861 Thomas Wood was appointed to the office of Colonel in the Army of the United States. In October of that year he was commissioned a Brigadier General of Volunteers. In 1862, while occupying a position authorized the rank of Major General, he was wounded. In 1865 he was promoted to the rank of Major General and retired from the Army with that rank in 1868

"United States v. Tyler, 105 U.S. 244, 246 (1882).

"Motion to Allow R. W. Tyler to Appear in Cases Against the United States, 18 Ct. Cl. 25, 27 (1883) (emphasis added).

"*Id.* at 29 (emphasis added).

43 MILITARY LAW REVIEW

because of disability resulting from wounds received in 1862. Subsequently, in 1875, Congress passed an act to the effect that all officers retired for disability resulting from battle wounds should be paid retirement pay based upon the rank held at the time wounded. General Wood objected to his retirement pay being reduced to that of a Brigadier General. The Supreme Court in considering his objections held that the pay and rank of retired officers are matters wholly within the control of Congress; that rank and office are not the same thing; that rank may be attached to office, and one may hold a higher rank than the office which he occupies; that General Wood never held an office other than that of Colonel; that his advancement to Brigadier General and then to Major General was simply an advancement in rank and not a change of office. Thus, the effect of the Court's ruling was to hold that Congress could at its pleasure alter the rank of persons retired from the military service. But the Court in its opinion further confused the question of whether retired officers hold office under the United States. Without citing the case of Captain Tyler, which it had decided the year previously, the Court said that by statute:

[T]he officers of the Army on the retired list are part of the Army of the United States and, therefore, no one can be upon that list who is not an officer appointed in the manner required by section 2 of article 2 of the Constitution. . . ."

Thus, without saying that the office to which one is originally appointed continues after his retirement, the Court by its language, ". . . while he holds the same office . . .,"⁵⁵ provided a limb for lesser bodies to grasp and use as justification for contending that one's office is not terminated by one's retirement from active military service.

In 1893 the Attorney General of the United States expressed doubt whether retired military officers hold "office under the United States," and stated that the question was one of such grave doubt that it could only be resolved by the Supreme Court.⁵⁶

But in 1894 the second Comptroller held that "the place and rank on the retired list held by an officer of the Army is a *military* office under the United States."⁵⁷

⁵⁵ Wood v. United States, 107 U.S. 414, 417 (1883).

⁵⁶ *Id.*

⁵⁷ 20 OP. ATT'Y GEN. 686 (5 Dec. 1893), cited in DIG. OPS. JAG 1912, p. 994, fn. 1.

⁵⁸ _____ 2d COMP. DEC. _____, cited in DIG. OPS. JAG 1912, p. 994, fn. 1 (emphasis added).

The Court of Claims, however, had no such doubt as that expressed by the Attorney General, and in 1895 held that an officer of the Army who has never resigned or been dismissed, and had been placed on the retired list, was still an officer of the United States.⁵⁹

In 1898 a question arose as to whether a reserve officer's civil office was vacated by his call to active military service. In answering the question the Attorney General of the United States laid the foundation for the differentiation of treatment to be given cases involving reserve and regular officers subsequently arising under article I, section 9, clause 8 of the Constitution, and furthered the proposition, without so stating, that the office of a Regular Army officer continues after his retirement. In the opinion of the Attorney General a reserve officer called to active duty simply responded to a patriotic call and expected, when the war was over, to return to civil life. His term of military service was contingent, and "the government does not need nor demand a final severance of his relations with civil life." Turning to the case of Regular Army officers, which was not directly in issue, he said:

An [Regular] Army officer on the active list is not only actively but permanently engaged in the military service of the Government. Having chosen the Army for his career . . . the [dual office] statute properly prohibits him from accepting or exercising the functions of a civil office.⁶⁰

In 1902, the Comptroller of the Treasury had occasion to state that an officer of the Army who is retired from active service is still in the military service of the United States.⁶¹ As a basis for this statement he quoted the language of the Supreme Court expressed in Captain Tyler's case.⁶²

By 1904, the doubt expressed earlier by the Attorney General had dissipated and he stated that it was clear that officers of the Army on the retired list hold public office as they are part of the Army of the United States.⁶³

In 1912 the Attorney General strengthened his language in yet another dual office case arising under the existing statute by stating:

⁵⁹ *In re* Winthrop, 31 Ct. Cl. 35 (1895). This case pertained to Colonel William Winthrop, often considered the fountainhead of modern military law in the United States, who desired to practice before the Court of Claims following his retirement from the Army.

⁶⁰ 22 OP. ATT'Y GEN. 88, 90 (1898).

⁶¹ 8 COMP. DEC. 243, 245 (1902).

⁶² *Supra* note 51.

⁶³ 25 OP. ATT'Y GEN. 185 (1904).

Officers retired only from active service may not simply continue to wear the uniform of their rank, they are not simply continued upon the Army Register, but they are subject to Army discipline, and this can be only because they have not been, wholly relieved from Army duties and obligations. *They are still soldiers.*"

Thus, shortly after the turn of the century the rule appeared firmly established, through the series of opinions dealing with retired pay matters and dual office and compensation statutes, that a retired officer or warrant officer⁶⁴ of a regular component of the armed forces continued in office. In such cases, the rule has not varied with the passage of time.⁶⁵

B. THE "OFFICE" OF RETIRED RESERVE OFFICERS

It is within the power of Congress to distinguish between regular and reserve officers.⁶⁶ Congress has provided that reserve officers, while not on active duty, are not by reason of their status as such officers, persons holding any office under or in connection with any department of the Federal Government.⁶⁷ Though the Comptroller General has held that the retired pay received by a retired reservist is based on his status in an armed force as a member of that organization and that the loss of such status would terminate his right to retired pay,⁶⁸ it is recognized that the status of such persons is essentially different from the status of an officer or enlisted man on the retired list of the Regular Army or Regular Navy.⁶⁹

C. THE "OFFICE" OF A RETIRED ENLISTED MEMBER OF THE ARMED FORCES

With respect to enlisted personnel it would appear certain that upon retirement they do not hold office under the United States, in view of the constitutional restrictions upon the appointment of officers.⁷⁰

The original position taken by The Judge Advocate General

⁶⁴ 29 OP. ATT'Y GEN. 397, 402 (1912) (emphasis added).

⁶⁵ See *Rains v. United States*, 160 Ct. Cl. 535 (1963); 36 COMP. GEN. 399 (1956).

⁶⁶ See *White v. Treibly*, 19 F.2d 712 (D.C. Cir. 1927); 1 COMP. GEN. 219 (1921); 22 COMP. GEN. 664 (1943); JAGA 1952/6276, 4 Aug. 1952, cited in 2 DIC. OPS. 726, RETIREMENT § 79.11.

⁶⁷ *Taussig v. McNamara*, 219 F. Supp. 767 (D.D.C. 1963).

⁶⁸ 5 U.S.C. § 2105(d) (1966). See also National Defense Act of 1916, § 37, 39 Stat. 116.

⁶⁹ 41 COMP. GEN. 715 (1962).

⁷⁰ See 28 COMP. GEN. 367 (1948).

⁷¹ U.S. CONST. art. II, § 2, cl. 2; *United States v. Mouat*, 124 U.S. 303 (1888).

of the Army was that retired enlisted men, though not formally discharged from the service at the date of their retirement, were in fact pensioners; their retired pay being in consideration of past services.⁷¹

However, through the interpretation of various acts of Congress and the apparent misinterpretation of the opinion of the Supreme Court in the case of *United States v. Grimley*,⁷² the general rule has become, for many interests and purposes, considerably eroded.

In the *Grimley* case, the Supreme Court compared enlistment to a contract and stated that the party violating the contract was not privileged to object to a provision of law designed for the protection of the government. Most importantly, in reaching its result, the Court used language which has often been used as the basis for finding in an enlisted man's military status the requisites of an office.

The Attorney General of the United States, speaking through the Solicitor General, was the first person to misconstrue the language used by the Supreme Court in the *Grimley* case and attribute "office holder status" to enlisted men.⁷³ In 1909, in answer to a question from the Secretary of War as to whether or not a contract surgeon should be advanced on the retired list one grade above that held by him at the time of his retirement, it was necessary to construe a statute which provided:

That any officer of the Army . . . who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war . . . may . . . be placed on the retired list of the Army with the rank and retired pay of one grade above that actually held by him at the time of retirement.⁷⁴

Relying on *United States v. Hendee*,⁷⁵ the Attorney General expressed the opinion that the words in the statute ". . . who served with credit as an officer or as an enlisted man . . ." would probably be held to embrace those who in a general or popular way may be called officers, though not officers in a strict constitutional sense.⁷⁶

Relying on *United States v. Hartwell*,⁷⁷ for the definition of a public office the Attorney General said:

⁷¹ DIC. OPS. JAG 1912 *Retirement*, para. II B1 at 1001.

⁷² 137 U.S. 147 (1890).

⁷³ See 27 OP. ATT'Y GEN. 468 (1909).

⁷⁴ Act of 23 April 1904, ch. 1485, 33 Stat. 264.

⁷⁵ 124 U.S. 309 (1888).

⁷⁶ 27 OP. ATT'Y GEN. 468, 470 (1909).

⁷⁷ 6 Wall. 385, 393 (1868).

An office is a public station or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its object. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.²⁷

Immediately following this quote the Attorney General stated:

The military status, whether that of an officer or enlisted man, is an office or fundamentally like one. The quoted language is therefore directly applicable to the case of a military officer, and is applicable either directly or at least by analogy to the case of an enlisted man.

Relying on the language of the Supreme Court in the *Grimley* case,²⁸ relating to military status, to sustain his proposition that such status is "an office or fundamentally like one," he then set forth the following language from that case:

But in this transaction something more is involved than the making of a contract, whose breach exposed to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligation which its existence imposes. Marriage is a contract; but it is one which creates a status . . . So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself, destroys his citizenship . . . By enlistment the citizen becomes a soldier. His relations to the state and to the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged.²⁹

The Attorney General then proceeded to find that the contract surgeon in question did not meet the definition of "officer" within the terms of the statute and therefore was not entitled to be advanced on the retired list.³⁰

²⁷ 27 OP. ATT'Y GEN. at 471.

²⁸ *Id.* at 472.

²⁹ 137 U.S. 147, 151-52 (1890).

³⁰ 27 OP. ATT'Y GEN. at 472 (1909), citing *Grimley*, 137 U.S. at 151-52.

³¹ *Id.* at 478.

In 1919, The Judge Advocate General of the Army reaffirmed his earlier position that retired enlisted men are not formally discharged at the date of their retirement, and held that they remained a composite part of the Regular Army.⁵³ In that same year, the Comptroller of the Treasury reaffirmed the earlier view that retired enlisted men of the Army and Navy are not in the military or naval service of the United States, and that their retired pay as enlisted men was a gratuity in the nature of a pension, and therefore they were not subject to the dual compensation act under consideration.⁵⁴

In 1922 the Comptroller General of the United States was called upon once again to answer the question of whether retired enlisted men were covered by the Dual Office Act of 1894.⁵⁵ Relying upon the statutes subjecting retired naval enlisted personnel to recall in time of war and including retired Army enlisted personnel as part of the Regular Army he stated:

Enlisted men on the retired list are now as much a part of the Army or Navy, respectively, as retired commissioned or warrant officers are. Mere nomenclature is not material, and I see no ground for distinction . . . between those ranking as non-commissioned officers of the Army or petty officers of the Navy and those ranking below such noncommissioned or petty officers. *The term office as used in the Act of 1894 is a broad general term which has been construed to include any person holding a place or position under the government and paid from government funds. . . .* I must conclude, therefore, that a retired enlisted man of the Army or Navy holds an office with compensation attached within the meaning of section 2 of the Act of July 31, 1894.⁵⁶

Here, the Comptroller General failed to take into consideration the fact that the same statutes applying to recall of retired enlisted personnel had been considered by the Comptroller of the Treasury in his opinion of 22 September 1919.⁵⁷ When this fact was subsequently brought to his attention the following year, he reaffirmed his opinion and expressly overruled the former opinion of the Comptroller of the Treasury.⁵⁸

In 1943 in considering the application of a pay statute⁵⁹ to

⁵³ DIG. OPS. JAG 1919 at 407, JAG 421, 25 Apr. 1919.

