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**MILITARY LAW**  
**REVIEW**  
**VOL. 74**

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## MILITARY LAW REVIEW

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**SUBSCRIPTIONS AND BACK ISSUES:** Interested persons should contact the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Subscription price: \$7.65 a year, \$1.95 for single copies. Foreign subscription, \$9.60 per year.

**REPRINT PERMISSION:** Contact Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia 22901.

This Review may be cited as 74 MIL. L. REV. (number of page)(1976).



PAMPHLET }  
 No. 27—100—74 }

HEADQUARTERS  
 DEPARTMENT OF THE ARMY  
 WASHINGTON, D.C., *Fall 1976*

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## PERSPECTIVE: GOVERNMENT CONTRACTS—LEGAL AND ADMINISTRATIVE REMEDIES\*

Judge Robert L. Kunzig\*\*

Jim Jones is a West Coast contractor. He constantly sees proposals for government construction advertised in the newspapers, but he doesn't bother to bid. It's too much trouble. Contracting with the Government can involve tons of paperwork, and he can't be bothered with the whole mess. Thus the public loses a good competitor and ends up paying more for government construction.

Bill Smith lives in New England. He just finished a job for the Government installing computers. There were only minor disagreements, but Bill feels the Government owes him \$2500 for an extra machine he was required to install. It's too expensive to fight over it, however, and he finally gives up—souring from then on—on all government contracts.

Tom Brown constructed a big office building for the Government in the southern part of the United States. There were many difficulties and constant changes brought about by the agencies who were eventually to occupy the building. Costs soared. The building is finished now, and Tom wants to sue, but he feels the department boards are pro-Government. They aren't, but his lawyer thinks they are. Tom wants to go to court, but the law requires him to go through the board first. He says, "Never again."

Joe Johnson built a dam on a major mid-west river for the Government. He had many unforeseen problems. The weather was horrible. There were two bad strikes, plus a major flood. He finally ended up broke and out of business. By the time he went through the contracting officer, board, an administrative appeal, courts, more boards again, and then up through the appellate courts to the Supreme Court, fourteen years went by.

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\*This article is an adaptation of a speech presented to the Sixth Advanced Procurement Attorneys' Course at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia on January 18, 1976. The opinions and conclusions expressed in this article are the private opinions of the author and do not necessarily reflect the views of any governmental office or agency.

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The delay killed him. His money was tied up the whole time, at zero percent interest.

Or, take the other side of the coin. . . . The Government feels a contractor built a building for the Army using shoddy material throughout. The contractor appeals. The Army realizes that in spite of inspections and constant watching, the public has been "swindled." A board of contract appeals (mistakenly in the opinion of the Army) decides for the contractor. The Government wants to appeal, but under present law, cannot. The case is closed, and nothing more can be done.

All of these problems and many more beset those who wish to contract with the Government today. Red tape, expense, complicated legal procedures, and delay abound on every side. It's a wonder anyone is willing to take the risk.

In 1969 the President of the United States and Congress created the Commission on Government Procurement to analyze the entire problem and present recommendations for improvement.<sup>1</sup> The Commission worked about three years and reported its findings on December 31, 1972.<sup>2</sup> The purpose of this article is to discuss one important phase of those recommendations—legal and administrative remedies.

There *are* solutions to the difficulties of the government contractor. The Commission has wisely suggested many. Specific proposals have recently been placed before the Congress by Senator Lawton Chiles, Chairman of the Senate Subcommittee on Federal Spending Practices and by Representative Peter Rodino, Chairman of the House Judiciary Committee.<sup>3</sup>

This article will discuss these serious problems and the proposed solutions from the particular standpoint of whether they will *work*. I think they will. My comments are purely my own, and I speak, of course, only for myself. But as I see it, there is hope in the future for Jim Jones, Bill Smith, Tom Brown, Joe Johnson and the many other contractors who have endured these enormous difficulties for so many years.

As we begin our analysis of current problem areas of the Court of Claims<sup>4</sup> and the boards, it is essential to review briefly the role of the Court of Claims in the contract remedies process. The primary jurisdictional source for the court's review of Government contract suits is the Tucker Act.<sup>5</sup> This Act dates back to 1887.<sup>6</sup> As presently constituted, the Tucker Act gives the

<sup>1</sup> See Act of Nov. 26, 1969, Pub. L. No. 91-129, 83 Stat. 269.

<sup>2</sup> See REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT II (1972).

<sup>3</sup> S. 3512, 94th Cong., 2d Sess. (1976), H.R. 6085, 94th Cong., 1st Sess. (1975).

<sup>4</sup> Hereinafter designated as "the court" in text.

<sup>5</sup> 28 U.S.C. § 1491 (Supp. V, 1975).

<sup>6</sup> See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505.



court jurisdiction to render judgment on all claims against the Government (except tort claims) based on the Constitution, Acts of Congress, executive regulations and express or implied contracts (including certain "exchange activity" type contracts).<sup>7</sup>

A key distinction has developed with regard to contract suits in the courts. A litigant has direct court access for suits against the Government based upon a breach of contract. However, if the suit arises from what is commonly called a contract *dispute* rather than a contract breach, then under the standard "disputes clause,"<sup>8</sup> a contractor must first exhaust administrative remedies by presenting his claim to a contracting officer with subsequent review through an agency appeals board.<sup>9</sup> Only after the contractor has presented his dispute administratively may he bring his claim to the court for review. As we shall see, the exhaustion requirement leads to some of the current problems in the disputes process.<sup>10</sup>

<sup>7</sup> Federal district courts have concurrent jurisdiction over the same claims up to a \$10,000 limit. 28 U.S.C. § 1346 (1970).

<sup>8</sup> The usual disputes clause provides:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract, and in accordance with the Contracting Officer's decision.

(b) This "Dispute" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

<sup>9</sup> E.g., the Armed Services Board of Contract Appeals. See, e.g., United States v. Utah Const. Co., 384 U.S. 394, 401-02 (1966).

<sup>10</sup> An additional aspect of Court of Claims contract jurisdiction deals with the Renegotiation Act. The provisions of this Act may prove important to those who become involved in the military procurement program. In this Act, 50 U.S.C. APP. §§ 1211-1224 (1970), as amended (Supp. V, 1975), Congress has attempted to eliminate "excessive profits" reaped by some contractors in the national defense program. In theory, faced with a national defense emergency, the military is free to fulfill its needs without worrying about the big jump in prices in the "seller's market" created by emergency needs of the Government. The Act establishes a Renegotiation Board that reviews defense contracts to determine if a contractor has reaped unwarranted excess profits. If the contractor is unhappy with the Board's decision, he may seek a de novo determination of excess profits in the Court of Claims. 50 U.S.C. APP. § 1218 (Supp. V, 1975). The Court of Claims has only recently been given Renegotiation jurisdiction. Cases are now beginning to emerge outlining the course of such proceedings. For example, the first decision on the merits of a Renegotiation claim was announced by the court last June. *Mason & Hanger—Silas Mason Co., Inc. v. United States*, 518 F.2d 1341, 207 Ct. Cl. 106 (1975).

In short, the basic contract jurisdiction of the court is the Tucker Act; contract breach actions may be brought directly, and dispute actions are initially decided on the administrative level with subsequent court review. The court's review of administrative decisions is the principal focus of this article. Court of Claims review of agency contract decisions is governed by what is called the Wunderlich Act.<sup>11</sup> This Act contains two parts. The first part deals with judicial review of *fact* determinations made by the boards.<sup>12</sup> The second determines the scope of court review of *legal* conclusions made by the boards.<sup>13</sup> Before discussing the specific provisions of the Wunderlich Act and the various problems the Act raises, a quick look at events leading to its enactment might prove helpful.

"Disputes clauses" in Government contracts predate judicial consideration of agency contract actions.<sup>14</sup> Beginning in 1878 with *Kihlberg v. United States*,<sup>15</sup> and continuing thereafter, courts reviewed contract decisions of administrative boards on a challenge by either the contractor or the Government that the board's decision was based upon "fraud or bad faith."<sup>16</sup> The Court of Claims gradually broadened this rather narrow standard of review.<sup>17</sup>

However, in two rather startling cases in the early 1950's, *United States v. Wunderlich*<sup>18</sup> and *United States v. Moorman*,<sup>19</sup> the Supreme Court found the court's expanded review of administrative decisions unwarranted and the Court expressly limited review to whether or not the departmental decision had been founded on *fraud, i.e., "conscious wrongdoing, an intention to cheat or be dishonest."*<sup>20</sup>

Congress rather quickly responded to the Supreme Court's *Wunderlich* decision, effectively overturning the case in 1954 by reinstating broader review standards.<sup>21</sup> This Act (called the Wunderlich Act) established the standards for court review of board decisions. Still, Congress left various crucial problems unresolved.

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<sup>11</sup> 41 U.S.C. §§ 321-322 (1970).

<sup>12</sup> *Id.* § 321.

<sup>13</sup> *Id.* § 322.

<sup>14</sup> See *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 24 (1972).

<sup>15</sup> 97 U.S. 398 (1878).

<sup>16</sup> See *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 24 (1972).

<sup>17</sup> See, e.g., *Needles v. United States*, 101 Ct. Cl. 535 (1944); *Southern Shipyard Corp. v. United States*, 76 Ct. Cl. 468 (1932), *cert. denied*, 209 U.S. 640 (1933).

<sup>18</sup> 342 U.S. 98 (1951).

<sup>19</sup> 338 U.S. 457 (1950).

<sup>20</sup> *United States v. Wunderlich*, 342 U.S. 98, 100 (1951).

<sup>21</sup> Act of May 11, 1954, ch. 199, 68 Stat. 81.

The immediate ambiguity created by the Act was the matter of trials in the Court of Claims following a board determination. The Supreme Court's first resolution of this problem took place in 1963. The question presented in *United States v. Carlo Bianchi & Co.*<sup>22</sup> was whether or not the Court of Claims could take *additional* evidence in its consideration of the administrative decision. The Court of Claims initially decided that *it could* reopen the record and take additional evidence when a contractor appealed a board decision.<sup>23</sup> The Supreme Court found otherwise.<sup>24</sup> Thus the Court of Claims in its evaluation of the board's decision is now limited to evidence taken and considered by the board. The court cannot make additional fact findings.

In *United States v. Utah Construction Co.*,<sup>25</sup> the Supreme Court expanded *Bianchi*. While board jurisdiction is limited to *disputes* arising under a contract's "disputes clause," where the same facts give rise to both a *dispute* and a *breach of contract* claim, board fact findings are to be accorded finality. The Court of Claims may not retry in a "breach action" those facts found by a board in an earlier "dispute claim."<sup>26</sup> This situation obtains despite the fact that the court has *de novo* or original jurisdiction in breach of contract claims.

The Supreme Court concurrently considered a further step. In a case where the board had improperly declined to make *any* fact findings, the Court of Claims determined that it had authority to try the case at the review stage since there was simply no record at all.<sup>27</sup> In *United States v. Anthony Grace & Sons, Inc.*<sup>28</sup> the Supreme Court reversed the Court of Claims' position, concluding that in all cases the agency, not the court, must establish the record for review.