⁵⁴ 26 COMP. DEC. 209 (1919).

⁵⁵ Act of 31 July 1894, ch. 174, § 2, 28 Stat. 205.

⁵⁶ 1 COMP. GEN. 700, 702 (1922) (emphasis added).

⁵⁷ 26 COMP. DEC. 209 (1919).

⁵⁸ 3 COMP. GEN. 164 (1923). See DIG. OPS. JAG 1919-1923 at 88. The Dual Office Act of 31 July 1894 was amended in 1916 to exempt retired enlisted personnel from its application. Act of 10 May 1916, ch. 117, § 6, 39 Stat. 120.

⁵⁹ Act of 2 December 1942, ch. 699, § 1, 56 Stat. 1037.

retired enlisted personnel recalled to active duty in a commissioned status, the Comptroller General ruled that such persons were entitled to compute for longevity pay purposes time elapsed between retirement as an enlisted man and recall to duty because "it is clear that retired enlisted men and warrant officers of the Navy remain a part of the service after retirement . . ." ⁸⁰ As a basis for his ruling he relied upon the previously quoted portion of his 1922 opinion.⁸¹

In 1954 The Judge Advocate General of the Navy ruled that an enlisted man who waives his right to retired pay would still remain a retired enlisted man of the Navy.⁸² Therefore, until discharge, custody and control over a retired enlisted person would be retained.⁸³

The "military status" of an enlisted man had been found by the Attorney General to be "fundamentally like" an office,⁸⁴ according to the definition of "office" set forth in the *Hartwell*⁸⁵ opinion, which was found to be "applicable . . . at least by analogy to the case of an enlisted man."⁸⁶ The Comptroller General, then, operating under the rule of the *Tyler*⁸⁷ and *Hendee*⁸⁸ cases—that Congress sometimes uses the term "office" to include all employees of the Government—concluded "that a retired enlisted man of the Army or Navy holds an office with compensation attached *within the meaning of section 2 of the Act of 31 July 1894.*"⁸⁹ Persons subsequently considering the status of retired enlisted men have seized upon these expressions, completely disregarding either the underscored language or the sentence immediately preceding the quote where the Comptroller General said: "The term office *as used in the Act of 1894* is a broad general term which has been construed to include any person holding a place or position under the government and paid from government funds."⁹⁰ Thus, by the end of World War II the concept of "office of an enlisted man on the retired list"⁹¹ had solidified and become firmly entrenched as a rule in adminis-

⁸⁰ 22 COMP. GEN. 864, 671 (1943).

⁸¹ *Supra* note 86, p. 127.

⁸² Op. JAGN 1953/173, 16 Oct. 1953, as digested in 3 DIG. OPS. 706 (1953); in 245 *infra*.

⁸³ 38 COMP. GEN. 523 (1959); 21 COMP. GEN. 927 (1942).

⁸⁴ *United States v. Grimley*, 137 U.S. 147 (1890).

⁸⁵ *United States v. Hartwell*, 6 Wall. 385 (1868).

⁸⁶ 27 OP. ATT'Y GEN. 469, 472 (1909).

⁸⁷ *United States v. Tyler*, 105 U.S. 244 (1882).

⁸⁸ *United States v. Hendee*, 124 U.S. 309 (1888).

⁸⁹ 1 COMP. GEN. 700, 702 (1922) (emphasis added).

⁹⁰ *Id.* (emphasis added).

⁹¹ Op. CCG 1953/12, 4 Aug. 1953, as digested in 3 DIG. OPS. 730 (1953).

trative opinions considering the applicability of article I, section 9, clause 8, to retired enlisted persons, as being "office under the United States."¹⁰²

IV. APPLICATION OF THE PROHIBITIONS OF ARTICLE I, SECTION 9, CLAUSE 8

With this understanding of the background of the problems involved, it is appropriate to consider the manner and the circumstances under which the prohibitions of article I, section 9, clause 8, of the Constitution and Executive Order 5221 have been applied to civilians and retired military personnel.

A. CIVILIANS

With respect to civilian officers of the Federal Government, article I, section 9, clause 8, has been found applicable most often in questions arising from the conduct of diplomatic representatives.¹⁰³ In 1955 the Comptroller General of the United States ruled that the acceptance of annuity payments, made by the German Government, to a United States employee as damages for injuries inflicted by the Nazis while he was a former citizen and public official of Germany did not violate the constitutional prohibition.¹⁰⁴

In 1957, however, the Comptroller General held that a retired British soldier, who had subsequently become a United States citizen, and was appointed court crier in a federal district court, was an "officer of profit or trust" within the meaning of article I, section 9, clause 8, of the Constitution, and thus precluded from accepting pension payments from the British Government.¹⁰⁵ Rather than ruling that the acceptance of such pension payments would cause the loss of the federal office, the Comptroller General held that it would preclude the payment of compensation from appropriated funds.

There is no reported case considering the applicability of article I, section 9, clause 8, of the Constitution to retired civilians

¹⁰² See 44 COMP. GEN. 227 (1964).

¹⁰³ 1 WHARTON'S INTERNATIONAL LAW DIGEST, sec. 110 at 757 (1886); 6 ATT'Y GEN. 409 (1854); 18 ATT'Y GEN. 537 (1871).

¹⁰⁴ 34 COMP. GEN. 331 (1955). Admittedly, the decision was somewhat political, for the Comptroller General emphasized the fact that the German Government had provided damage payments to victims of Nazi persecution only after being strongly encouraged to do so by the United States. This being the case, it was found that the payments in question were not designed to influence an officer of the United States.

¹⁰⁵ 37 COMP. GEN. 138 (1957).

43 MILITARY LAW REVIEW

who have formerly held office under the United States. In the vast majority of cases involving civilian officers of the government there is no indication whatsoever that they continue to hold "office under the United States" in any form after retirement. Apparently in such cases the general rule applied is that their office is terminated either by resignation or appointment of a successor.¹⁰⁶

B. RETIRED REGULAR ARMY OFFICERS

The Department of the Army considers it to be the responsibility of the individual officer to avoid violation of Federal law and regulations, and he has the duty to order his affairs accordingly.¹⁰⁷

As applied to Regular officers of the armed forces, practically all the reasons given by the Supreme Court for finding that retired officers remain a part of the military service are as valid today as they were in 1882.¹⁰⁸ They are appointed to office within the strict meaning of the Constitution,¹⁰⁹ and there is no authority for contending that their office terminates upon their retirement from active duty. Therefore, the predominant question concerning the applicability of the constitutional prohibition to retired Regular officers is whether such is within the intent and spirit of the Constitution.

As the theory for the applicability of the constitutional prohibition has developed, its chief impact has been upon the retired pay of military personnel. "Retirement" in any form from the armed services of the United States is purely a creature of statute, unknown in our history until the early 1860's, and, hence, obviously not a subject contemplated by the drafters of the Constitution.¹¹⁰ The traditional view, and certainly the prevailing view among members of the active military forces today, is that the pay of retired military personnel is not given in the

¹⁰⁶ *Fletcher v. United States*, 26 Ct. Cl. 541, 562 (1891). One partial exception to these generalizations has, however, been noted. In 1952 the Comptroller General was called upon to decide if there was an objection to a retired federal judge accepting employment with an international organization. By law the retired judge could be required for as many as ninety days during any calendar year as an emergency judge. Limiting his consideration to whether the retired judge would violate any dual compensation or employment laws, the Comptroller General found no objection to the contemplated employment. No mention was made of whether the constitutional prohibition was applicable. 31 COMP. GEN. 505 (1952).

¹⁰⁷ JAGA 1966/4046, 15 Jun. 1966.

¹⁰⁸ Compare *United States v. Tyler*, 105 U.S. 244 (1882), with 10 U.S.C. §§ 122, 772(b), 802, 3062, 3075(a), 3075(b), 3504, 3996(a) (1964).

¹⁰⁹ U.S. CONST. art. II, § 2, cl. 2.

¹¹⁰ *Taussig v. McNamara*, 219 F. Supp. 757 (D.D.C. 1963).

form of compensation for discharging the duties of any office during the period for which it is to be paid. Rather it is considered as a pension for services to one's country previously performed. The Court of Claims adopted this view in 1879.¹¹¹ This view persisted, at least with the Court of Claims, as late as 1903, when it had occasion to hold that the pay of a retired officer was not compensation, but, rather, that:

[H]is reduced retired pay is but an honorary form of pension to be paid him when, having reached a certain age, it is presumed that he is no longer well fitted to render active service. . . .¹¹²

The Comptroller General of the United States has, however, adopted a different view on this subject.¹¹³ It is his position that a pension is a periodical allowance of money granted by a government in consideration or recognition of meritorious past services, and such pensions are considered a gratuity where granted for services previously rendered which, at the time they were rendered, gave rise to no legal obligation. On the other hand, a pension is considered as deferred compensation where it was provided for by law at the time the services were rendered.¹¹⁴ According to his view, retired pay, together with any longevity increases therein, is paid to retired officers of the Regular Army as current compensation or pay for their continued service as officers after retirement, and is payable as such only while they remain in the military service.¹¹⁵

The early consideration of the applicability of the constitutional prohibition to military officers demonstrates the limits of its applicability intended by the spirit of the Constitution. In 1876 The Judge Advocate General of the Army expressed the opinion, which was reaffirmed in 1910, that:

In the absence of express authority from Congress, an officer of the Army cannot accept remuneration from a foreign power in return for military or other public service rendered, without a violation of Art. I, sec. 9, par. 8, of the Constitution. Nor can such an officer (in the absence of such authority) properly be granted a leave of absence for the purpose of rendering foreign service, even without compensation, since such a proceeding would be contrary to the spirit and intent of the laws . . . which clearly contemplate that the services of its officers shall be rendered to the United States.¹¹⁶

¹¹¹ Collins v. United States, 15 Ct. Cl. 22, 40 (1879).

¹¹² Geddes v. United States, 38 Ct. Cl. 428, 445 (1903).

¹¹³ See 22 COMP. GEN. 174 (1942).

¹¹⁴ 37 COMP. GEN. 188 (1957).

¹¹⁵ 23 COMP. GEN. 284 (1943).

¹¹⁶ DIG. OPS. JAG 1912 Army, para I C3 at 79 (15 Apr. 1910). See also DIG. OPS. JAG 1912-1917 at 124 (8 Jul. 1912).