These decisions placed the Court of Claims in a somewhat uncomfortable position. The court had no remand powers. Given an erroneous administrative determination, the Court of Claims had only two alternatives. First, it could decide the case based on facts in the administrative record if sufficient evidence had been placed in the record to allow such action; or second, if the record was insufficient, it could stay consideration pend-

<sup>22</sup> 373 U.S. 709 (1963).

<sup>23</sup> *Carlo Bianchi & Co. v. United States*, 169 F. Supp. 514, 157 Ct. Cl. 432 (1962), *vacated and remanded*, 373 U.S. 709 (1963).

<sup>24</sup> *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963).

<sup>25</sup> 384 U.S. 394 (1966).

<sup>26</sup> *Id.* at 417-22.

<sup>27</sup> *Anthony Grace & Sons v. United States*, 345 F.2d 808, 170 Ct. Cl. 608 (1965), *rev'd*, 384 U.S. 424 (1966).

<sup>28</sup> 384 U.S. 424 (1966).

ing further agency action with the threat of entry of judgment for the contractor as a sanction for cases where the board refused to complete the record.<sup>29</sup> Congress resolved this specific situation by granting remand powers to the court in 1972.<sup>30</sup> However, serious problems still remained to plague both the contractor and the Government.

A second ambiguity in the Wunderlich Act was the government's right to appeal an adverse board determination to the courts. Prior to the Act, both plaintiff and Government could seek a court review, at least under the old "fraud" standard. After Congress overturned the *Wunderlich* decision, there was some doubt as to the government's right to appeal an adverse decision. A divided Supreme Court answered the question in favor of the contractor in *S & E Contractors, Inc. v. United States*.<sup>31</sup> Now a contractor may appeal an adverse board decision, but the Government cannot, absent "fraud" in the administrative board decision.

The *S & E* case left unresolved several other problems involving the Government's right of appeal. For example, what of the situation where the contractor wins in part of a case (let us call it Part *A*), the Government wins in a second part (Part *B*), and the contractor decides to appeal Part *B*? May the Government *then* contest the decision as to Part *A*? In a recent case, the court faced such a problem.<sup>32</sup> Obviously, the contractors urged that under *S & E* the Government could not appeal Part *A*. The Government countered that acceptance of a Board decision is an all or nothing proposition and if the contractor appealed Part *B*, he consented to the Government's appeal of Part *A*. The court rejected both of these "automatic alternatives." Instead it decided that a fairer solution mandated a result somewhere in between the two extreme positions. The Government may appeal those "issues [in Part *A*] which are so interrelated that they form a whole [with the issues appealed by the contractor in Part *B*] and should in fairness be decided together."<sup>33</sup> This resolution may give rise to additional litigation, for it is not an easy test to apply. Further, *S & E* portends similar complex questions in other areas, for example, set offs and counterclaims.<sup>34</sup>

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<sup>29</sup> *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 432-33 (1966); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717-18 (1963).

<sup>30</sup> Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652.

<sup>31</sup> 406 U.S. 1 (1972).

<sup>32</sup> *Roscoe-Ajux Const. Co. v. United States*, 499 F.2d 639, 204 Ct. Cl. 726 (1974).

<sup>33</sup> *Id.* at 643, 204 Ct. Cl. at 744-45.

<sup>34</sup> See, e.g., *Dynallectron Corp. v. United States*, 199 Ct. Cl. 996 (1972).

Against this background, one can more readily understand the current problem areas in Wunderlich cases at the Court of Claims. To summarize, a contractor may sue directly in the Court of Claims if the Government has breached the contract, but must initially pursue administrative remedies if the "wrong" amounts to a "dispute" rather than a "breach." Note that the distinction between a dispute and a breach is not always an easy one to draw.<sup>35</sup> If the action arose as a contract dispute, it will come to the court for review of a board decision. The court may review board decisions if they are adverse to the contractor. The Government may not, absent fraud, appeal a board decision. Further, in reviewing a board decision, the court is limited to administrative record evidence. The Court of Claims may not take new evidence to complete an insufficient board record. If the board decision is incorrect, the court may render judgment for the contractor where there is sufficient record evidence; it may reverse the board as a matter of law; or may *remand* the case to the board for additional evidentiary findings if such is indicated. The Wunderlich Act establishes the basis for this procedure.

On questions of fact "[t]he decision of the board shall be final and conclusive unless it is fraudulent or capricious or arbitrary or so grossly erroneous as to imply bad faith, or is not supported by substantial evidence."<sup>36</sup> On questions of law, the board's determination is not final: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board."<sup>37</sup>

Review of board decisions at the Court of Claims is currently governed by this Act, and subsequent decisions which interpret it. Let us now turn to some of the more troubling problems which are created by the review process.

The first problem is the need to differentiate between contract disputes and breach of contract claims. A dispute requires exhaustion of administrative remedies by a contractor before resort may be had to the courts. A breach claim is directly redressable in the Court of Claims (and the federal district courts if under \$10,000). The distinction often proves difficult to fathom in practice.<sup>38</sup>

A second problem stems from the structure of the Wunderlich Act itself. The Act compels the court to differentiate be-

<sup>35</sup> See *Nager Electric Co. v. United States*, 396 F.2d 977, 978-79, 184 Ct. Cl. 390, 394 (1968).

<sup>36</sup> 41 U.S.C. § 322 (1970).

<sup>37</sup> *Id.* § 322.

<sup>38</sup> See, e.g., *Nager Electric Co. v. United States*, 199 Ct. Cl. 996 (1972).

tween fact questions and legal questions. Board fact determinations are accorded finality. Board legal conclusions are not. Again, there is often very little difference between a question of fact and a question of law. Mixed questions of fact and law are common. This presents great difficulties for a reviewing court in deciding exactly which board resolutions are to be considered final.

Third, the "finality" which the Wunderlich Act gives to board fact determinations is itself ambiguous. The terms "arbitrary," "capricious," and "substantial evidence" are quite vague. Even the Supreme Court has difficulty in using such standards.<sup>39</sup> A court often finds it difficult to determine whether a board decision is supported by substantial evidence.

Fourth, the court may not take additional evidence to supply missing essential facts in the record. The most serious problem which results from this is the expense and delay that occurs when it is necessary to remand a case for further evidence. *Merritt-Chapman & Scott Corp. v. United States*,<sup>40</sup> recently argued before the court, is a good example.

That case presented a vivid example of the kind of delays the Wunderlich situation produces. In *Merritt-Chapman* a contract dispute arose in 1956 over the government's delivery of a site to the contractor for excavation and building of a dam. Plaintiff allegedly suffered various increased costs due to the delay because the Government should have suspended the work. At any rate, after four board hearings over a period of eight years, the Board of Contract Appeals (BCA) found for the Government. The case reached the Court of Claims in 1964. On March 19, 1971, after a four-year stipulated suspension of the case and 13 motions for extension of time, the court held that the board's decision was erroneous and remanded the case to the board.<sup>41</sup> The board again found for the Government, concluding that independent events, not the Government, caused plaintiff's loss. Again the case came to the Court of Claims for review of the board's *fifth* decision. After 11 more requests for extension of time by the parties, the trial judge (who advises the court in Wunderlich cases), held that the board's decision

<sup>39</sup> See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) where the Court had difficulty construing the term "substantial evidence" in the context of the Administrative Procedure Act.

<sup>40</sup> 528 F.2d 1392 (Ct. Cl. 1976). This was the historic TV experiment recently conducted by the Court of Claims in conjunction with the ABA. The case was orally argued over a "picture phone" network. The attorneys argued in New York, and the court sat in Washington.

<sup>41</sup> *Merritt-Chapman & Scott Corp. v. United States*, 439 F.2d 185, 191 Ct. Cl. 461 (1971).

was erroneous and recommended an award of \$272,144 to plaintiff. The court heard oral argument in the case in November 1975 and held that the board had erred, but remanded for yet another board determination on the quantum of damages<sup>42</sup> *à la Grace and Bianchi*. Under this decision, another board hearing and, presumably, another Court of Claims review could be expected.<sup>43</sup> Much of this long delay would have been avoided if the court could have supplied missing record evidence at the time of the 1972 decision or if the contractor could have sued directly in the court.

Fifth, a contractor does not receive interest on judgments rendered by the Court of Claims. The long delays that are created by the Wunderlich review problems have already been noted. Clearly, the delay and expense inherent in pursuing a Wunderlich Act claim are aggravated by the government's failure to pay interest on the judgment when rendered. Suppose a \$100,000 dispute arises today. Assume also that the contractor's claims are totally meritorious, but that dispute might take as many as twenty years to grind through the adjudicatory mills as in *Merritt-Chapman*. Clearly the contractor will lose a vast amount of money in lost interest alone over this twenty-year period. Certainly if legal fees are also deducted, it hardly seems worthwhile for the contractor to pursue his remedies. What incentive does the Government have to settle in such a situation?

Sixth, there seems to be some sentiment, at least on the part of contractors, that the boards are biased in favor of the Government. This fear is, for the most part, groundless. Each case is generally decided strictly on its merits. However, let us look at the facts as they appear to the contractor. The boards are composed of career agency employees who are paid by the Government. They are responsible only to the agency heads. They do not have the independence stemming from the lifetime appointments accorded federal judges. It is understandable that unsuccessful contractors might question their impartiality.

Seventh, judgments rendered by the courts on claims are paid from the Treasury, not from particular appropriations. If an agency settles a disputes claim out of court, the payment will come out of its appropriations. If the agency forces the claim into the courts it "frees up" the portion of its budget represented by the potential liability because payment there comes

<sup>42</sup> *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392 (Ct. Cl. 1976).

<sup>43</sup> The parties settled the case in April 1976, obviating the need for further proceedings.

out of the Treasury. The pressure toward further delay and away from settlement is obvious.

Eighth, the concurrent jurisdiction of the district courts over claims up to \$10,000 appears, in the opinion of many, to be unduly limited. Originally, the district courts were given concurrent jurisdiction so that "lesser" claims could be adjudicated less expensively at the contractor's locale—or perhaps where the greatest number of witnesses (in breach actions) was located. The Court of Claims remained *the* forum for "greater claims" due to its expertise in Government contract suits. However, the \$10,000 limit was set in 1911.<sup>44</sup> The value of a dollar has significantly eroded since that time. Now, all but the very smallest claims must come before the Court of Claims in Washington.

In summary, these eight problem areas and others have created a situation where nearly everyone agrees that the government contract remedies process is not working as well as it should. Many contractors are convinced that there is an insufficient remedy if something goes wrong, and that the best course for them to follow is totally to avoid bidding on government contracts. When the contract remedies process gets to the point of deterring potential competition, something needs to be done.

More importantly, the President and Congress agreed.<sup>45</sup> A bipartisan commission was named to study not just contract remedies, but all phases of government procurement.<sup>46</sup> As such, this was perhaps the most sweeping study in history of a government's procurement program. The makeup of the Commission was indeed distinguished. It included Senators, Congressmen, industry leaders, and attorneys, as well as the Under Secretary of the Navy, the Comptroller General, and the Administrator of General Services of the United States. On December 31, 1972 the Commission issued its final report<sup>47</sup> which included numerous recommendations for sweeping changes in the government procurement process. Given the current problems in the area of contract remedies, let us look at the Commission's recommendations.