As early as 1926 Congress provided for the detail or assignment of military officers of the United States to foreign governments or governmental agencies under certain conditions.¹¹⁷ The Judge Advocate General of the Army, failing to find express statutory authority for the recall of retired officers to be detailed to military duties, disapproved of the assignment of such officers to serve with the Nicaraguan Government in connection with its constabulary or national guard, or as Chairman of its Board of Claims, because such activities were within the constitutional prohibition.¹¹⁸

By the Mutual Security Act of 1954,¹¹⁹ Congress broadened the conditions under which officers of the United States could be detailed or assigned to foreign governments or governmental agencies. Again, in 1961, in appreciation of the limitations of the constitutional prohibition, by the Foreign Assistance Act of 1961, Congress provided for the detail or assignment of officers of the United States to foreign governments, their agencies, or to international agencies, whenever determined by the President to be consistent with and in the furtherance of the foreign relations or peace and security of the United States.¹²⁰ The statute dealing with assignment or detail of government officials to foreign governments or agencies thereof provides that such assignment or detail may only be made where the office or position to be accepted does not involve the taking of an oath of allegiance to another government or the acceptance of compensation or other benefits from any foreign country.¹²¹ No such limitation is made in the situation involving international organizations. These statutes cover exactly the situation contemplated by the framers of the Constitution when that portion of article I, section 9, clause 8, dealing with the acceptance of foreign office or emoluments was included in the Constitution. There is no evidence whatsoever to indicate that the intent of the constitutional prohibition was to limit the activities or employment rights or potential of any "officer" of the United States not actively engaged in the service of the United States. This understanding

¹¹⁷ Act of 19 May 1926, title 10, § 540 (44 Stat. 1907).

¹¹⁸ JAG 210.41 (5 Mar. 1929), as digested in DIG. OPS. JAG 1912-1940, § 186 at 77.

¹¹⁹ Act of 26 August 1954 (68 Stat. 832). For a history of the Act, see U.S. Code Congressional and Administrative News, 83d Cong. 2d Sess. 1954, at 3277.

¹²⁰ 22 U.S.C. §§ 2387-88 (1964). The functions of the President under these sections have been delegated to the Secretary of Defense. See also Exec. Order No. 10973, § 201(b); 3 C.F.R. (1959-1963) 493 (3 Nov. 1961).

¹²¹ *Id.* at § 2387.

FOREIGN EMPLOYMENT

of the problem has not, however, received acceptance from administrative officials of the government empowered by their position to limit the activities of retired military personnel.

In 1928 The Judge Advocate General of the Army considered for the first time the applicability of the constitutional prohibition to the unofficial activities of a retired military officer. On the question of whether a retired officer could accept appointment to a board of honorary advisors for the Nationalist Government of China, he held that if such appointment was merely as an expert advisor, without emoluments or title, the functions, duties, and responsibilities being wholly personal and unofficial, there would be no legal objection to the acceptance of the appointment.¹²² The following year, however, he held that the provisions of article I, section 9, clause 8, of the Constitution would prohibit a retired Army officer from accepting an engineering position in an advisory capacity with a foreign government, whether or not the position would constitute an "office," because the compensation he would receive was embraced in the constitutional term: "emolument."¹²³

In 1942, The Judge Advocate General reiterated his position that the constitutional prohibition applied to retired officers, saying:

There is no general statutory prohibition against the employment in civilian pursuits of retired officers of the Army. A retired Army Officer is an officer of the United States, however, and, as such, is subject generally to any law restricting the activity of an officer of the United States, unless specifically exempted from the operation of its provisions.¹²⁴

Especially noteworthy in this opinion is the language of The Judge Advocate General requiring "specific exemption" in cases involving military officers from the provisions of "any law" restricting the activities of "officers." This demonstrates clearly the impact made by the decisions relating to dual employment and compensation upon questions subsequently arising under article I, section 9, clause 8, of the Constitution. The warning of the Supreme Court in the *Hendee* case¹²⁵—that care should be given to the construction of the term "officer" when used by Congress because of the tendency of Congress to use it in its broad sense—was completely ignored.

¹²² JAG 210.851 (9 Nov. 1928), as digested in DIG. OPS. JAG 1912-1940 at 10.

¹²³ JAG 210.41 (16 Dec. 1930), as digested in DIG. OPS. JAG 1912-1940 at 10-11.

¹²⁴ 1 BULL. JAG § 315(3), at 152 (1942).

¹²⁵ *United States v. Hendee*, 124 U.S. 309 (1888).

Most often opinions by The Judge Advocate General of the Army on this subject are occasioned by inquiries from retired officers. However, every retired Regular Army officer and warrant officer is required to submit a "Statement of Employment"¹²⁶ within thirty days of his retirement and subsequently whenever the information in his previously submitted statement of employment is no longer accurate. These statements are reviewed by The Adjutant General and any questionable statement of employment is forwarded to The Judge Advocate General of the Army for an opinion.¹²⁷ If The Judge Advocate General determines that the employment is in violation of the constitutional prohibition, or other law or regulation, that fact is communicated to the retired member and he is advised that, unless he submits matters in rebuttal, action is contemplated to stop payment of retired pay.¹²⁸ It is not the policy of the Department of the Army to stop retirement pay arbitrarily in such cases until the position of the retired member is examined.¹²⁹ In 1962 a retired general officer objected to filing a statement of employment and complained of the investigation which was initiated as a result of his failure to do so. The Judge Advocate General of the Army held that the statement must be submitted as required.¹³⁰

In 1949 The Judge Advocate General entertained the opinion that acceptance of employment with a foreign government by a retired regular officer would vacate the office of the retired officer.¹³¹ In 1959 he was of the opinion that acceptance of employment with a foreign government would result in the loss of retired pay during the period of such employment.¹³² Later in that year he noted the conflict in his opinions but was unable to resolve it at that time.¹³³ By 1966 he had solidified his views and expressed the opinion that acceptance of such employment would result in the forfeiture of retired pay until Congressional con-

¹²⁶ DD Form 1357.

¹²⁷ JAGA 1966/4702, 9 Dec. 1966.

¹²⁸ JAGA 1966/4583, 28 Nov. 1966.

¹²⁹ JAGA 1966/4703, 9 Dec. 1966.

¹³⁰ JAGA 1962/3644, 23 Mar. 1962; JAGA 1962/3455, 9 Feb. 1962.

¹³¹ CSJAGA 1949/4614, 1 Nov. 1949; *accord*, SPJGA 1946/3215, 25 Apr. 1946.

¹³² JAGA 1959/4698, 30 Sep. 1959.

¹³³ JAGA 1959/7767, 30 Nov. 1959. *See also* 1 MIL. L. REV. 21, 27 (1958), stating that acceptance of a foreign office because of its incompatibility with the office under the United States held by a retired officer would operate to vacate, *ipso facto*, the commission of an officer.

sent is obtained for the employment or until the employment is terminated.¹³⁴

C. RETIRED ENLISTED MEMBERS

Enlisted men of a regular component of the armed forces retire, generally, upon the same terms as officers.¹³⁵

The first reported decision dealing with post retirement employment of enlisted men by foreign governments was rendered in 1904, when The Judge Advocate General of the Army held that a retired enlisted man could accept a position as interpreter to the Austro-Hungarian Commissioner at the St. Louis Exposition.¹³⁶

The Judge Advocate General of the Army was not again called upon until 1950 to express an opinion as to whether the constitutional prohibition of article I, section 9, clause 8, was applicable to retired enlisted men. In that year he expressed the view that retired Regular Army enlisted men held offices under the United States. As a basis for his opinion, he relied upon the decisions rendered by the Attorney General and the Comptroller General in their consideration of dual employment and dual compensation statutes.¹³⁷

In 1951, The Judge Advocate General of the Navy had held that a retired Navy enlisted man, who was a citizen of the Philippines, would forfeit his retired pay if elected mayor of his village in the Philippines, on the ground that enlisted men of the Regular Navy were officers within the meaning of article I, section 9, clause 8 of the Constitution, and thus precluded from accepting employment or office in a foreign government in the absence of the consent of Congress.¹³⁸ And in a more recent opinion, following this decision, it was said:

There can be no assumption as to what the ruling of a court of competent jurisdiction might be on the effect of the acceptance by an enlisted man on the retired list of the Regular Navy of any "present,

¹³⁴ JAGA 1966/4046, 15 Jun. 1966. In actuality this was the adoption of an opinion of the Comptroller General rendered in the case of a retired enlisted man who had accepted employment with a foreign government.

¹³⁵ 10 U.S.C. §§ 3914, 3917, 3996, 6830, 6831, 6482, 6485, 8914 (1964). There is, however, no statutory authority for a retired enlisted man to bear the title and wear the uniform of the grade upon which he retired. Compare 10 U.S.C. § 772(b) (1964).

¹³⁶ JAG C.16024, 15 Mar. 1904, as digested in DIG. OPS. JAG 1912 *Retirement* para II E(2)(c) at 1003.

¹³⁷ See 1 COMP. GEN. 700 (1922); 22 COMP. GEN. 664 (1948); 27 OP. ATT'Y GEN. 468 (1909).

¹³⁸ DIG. OPS. JAGN (1951-1954), part B, at 699-700.

43 MILITARY LAW REVIEW

emolument, office or title, of any kind whatever, from any King, prince, or foreign state." When a case arises with respect to which there is no controlling judicial precedent, and substantial doubt exists as to the action which a court of competent jurisdiction might take thereon, it has been heretofore regarded as the duty of the respective officers of the government to resolve the doubt in favor of an interpretation which will best serve the interests of the United States. Therefore, in the absence of such precedent, *this office considers that the term "office" as used in the Constitutional provision is a broad general term and is to be construed to include any person holding a place or position under the government and paid from government funds. . . .*¹⁹⁹

It is provided by 10 United States Code section 3914 that:

Under regulations to be prescribed by the Secretary of the Army, a regular enlisted member of the Army, who has at least 20, but less than 30, years of service . . . may, upon his request, be retired. He then becomes a member of the Army Reserve, and shall perform such active duty as may be prescribed by law, until his service . . . plus his inactive service as a member of the Army Reserve, equals 30 years.²⁰⁰

In apparent reliance upon this statute and sections 1032 of title 10, United States Code, and 2105(d) of title 5, United States Code, The Judge Advocate General of the Army in 1959 adopted the opinion that Regular Army enlisted men who retired after twenty years' service, and were thereafter placed in the Army Reserve, were members of reserve components within the meaning of 10 United States Code 1032, so that the Secretary of the Army could authorize them to accept employment with a foreign government.²⁰¹

In 1963 a retired sergeant first class applied to the Secretary of the Army for permission to accept civil employment with the Minister of Public Buildings and Works, at the Royal Air Force Airdromes in Great Britain. His duties were to consist of painting, decorating, signwriting, and silk screen production of signs. As a result of this request, The Judge Advocate General of the Army not only overruled his prior opinion concerning the acquisition of reserve status upon retirement by Regular Army enlisted men, but also adopted a completely new theory for sus-

¹⁹⁹ JAGA 1967/3773, 28 Apr. 1967 (emphasis added). The supporting papers for this opinion stated: "This office has discussed the need for legislation to permit a Philippine national who holds a retired status in any of the armed forces to be employed by, or hold office in, the Philippine government. Such legislation has never been enacted." See JAGA 1949/6914, 1 Nov. 1949.

²⁰⁰ 10 U.S.C. § 3914 (1964).

²⁰¹ JAGA 1960/4209, 24 Jun. 1960, at 2. See also JAGA 1962/4889, 29 Nov. 1962, at 9.

taining his proposition that retired enlisted men hold office within the meaning of the constitutional prohibition. In adopting this new theory, The Judge Advocate General of the Army said:

The constitutional prohibition against receipt of emoluments . . . applies to both regular and non-regular military officers. . . .

The amenability of enlisted men to the Constitutional limitation is not so readily apparent. The [Attorney General] has indicated that they occupy an office, or a status fundamentally like one. . . . This office has on two occasions rendered opinions that enlisted men are subject to the prohibition. . . . The former opinion expressed the view that retired Regular Army enlisted men hold offices within the meaning of the Constitution. It appears to rely mainly upon analogous opinions of the [Comptroller General] and the [Attorney General]. The second opinion . . . [14] reached the same conclusion *with respect to enlisted men on active duty*. However, it turned on the World War I statute which specifically authorized enlisted men to accept foreign decorations and treated the enactment as a definitive interpretation of the Constitution by the Congress. . . .