In its consideration of disputes arising in connection with contract performance, the Commission first recommended the necessity "to make clear to the contractor the identity and

<sup>44</sup> Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1693.

<sup>45</sup> See Act of Nov. 26, 1969, Pub. L. No. 91-129, § 2, 83 Stat. 269.

<sup>46</sup> See *id.* § 4.

<sup>47</sup> See REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT II (1972) [hereinafter cited as REPORT].



authority of the contracting officer, and other designated officials, to act in connection with each contract."<sup>48</sup> The reason for this recommendation is fairly obvious. The role of the contracting officer varies from agency to agency. Still, it is the contracting officer (CO) who is the "representative of the Government" in dealings with contractors. It can be very frustrating to a contractor to be told one thing by the CO only to find out later that the CO never had authority to act. As the Commission stated, clear delineations of authority will "avoid misunderstandings, promote confidence in the procurement process, and improve the climate for the negotiated settlement of disputes."<sup>49</sup>

The Commission's second proposal also centers on intra-agency resolution of disputes. The Commission called for "a [timely] informal conference to review contracting officer decisions adverse to the contractor."<sup>50</sup> The Commission believed this informal conference can provide several benefits. It would "promote settlements" by bringing in less interested officials to hear both sides of a dispute; might add to the CO's confidence in making his decisions to know that his superiors are present; should "increase contractor confidence" in the procurement process by providing for more "open" decisions; and could allow the agency to detect and correct erroneous CO determinations at the earliest possible moment. The agency would also be able to screen potentially large or legally important claims at an earlier stage.<sup>51</sup>

Note that these first two Commission recommendations are directed at the "contracting officer" procedures. Obviously, the more claims that can be resolved at this stage, the better the entire process.

After an extensive look at the present administrative board structure, the types of cases handled, the time required for various board resolutions and many other factors, the Commission, in its third recommendation, favored retention of the current multiple agency board system, but would set minimum standards for board personnel and caseload and would grant subpoena and discovery powers to the boards.<sup>52</sup>

This recommendation adopts the current "flexible approach" to dispute resolution by allowing each agency to retain boards and procedures tailored to the types of disputes that commonly

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<sup>48</sup> 4 *id.* at 12 (Recommendation 1).

<sup>49</sup> 4 *id.* at 13.

<sup>50</sup> 4 *id.* at 13 (Recommendation 2).

<sup>51</sup> 4 *id.* at 13-14.

<sup>52</sup> 4 *id.* at 20 (Recommendation 3).

arise in a given agency. The Commission believed that its proposal would "eliminate the disadvantages" of the consolidated "superboard" proposals. It is true that a superboard might give "economies of scale" by eliminating duplication, and could provide "uniformity of practice and procedure."<sup>53</sup> However, these advantages are more than outweighed by the disadvantages of a "superboard." The speedy administrative remedy now found in some of the agency boards would probably be lost at the superboard. A consolidated board would be less familiar with the unique problems faced by a single agency; and it would not be as responsive to the unique needs of a given agency. Thus, the consolidated board would be less flexible than the current agency boards.<sup>54</sup> Finally, the Court of Claims, in existence for over 120 years, has the necessary expertise to handle procurement claims. If the necessity for creating a "superboard" is indicated, expansion of the Court of Claims trial division rather than creation of a new board, would provide the same benefits without entailing the vagaries that a new board might produce.

New commissions, new boards and new agencies are invariably the quick and easy answer to all governmental problems. They cost more, merely transfer one man's work to another, and usually solve nothing. In short, the Commission is correct in its conclusion that the multiple agency boards should be retained.

The Commission's other suggestions are quite well taken: establishing a minimum caseload (to justify the expense of maintaining a full-time board);<sup>55</sup> establishing minimum qualifications for board members to improve quality;<sup>56</sup> and granting discovery and subpoena powers to the boards to improve the quality of board records and findings.<sup>57</sup>

The Commission's fourth recommendation attacks the delay and expense problems inherent in the current remedies situation. Under this proposal, regional "small claims boards" would be established to provide expedited local handling for disputes of \$25,000 or less.<sup>58</sup> Notably, a decision by a small claims board *would not be reviewable in court*. The contractor could obtain a *de novo* court trial after an adverse decision, but the

<sup>53</sup> 4 *id.* at 20.

<sup>54</sup> 4 *id.* at 21.

<sup>55</sup> 4 *id.* at 21.

<sup>56</sup> The Commission suggested a selection process similar to that used to select hearing examiners under the Administrative Procedure Act, 5 U.S.C. § 551 (1970). 4 REPORT, *supra* note 47, at 21.

<sup>57</sup> 4 REPORT, *supra* note 4, at 21.

<sup>58</sup> 4 *id.* at 22 (Recommendation 4).

Government could not appeal a decision except for fraud. The idea here is to develop a quick and cheap, yet efficient system for resolution of small claims. Because there is no pressure on the small claims board to "build a record for review" such a board would presumably remain informal in outlook. Whether \$25,000 is a "small" claim could be questioned. However, with the current high costs of litigation, very few claims of this amount or less can be economically brought in the courts, and this limit is probably valid.

The fifth Commission recommendation concerns what is termed "all disputes power." This proposal would eliminate the current distinction between contract *disputes* and contract *breaches*; and thereby enable procuring agencies to settle and pay any claim in connection with a contract.<sup>59</sup> Note that such a practice is adopted in conjunction with recommendation six which allows the contractor the alternatives of seeking the resolution of *any contract* claim, at the board or in court, as an initial matter. As the Commission properly points out, the distinction between dispute and breach is "neither logical nor useful." In some cases, the line between the two is quite difficult to determine. All concerned would be better off if this distinction were eliminated.

The Commission's sixth recommendation is quite important to the Court of Claims. It would allow contractors direct court access.<sup>60</sup> This would provide a third *alternative* forum for dispute resolution (after the agency boards and the small claims boards). The proposal would eliminate the review problems created by the Wunderlich Act including the "fact/law" distinction and the "substantial evidence/arbitrary or capricious" dilemma discussed earlier. If a contractor elected, he would litigate before the court's trial division. The court would not have to question whether a given contractor had fully exhausted his administrative remedies. Certainly this proposal would make the court's job easier. It would also provide a judicial forum to those contractors who are worried about the independence of the administrative boards. The Commission did not believe that providing three alternative forums (four, counting the federal district courts independently) would lead to forum shopping. In the system envisioned by the Commission, each forum will fill a rather unique role: the small claims boards for a quick, informal and cheap resolution of a dispute; the agency boards for a fairly fast and rather expert resolution; and the courts for the more important disputes which call for judicial

<sup>59</sup> 4 *id.* at 22 (Recommendation 5).

<sup>60</sup> 4 *id.* at 23 (Recommendation 6).

independence and a well-studied resolution in spite of the somewhat greater time and expense which must be invested for a court trial.

Recommendation seven would allow both the contractor and the Government the right to judicial review of an adverse agency decision.<sup>61</sup> This would reverse the Supreme Court's decision in *S & E Contractors v. United States*.<sup>62</sup> In addition to eliminating the rather complex determinations involved when a contractor appeals only part of a case as in *Roscoe-Ajax*, this proposal recognizes the "adversary nature" of most board hearings now conducted. In addition, the Commission noted, if the suit were brought in the district court or in the Court of Claims trial division (as in recommendation six), the Government would have a right to appeal. Without recommendation seven, the Government could not appeal if the contractor brought the action at the board level. The Commission saw little basis for such a difference.<sup>63</sup>

The Commission's eighth recommendation is self-explanatory and laudable. It seeks to set "uniform and relatively short time periods," limiting the right to appeal adverse agency decisions.<sup>64</sup> At the present time, a contractor has six years before his right of appeal expires.<sup>65</sup> The Commission would considerably shorten this—and suggested 90 days as being more appropriate.

The ninth recommendation would overturn the *Grace* and *Bianchi* decisions. It would permit the reviewing court to take additional evidence and make a final disposition of the case.<sup>66</sup> The thrust of this proposal is clear: to shorten considerably the time now required for judicial resolution. For example, at least four years could have been "lopped" off the appellate time required for resolution of the *Merritt-Chapman* case which exemplifies the great delay inherent in the present system.<sup>67</sup>

The Commission's tenth recommendation is to increase the district courts' concurrent jurisdiction to \$100,000.<sup>68</sup> While this might be a little too high, the current \$10,000 ceiling needs to be raised. One Commissioner's dissent to this recommendation proposed raising this limit to \$25,000.<sup>69</sup>

<sup>61</sup> 4 *id.* at 25 (Recommendation 7).

<sup>62</sup> 406 U.S. 1 (1972). See text accompanying notes 31-34 *supra*.

<sup>63</sup> See 4 REPORT, *supra* note 47, at 25-26. Five Commissioners dissented from this recommendation of the Commission, 4 *id.* at 26-27.

<sup>64</sup> 4 *id.* at 27 (Recommendation 8).

<sup>65</sup> 28 U.S.C. § 2401 (1970).

<sup>66</sup> 4 REPORT, *supra* note 47, at 27-28 (Recommendation 9).

<sup>67</sup> See text accompanying notes 40-43 *supra*.

<sup>68</sup> REPORT, *supra* note 47, at 28 (Recommendation 10).

<sup>69</sup> 4 *id.* at 29.

Recommendation eleven would force the Government to pay interest on all claims awarded by both administrative and judicial forums.<sup>70</sup> The import of this proposal is clear. It would eliminate the current unfairness and hardship imposed on a meritorious claimant by forcing him to let the Government "use his funds" at no cost while the dispute resolution process moves on. An added benefit is foreseen in that the Government would be encouraged to settle cases more readily. If there is some additional cost to the Government attendant in delays the Government would probably be less likely to force doubtful cases into litigation.

Recommendation twelve is also aimed at urging the Government to settle cases. This proposal would force payment of judgments from agency appropriations.<sup>71</sup> As we have previously seen, the agency presently has an interest in forcing claims out of the agency into litigation to free up appropriations for other purposes. This requirement would provide greater incentive for the Government to settle cases.

There are other Commission recommendations, but the 12 just discussed center on the current problem areas between the courts and the boards. While they portend no cure-all, they provide a comprehensive and fair approach to reform. At this point, the even-handed approach that the Commission's recommendations provide as an entity might be emphasized. All parties concerned will obtain certain gains and will be required to make certain concessions. For example, the contractors will obtain a quicker, fairer and more flexible system for resolution of their disputes. The Government will gain the right to appeal adverse board decisions and, hopefully, the benefits of increased bidding competition. The boards will acquire powers they currently lack to subpoena evidence and conduct discovery, thus improving the quality of their decisions. The courts will get a streamlined and easier-to-apply system of review. Each party will also suffer some detriment. The contractors will no longer have the exclusive right to appeal an adverse decision of the agency board. The Government will no longer be free from liability for interest on contract judgments. The agencies lose the exclusivity of their domain over contract disputes now embodied in the exhaustion and finality requirements. Some of the Court of Claims' caseload is shifted to the small claims boards and the district courts.

All of this leads to the conclusion that the Commission's recommendations create a finely balanced and carefully con-

<sup>70</sup> 4 *id.* at 29 (Recommendation 11).

<sup>71</sup> 4 *id.* at 29-30 (Recommendation 12).

sidered *package*. Taken as a whole, the package seems to be the best proposal for remedying many of our current problems.

Recently, Congressman Rodino introduced a bill which would adopt the majority of the Commission's contract remedies recommendations.<sup>72</sup> With the exception of the Commission's proposal to pay judgments from agency appropriations, the Rodino bill adopts, in the main, the proposals of the Commission. One provision of the Rodino bill appears to provide the greatest impact on the Court of Claims. That provision gives the contractor the option of direct access to the courts. Congressman Rodino has remarked that "this option of direct access to court is the keystone of the entire reform system recommended by the Commission because it provides the flexibility that the Commission saw as essential to a fair and workable system." The Congressman has identified the most important need for the future, and I concur in his analysis.

An executive branch proposal has suggested the possible creation of two superboards. This idea has been strongly opposed by many distinguished individuals and groups, among them the American Bar Association, the District of Columbia Bar Association, the Association of General Contractors, and the American Road Builders Association. Answering an official request for comment, the Court of Claims, through Chief Judge Wilson Cowen, has stated, "taken as a whole, the Commission's recommendations provide the fairest and best-balanced approach . . . for correcting the inequities and inefficiencies in the existing system for the resolution of Government contract disputes."<sup>73</sup> The Chief Judge went on to support the Rodino bill which, in his opinion, provides a better method to effectuate the Commission's objectives.

The Rodino bill seems to offer the best system for all parties. Certainly the beleaguered contractors will find their situation enormously improved.

To return to our original illustrations. . . . Jim Jones, the West Coast contractor who doesn't bother to bid on Government contracts, may now well try to "take a fling." Settling disputes with the Government wouldn't be nearly as complicated under the proposed, new procedures.

Bill Smith felt the Government owed him \$2500 on his computer job in New England. It was only a small amount, but now it wouldn't be too expensive to fight for this claim. He could move immediately into the small claims board nearest his area.

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<sup>72</sup> H.R. 6085, 94th Cong., 1st Sess. (1975).

<sup>73</sup> Letter from Hon. Wilson Cowen, Chief Judge, United States Court of Claims to Hugh E. Witt, Administrator for Federal Procurement Policy, Nov. 25, 1975.

Tom Brown's huge office building down South constructed after many difficulties and constant change orders would now present a different legal picture. Tom could move immediately into the United States Court of Claims, and start with a trial de novo.

The floods, strikes, and other problems that beset Joe Johnson on his midwest dam would no longer add up to a fourteen-year delay. Joe's case could well end before a board of contract appeals, but if he wanted to go to court, he could move swiftly to an appellate tribunal. In addition, the Government would be required to pay interest for the period of time it had the use of his money.

And the contractor who built the bad building for the Army using shoddy material could be held to account by the Government through the means of a counterclaim. No longer would the Government's right to appeal be foreclosed.

The bottom line under this discussion is that things need to be done in the contract remedies area. Vital changes must be made and must be made as soon as possible. The Rodino bill appears to present the best resolution to these major problems. And most important of all, these practical recommendations will work!

Perhaps all changes will not be to everyone's liking, but compromise is the way our Government really functions.





# COPYRIGHT IN GOVERNMENT PUBLICATIONS: HISTORICAL BACKGROUND, JUDICIAL INTERPRETATION, AND LEGISLATIVE CLARIFICATION\*

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## I. INTRODUCTION†

Ever since 1895, statutory provisions have prohibited the assertion of copyright in any publication of the United States Government.<sup>1</sup> Although the interaction of the statutory provisions contained in the printing law and in the copyright law,

\* The opinions and conclusions presented in this article 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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† As the type was being set on this article, the House of Representatives, 122 CONG. REC. H10911 (H. daily ed. 1976), passed its version of the copyright law revision. Because the Senate and House versions were not identical, the bills were referred to a conference committee which resolved the conflicts. See H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. 1 (1976). The Senate, 122 CONG. REC. S17256 (S. daily ed. 1976), and the House of Representatives, 122 CONG. REC. H12018 (H. daily ed. 1976), approved the conference bill and transmitted it to the President who signed it into law. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

In this article, the provisions denominated as "proposed" in S. 22, 94th Cong., 1st Sess. (1975), have, without exception, been enacted into law. The Act becomes fully effective on January 1, 1978. Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 301-303, 90 Stat. 2541. Under section 301(b) no rights arising under the old act prior to January 1, 1978 are affected. Consequently, over the next 14 months, we will operate under the old law, but with an eye toward the new statute.

The article predicts no legislative solution to the problem of copyright in works produced under government contract, but the Congress may take another look at the entire area. The bill originally passed by the House provided that the National Technical Information Service, a part of the Department of Commerce, could copyright a limited number of documents. That provision was eliminated from the conference bill in view of the conferees' promise that the Senate will consider the matter in 1977. 122 CONG. REC. H12017 (H. daily ed. 1976) (remarks of Mr. Kastenmeier); see H.R. REP. NO. 94-1733, 94th Cong., 2d Sess. 69-70 (1976). When this subject is reconsidered, the Congress will have the opportunity to deal with the broader problem of works produced under government contract.

The initial statutory provision was a part of the 1895 revision of the printing law. Act of June 12, 1895, ch. 23, § 52, 28 Stat. 608. A similar provision was incorporated into the copyright law during the 1909 revision. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077. The provisions have been only slightly modified since their enactment. The current provision in the printing law is 44 U.S.C. § 505 (1970) and the current copyright provision is 17 U.S.C. § 8 (1970).

and the provisions themselves raise almost as many questions as the provisions answer,<sup>2</sup> the major issue of what constitutes a publication of the United States Government has been largely settled by administrative practice,<sup>3</sup> the courts<sup>4</sup> and the interpretations of commentators.<sup>5</sup> Nonetheless, questions regarding the rights of military authors in works produced in the course of their duties still arise, and little readily available military authority is available to quickly resolve these issues.<sup>6</sup>

Three other questions of varying degrees of importance are alive in the area, although two may be neatly resolved by the Congress in the near future. The two easily resolved questions concern the common law rights of the Government in unpublished works and the ability of the Government to secure a copyright in works that are not "publications" in the sense that they are not printed documents. The third question is somewhat more complex. It is whether the prohibition against copyright in government publications should extend to materials produced under government funded grants or contracts. This issue has not been litigated in recent years and has emerged only in

<sup>2</sup> For example, what precisely is a "government publication"? See Section IV.A.1 *infra*. Does the term refer only to material that has been "published" generally? See Section IV.C *infra*. What is the precise nexus with the Government that makes such a work a government publication? See Section IV.A.2 *infra*. May the Government retain a common law copyright in an unpublished work on the ground that it is not a "publication"? See Section IV.C *infra*.

<sup>3</sup> See REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS (Committee Print 1961) [hereinafter cited as REPORT OF REGISTER] which states that the Copyright Office considers a government publication to be one produced by a government employee within the scope of his employment, whether or not privately printed. *Id.* at 131.

<sup>4</sup> See, e.g., *Public Affairs Associates, Inc. v. Rickover*, 294 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962); *Sherr v. Universal Match Corp.*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Sherrill v. Grieves*, 57 Wash. Law Rptr. 286, 20 C.O. Bull. 675 (Sup. Ct. D.C. 1929).

<sup>5</sup> H. HOWELL, COPYRIGHT LAW § 8, at 47 (Latman rev. ed. 1962), 1 M. NEMMER ON COPYRIGHT § 66, at 267 (1975).

<sup>6</sup> The principal Army regulation dealing with this subject is overbroad and probably incorrect. Army Regulation No. 27-60, Patents, Inventions, and Copyrights, para. 4-8 (15 May 1974) merely repeats the phraseology of the statute and adopts the broadest possible reading: "A Government publication is defined as a work prepared by a [government] officer or employee . . . as part of his duties." *Id.* para. 4-8a (emphasis added). The regulation goes on to include works which are prepared as part of an officer or employee's *express or implied* duties and claims a royalty-free license in any work which was created with any government time, materials or facilities, *id.* para. 4-8b (emphasis added). Another regulation merely states that "Government publications are not eligible for copyright." Army Regulation No. 310-1, Publications, Blank Forms, Printing Management, para. 1-19b (CI, 25 Sept. 1973). The Army's *Legal Assistance Handbook*, a remarkably thorough work, contains no discussion of the government publications problem. See U.S. DEPT OF ARMY, PAMPHLET NO. 27-12, LEGAL ASSISTANCE HANDBOOK ch. 31 (1974).

the congressional hearings considering the revision of the copyright laws. The committee proceedings have provided a forum for advocates on either side of the question<sup>7</sup> and have produced little in the way of balanced commentary. Most of the presentations have ignored the historical basis for the copyright prohibition as well as two programs which have explicitly authorized copyright in government subsidized materials for several years.

This article will trace the development of the American common law and statutory prohibitions on copyright in government publications and synthesize the various reasons the courts first, and then the Congress, determined that governmental works should not be copyrighted. This discussion will illustrate situations in which the courts have found the restriction applicable and will consider some of the other problems typically associated with the publication of materials created by government authors. Using the historical and theoretical bases for the prohibition of copyright in government publications, the article will then address two questionable and probably incorrect provisions of the Army regulation; whether the Government may assert common law copyright in unpublished government materials; and whether materials produced under government contracts are the proper subject of copyright. The discussion of these issues will draw upon the published congressional hearings considering the various bills to revise the copyright law and will note proposed legislative alterations where appropriate.

## II. AMERICAN COMMON LAW ORIGINS

### A. EARLY SUPREME COURT CASES

Even before Congress enacted the first statutory prohibition of copyright in government publications, the Supreme Court, first in a casual aside, and later in a more clearly articulated holding, determined that on public policy grounds there could be no copyright in the written judicial opinions of the courts. In *Wheaton v. Peters*<sup>8</sup> the Court, after a thorough review of the British common law, the United States Constitution and

<sup>7</sup> As a general rule, book publishers and researchers have sought an exception to the statute which would permit them the opportunity to publish government sponsored material with copyright protection, and news media representatives have opposed any such exemption with equal vigor. See DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS (Committee Print Feb. 1963). There Mr. Rosenfield of the Public Affairs Press advocated strict adherence to the principles of non-copyrightability. *Id.* at 203, while Mr. Frase of the American Book Publishers Council extolled the advantages of private publication and copyright. *Id.* at 204.

<sup>8</sup> 33 U.S. (8 Pet.) 591 (1834).

the early copyright act, held that after publication no common law right could serve as the basis for copyright; and that in order to obtain a copyright, compliance with the notification and delivery provisions of the statute was indispensable. Before remanding the case for trial on the issue of compliance with the act, the Court, joined by Justices Thompson and Baldwin, who had dissented on the merits, gratuitously remarked

... that the court are unanimously of the opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.<sup>9</sup>

In its first attempt to elucidate the position taken in the final lines of *Wheaton v. Peters* the Court appeared to rely on three somewhat related theories, each having its basis in "public policy." The case of *Banks v. Manchester*<sup>10</sup> involved a statutory scheme whereby the reporter of the Ohio Supreme Court was to secure a copyright in that court's opinions for the benefit of the state. The Court rejected the plaintiff's contention that the reporter could obtain a copyright in the opinions, statements of the cases, syllabi or headnotes, all of which had been prepared by the judges. The first basis of the opinion stated that:

In no proper sense can the judge who [prepared all the material to be copyrighted] be regarded as their author or proprietor . . . so as to confer any title . . . on the state. . .<sup>11</sup>

Then the Court commented that the judges

... receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors.<sup>12</sup>

After this statement and an incantation of *Wheaton's* name, the "public policy" basis of the decision finally emerged:

The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a Constitution or a statute.<sup>13</sup>

The result was unmistakably clear. The judges lacked the capacity to empower the reporter to obtain a copyright in their decisions. What was unclear was whether this result flowed from the judges' failure to obtain the status of "authors"; whether the judges' receipt of statutory compensation precluded them from obtaining an additional pecuniary reward; or whether judicial opinions, as expositions of the law, were

<sup>9</sup> *Id.* at 668.