The rationale in the latter opinion seems particularly sound. Congress has consistently felt compelled to enact statutes which specifically granted to enlisted men, as well as officers, the consent required by the Constitution to accept foreign gifts or decorations. . . . In the absence of a judicial decision to the contrary, this legislative interpretation of the Constitution cannot be disregarded and should be followed. . . . While the cited legislation does not distinguish between enlisted men on active duty and those in a retired status, *this is really not significant*, at least with respect to Regular Army enlisted men. It seems well settled that Regular Army officers on the retired list retain their status as officers. . . . Retirement does not change the status of Regular Army enlisted men more significantly than it does that of Regular Army Officers. They, too, remain members of the Army, are subject to military discipline, may be given military duties, and depend upon their military status for their retired pay. . . . Accordingly, if, as Congress has indicated, Regular Army enlisted men hold an office within the Constitutional prohibition while on active duty, there is no *apparent* logical or historical reason for considering those on the retired list to be in a lesser status solely because of their retired status. . . .¹⁴

¹⁴ JAG 220.5 (21 May 1935), as digested in DIG. OPS. JAG 1912-1940 at 10: "(3) Enlisted men.—In view of the congressional interpretation of clause 8, section 9, Article I, of the Constitution, prohibiting persons holding 'any office of profit or trust' under the United States from receiving foreign decorations, as contained in the Act of July 9, 1918 (40 stat. 872); 10 U.S.C. 1422, authorizing officers and enlisted men to accept certain decorations theretofore bestowed on them by the Allies, it is *Held*, That enlisted men are within the constitutional inhibition, and may not legally receive a medal . . . from a foreign government unless authorized by Congress."

¹⁴ JAGA 1963/4645, 18 Oct. 1963, pp. 2-3 (emphasis added).

43 MILITARY LAW REVIEW

If the Comptroller General was aware of the new theory espoused by The Judge Advocate General of the Army, he was apparently unimpressed by it, for the next year he rendered his first decision relating to post retirement employment of an enlisted man by a foreign government. Relying solely upon his 1922 decision,¹⁴⁴ he stated:

Since retired enlisted members of the United States Coast Guard remain a part of the service and are subject to recall to active duty in time of war or national emergency, *it appears proper* to view them as holding an office of profit and trust under the Federal Government after retirement. . . .¹⁴⁵

In 1963, The Judge Advocate General of the Army had said:

The effect of employment contrary to the Constitutional prohibition is not clear. The traditional position is that it would void the prior retirement status. . . . However, it is not clear that the prohibition is self-executing . . . and this office and the [Comptroller General] seem to be adopting the view that a prohibition of this nature voids the second office rather than the first. . . . At any rate, it may effect a forfeiture of retired pay. . . .¹⁴⁶

Not wishing to leave this question in doubt any longer, the Comptroller General proceeded to lay the matter at rest, by saying:

While the applicable constitutional provision does not specify the penalty to be imposed for action taken contrary to the prohibition contained therein, *substantial effect* can be given such provision by withholding retired pay from Mr. Ward in an amount equal to the salary he has received from the State of Tasmania in violation of the Constitution. *It is believed that such action is proper in this case.* The amount should be retained unless and until Congressional consent to its receipt by Mr. Ward is obtained. . . .¹⁴⁷

The Judge Advocate General of the Army has substantially adopted this position as a means of enforcing the constitutional prohibition. Rather than requiring a total forfeiture of retired pay, he has ruled that only an amount equal to that received monthly from a foreign government need be withheld.¹⁴⁸

¹⁴⁴ 1 COMP. GEN. 700 (1922).

¹⁴⁵ 44 COMP. GEN. 130, 131 (1964) (emphasis added).

¹⁴⁶ JAGA 1963/4645, 18 Oct. 1963, p. 4.

¹⁴⁷ 44 COMP. GEN. 130, 131 (1964) (emphasis added); *accord*, 44 COMP. GEN. 227 (1964).

¹⁴⁸ JAGA 1965/5060, 26 Nov. 1965. This case arose because of an examination of the retired member's statement of employment.

**D. FUNDAMENTALS OF APPLICABILITY OF THE
CONSTITUTIONAL PROHIBITION TO RETIRED
REGULAR MILITARY PERSONNEL**

As a result of opinions holding the constitutional prohibition applicable to retired Regular Army personnel, there has developed a group of fundamentals which are applicable to both officers and enlisted men. Thus, regular military personnel may not accept employment with a foreign corporation if the corporation is an agency or instrumentality of a foreign government, or is owned wholly or partially by a foreign government, or supported by taxes collected by a foreign government.¹⁴⁹ If the foreign corporation has a private source of income and the support funds which it receives from the foreign government become so intermingled with private funds as to lose their identity, there is no constitutional objection to such employment.¹⁵⁰ A nationalized industry which is technically "owned" by a foreign government may be categorized as independent for the purpose of article I, section 9, clause 8, of the Constitution, in some limited circumstances, if the company retains economic and managerial autonomy.¹⁵¹

In order to determine whether a foreign employer is an agent or instrumentality of a foreign government, The Judge Advocate General of the Army has set forth the following questions to be answered by prospective employees:

Do local statutes establish your prospective employer as a separate, self-governing, corporate entity with authority to operate independently of the local or national government?

Are any funds received by your prospective employer from the local or national government intermingled with private funds so that

¹⁴⁹ See SPJGA 1946/3215, 25 Apr. 1946 (portion of corporation's stock owned by Brazilian Government); *accord*, JAGA 1965/5005, 2 Dec. 1965 (taxes used to support corporation's operations).

¹⁵⁰ See JAGA 1951/2322, 18 Mar. 1951; JAGA 1951/2540, 30 Mar. 1951; JAGA 1965/5005, 2 Dec. 1965. These opinions adopt the rationale of the Comptroller General expressed in answering an inquiry concerning possible objections to a retired military officer accepting employment with a United Nations agency. 27 COMP. GEN. 121 (1947). Resting his decision wholly on dual office and dual compensation statutes, the Comptroller General stated that if the funds paid into the United Nations by the United States became so intermingled with funds provided by other member nations there would be no violation of the dual office or compensation statutes so long as the funds paid to the retired military officer themselves could not be identified as coming from the Federal Government.

¹⁵¹ See JAGA 1966/4463, 27 Sep. 1966; JAGA 1966/4046, 15 Jun. 1966; JAGA 1966/3871, 17 May 1966; JAGA 1965/4222, 30 Jun. 1965; JAGA 1964/4274, 7 Aug. 1964.

they lose their identity, or is the source of compensation you may receive identifiable as governmental?

Would any rights or benefits you may receive be received solely by virtue of your contract with your employer?

Would the contract with your employer be subject to review or control by or on behalf of any official of the local or national government?¹⁵²

In 1964 a retired member, employed by a private firm in England, queried The Judge Advocate General as to whether he was prohibited from participating in the National Health Insurance, welfare, pension, and unemployment insurance programs of the British Government, and in 1967, a retired enlisted man, employed by an American concern in Belgium, asked if he would be permitted to accept social security benefits accorded to employees in Belgium. In both cases The Judge Advocate General held that the constitutional prohibition would apply if the cost of the benefits was defrayed directly from the tax revenues or other public funds of the foreign government, but that if the benefits were financed by an independent private fund supported by individual private contributions the inhibition would not apply. He even broadened his permissive statement by stating that even if the private fund is partially supported by government funds, so long as the government funds are so intermingled with the private funds as to lose their identity, there would be no objection to the receipt of the benefits.¹⁵³

The separation of Church and State provided for by our Constitution¹⁵⁴ does not exist in all parts of the world. A retired enlisted man, serving in the United States as a priest in the Episcopal Church, desired to go to England and continue his ministry with the Church of England.¹⁵⁵ He inquired of the Department of the Army if he would lose any retirement benefits as a result of his contemplated move to England, and was advised that his planned association with the Church of England, without the consent of Congress, was prohibited by article I, section 9, clause 8, of the Constitution on the ground that the Church of England was an agency of the Government of Great Britain.¹⁵⁶

The Judge Advocate General has consistently advised retired

¹⁵² JAGA 1966/4046, 15 Jun. 1966.

¹⁵³ JAGA 1964/3914, 28 May 1964; JAGA 1967/4149, 31 Jul. 1967.

¹⁵⁴ U.S. CONST. amend. I.

¹⁵⁵ "And he said unto them, Go ye into all the World, and preach the gospel to every creature." *St. Mark* 16:15, THE HOLY BIBLE (King James Version 1611).

¹⁵⁶ JAGA 1967/4251, 7 Sep. 1967.

FOREIGN EMPLOYMENT

Regular Army personnel that the constitutional inhibition prohibits them from accepting positions connected with the defense efforts of foreign governments.¹⁵⁷

Acceptance of teaching positions has been held to violate the constitutional prohibition if the employer is a foreign government or a political subdivision thereof.¹⁵⁸ In such cases the Comptroller General and The Judge Advocate General of the Army follow the rule that the government of a political subdivision of a nation is ordinarily considered to be an agency or instrumentality of the foreign government, although it may be deemed to be a foreign government in itself.¹⁵⁹

In 1963 The Judge Advocate General of the Army found no objection to a retired Regular Army officer accepting employment with a public relations firm which acted as agent for foreign governments (such firm being required by statute¹⁶⁰ to register as an agent for foreign principals), so long as compensation paid to the retired military member was paid from the general funds of the advertising firm and not directly by a foreign government.¹⁶¹ In 1967 an even more elaborate opinion in this area was demanded. A retired Regular Army officer owned an advertising firm which acted as agent for the information service of a foreign nation. At the request of the foreign country's information service his firm would place advertisements in selected newspapers in the United States. He would then, according to his relation of the facts, bill the foreign information service for the costs. The newspapers would, in turn, bill his firm and remit to his firm a fifteen per cent commission. The Judge Advocate General of the Army found that the constitutional prohibition was inapplicable, because it appeared that the firm's compensation was received from the newspapers which ran the advertisements, rather than the foreign information service, so that the payments to the firm were not made directly by a foreign government. As a cautionary matter, The Judge Advocate General noted that should it be determined that the

¹⁵⁷ See 6 BULL. JAG 1947, at 1 (assist in establishing a Brazilian War College); JAGA 1946/11007, 3 Jan. 1947; JAGA 1947/1447, 29 Jan. 1947; JAGA 1959/7767, 30 Nov. 1959 (instructor at Venezuelan War College); JAGA 1960/3622, 8 Feb. 1960 (military advisor to Government of Burma). With respect to retired reserve personnel see text accompanying footnote 171, *infra*.

¹⁵⁸ See JAGA 1962/4906, 27 Nov. 1962; JAGA 1963/8896, 30 Apr. 1963; JAGA 1963/4265, 15 Jul. 1963; JAGA 1965/4761, 24 Sep. 1965; JAGA 1965/5247, 18 Jan. 1966.

¹⁵⁹ See JAGA 1962/4906, 27 Nov. 1964; 44 COMP. GEN. 150 (1964).

¹⁶⁰ 22 U.S.C. § 612 (1964).