<sup>10</sup> 124 U.S. 244 (1888).

<sup>11</sup> *Id.* at 253.

<sup>12</sup> *Id.*

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

simply noncopyrightable. This final consideration was in all probability the motivating rationale, because in its final sentence, the Court extended its language in *Wheaton*, which involved its own decisions, to all courts: the Justices in effect stated that no judge of any court could confer exclusive rights to his judicial labors on any person.

One month later the Court had another opportunity to clarify *Wheaton* and took the opportunity to inferentially reemphasize the final rationale of *Banks* as the basis of its decision. In *Callaghan v. Myers*,<sup>14</sup> the plaintiff was the assignee of the reporter of the Supreme Court of Illinois who had prepared considerable original material and appended it to the opinions of the court. The defendant, who had been sued for infringing the assignee's copyright, contended that the reports were public property and therefore not susceptible of private ownership. Myers also alleged that the reporter was not an author within the meaning of the copyright act. The Court, relying on what was *not* stated in *Wheaton*, concluded that the Court must have determined that *Wheaton* could have obtained a copyright in the materials which he appended to the Supreme Court's opinions. Had this not been the case, there would have been no cause to return the case for trial on the issue of compliance with statutory prerequisites. Further, the Court found the reporter to be an author under the statute and despite his public position and salary, found him to be capable of obtaining copyright in his additions to judicial opinions absent any explicit inhibition. Clearly then, the Court read *Wheaton* and *Banks* as having precluded the assertion of property rights in judicial opinions on the basis that the law cannot become the property of any one individual. It excluded the "author" and "compensation" bases of the *Banks* opinion and relied upon it for the proposition that "there can be no copyright . . . in the opinions of the judges, or in the work done by them in their official capacity as judges . . ." <sup>15</sup> presumably because the freest access to such works should be encouraged.

This theory of the Court's *ratio decidendi* has not been universally accepted by the commentators who have discussed the issue. While Howell strenuously questions whether any copyright can subsist in judicial reports,<sup>16</sup> Nimmer seems to view the double compensation rationale as a persuasive basis for disabling government employees from obtaining copyright in materials produced within the scope of their employment:

<sup>14</sup> 128 U.S. 617 (1888).

<sup>15</sup> *Id.* at 647.

<sup>16</sup> H. HOWELL, COPYRIGHT LAW 205 (Latman rev. ed. 1962).

[S]omewhat anomalously the older decisions have held that an official reporter paid by the state may personally claim copyright in the headnotes and synopses . . . written as a part of his official duties, in the absence of an agreement to the contrary.<sup>17</sup>

Nimmer continues by stating that this exception for reporters who were paid government employees may be explained on the basis of "a time honored usage."<sup>18</sup> Indeed, such an argument has a substantial persuasiveness to it. The fact that reporters of court decisions may copyright material they prepare in the scope of their duties probably is a result of the Court's failure to squarely face the question of the copyrightability of a government employee's work in *Wheaton v. Peters*. Between *Wheaton* and the two 1888 decisions, *Banks* and *Callaghan*, lower courts had commented upon the Supreme Court's inferential ruling that *Wheaton* was entitled to copyright his additions to the *Supreme Court Reports*<sup>19</sup> and an influential commentator thought the question of copyright in the reporter's notes, and even in the decisions themselves, was easily answered in the affirmative.<sup>20</sup> The question of the ability of the reporter to copyright his additions to the reports not having been litigated, the Court may have failed to realize the full implications of its remand of the case to the circuit court.

Nonetheless, by 1890 there appeared to be either an exception to the general allowability of copyright for expositions of the law; a presumption which prohibited copyright by government employees of material created in the scope of their employment with an anomalous exception for reporters of judicial opinions; or, most likely, a general prohibition of copyright in materials which constituted "the law" and a presumption, that absent express language or firm tradition to the contrary, publications of government employees could not be copyrighted because they belonged to the writer's employer—the public at large.

#### B. LOWER COURT DECISIONS AND ADMINISTRATIVE OPINION

Even before the first statutory restriction on copyright in government publications emerged in 1895, the general practice, if

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<sup>17</sup> 1 M. NIMMER ON COPYRIGHT LAW § 66, at 269 (1975) (emphasis added).

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

<sup>19</sup> *Little v. Gould*, 15 F. Cas. 612 (No. 8395) (C.C.N.D.N.Y. 1852); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839).

<sup>20</sup> E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 161 (1879) [hereinafter cited as DRONE]. Drone contended that judicial decisions "are a proper subject of copyright." *Id.*

we can believe a contemporary source, was to publish government printed material without complying with the formalities for obtaining a copyright.<sup>21</sup> Indeed, the public at large, or at least litigants challenging another's right to property in a document that had some connection with the Government, frequently alleged or assumed that all public documents were in the public domain.

The practical ramifications of the government's failure to properly claim copyright emerge in bits and pieces from occasional reports of judicial and legislative consideration of the copyright issue. In *Blunt v. Patten*<sup>22</sup> the defendant claimed he had not infringed the plaintiff's copyright in a map because he had merely copied a public document, which anyone was free to do. The decision is not clear whether Patten claimed the map was public merely because the author had transmitted a copy to the Navy Department for government use and preservation in the public archives, or because the Navy had provided assistance in the preparation of the map. The chart was prepared by the plaintiff and his crew, although the commander of a naval station had permitted the use of a naval vessel in making the survey in question. The government assistance was given with the express understanding that the results of the work were to be for the plaintiff's private benefit. The circuit judge concluded:

... [T]he pretense that it became a public document from being deposited in a public office, was entirely untenable. The survey was made chiefly at the plaintiff's expense, and according to the understanding, it was to be for his benefit; it was of great use to the navigating community, and Capt. Hull was justified in aiding him in it upon such terms.<sup>23</sup>

A more direct relationship with the Government mandated a different result in *Heine v. Appleton*.<sup>24</sup> There the plaintiff attempted to assert his copyright on drawings which he had made while employed by the Government during Commodore Perry's expedition to Japan. After Congress had ordered Perry's report of his journey published, the plaintiff sued to enjoin publication of a subsequent edition. His motion was quickly denied because he could not qualify as an "author" for the purpose of the statute because his

sketches and drawings were made for the government, to be at their disposal; and Congress, by ordering the report, which contained those sketches and

<sup>21</sup> *Id.* at 164. Drone indicates that this practice was the result of inaction, rather than any lack of capacity to obtain a copyright. *Id.*

<sup>22</sup> 3 F. Cas. 762 (No. 1579) (C.C.S.D.N.Y. 1828).

<sup>23</sup> *Id.* at 763.

<sup>24</sup> 11 F. Cas. 1031 (No. 6324) (C.C.S.D.N.Y. 1857).

drawings, to be published for the benefit of the public at large, has thereby given them to the public.<sup>25</sup>

An opinion of The Judge Advocate General rendered in 1897 illuminates the administrative interpretation given to the Supreme Court precedents during this same period.<sup>26</sup> The facts giving rise to the opinion involved an Army officer's assertion of copyright in a published course of rifle and carbine instruction which he had prepared under orders from competent authority. When other officers revised the work several years later, they questioned the propriety of republishing the material in view of the original author's copyright. The opinion concluded that the facts that the first author had prepared the instructions "in his official capacity, . . . in the performance of his duty . . . and under [his government] salary" were sufficient grounds to hold "the copy right [*sic*] was not a valid one." However, after this clear articulation that the nature of the officer's duties precluded him from obtaining a valid copyright, The Judge Advocate General brought his decision into line with *Wheaton v. Peters* by stating:

[T]he regulations as originally prepared, considered, revised and adopted became the official public regulations for rifle and carbine firing in the army, and that therefore they could, as again revised by other officers in their official capacity, be printed by the Government for distribution to the army, without infringement of the copyright referred to.<sup>27</sup>

This phraseology appears to undercut the prior basis of the decision by seeming to concede the validity of the author's copyright, even though the copyright could not bar the Army from utilizing the work. One theory that might justify this position is the implicit assumption that even if a copyright did exist, it be-

<sup>25</sup> *Id.* at 1033; *accord*, *Dir. Ops. JAG 1901 Copyright*, para. 969, at 277 (1891).

In that 1891 opinion The Judge Advocate General considered the effect of a retired officer's assertion of copyright in an abridgement of the "Infantry Drill Regulations." This publication had been printed by the Public Printer who had then sold a set of duplicate electrotypes to the abridger. See Section III.A *infra*. The opinion belittled the abridgement, terming it the "so-called 'Abridgement'—substantially the original work somewhat reduced" and held the act of "attempted copyrighting . . . wholly nugatory at law." The basis of the opinion was that the retired officer's efforts could not confer upon him the status of an author for the purposes of the statute. See *also Dir. Ops. JAG 1912 Copyright*, para. I, at 388.

In an interesting sequel to this case, The Judge Advocate General held that:

Assuming (by an Officer) to copyright as owner, and thus asserting the exclusive right to publish, in an abridged form, the Infantry Drill Regulations, property of the United States, and the formal official publication of which had already been announced in orders by the Secretary of War, . . .

was properly chargeable under the Articles of War as a disorder or neglect to the prejudice of good order and military discipline. *Dir. Ops. JAG 1912 Articles of War*, para. L.XII D, at 149-50 (1893).

<sup>26</sup> *Dir. Ops. JAG 1901 Copyright*, para. 971, at 277-78 (1897).

<sup>27</sup> *Id.* at 278 (emphasis added).



longed to the Government by virtue of the fact that it was obtained by an employee for work created within the scope of his duties.<sup>28</sup>

The factual situations in *Blunt* and *Heine* are so different that meaningful conclusions of other than the broadest type are difficult to substantiate, and the JAG opinion seems to adopt theories compatible with both. It is, at this point, unclear whether public documents other than expositions of the law were as a matter of principle debarred from copyright protection or whether publication without compliance with the statutory formalities forfeited otherwise allowable protection. The defendant in *Blunt* urged the former construction, while the language in *Heine* and the JAG opinion can be read to support the latter view.

The last pre-statute case sheds little more light on the question of copyright in government publications than did the earlier cases. *Hanson v. Jaccard Jewelry Co.*<sup>29</sup> merely held that a compilation of materials drawn from public documents could be copyrighted. The basis of the decision was that "such publications are valuable sources of information and require labor, care and some skill in their publication."<sup>30</sup> As with most of these pre-statute materials, the noncopyrightability of government published works is implicit in the court's opinion, but no reason for the restriction is stated.

These events comprise the available sources of information on the practice and opinion concerning copyright in government publications prior to the enactment of the first statutory proscription in 1895. The events noted above, and the uncertainty of the rules respecting copyright in governmental publications would not in all probability have provoked legislation to regularize the status of property rights in governmental publications<sup>31</sup> had it not been for the Richardson Affair. This particular interlude in congressional history has been thoroughly

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<sup>28</sup> This theory is made all the more plausible by the fact that the original copyright had been granted before any statutory proscription on copyright in government publications had been enacted. Thus the Government would argue that the copyright should vest in it on a "works for hire" theory.

<sup>29</sup> 32 F. 202 (C.C.E.D. Mo. 1887).

<sup>30</sup> *Id.* at 203. *Contra*, Dig. Ops. JAG 1901 *Copyright*, para. 970, at 277 (1890):

Where an official of the War Department was allowed to compile and publish facts derived from records, the property of the United States, preserved in that Department for official and public use and reference, held that he could not legally copyright in his own name such compilation.

<sup>31</sup> During this period there is little evidence that Congress either saw the need to deal directly with the question of copyright in government publications or considered the reasons behind the administrative practice which avoided copyrighting government documents. Congress did enact two relief bills which issued duplicate printing plates and permitted copyright in materials previously printed by order of Congress. Act of May 24, 1866, ch. 99, 14 Stat. 587; Act of Jan. 25, 1859, ch. 16, 11 Stat. 557.

treated elsewhere<sup>32</sup> and will be noted here only to the extent necessary to illuminate the considerations that found their expression in the first congressional prohibition of copyright in governmental documents.

### III. STATUTORY PROHIBITIONS ON COPYRIGHT IN GOVERNMENT PUBLICATIONS

#### A. THE 1895 PRINTING LAW

An 1894 Joint Resolution delegated to the Joint Committee on Printing the task of publishing a collection of presidential communications including messages, addresses and proclamations.<sup>33</sup> Unfortunately, no provision appropriated the funds necessary for prepublication collection and editorial work. Congressman Richardson, Chairman of the Committee, volunteered his services, spent considerable time and effort in the process, and sought and received compensation in the form of a set of duplicate plates from the Public Printer. The year before, Richardson himself had developed a bill which included a provision allowing the sale of duplicate plates to the public.<sup>34</sup> To preclude the assertion of copyright by users of these plates, a restriction on copyright in reprints of government publications was inserted<sup>35</sup> and then the general prohibition on copyright in government publications was added.<sup>36</sup> Richardson took out

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The first bill authorized the conveyance of duplicate plates to a work entitled *History, Statistics, Condition, and Prospects of the Indian Tribes of the United States* to the widow of the author, Henry R. Schoolcraft. The only concern shown in the debate on the floor of Congress was whether the plates were of any value to the Government. Upon assurance that the plates held no value to anyone the Congress passed the bill. CONG. GLOBE, 35th Cong., 2d Sess. 511, 517 (1859). The 1866 Act permitted the widow of Naval Lieutenant William L. Herndon to reprint his book *Exploration of the Valley of the Amazon* which had been ordered published by the Congress after Lt Herndon's return from the Amazon. H.R. EXEC. DOC. NO. 53, 33d Cong., 1st Sess. (1854). This bill was passed after somewhat more searching inquiry, probably because someone had questioned the right of the Government to award the earlier copyright to Mrs. Schoolcraft. See CONG. GLOBE, 39th Cong., 1st Sess. 2738 (1866).

Despite the publication by order of the Congress, in 1851, a second, private edition of Schoolcraft's work was printed, bearing a copyright notice in the name of the publisher. The validity of this copyright, whether asserted on a work printed from duplicate government plates or not, appears to never have been questioned judicially.

<sup>32</sup> Berger, *Copyrights in Government Publications*, STUDY NO. 33 PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86th Cong., 2d Sess. 29-30 (Committee Print 1961) [hereinafter cited as Berger]; Stiefe, *Piracy in High Places—Government Publications and Copyright Law*, ASCAP COPYRIGHT LAW SYMPOSIUM No. 8, at 21-26 (1957).

<sup>33</sup> See 26 CONG. REC. 7952 (1894).

<sup>34</sup> See 25 CONG. REC. 1452-57 (1893).

<sup>35</sup> *Id.* at 1765.

<sup>36</sup> *Id.* at 1766-67 (comments of Mr. Dingley).

a copyright on his editions, and although he claimed that he did not assert his copyright as against the Government<sup>37</sup> and that his editorial work added original material to the editions, a Senate committee later found that Richardson should never have obtained a copyright on those materials.<sup>38</sup> This finding was based on the considerations that the work as a whole had been commissioned by Congress and more specifically that:

If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.<sup>39</sup>

This statement, while clarifying the Richardson case, began the confusion which to some extent still exists concerning the definition of "Government publications."<sup>40</sup> The Superintendent of Documents, for his purposes, defined the term as publications reproduced and disseminated under the auspices of the Government.<sup>41</sup> The Attorney General echoed this interpretation.<sup>42</sup> This definition, however, ignores the problems generated when government sponsored or federal works are not officially printed by the Government.

Another example of the narrow coverage of the 1895 Act was germinating even as the printing law was being debated. As a section of the printing law, the bill could obviously hope to control only *printed* material and not other works subject to copyright. In *Dielman v. White*<sup>43</sup> the plaintiff had been commissioned by the Library of Congress to create a mosaic for a wall of the Library. He submitted his cartoon, complete with notice of copyright, for approval; and after the contract administrator had approved the design, the mosaic was fashioned and hung, always bearing the statutory notice. When the artist subsequently objected to the publication of unauthorized photographs of his work, the court dismissed his bill. Relying on the normal patron-artist principle that the patron would obtain copyright in any work he commissioned absent agreement to the contrary, the judge dismissed the parties' citation of *Banks*,

<sup>37</sup> See 25 CONG. REC. 1766 (1893). See also Stiefel, *supra* note 32, at 22 n.61.

<sup>38</sup> INVESTIGATION RELATING TO MESSAGES AND PAPERS OF THE PRESIDENTS, S. REP. NO. 1473, 58th Cong., 1st Sess. 2 (1900).

<sup>39</sup> *Id.*

<sup>40</sup> As finally enacted, the statute provided "That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted." Act of June 12, 1895, ch. 23, § 52, 28 Stat. 608.

<sup>41</sup> See Stiefel, *supra* note 32, at 26.

<sup>42</sup> 27 OP. ATT'Y GEN. 288 (1909); 18 OP. ATT'Y GEN. 51 (1884).

<sup>43</sup> 102 F. 892 (C.C.D. Mass. 1900).

Callaghan and government-related patent cases as "remote," and found that "considering . . . the habits of governmental officers"<sup>44</sup> the evidence of acquiescence was not sufficient to overcome the presumption of copyright vesting in the patron.

The failure of the court to make mention of the newly enacted prohibition of copyright is not surprising in light of its emergence in the printing act and its reference to "publications" or "reprints."<sup>45</sup> Indeed, this interpretation of the decision has been followed in a recent case.<sup>46</sup> More surprising, however, is the absence of any concern over the origination of and payment for the project by the Government. Nowhere did the court make any mention of the dual compensation or public domain arguments which served to justify the common law prohibition of copyright in government publications.

### B. THE COPYRIGHT ACT

The statutory provision was substantially incorporated into the copyright law in the hurried passage<sup>47</sup> of the 1909 revision,<sup>48</sup> and the courts, with some exceptions, began to go beyond the mere face of the statute and elaborated on the reasons for the prohibition. One case noted that a document's "public character"<sup>49</sup> excluded it from copyright protection. This "character" must have attached as a result of the article's publication as an official document by the U.S. Bureau of Education; the court noted in dictum that the author was not herself disabled from asserting her copyright in the article prior to its publication without statutory formalities.

### C. JUDICIAL INTERPRETATION OF THE ACTS

This theory of the prohibition was further developed in *Sherrill v. Grieves*,<sup>50</sup> a case involving a government officer

<sup>44</sup> *Id.* at 894-95.

<sup>45</sup> See note 40 *supra*.

<sup>46</sup> *Sherr v. Universal Match Corp.*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 396 (1970). See also section IV.A.1 *infra*.

<sup>47</sup> The Congress had apparently not anticipated that the Senate and House committees would both take favorable action on the bill. When both committees unanimously reported the bill favorably, 43 CONG. REC. 3765 (1909), the House, *id.* at 3769, and the Senate, *id.* at 3747, passed the bill. The hearings indicate that there was no attempt to broaden the Printing Act's provisions in the enactment of the copyright bill. See *Arguments on S. 6230 and H.R. 19853 Before the Comm. on Patents of the Senate and House of Representatives, Conjointly*, 59th Cong., 1st Sess. 133 (1906) [hereinafter cited as *1906 Copyright Hearings*].

<sup>48</sup> The original copyright provision read: ". . . [N]o copyright shall subsist in the original text of any work which is in the public domain. . . or in any publication of the United States Government." Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077.

<sup>49</sup> *Du Puy v. Post Telegram Co.*, 310 F. 883, 884 (3d Cir. 1914).

<sup>50</sup> 57 Wash. L. Retr. 286, 20 C.O. Bull. 675 (Sup. Ct. D.C. 1929).

whose writings were initially printed at government expense. While willing to concede that such publication may have made the pamphlet a government publication "in the mere physical sense,"<sup>51</sup> the court was unwilling to conclude that the physical act of printing by the Government was sufficient to invoke the restriction of the statute.

In *Sherrill*, the plaintiff was an Army officer, teaching advanced courses in map reading, topography and surveying at the Command and General Staff College. In his leisure time, he worked on his book, which was produced for, and was in fact used in civilian institutions, as well as by his military audience. When the author sued Grieves for infringing his copyright, both parties to the litigation agreed that the plaintiff was under no duty to reduce his lectures to writing, but nevertheless the defendant urged that:

The denial of copyright to any publication of the Government or to any reprint of the whole or a part thereof has the strongest public equity as its base. In all such cases the public has paid the cost of publication and, presumably in all, has also paid the cost of producing the subject matter by salary or other compensation to those who have created or prepared the matter for publication.<sup>52</sup>

To accept such an argument would be to affirm the proposition that

by entering the employment of the Government a person sells all his energies, physical and mental, to the Government if they relate to any subject matter dealt with by him in performing his duties.<sup>53</sup>

This the court refused to do, basing its conclusion on the fact that military officers do in fact write books that have been copyrighted and used in government schools and on the early Supreme Court holdings that court reporters may copyright their "original" additions to the opinions.

Even though the court off-handedly cited the Supreme Court's decisions without considering the anomaly that the Re-

<sup>51</sup> *Id.* at 290-91, 20 C. O. Bull. at 688.

<sup>52</sup> *Id.* at 290, 20 C. O. Bull. at 687.