¹⁶¹ JAGA 1963/4354, 1 Jul. 1963.

payment procedure was not a *bona fide* business practice, the constitutional prohibition would apply. He also stated that the constitutional prohibition would apply to a case involving employment by any agency or instrumentality of a foreign government, established by virtue of substantial ownership or control exercised over the employer by a foreign government.¹⁶²

E. RETIRED RESERVE OFFICERS

Although their status is not identical to that of retired officers of the Regular Army,¹⁶³ their entitlement to the receipt of retired pay, based upon length of service, is contingent upon the maintenance and continuance of their military status.¹⁶⁴

In order to resolve any doubt as to whether the constitutional prohibition applied to reserve officers, Congress, in 1956, enacted 10 United States Code section 1032¹⁶⁵ which provided:

Subject to the approval of the Secretary concerned, a Reserve may accept civil employment with, and compensation therefor from, any foreign government or any concern that is wholly or partially controlled by a foreign government.¹⁶⁶

¹⁶² JAGA 1967/3740, 27 Apr. 1967. 18 U.S.C. § 219 (1966), provides in part: "Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, is or acts as an agent of a foreign principle required to register under the Foreign Agents Registration Act of 1938, as amended, shall be fined not more than \$10,000.00 or imprisoned for not more than two years, or both . . ." In response to an inquiry from the Office of General Counsel, Department of Defense, dated 23 September 1966, requesting an opinion from the Attorney General, the Assistant Attorney General, Internal Security Division, Department of Justice, on 4 November 1966, said: ". . . In light of the legislative history of section 219 and other materials I have considered it would appear that section 219 was not intended to apply to a member of the uniformed services while not on active duty, whether retired or as a reserve. In addition this section would not appear applicable to a member of a Reserve when on active duty for training. . . ." JAGA 1966/4777, 22 Dec. 1966. For a discussion of this Act, see Irwin, *Retired Military Personnel—New Restrictions on Foreign Employment*, THE JAG JOURNAL, NAVY, Vol. XXX, No. 3 (Dec. 1966-Jan. 1967) at 87.

¹⁶³ Compare *United States v. Tyler*, 105 U.S. 244 (1882), with 10 U.S.C. §§ 122, 267(a), 267(b), 274, 672, 675, 772, 953(c), 1376, 3062(c), 3911, 3996, 6323, 8911 (1964), and 5 U.S.C. §§ 502, 5534 (1966). A reserve of the armed forces who is not on active duty is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed. 5 U.S.C. § 2105(d) (1966).

¹⁶⁴ 41 COMP. GEN. 715 (1962).

¹⁶⁵ S. REP. NO. 1795, 82d Cong., 2d Sess. (1952), U.S. Code Congressional and Administrative News, 88th Cong., 2d Sess. (1952), vol. 2, p. 2005.

¹⁶⁶ 10 U.S.C. § 1032 (1964). *Accord*, Army Reg. No. 600-20, para 39c (31 Jan. 1967); 41 COMP. GEN. 715 (1962).

This was not the first occasion Congress had taken to exclude reserve officers from the prohibition of article I, section 9, clause 8, of the Constitution. Rather it was a re-enactment of the Act of 1 July 1930.¹⁸⁷ But the "subject to . . ." clause was a trap for the unwary, and in the event a retired reserve officer accepted employment from a foreign government without first obtaining the permission of the Secretary of the Army, it was the stated policy of the Department of the Army to eliminate him from the service.¹⁸⁸

The sharp distinction, under section 1032, between foreign *civil* employment and foreign *military* employment, should be noted. It is clear that retired reserve officers, under this section, are not permitted to accept military employment or office with a foreign government.

As a result of these limitations, two unique situations have been presented to The Judge Advocate General of the Army for resolution. In the first case, which arose in 1966, a retired reserve officer, who was an attorney, desired to accept a position as Resident Consul in the State of Tennessee for the Federal Republic of Germany. In such position the retired officer would, in depositions to be used in Germany, take testimony as a Tennessee notary; authenticate, on behalf of the German Consulate in Atlanta, Georgia, the fact that the deponent gave the testimony and that the translation of it was proper; and, in commercial claims and contracts, where no oath was required, authenticate, on behalf of the German Consulate in Atlanta, Georgia, the fact that the claimant or contracting party did sign the document and that the translation thereof was correct. In such position he would receive no salary, but he would receive an annual voluntary remuneration from the German Consulate in Atlanta. The purpose of such a position was to save time for local business people in their commercial transactions with West Germany. No other duties were prescribed and no orders were to be issued from superiors. He would take no oath nor give any allegiance to the German Government. In finding no objection in this case, The Judge Advocate General relied upon the fact

¹⁸⁷ Act of 1 July 1930, ch. 784 (46 Stat. 841).

¹⁸⁸ Generally, in cases arising under 10 U.S.C. § 1082 involving retired reserve officers, The Judge Advocate General of the Army has taken the position that the criterion to be employed involves policy considerations, not legal issues, and recommendations for approval or disapproval are beyond the purview of his office. See JAGA 1967/4205, 18 Aug. 1967; JAGA 1961/3462, 26 Jan. 1961; JAGA 1967/3382, 9 Feb. 1967; former Army Reg. No. 135-175, para 13A (10 Mar. 1964). Such elimination could be accomplished only by board action.

that the term "employment" is broad enough to include an "office," particularly a minor office, as opposed to a cabinet office.¹⁶⁹

In the second case, a retired reserve officer inquired if his "duties" constituted "civil employment" requiring approval of the Secretary of the Army. This officer's "duties," which were performed for the Ambassador of Haiti, entailed representing the Haitian Ambassador in dealing with agencies of the United States Government and international banking organizations. He was not compensated for his services, but was reimbursed for out-of-pocket expenses. In finding nothing objectionable in such "duties," though finding that approval for such employment by the Secretary of the Army was required, The Judge Advocate General stated:

Although the term "employment" often carries the connotation of work in exchange for compensation, in addition to reimbursement for expenses, the term is not limited to that meaning. Employment can mean any labor or service rendered for another with or without compensation. This office has apparently adopted the broader meaning of employment in applying 10 U.S.C. § 1082. . . .¹⁷⁰

In 1957, The Judge Advocate General stated that a reserve officer's employment as a consultant to the West German Government on atomic weapons training for naval personnel was not legally objectionable if the Secretary of the Army's approval was obtained, provided no oath, affirmation, or other declaration of allegiance to the German Government was required.¹⁷¹ Also, in 1959, without consideration of 10 United States Code section 1082, it was concluded that reserve officers may join certain volunteer services of the Crown Colony of Hong Kong, not directly associated with the armed defense of the colony, provided no oath of allegiance to a foreign state was required.¹⁷²

¹⁶⁹ JAGA 1966/3411, 14 Feb. 1966.

¹⁷⁰ JAGA 1967/4116, 19 Jul. 1967, p. 2.

¹⁷¹ JAGA 1957/7753, 23 Oct. 1957. See text accompanying footnote 157.

¹⁷² JAGA 1951/3845, 15 May 1959. A detailed consideration of the effect upon the military status of retired military personnel who acquire foreign citizenship is beyond the scope of this article. Yet the acquisition of foreign citizenship may have a tremendous effect upon the pay of both regular and reserve retired military personnel. The Immigration and Nationality Act of 1952 provides for the loss of U.S. nationality (and consequently citizenship) by accepting, serving in, or performing the duties of any office, post or employment under the government of a foreign state for which position an oath, affirmation, or declaration of allegiance is required. See JAGA 1966/3922, 1 Jun. 1966. Much of the effect of this statute has been removed by the recent decision of the United States Supreme Court in the case of *Afroyin v. Ruck*, 387 U.S. 253 (1967). The basic effect of this

It is suggested, moreover, that the "subject to . . ." clause in section 1032 will no longer be a trap for the retired reserve officer who accepts foreign employment without first obtaining permis-

decision is that in order to lose one's citizenship, the act resulting in such loss must be wholly voluntary and indicate an intent to adopt citizenship of a new country in lieu of American citizenship. While it is true that a great reliance upon the Immigration and Nationality Act of 1952 has been cited for the basis of decisions arising in this area, the crucial factor seems to be the continuance of military status. It is wholly conceivable that one could lose his military status by performing an act outlined in the Immigration and Nationality Act of 1952, even though such act did not actually result in loss of citizenship. There can be no doubt of the authority of the armed forces to require complete loyalty of its members to the United States. Personnel on the retired lists of regular components of the armed forces remain a part of the armed forces of the United States. A legislative intent to rely upon such members as a dependable source of manpower is indicated by enactments of law providing for the ordering of such members to active duty without their consent. The right to retired or retirement pay is contingent upon a continuation of their military status. There is no difference in the case of a retired officer or enlisted man who obtains foreign citizenship, for in both cases the obtaining of foreign citizenship would be inconsistent with continued military status in the U.S. armed forces. While citizenship is not a requirement in all cases for enlistment in the regular establishment, if an enlisted man is a citizen, a loss of his citizenship as a result of his own voluntary action by acquiring citizenship in a foreign country would be inconsistent with his oath of enlistment to bear true faith and allegiance to the United States and thus would be so repugnant to his status as a member of the armed forces to warrant termination of his retired pay. See 44 COMP. GEN. 51 (1964); 37 COMP. GEN. 207 (1957). A retired reserve officer who is receiving retired pay based upon the completion of a prescribed length of service in the armed forces when he acquires foreign citizenship would no longer be liable for involuntary recall to active duty in times of war or national emergency and the acquisition of foreign citizenship would be inconsistent with the oath prescribed for reserve officers to support and defend the Constitution of the United States; therefore, in the absence of any law authorizing continuation of an officer's membership in a reserve organization after he becomes a citizen of a foreign country, payment of retired pay may not be approved. See 41 COMP. GEN. 715 (1962). In the absence of some provision of law or regulation affecting his right to retired pay upon acquisition of residency in a foreign country, there is no basis for questioning the right of a retired alien member of a regular component of the armed forces to retired pay based upon length of service. See 44 COMP. GEN. 51 (1964); *United States v. Gay*, 264 U.S. 353 (1924). With respect to reserve officers, retired and not on active duty, accepting office in or serving in a foreign military force, see JAG 326.21, 1 Feb. 1926, JAG 210.41, 19 Jan. 1932, JAG 291.2, 7 Jan. 1936, as digested in DIG. OPS. JAG 1912-1940 §§ 1358a, 1361, at 672; 1 BULL. JAG 1942 at 195; SPJGA 210.45, 22 Aug. 1942; JAGA 1967/4689, 8 Jan. 1968. Otherwise, generally, see; DIG. OPS. JAG 1912 *Retirement* II B(4)(a) and D(1), at 1001-02; 43 COMP. GEN. 821 (1964); 44 COMP. GEN. 227 (1964); JAGA 1967/4251, 7 Sep. 1967. As receipt of disability retirement income is not dependent upon a continuation of military status, such payments are not affected by acquisition of foreign citizenship. See 37 COMP. GEN. 207 (1957); Ms. Comp. Gen. B-144694, 14 Feb. 1961; and 41 COMP. GEN. 715 (1962). Recently a

sion from the Secretary of the Army. Significantly, the former Department policy to that effect has been notably left out of the new regulation.¹⁷²

V. APPLICABILITY OF THE PROHIBITION OF ARTICLE I, SECTION 9, CLAUSE 8, TO EMPLOYMENT OF RETIRED MILITARY PERSONNEL BY INTERNATIONAL ORGANIZATIONS

Closely related to the question of employment by foreign nations, or the agencies or instrumentalities thereof, is the question of whether or not retired military personnel are precluded by the constitutional inhibition from accepting employment with international organizations, some of which are highly political in nature.