<sup>53</sup> *Id.* at 290, 20 C. O. Bull. at 687; *accord*, SPJGP 1942:5928, Dec. 17, 1942, 1 BULL. JAG 375:

A work created by an officer or enlisted man in the course of his official duties, but not by virtue of a specific assignment to create such work, belongs to the author thereof. The rights of the Government to a work produced by an officer or enlisted man does [sic] not depend upon the production of such work during or outside or [sic of] office hours, but upon the nature of the service in which the officer or enlisted man is engaged at the time the work is produced. What has been said in regard to a "work" applies, of course, to music and lyrics. . . . When copyrightable material has been created by officers or enlisted men, not specifically assigned to the production of such work, it belongs to the officer or enlisted man, and may not be used by Public Relations Officers, or reproduced on sustaining or commercially sponsored shows or broadcasts under the direction of the Bureau of Public Relations without the consent of the owner.

*Contra*, AR 27-60, para. 4-8b. See note 6 *supra* & text accompanying notes 118-124 *infra*.

porter was permitted to assert copyright in material that he prepared in the course of his duties, it seemed to base its decision on the fact that Sherrill produced the materials in addition to the duties he was contractually obligated to perform. Furthermore, the court concluded that there was nothing financially improper in the arrangement inasmuch as the Government made a deal that was obviously to its advantage.

Ostensibly using the same test, the Federal District Court for the Southern District of New York held that an employee was not entitled to damages for the infringement of a map he had created while in Alaska on government business:<sup>54</sup>

... [W]hen an employee creates something in connection with his duties under his employment, the thing created is the property of the employer and any copyright obtained thereon by the employee is deemed held in trust for the employer.<sup>55</sup>

The court found the requisite nexus between the plaintiff's work and the publication in the fact that the map would promote interest in Alaska and therefore that the publication of the map "relates directly to the subject matter of the plaintiff's work."<sup>56</sup> Even though the required relationship between the scope of employment and the literary product is much more distant here, and the "connection with" test is much broader than others used, it is worthy of note that the court felt the need to protect taxpayer dollars and prevent double compensation: there was "no evidence that this was not done on government time";<sup>57</sup> and a subordinate government employee as well as government facilities had been utilized in the project.

The rationale of the *Sawyer* case has been criticized<sup>58</sup> and was not followed in the series of cases resolving Vice Admiral Hyman Rickover's right to copyright certain speeches given by him,<sup>59</sup> some of which related to his duties as a naval officer. Because the speeches were the outgrowth of Rickover's government activities, were in part prepared on what the plaintiff alleged was "government time" and were produced with the assistance of government facilities, the plaintiff deemed that they were in the public domain, free of copyright.<sup>60</sup>

<sup>54</sup> *Sawyer v. Crowell Publishing Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942).

<sup>55</sup> *Id.* at 473.

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

<sup>57</sup> *Id.*

<sup>58</sup> Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, ASCAP COPYRIGHT LAW SYMPOSIUM No. 11, at 149-54 (1960).

<sup>59</sup> *Public Affairs Associates, Inc. v. Rickover*, 117 F. Supp. 601 (D.D.C. 1959), *rev'd*, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962), *opinion on remand*, 268 F. Supp. 444 (D.D.C. 1967).

<sup>60</sup> See the statement of facts as recited by the district court, 177 F. Supp. at 602-03.

The district court, using language reminiscent of *Sherrill v. Grieves*, divided publications emanating from government officers or employees into three categories: first, where the individual is hired to write for the government as part of his official duties; second, where the writing has no connection whatever with the individual's duties; and third, a class of writings somewhere between the first two. In this group are those works which "have some bearing on, or that arise out of . . . official actions"<sup>61</sup> although their preparation is not part of the person's official duties. The district court relied on the public interest in fostering the intellectual growth of government employees to the exclusion of "minor considerations" such as the facts that the work might have been prepared during office hours or with the assistance of government facilities or personnel. The court added that abuse of government facilities could be controlled by administrative regulations,<sup>62</sup> and noted that several of the nation's more valuable literary creations have been produced by individuals on the government payroll. After deciding the publication issue<sup>63</sup> in the Admiral's favor, Judge Holtzoff dismissed the plaintiff's complaint for a declaratory judgment on the merits.<sup>64</sup>

On appeal to the District of Columbia Circuit, the plaintiff reiterated its reading of section 8. Mr. Justice Reed, sitting by designation, declined to accept the proposition that a government official who speaks or writes on matters with which he is concerned as an official is by virtue of his official status barred from asserting a copyright in such materials. Instead, he found that none of the speeches was a government publication.<sup>65</sup> In the process of reaching this decision the court interpreted the statutory prohibition as having been enacted to promote the

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All the courts which considered the issue decided that the speeches in issue were not "government publications." The circuit court differed on the issue of whether there had been a general publication of the speeches which invalidated any subsequent copyright. 284 F.2d at 269-72.

<sup>61</sup> 177 F. Supp. at 604.

<sup>62</sup> See, e.g., Army Regulation No. 360-5, Public Information Policies, para. 4-3b (24 Oct. 1975) [hereinafter cited as AR 360-5]: "Personal literary or public speaking efforts may not be conducted during normal working hours or accomplished with the use of Army facilities, personnel or property."

<sup>63</sup> The plaintiff alleged that the speeches had been dedicated to the public by Admiral Rickover's distribution or acquiescence in the distribution of several copies which did not bear any notice of copyright. The court, reaffirming the doctrine of limited publication, see *Wreckmeister v. American Lithographic Co.*, 134 F. 321 (2d Cir. 1904), held that the distribution of a limited number of copies for a limited purpose did not amount to an abandonment of the literary property in the work or bar the subsequent assertion of copyright. 177 F. Supp. at 606.

<sup>64</sup> 177 F. Supp. at 607.

<sup>65</sup> 284 F.2d at 269.

"broadest publicity for matters of government" and limited the term "government publication" to encompass only material "commissioned or printed at the cost and direction of the United States,"<sup>66</sup> in other words "authorized expositions on matters of governmental interest by governmental authority."<sup>67</sup> After this discourse the circuit court looked to officials' conduct and judicial opinions to confirm this finding. However, the court reversed and remanded the case for further proceedings on the issue of publication without notice of copyright.<sup>68</sup>

In a *per curiam* opinion the Supreme Court vacated the court of appeals' decision and returned the case to the district court because, in light of the importance of the decision, the "record was woefully lacking."<sup>69</sup> Consequently, the Court refused to exercise its discretion and render a declaratory judgment. Among the matters the Court deemed important for a complete presentation of the question were the following:

... [T]he circumstances of the preparation and of the delivery of the speeches in controversy in relation to the Vice Admiral's official duties. The nature and scope of his duties. . . . the use by him of government facilities and government personnel in the preparation of these speeches . . . [and] administrative practice, insofar as it may relevantly shed light. . . .<sup>70</sup>

Like the lower courts, the Supreme Court was concerned with the scope of Rickover's duties, the use of government facilities and personnel, and the administrative practice pertaining to (it must be assumed) other government authors. Siding with past authorities, the Court was apparently concerned that property belonging to the Government was being appropriated to private use and that the use of government facilities could have a bearing upon whether a particular item was a publication of the United States Government.<sup>71</sup>

#### D. RATIONALES FOR THE PROHIBITION

The prohibition of copyright in government documents has been justified on a number of bases. The early judicial decisions relied on the policy that expositions of the law could not belong to any one person and that absent express agreement or long-standing tradition, works of government employees created in

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<sup>66</sup> *Id.* at 268. The court relied on the provisions of the 1895 Act as the source of this statement.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 272

<sup>69</sup> 369 U.S. at 113.

<sup>70</sup> *Id.*

<sup>71</sup> *Cf. Nixon v. Sampson*, 389 F. Supp. 107, 133-35 (D.D.C. 1975) which considered the extent of President NIXON's property rights in the presidential materials and tape recorded conversations generated during his administration.



their official capacity could not be copyrighted because the works belonged to the employer, the public at large. This common law basis was reflected by text writers, through administrative practice and in judicial decisions.

In the commotion surrounding the Richardson Affair, legislation was passed to prohibit copyright in any publication of the Government, ostensibly any material printed by the Government through its official printing facilities. The congressional debates reflect that the Congress' purpose was to make public documents more readily available to the public at large,<sup>72</sup> a rationale similar to the reasons underlying the common law proscription of copyright in the sources comprising the law, statutes,<sup>73</sup> judicial decisions,<sup>74</sup> and eventually legislative history.<sup>75</sup> As a *post hoc* rationale, a Senate committee articulated the theory that there should be no "hidden" benefits involved in the production of government documents. Money should be frankly appropriated to cover the services of all compilers and authors, and the public should not pay twice, once through taxes, and a second time to the author for his copyright royalties.

The first appearance of the prohibition in the copyright laws came with no floor discussion of the issue. At only one point during the lengthy hearings did the question arise, and there the testimony indicated that the law was "perfectly well settled"<sup>76</sup> and needed no more explicit enumeration. Unfortunately, if this clarity existed then, it did not continue. Not only did the absence of a definition of the operative term itself pose problems, but as in the past, the courts affixed their decisions to any rationale for the prohibition which suited their purposes. When a court desired to uphold a government employee's copyright, it would merely claim that an individual does not sell his entire being to his employer when he assumes his position. Where copyright was denied, courts focused on a document's "public character," or the fact that public funds were either directly or indirectly involved in the publication of the document.

<sup>72</sup> The insertion of the provision allowing the Public Printer to sell duplicate plates to anyone who desired them ". . . would aid the circulation of knowledge without any detriment to the public service or any extra charge to the Government." 25 CONG. REC. 1457 (1893) (remarks of Mr. Richardson).

<sup>73</sup> *E.g.*, Davidson v. Wheelock, 27 F. 61 (C.C.D. Minn. 1866).

<sup>74</sup> *Id.*; Connecticut v. Gould, 34 F. 319 (C.C.N.D.N.Y. 1888).

<sup>75</sup> See the Act of June 20, 1878, ch. 357, 20 Stat. 207 which authorized the purchase of the plates and back issues of the *Congressional Globe* and also required the purchase of the copyright on those issues. While the copyright would vest in the Government, it cleared the way for uncopyrighted publication of the legislative history in the *Congressional Record*.

<sup>76</sup> 1906 Copyright Hearings, *supra* note 47, at 133.

In summary, then, copyright in "government publications" has been denied because:

1. In a democracy where the widest possible public dissemination of materials of public interest is considered vital:
  - a. expositions of the law (statutes, judicial opinions and legislative histories) cannot be copyrighted because everyone is presumed to know the law and no one can be given a monopoly on publishing these expositions.
  - b. materials generated by government employees and initially printed by the government should be given the widest, least expensive distribution, which is possible only if no one can monopolize the publication or republication of an item.
2. The Government should frankly recognize and openly appropriate the money to cover the cost of its public documents; and the public should not have to pay twice, once through appropriations and then again through royalties.
3. Employees cannot claim property in their work because it belongs to their employer, the public at large, and should therefore be in the public domain.
4. Government employees cannot be compensated twice for material produced in the scope of their official duties. Their only source of compensation can be their employer.<sup>77</sup>
5. Government facilities may not be used for private gain; any such use will result in the forfeiture of the rights to any property so produced.<sup>78</sup>

#### IV. ACTUAL PRACTICE UNDER THE STATUTE

Despite the general acceptance of the proposition that for the purposes of section 8 of title 17 a "publication of the United States Government" is a work produced by a government employee within the scope of his employment, whether or not privately printed,<sup>79</sup> the transformation of this principle into

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<sup>77</sup> Statutes and regulations provide that an officer of the Government may not receive additional money "or compensation for his services." 18 U.S.C. § 209(a) (1970). This statute is implemented by regulation, Army Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, para. 3-1b (6 Mar. 1972). With regard to literary efforts, individuals "will not . . . [r]eceive pay (including honorariums) for speeches or literary efforts provided as part of their official and normal duties." AR 360-5, para. 4-3g. See also 49 COMP. GEN. 819 (1970); 37 COMP. GEN. 29 (1957).