The issue was first presented to the Comptroller General in 1945 when he was asked if there was any objection to a retired Army officer accepting employment with the United Nations Relief and Rehabilitation Administration. Deciding the question solely on the basis of dual compensation statutes, the Comptroller General found no objection to such employment.¹⁷³ Subsequently, he was presented the same issue by an officer on terminal leave pending retirement. Relying upon the same statutes, the same general result was reached, except with the qualification that the dual compensation statutes would be violated if employment with the United Nations commenced prior to the officer's effective retirement date.¹⁷⁴

The following year the Comptroller General held that the commission or rank of a Regular Army officer would not be jeopardized if he were detailed to the United Nations Relief and Rehabilitation Administration pursuant to section 201 of the United Nations Relief and Rehabilitation Participation Appropriation Act of 1945.¹⁷⁵

former Army nurse, retired for physical disability, was advised that the constitutional prohibition did not apply and there was no objection to her accepting employment as a missionary, even though she was to be paid by the Zambian Government. JAGA 1967/4751, 26 Dec. 1967. See 23 COMP. GEN. 284 (1948).

¹⁷² See current Army Reg. No. 135-175 (8 Mar. 1967), superseding AR 135-175 (10 Mar. 1964); former para 13h is not found in new para 20, which encompasses the same material; see also *supra* p. 143, note 168; note that old para 13g prohibiting serving in a military capacity is continued full strength in current para 20g.

¹⁷³ 25 COMP. GEN. 98 (1945). See 4 BULL. JAG § 315 at 331 (1945).

¹⁷⁴ 25 COMP. GEN. 203 (1945).

¹⁷⁵ See 5 BULL. JAG § 622 at 286 (1946); Ms. Comp. Gen. B-58952 (1946).

These early opinions of the Comptroller General, which he reaffirmed in 1947,¹⁷⁷ were adopted by The Judge Advocate General of the Army, who likewise did not question the applicability of the constitutional prohibition in such cases initially.¹⁷⁸

In 1956 The Judge Advocate General of the Army advised a retired officer that there was no objection to his accepting employment with the United Nations.¹⁷⁹ A year later, in answer to a second inquiry from the same officer, The Judge Advocate General advised him that though he would not violate the dual compensation statutes by accepting a position with the United Nations Technical Assistance Administration, it was possible that article I, section 9, clause 8, of the Constitution would preclude such employment because ". . . the character of the United Nations might justify the conclusion that it is a 'foreign state' within the meaning of the constitutional provision."¹⁸⁰

In 1958, the same opinion was expressed by The Judge Advocate General of the Army with respect to accepting employment with the United Nations Educational, Scientific and Cultural Organization.¹⁸¹ At this time The Judge Advocate General noted that he was unaware of any determination having been made that the United Nations was a "foreign state" and said that a final determination could only be obtained from the Attorney General or the federal courts.

In 1959 The Judge Advocate General reversed his opinion and stated that he found no objection to a retired Regular Army officer accepting employment with the World Health Organization.¹⁸² In expressing this opinion, The Judge Advocate General stated that he was overruling his prior opinions in reliance on the rulings of the Comptroller General. Since that time he has had occasion to reaffirm this position at least three times.¹⁸³ In one of these opinions he again noted the possible conflict between employment with the United Nations and the constitutional inhibition, but again cited as his authority for approving of such employment the opinions of the Comptroller General.¹⁸⁴

The Comptroller General in 1962 again reaffirmed his position that there was no objection to retired officers accepting employ-

¹⁷⁷ 27 COMP. GEN. 12 (1947).

¹⁷⁸ See 5 BULL. JAG § 315 at 269 (1946); JAGA 1946/7781, 19 Sep. 1946.

¹⁷⁹ JAGA 1953/5258, 18 Jun. 1953.

¹⁸⁰ JAGA 1954/8463, 11 Oct. 1954; see also JAGA 1954/6115, 6 Jul. 1954.

¹⁸¹ JAGA 1958/4541, 9 Jun. 1958.

¹⁸² JAGA 1959/4248, 26 May 1959.

¹⁸³ See JAGA 1961/3481, 18 Jan. 1961; JAGA 1962/4278, 22 Aug. 1962; JAGA 1964/4274, 7 Aug. 1964.

¹⁸⁴ JAGA 1962/4278, 22 Aug. 1962.

ent with international organizations, and again he relied wholly on his findings of no conflict between such employment and dual compensation statutes as the basis for his decision. As of yet the Comptroller General has not been asked specifically if such employment is prohibited by article I, section 9, clause 8, of the Constitution.

VI. APPLICABILITY OF EXECUTIVE ORDER 5221, 11 NOVEMBER 1929, TO RETIRED MILITARY PERSONNEL

President Hoover issued Executive Order 5221 on 11 November 1929.¹⁵⁵ It was shortly thereafter promulgated to the members of the Army by the War Department without comment.¹⁵⁶ By its terms,¹⁵⁷ however, there is no foundation whatsoever for assuming this order is applicable to retired military personnel.

A. REGULAR OFFICERS

For more than sixteen years, the order was apparently ignored by The Judge Advocate General of the Army insofar as it might apply to retired Army personnel.¹⁵⁸ In 1946, however, a retired Army officer asked if there was any objection to his accepting a position with a partially government-owned Brazilian corporation. In answering the inquiry, the retired officer's attention was invited to the Executive Order in the event the Brazilian corporation was in competition with American industry. Relying upon his prior determinations, reached in dual employment and com-

¹⁵⁵ Complete background information on why President Hoover issued this order is somewhat obscure. One view, and perhaps the least likely, is that the order was issued shortly after the stock market crash of 1929 as one of the measures designed to revive and strengthen the American economy. JAGA 1963/5219, 9 Jan. 1964. The other, and seemingly sounder view, is that this Executive Order was prompted by a communication from the United States minister to Canada to the then Secretary of Commerce wherein he complained that the British-American Bank Note Company of Ottawa was utilizing the services of an expert plate printer in the Bureau of Engraving. JAGA 1963/4889, 29 Oct. 1963.

¹⁵⁶ *Supra* note 2.

¹⁵⁷ *Supra* p. 111; see also *supra* note 2.

¹⁵⁸ In 1945, Executive Order 5221 was listed, among others, as applicable to active and former military personnel in a document prepared in The Judge Advocate General's office and transmitted to the Legislative Branch in the Office of the Assistant Chief of Staff, G-1, War Department General Staff. SPJGA 1945/13240, 17 Jan. 1946. Though in later opinions, The Judge Advocate General states that he has consistently held Executive Order 5221 applicable to retired Regular Army officers since 1950, it is certain that it was considered twice by his office in 1946, and at least once in 1949, and possibly as early as 1941. See JAG 210.41, 7 Mar. 1941; JAG 248.4, 18 Jul. 1941; JAG 210.41, 16 Sep. 1941; CSJAGA 1949/3977, 8 Jun. 1949.

compensation cases, as well as under the Constitution, The Judge Advocate General reaffirmed that a retired Regular Army officer continued to hold office under the United States, and held that the constitutional prohibition was applicable. He advised, however, that no prior decision had been found actually holding the Executive Order either applicable or inapplicable to retired Army officers, and thus the opinion expressed was merely advisory.¹⁵³

And in 1949, in a letter to a retired major general concerning restrictions on post retirement employment, it was categorically stated that Executive Order 5221 applied to retired Regular Army officers.¹⁵⁰ This was affirmed in the 1950 edition of The Judge Advocate General's reference guide to prohibited activities,¹⁵¹ and was consistently reaffirmed, without comment, until 1955.¹⁵²

Then in a letter, drafted in the Office of The Judge Advocate General of the Army, which was dispatched from the White House, the correspondent was advised that it was not deemed appropriate to exempt retired Regular Army officers from operation of the Executive Order so long as they remained subject to other and similar prohibitions in similar fields.¹⁵³ Shortly after the dispatch of this letter The Judge Advocate General of the Air Force acknowledged that Executive Order 5221 applied to retired Regular Air Force personnel.¹⁵⁴

But on 3 August 1955, as a result of a letter from the Retired Officers Association, The Judge Advocate General of the Army expressed the opinion that the Executive Order did not apply to retired reserve officers because they were not considered officers of the United States within the meaning of the Executive Order, and said:

This office perceives no legal objection to the rescission or modification of Executive Order No. 5221, *supra*. Whether such action should be taken to exempt retired officers of the Regular Army

¹⁵³ SPJGA 1946/3215, 25 Apr. 1946. See SPJGA 1945/13240, 17 Jan. 1946, at 4, and 24 of outline attached thereto.

¹⁵⁰ CSJAGA 1949/3977, 8 Jun. 1949.

¹⁵¹ JAGA 1950/5666, 25 Feb. 1950, at subpara 16 of part I, and subpara 36 of part VII.

¹⁵² See JAGA 1951/2322, 15 Mar. 1951; JAGA 1951/2540, 30 Mar. 1951; JAGA 1953/3299, 10 Apr. 1953; JAGA 1953/3681, 21 Apr. 1953; JAGA 1955/4393, 4 May 1955.

¹⁵³ JAGA 1955/6217, 13 Jul. 1955. In this opinion it was indicated that retired reserve officers were not subject to the Executive Order by reason of sec. 246 of the Armed Forces Reserve Act of 1952 (66 Stat. 495).

¹⁵⁴ Op. JAGAF 1955/36 (15 Jul. 1955), as digested in 6 DIG. OPS. 1955 Retirement, § 81.73 at 437.

43 MILITARY LAW REVIEW

from the restrictions imposed by the Executive Order, while leaving them subject to similar provisions in related fields, is a matter of policy beyond the province of this office.¹⁹⁶

Later that month the Assistant Chief of Staff, G-1, for the Army submitted to The Judge Advocate General for comment a proposed modification of the Executive Order which stated:

Executive Order No. 5221 discriminates against retired officers of the regular components of the Armed Forces in that it deprives them of certain job opportunities after retirement, whereas there is no similar prohibition *against other citizens of the United States securing such employment.*¹⁹⁷

The Judge Advocate General suggested that the emphasized portion be changed to read:

. . . against securing such employment by retired non-Regular officers of the Armed Forces.¹⁹⁸

No reason was given for the suggested change, and if The Judge Advocate General was aware of any group of retired civilian employees to whom the order applied, he did not so indicate. The Judge Advocate General then stated that he perceived no objection to submitting a request for modification to the White House, which would continue the prohibition against such activities on the part of active personnel, but pointed out that in view of the letter prepared in his office for dispatch from the White House during the prior month "there may be in existence a White House policy against changing Executive Order 5221."¹⁹⁹

The Army having failed in its attempt to obtain modification of the order, the Department of the Navy, the following year, attempted to persuade the Bureau of the Budget to agree to a proposed modification.²⁰⁰ Their effort was likewise unsuccessful.

Following this brief flurry of activity attempting to secure rescission or modification of the Executive Order, there followed a period of seven years where the application of the order went unchallenged.²⁰¹ During this period the Attorney General informally indicated his approval of the decisions holding the Executive

¹⁹⁶ JAGA 1955/6699, 3 Aug. 1955, at para 2.

¹⁹⁷ JAGA 1955/7230, 22 Aug. 1955, at p. 2 (emphasis added).

¹⁹⁸ *Id.* at p. 1.

¹⁹⁹ *Id.*

²⁰⁰ JAGA 1956/2675, 12 Mar. 1956.

²⁰¹ See JAGA 1958/6643, 15 Sep. 1958; JAGA 1959/6109, 9 Sep. 1959; JAGA 1962/4258, 20 Jul. 1962; JAGA 1962/4307, 14 Aug. 1962.

FOREIGN EMPLOYMENT

Order applicable to retired regular military personnel,²⁰¹ and a group of rules for its application began to evolve.

In 1956 it was decided that the Executive Order did not apply to a corporation organized under the laws of one of the United States, even though a majority of the stock of such corporation was owned by citizens of a foreign country,²⁰² and the firm conducted its principal operations outside the United States.²⁰³ Subsequently, it was held that if the corporation was a wholly owned subsidiary of a foreign corporation, and it was organized and incorporated within the United States, the provisions of the Executive Order were not applicable.²⁰⁴ However, in the case of a wholly owned subsidiary of an American corporation organized under the laws of a foreign country, the Executive Order was deemed applicable. In such a situation it was held that the applicability of the order could be avoided by accepting employment with the parent corporation with the understanding that duties were to be performed with the foreign organized subsidiary firm only so long as all compensation was paid by the parent corporation, because ". . . the fact of ownership in such a case establishes that employment by the domestic corporation serves a legitimate business purpose."²⁰⁵ The Executive Order is applicable whether duties for the foreign employer are to be performed within the United States²⁰⁶ or in a foreign country; and it would appear that any degree of competition, no matter how slight, between the foreign concern and American industry would result in a violation of the Executive Order.²⁰⁷

²⁰¹ JAGA 1958/7829, 20 Oct. 1958. The Attorney General said: "It appears that the Executive Order has never been revoked or modified and that, therefore, it is presently in effect. The statement of the Adjutant General, in his letter to you, that the order applies to retired officers of the Regular Army undoubtedly reflects a decision or opinion of The Judge Advocate General of the Army since the records of this Department do not indicate that the question has been presented to the Attorney General. I have been advised informally that the Department of Defense recently proposed amending the order to except retired officers of the armed forces. However, I understand that objections were raised to creating a special exemption and that the Bureau of the Budget has not taken action to effectuate the recommendations of the Department of Defense." JAGA 1963/4799, 16 Oct. 1963.

²⁰² JAGA 1956/4992, 24 Oct. 1956.

²⁰³ See JAGA 1956/4992, 24 Oct. 1956; JAGA 1956/8347, 3 Apr. 1956; JAGA 1963/5219, 9 Jan. 1964.

²⁰⁴ JAGA 1964/4035, 25 Jun. 1964; JAGA 1966/4044, 21 Jun. 1966.

²⁰⁵ JAGA 1963/4799, 16 Oct. 1963.

²⁰⁶ JAGA 1965/4926, 29 Oct. 1965 (life insurance salesman); JAGA 1966/4046, 15 Jun. 1966 (sales of small parts to arms manufacturers).

²⁰⁷ JAGA 1967/8848, 10 May 1967.

A much more difficult problem is presented when the foreign enterprise is owned, wholly or partially, by a retired military officer. When the question first arose it was given very little consideration, and a retired officer who was involved in a partnership, which was incorporated under the laws of Peru, was advised that his corporate activities were in conflict with the provisions of the Executive Order, even though he would sell only United States manufactured products.²⁰⁹ This question again arose in a case pertaining to a retired officer who owned a majority of the stock in the foreign corporation. The Judge Advocate General noted that there was no restriction upon retired military personnel owning stock in a foreign corporation, and that it had been previously decided that the statute²⁰⁹ which prohibited a retired Regular Army officer from representing anyone in a sale to the Army was inapplicable to an officer who was self-employed or who owned a substantial majority of the shares of the corporation which he represented.²¹⁰ Upon this basis he altered his prior opinion and found no objection if a majority of the stock in the foreign corporation was owned by the retired officer.²¹¹

There appears to be some concern in the Office of The Judge Advocate General of the Army as to the extent of Executive Order 5221, and some degree of doubt was expressed concerning the propriety of a retired Regular Army officer entering the import business. In answer to a question as to whether the Executive Order was applicable in such a case, The Judge Advocate General said:

However, the order does not prohibit a retired Regular Army officer from entering into his own business of importing foreign goods, as long as his business is an independent entity and is not funded, supported, or managed in any significant manner by a foreign business. Such a business must not be operated in such a way that it is a mere agent or arm of the foreign business. It must be wholly self-sufficient. The relationship must be one between a seller (the foreign business) and his customer (the importer) and not one of employer and employee or principal and agent.

Incorporation of an import business serves two useful purposes in this regard. First, it tends to lessen the likelihood of a principal-agent relationship, since such a corporation would usually be owned by individual shareholders and corporate employees and not by a foreign business. Second, in the event some funds are received from foreign businesses, the receipt thereof would not create the

²⁰⁹ JAGA 1959/6109, 9 Sep. 1959.

²¹⁰ 14 U.S.C. § 281 (1964).

²¹¹ JAGA 1966/4678, 21 Dec. 1966.

²¹² JAGA 1967/4564, 11 Oct. 1967.

FOREIGN EMPLOYMENT

prohibited employment relationship if the funds are comingled with funds received as a result of the corporation's domestic selling activities. . . .²¹²

The Judge Advocate General of the Army has consistently stated that he will not render advisory opinions on whether or not employment with a particular foreign firm will amount to a violation of the Executive Order, because business conditions are subject to change.²¹³ However, in at least one case, as a result of review of a statement of employment filed by a retired Regular Army officer, it was noted that he was employed abroad by a foreign corporation. He was thereupon advised that he should ascertain whether his employment fell within the provisions of the Executive Order.²¹⁴ It is the position of The Judge Advocate General and the Department of Justice that whether a foreign firm is in competition with American industry depends upon the facts of its particular operations.²¹⁵ Retired officers who have questions on this point are advised that it is their duty to comply with the Executive Order,²¹⁶ as "the Department of the Army considers it to be the responsibility of the individual officer to avoid violation of federal law and regulations, and to order his affairs accordingly."²¹⁷ Such officers are also advised that they might wish to consult THE WORLD TRADE DIRECTORY REPORT²¹⁸ to ascertain the competitive position of their prospective employer.²¹⁹

B. RESERVE OFFICERS

Until 1962, retired reserve officers were not considered to be within the category of persons to whom Executive Order 5221 was applicable. The primary basis for this view appeared to be based on 10 United States Code section 1032, which gave statutory authority for reserve officers, with the permission of the Secretary concerned, to accept employment with foreign governments and agencies thereof, and 5 United States Code section 2105(d) declaring such persons not to be employees or individ-

²¹² JAGA 1967/4667, 21 Dec. 1967, at p. 2.

²¹³ See JAGA 1963/4783, 23 Oct. 1963; JAGA 1964/4216, 14 Jul. 1964; JAGA 1967/4375, 13 Sep. 1967.

²¹⁴ JAGA 1963/3400, 15 Jan. 1963.

²¹⁵ JAGA 1964/3644, 9 Mar. 1964; JAGA 1967/3475, 13 Sep. 1967; JAGA 1967/3387, 27 Jan. 1967.

²¹⁶ JAGA 1965/3674, 23 Mar. 1965.

²¹⁷ JAGA 1967/3387, 27 Jan. 1967.

²¹⁸ Published by the Bureau of International Commerce, United States Department of Commerce, Washington, D.C.

²¹⁹ JAGA 1967/3387, 27 Jan. 1967; JAGA 1964/3644, 9 Mar. 1964.

43 MILITARY LAW REVIEW

uals holding offices of trust or profit or discharging official functions under or in connection with the United States.²²⁰ This view was radically changed by a decision of the Comptroller General wherein he held:

The right of a retired member of a reserve component of the uniformed services who is in receipt of retired pay based upon length of service to accept employment with a foreign private concern not controlled by a foreign government is subject to Executive Order Number 5221. . . .²²¹

In considering the effect of 10 United States Code section 1032 upon this matter, the Comptroller General said:

It is assumed that the Secretary would not approve such foreign civil employment if that employment was prohibited by . . . Executive Order 5221.²²²

Thus, with the stroke of a pen, the Comptroller General, relying upon "military status," brought under the provisions of the Executive Order a group of retired officers long favored by Congress, and, by ignoring the prior enunciation of intent by Congress, severely limited the right of this group to be exempt from article I, section 9, clause 8, of the Constitution.

This decision was looked upon with almost disbelief by The Judge Advocates General of the Army and Air Force.²²³ The Judge Advocate General of the Army initially determined to view it with "caution";²²⁴ and The Judge Advocate General of the Air Force launched an attempt to have Executive Order 5221 rescinded, which was unsuccessful.²²⁵

Following rejection of the effort of the Air Force, The Judge Advocate General of the Army, proceeding with "caution," held that a retired reserve officer did not need permission from the Secretary of the Army to accept employment with a privately owned foreign corporation.²²⁶ By 1967, the "proceed with caution" doctrine was abandoned and it was decided that permission of the Secretary of the Army was required before acceptance of employment with a foreign corporation even though the foreign corporation was not in competition with American industry,²²⁷ and that if a foreign corporation were wholly or partially controlled by a foreign government, and in competition

²²⁰ See 39 OP. ATT'Y GEN. 197 (1938).

²²¹ 41 COMP. GEN. 715 (1962) (headnote no. 3).

²²² *Id.* at 719.

²²³ See JAGA 1963/5219, 9 Jan. 1963; JAGA 1963/4889, 24 Oct. 1963.

²²⁴ See JAGA 1963/5219, 9 Jan. 1963; JAGA 1967/3848, 10 May 1967.

²²⁵ See JAGA 1963/4889, 29 Oct. 1963; JAGA 1965/4499, 29 Jul. 1965.

²²⁶ JAGA 1965/4926, 24 Oct. 1965.

²²⁷ JAGA 1967/4564, 11 Oct. 1967.

with American industry, approval of the Secretary should not be granted.²²⁸

C. ENLISTED PERSONNEL

There is no opinion holding the provision of Executive Order 5221 applicable to retired enlisted men. On three occasions since the Comptroller General held the order applicable to retired reserve officers, The Judge Advocate General of the Army has stated that he does not find it applicable to retired enlisted men.²²⁹

It appears that the rulings concerning enlisted men should be viewed with great caution. It is difficult to understand how a retired enlisted man can be treated as an "officer" for the purposes of the constitutional prohibition, but not for the purposes of the Executive Order.²³⁰

VII. PROBABLE CONSEQUENCES FOR VIOLATING EXECUTIVE ORDER 5221

What then is the effect of a violation of Executive Order 5221 by a retired officer? In 1955, after advising a retired major general of the applicability of the Executive Order, it was stated:

Violation of the Executive Order by a retired officer of the Regular Army would constitute an offense punishable under the Uniform Code of Military Justice.²³¹

In his 1962 opinion applying the Executive Order to retired reservists, the Comptroller General said:

[A]cceptance of employment by a retired Reserve officer contrary to the provisions of the Executive Order would not automatically terminate the member's retired Reserve status.²³²

In 1963, The Judge Advocate General of the Army noted that

²²⁸ JAGA 1967/3453, 28 Feb. 1967.

²²⁹ JAGA 1964/3669, 14 Apr. 1964; JAGA 1966/3871, 17 May 1966; JAGA 1966/4468, 27 Sep. 1966.

²³⁰ Indeed, JAGA 1964/3669, 14 Apr. 1964, seriously questions why the Executive Order does not apply to retired enlisted men, but concludes that, as long as opinions excluding this group from the application of the Executive Order are not challenged, it is best not to raise the issue.

²³¹ JAGA 1955/5707, 1 Jul. 1955. The backup papers for this opinion bear the note: "Coordination: Mil Justice Div." This is the only time in any of the opinions dealing with either the constitutional prohibition or the Executive Order that any mention is made of the fact that violation of the provisions of either might result in disciplinary action by court-martial. Compare JAGA 1962/3644, 23 Mar. 1962, and JAGA 1962/3485, 9 Feb. 1962.

²³² 41 COMP. GEN. 715 (1962) (headnote 3).

43 MILITARY LAW REVIEW

the penalty for violating the Executive Order had never really been determined.²³³ In 1967, he added:

However, loss of retired pay for the period of employment is not an inconceivable consequence.²³⁴

Thus, the real effect of violating the order appears not yet firmly settled.

VIII. PROBABLE CONSEQUENCE FOR VIOLATING CONSTITUTIONAL PROHIBITION OF ARTICLE I, SECTION 9, CLAUSE 8

By 1961, in reliance upon the "substantial effect" doctrine²³⁵ of the Comptroller General, The Judge Advocate General had solidified his opinions as to the penalty to be assessed for accepting office under or employment with a foreign state in contravention of the constitutional prohibition contained in article I, section 9, clause 8. In a case involving the acceptance of elected office in the Philippine Islands by a retired enlisted man he said:

A violation of the cited portion of the United States Constitution will result in the forfeiture of your retired pay until congressional consent is obtained or until the *employment* is terminated.²³⁶

Later, in a case involving the acceptance of employment with the British Government, The Judge Advocate General said:

Any violation will result in a forfeiture of your retired pay until Congressional consent is obtained or until you terminate the prohibited employment.²³⁷

IX. SOUNDNESS OF METHODS USED TO ENFORCE THE CONSTITUTIONAL PROHIBITION AND EXECUTIVE ORDER 5221

It thus appears that the Comptroller General and The Judge Advocate General of the Army would employ seemingly ques-

²³³ JAGA 1963/5219, 9 Jan. 1964.

²³⁴ JAGA 1965/3674, 23 Mar. 1965.

²³⁵ See text accompanying footnote 202 *supra*.

²³⁶ JAGA 1967/3773, 28 Apr. 1967 (emphasis added). This was clearly a case of the acceptance of office under a foreign nation. There is no explanation in the opinion for the use of the term "employment" underscored above. Most likely the use of the term was inadvertent, but it is possible that the author of this opinion did not wish to face the issue of whether the acceptance of a foreign office would vacate the "office of an enlisted man on the retired list," especially when the office holder was not a citizen of the United States.

²³⁷ JAGA 1967/4620, 4 Dec. 1967.

tionable means to enforce their rulings that the constitutional prohibition and the Executive Order are applicable to retired military personnel. Neither the Constitution nor Executive Order 5221 provides a penalty for violating the prohibitions contained therein. There is no basis for contending that either provision is self-executing in that an automatic vacation of one's office would occur upon a breach of the directives. Congress has not by statute provided a penalty for breach of either article I, section 9, clause 8, of the Constitution or Executive Order 5221, and there has been no further implementation of the Executive Order providing a penalty for its violation.

The Supreme Court, in *Galvey v. United States*,²³⁸ held that where an act of Congress declares that an officer of the government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation may neither be enlarged nor diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress. In 1903, the Court of Claims, in a case involving retired military pay, held that if the salary or compensation of an officer or employee of the government is by statute fixed and certain, it can be neither increased, decreased, nor taken away by other officers of the government.²³⁹ In 1916, the United States Supreme Court reaffirmed its decision in the *Galvey* case by holding that if Congress specified when and under what circumstances an officer was to be paid, it was without the province or authority of a lesser official or department to withhold such pay without statutory authority.²⁴⁰ In *United States v. Gay*, the Supreme Court said:

[A retired] officer of the Navy . . . was subject to duties, and as such he was entitled to rights [including pay]; for neglect or violation of duty he was subject to reprimand, and, it might be, punishment; but punishment only after charge and conviction. . . .²⁴¹

In the *Gay* case the Court went on to hold that even if the actions of a retired officer were culpable, since the loss of his pay could only result from an act of Congress or as punishment by court-martial, it would be illegal to withhold the pay of one living or employed abroad. In 1961 the Supreme Court of the United States reviewed an administrative determination, made by the Department of the Army, not to deliver to certain "Korean War turncoats" pay that accrued while they were held captive by the

²³⁸ 182 U.S. 595 (1901).

²³⁹ *Geddes v. United States*, 38 Ct. Cl. 428 (1903).

²⁴⁰ *United States v. Andrews*, 240 U.S. 90 (1916).

²⁴¹ *United States v. Gay*, 264 U.S. 353 (1961).

43 MILITARY LAW REVIEW

North Koreans.²⁴² The Court reasoned that if this action were allowed to stand it would be tantamount to holding that an executive department could annul and defy an act of Congress at its pleasure. Noting that a soldier's entitlement to pay is dependent upon statutory right, the Court said:

If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future . . . pay. But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade . . . however ignoble a soldier he may be. . . . The mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances. . . . Such forfeiture can only be imposed by the sentence of a lawful court-martial.²⁴³

If the pay of retired military personnel accused of violating either the constitutional prohibition against acceptance of office or emolument from foreign states or the terms of the Executive Order by engaging in employment with foreign concerns in competition with American industry cannot be legally withheld unilaterally, is it possible to give "substantial effect" to these prohibitions by obtaining from the retired person an agreement to waive his retired pay for the period of such employment or until he obtains consent of Congress to engage in such activities? To this alternative, the answer must be given in the negative, for public policy forbids giving any effect whatsoever to an attempt to deprive by an unauthorized agreement, under the guise of a condition or otherwise, the right to pay given by a statute.²⁴⁴ In the event an agreement, either express or implied, were to be made with a superior official to forego receipt of retired pay in lieu of the institution of disciplinary proceedings, public policy would be even stronger against the recognition of such an agreement. The Comptroller General has indicated, nevertheless, that a waiver of retired pay by an Army enlisted man may be considered effective if it is construed as a renunciation of his retired status, and his renunciation of military status is approved by the Department of the Army.²⁴⁵ To be so considered, however, the waiver must be unconditional, and the intent to renounce military or retired status must be clear. It is therefore clear that a

²⁴² *Bell v. United States*, 366 U.S. 393 (1961).

²⁴³ *Id.* at 401-02, 404.

²⁴⁴ See *Galvey v. United States*, 182 U.S. 595 (1901); see also 20 COMP. GEN. 41 (1940).

²⁴⁵ 20 COMP. GEN. 41 (1940); see also OP. JAGN, 16 Oct. 1963, as digested in 3 DIG. OPS. 706 (1953); 26 COMP. GEN. 271 (1945); 36 COMP. GEN. 399 (1956); 21 COMP. GEN. 927 (1942).

FOREIGN EMPLOYMENT

waiver conditioned to last until the termination of the prohibited employment, or until consent of Congress for such employment is obtained, would be invalid.

X. SUMMARY

According to current interpretation, retired officers and enlisted men are prohibited from accepting office under or employment with the governments, agencies, or instrumentalities of foreign nations by the application of article I, section 9, clause 8, of the Constitution. This prohibition is founded upon the concept that retired regular officers and enlisted men, because of the continuation of their military status, hold office under the United States. But because of action by Congress, retired reserve officers are deemed not to hold public office, and thus are permitted, with the approval of the appropriate Secretary, to accept civil employment with foreign nations, their agencies, and instrumentalities thereof. However, because of the restrictive interpretation of Executive Order 5221, the broad approval granted by Congress has been limited, should the Secretary discover that the employment is in competition with American industry. Retired enlisted men, however, not deemed "officers," are thus not inhibited by the terms of the Executive Order.

XI. CONCLUSIONS

The provisions of neither article I, section 9, clause 8, of the Constitution, dealing with the acceptance of office or emoluments, nor Executive Order 5221, are properly applicable to retired military personnel. The interpretation placed upon these prohibitions by administrative officers has imposed upon career members of the military a burden not placed upon any other employee of the Federal Government.

It is not contended that the power does not reside with either the Congress or the President, as Commander in Chief of the Armed Forces, to impose certain reasonable limitations upon post-retirement activities of military personnel, such as a prohibition against acceptance of employment with a foreign nation which is contrary to the security interests of the United States. It is simply concluded that because of error which has crept into decisions pertaining to the constitutional prohibition and Executive Order 5221, the application of these provisions has been extended to a group of persons who were neither intended to be covered

43 MILITARY LAW REVIEW

by the terms thereof nor to whom the terms thereof are historically applicable.

If one were to contend that the underlying basis for prohibiting retired military personnel from accepting employment with foreign governments, agencies or instrumentalities thereof, or with foreign corporations, partnerships, or individuals is to protect the secrets of this nation, one would find it difficult to explain the basis for the decision allowing a retired officer to train the military forces of a foreign nation in matters concerning nuclear weapons. Retired military personnel, who have pledged their loyalty to this nation on the fields of its battles, will not likely destroy this nation by taking advantage of their right to accept honest employment. The price they have paid in the past to support their country is simply not so cheap that it would be bartered away under such conditions.

The sole underlying concept in the improper extension of the terms of those provisions to retired military personnel is to rule in cases of questionable doubt in favor of the position most likely to benefit the United States. It is quite true that The Judge Advocate General of the Army, in the great majority of his opinions in this area, advised the individual concerned that a final determination of the question of the applicability of these provisions could only be obtained from the federal courts. However, at the same time these persons are also advised that should they accept employment deemed to be covered by these provisions, their retired income will be withheld until consent from Congress to engage in such activity is obtained or until the employment is terminated. This threat to their financial security alone is more than sufficient to prevent litigation of the question.

Retired military personnel have spent the greater part of their adult life supporting and defending the Constitution of the United States and unhesitatingly obeying the orders of their Commander in Chief. By the very nature of their "military status" they are not prone to question these interpretations of law so long as the interpretations are not patently erroneous on their face. As a result many are unnecessarily deprived of the means to assist themselves financially, and, in many cases, the nation is deprived of much good these people can accomplish in the world.

This nation today is committed in all corners of the globe. Less developed nations are crying out for assistance in basic skills as well as technical knowledge from this land. Billions of dollars have been provided by the tax payers of this nation to assist the less fortunate. The Agency for International Development and

the Peace Corps are as much committed to the transfer of knowledge to underdeveloped nations as is the World Bank or the United Nations. In these days when America needs, and is attempting, to influence the development of other nations, it is indeed strange that a retired engineer in the United States Army may accept a position with the United Nations as consultant on a project to construct a port facility in Cambodia, but a retired Army enlisted man with thirty years' experience in preventative medicine may not accept a position with the Republic of Vietnam to instruct Vietnamese peasants in the basic rudiments of hygiene; that a retired Air Force reserve officer, trained as a pilot, may accept a position as personal pilot for the prime minister of Tanzania, but not as a pilot with British Overseas Airways; that a retired Army chaplain may serve a protestant parish in Quebec, but not teach in the schools of that province; that a retired Special Forces sergeant may accept a position as security inspector for Union Miniere in the Congo, but not as a radio operator for the King of Nepal; that a retired Coast Guard enlisted man may not teach school in Tasmania; or that a retired Army sergeant may not become a minister in the Church of England.

XII. RECOMMENDATIONS

It is recommended that Executive Order 5221, 11 November 1929, be amended to specify that it applies only to persons actively engaged as officers or employees of the Executive Branch of the Federal Government. This simple amendment would serve to place retired military personnel on an equal footing with retired or former civilian employees and officers of the Federal Government, who might wish to pursue employment opportunities outside the United States.

Further, it is recommended that Congress enact a statute authorizing retired military personnel to accept any employment so desired with any foreign government, its agencies or instrumentalities, provided that such employment would not be inimical to the security interests of the United States in the opinion of the Secretary of the military department concerned, and provided further that such persons regularly advise the appropriate military department of their location and pledge their willingness to respond to a recall to active duty as provided by law. Again, the effect of such a provision would be to afford equal opportunity for a class of persons who have fought to insure equal opportunity for others. Passage of such an act is not required to provide the

43 MILITARY LAW REVIEW

congressional consent envisioned by article I, section 9, clause 8, of the Constitution. Rather, such an enactment would be founded upon the responsibility of Congress to protect the security of the nation and assure a military force to meet any contingency for the defense of the nation.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

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