<sup>78</sup> This last basis rests on the decision in *Sawyer v. Crowell Publishing Co.* The decision is unpersuasive and has been criticized, see text accompanying notes 54-58 *supra*, and was not followed in the *Rickover* cases. The Army, by regulation, prohibits the use of government facilities for private gain. AR 360-5, para. 4-3b.

<sup>79</sup> REPORT OF REGISTER, *supra* note 3, at 131. This definition will be substantially reenacted if the proposed revision of the copyright laws is enacted into law. See S. 22.

administrative practice has not been consistent with the judicial interpretation of the statute. If the approach of the Department of the Army can be used as an example, it demonstrates the problems which arise when administrative regulations attempt to control employee conduct through the use of the copyright laws. Although some of the regulatory provisions are consistent with the *purposes* of the copyright provision, they do considerable violence to the terms of the statute and ignore its history.

Other problems crop up when governmental agencies, including the Army, wish to avoid the terms or the intent of the statute. In some instances these agencies have blatantly violated both the letter and the judicial interpretation of the statute by claiming (or authorizing employee-authors to claim) copyright in publications which were prepared as part of their official duties, and which have on occasion even been printed by the Government Printing Office. Another issue is whether the Government can assert a common law copyright in material and thereby prevent its dissemination. Finally, the practice of avoiding the spirit of the statute by paying nonemployee contractors or grantees to create government works and then permitting such authors to copyright their works should be examined.

#### A. INTERPRETATION OF THE COPYRIGHT LAW IN ARMY REGULATIONS

Army regulations have adopted a reading of the prohibition of copyright in governmental publications which is broader in language and application than the judicial decisions which have interpreted the statute in at least two particulars. The first of these provisions transforms the statutory term "publication" into the broader term "work."<sup>80</sup> The second regulatory provision interprets the statute as prohibiting private copyright in any work prepared by an employee even as part of his "implied" duties.<sup>81</sup> This interpretation, if not inaccurate, pushes the provision to its outer limits and without further clarification is misleading. A third portion of the regulation, which purports to give the Government a royalty-free license to utilize a validly

94th Cong., 1st Sess. § 105 (1975). See also S. REP. NO. 94-473, 94th Cong., 1st Sess. 56 (1975). The Senate approved S. 22 on February 19, 1976. 122 CONG. REC. S2047 (S. daily ed. 1976).

<sup>80</sup>"A Government publication is defined as a work prepared by an officer or employee of the US Government as part of his duties." AR 27-60, para. 4-8a. See also *id.* para. 4-8b.

<sup>81</sup>"Any publication or other copyrightable work which is prepared by an employee as part of his duties, either express or implied, is owned by the Government and no copyright may be obtained thereon." *Id.* para. 4-8b(1).

copyrighted work which was created with the use of any governmental facilities,<sup>82</sup> derives not from the copyright law itself but rather from a jurisdictional provision of the *United States Code*, and should be examined.

1. "Any publication or other copyrightable work . . ."

The use of the word "publication" in section 8 has provoked difficulties in discerning the section's true meaning. The use of a term so directly and exclusively applicable to printed media may leave classes of copyrightable but nonprinted works outside the coverage of the statute. Indeed, there is persuasive historical and judicial support for this interpretation of the statute.

Initially included in the 1895 Printing Act, the prohibition on copyright in government publications must be read in light of the Richardson Affair.<sup>83</sup> There, it will be remembered, Congressman Richardson obtained a duplicate set of the printing plates which had been used to print a congressionally funded compilation of the messages of the Presidents. Richardson then printed his own edition with the plates and claimed copyright in his version. Although Richardson obtained his electrotype plates by gift rather than under the statute which permitted the purchase of such plates, the Congress had only one year earlier prohibited the assertion of copyright not only in materials produced from duplicate plates but also in any "Government publication."<sup>84</sup> When a congressional committee reviewed the Richardson affair it found that this type situation was precisely what the Congress had intended to prohibit. Because this provision was first enacted in a printing statute, the reach of the original statute can only have extended to materials printed by direction of the Government. When a variant on the statutory language was incorporated into the copyright law, the drafters considered their action as merely having perpetuated settled law.<sup>85</sup> Thus, the origin of the provision supports the proposition that the term "publication" was intended to mean a document printed by order of the Government.

<sup>82</sup> If a copyrightable work is prepared by an employee not as part of his duties he may obtain and own the copyright therein. However, if the preparation of such work involves the use of any Government time, material, or facilities, the Government is entitled to a royalty-free license to duplicate and use the copyrighted work and to have others do so for its benefit.

*Id.* para. 4-8b(2).

<sup>83</sup> See Section III.A. *supra*.

<sup>84</sup> Act of Jan. 12, 1895, ch. 23, § 52, 28 Stat. 608.

<sup>85</sup> See 1906 Copyright Hearings, *supra* note 47, at 132. Between its enactment in 1895 and its incorporation in the copyright law, the statutory provision prohibiting copyright in government publications had been interpreted as only disallowing copyright in printed, published works of the Government. See Section II.B *supra*.

This historical interpretation conveniently meshes with the particular wording used and is consistent with the terms which the Congress has used when referring to broader classes of works in the copyright statute. Section 8 itself utilizes the term "work" when identifying the class of materials which cannot be copyrighted because they are in the public domain or had been published prior to 1909 without notice of copyright.<sup>86</sup> The term "work" is likewise used in section 10 of the Code which prescribes the manner for securing a copyright upon publication.<sup>87</sup> In short, while the selection of the term "publication" was inartful and in all probability an unthinking adoption of the language of the prior printing law, the word choice seems deliberate and the term certainly encompasses a smaller class of material than the term "work."

The facts and the judicial opinions in *Sherr v. Universal Match Corporation*<sup>88</sup> illustrate the distinction between the use of the term "publication" and the broader term "work." There two soldiers with some artistic abilities were relieved from their other duties to design and create a statue which depicted a charging soldier dressed in full battle gear. The work was created by the plaintiffs largely during their duty hours and was fashioned from Army supplies and with Army equipment. Shortly before the statue was to be unveiled, one of the soldier-artists placed a copyright symbol on a portion of the statue where it was imperceptible to anyone who would view the statue once it had been put in place.

After the sculptors' discharge from the Army, they sued the defendant match company for infringing their copyright by manufacturing and selling match covers bearing a picture of the statue. The district court and the circuit court of appeals both granted the defendants'<sup>89</sup> motion for summary judgment on the basis that the plaintiffs were not entitled to a copyright in their production.

The district court found that the statue was not a "publication of the United States Government" because that term re-

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<sup>86</sup> No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government. . . .

17 U.S.C. § 8 (1970) (emphasis added).

<sup>87</sup> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title. . . ." 17 U.S.C. § 10 (1970).

<sup>88</sup> 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

<sup>89</sup> The United States, not initially a defendant, intervened and asked, if the copyright were held to be valid, for an assignment of the copyright under 17 U.S.C. § 26 (1964) on the basis that the employees' rights in the property belonged to their employer.

fers only to printed matter,<sup>90</sup> but held that the plaintiffs were not entitled to a copyright because the statue had been published without valid notice of copyright.<sup>91</sup> The Second Circuit avoided the section 8 question,<sup>92</sup> and affirmed the judgment of the district court on the ground that any right in the statue vested in the Government under the provision of the copyright law dealing with "works for hire."<sup>93</sup>

The interesting point is that the Second Circuit also avoided the government's counterclaim that it be assigned the plaintiffs' copyright in the event that they prevailed. The circuit court saw no "necessity to make such a determination."<sup>94</sup> However, given the logic of the district court's reasoning and its citation of authority, a strong possibility exists that the Government could have obtained copyright in the statue had the notice of copyright been effective.

*Sherr* is not the only judicial opinion which has seemed to confine the term "publication" to printed material. In the first *Rickover* opinion, the Federal District Court for the District of Columbia noted that the only materials which were indisputably "publications of the United States Government" were those "prepared by a Government officer or employee as part of his official duties and issued by the Government as a public document."<sup>95</sup>

These cases highlight the inartful drafting of the act and suggest that any number of nonprinted materials can be the proper subject of a governmental copyright under the current law. This result is inconsistent with all the announced reasons behind the general prohibition of copyright in government-produced materials, and will be corrected if the House of Representatives passes the currently proposed revision of the copyright law or an equivalent bill and the President signs such a bill into law. Section 105 of the bill currently before the House<sup>96</sup> and of the bill which has already passed the Senate<sup>97</sup> proscribes copyright in any "work of the United States Government." The Senate Report accompanying the bill makes no mention that a purpose of the bill is to expand the coverage of

<sup>90</sup> 297 F. Supp. at 110-11.

<sup>91</sup> *Id.* at 112.

<sup>92</sup> 417 F.2d at 500.

<sup>93</sup> *Id.* at 501.

<sup>94</sup> *Id.* at 500 n.3.

<sup>95</sup> 177 F. Supp. at 603.

<sup>96</sup> H.R. 2223, 94th Cong., 1st Sess. § 105 (1975).

<sup>97</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975).

the current section 8 to clarify the *Sherr* problem,<sup>98</sup> but the intent is obvious. After enactment of this or similar legislation, there will be clear authority to ensure that not only writings, but artistic works created by government officers or employees in the scope of their duties will be in the public domain. Until such time, however, the current language of the Army regulation will continue to be suspect.

2. Material "prepared by an employee as part of his duties, either express or implied. . . ."

There is no dispute that publications created by government officers or employees within the scope of their duties may not be copyrighted.<sup>99</sup> This phraseology obviously includes publications which such personnel create under direct orders from competent authority.<sup>100</sup> It is, however, more difficult to determine the status, for copyright purposes, of materials not so directly related to a governmental employee's express responsibilities.

Of the courts which have considered the requisite nexus between an officer or employee's duties and a work he seeks to copyright, those in the *Sherrill* and *Rickover* cases differentiated between material which has been expressly required by the terms of the author's employment and material which has been prepared on the individual's own volition, although it relates in some way to his governmental duties. In *Sherrill v. Grieves*, the defendant-infringer asserted that the pamphlet entitled "Military Sketching" was created as part of the author's implied duty to provide the school's students with the best instruction of which he was capable, including the preparation of the text:

[I]t was his legal contract duty to the Government to give to the student officers the identical instruction contained in the pamphlet if that was the best treatment of the subject of which he was capable, and that when he adopted as a means of performing his duty written instructions and had them printed at Government expense in a Government printery the court must assume he had the consent of his superior officers at the school to discharge his duties in that way.<sup>101</sup>

<sup>98</sup> S. REP. NO. 94-473, 94th Cong., 1st Sess. 56-57 (1975) [hereinafter cited as S. REP. NO. 94-473].

<sup>99</sup> See, e.g., REPORT OF REGISTER, *supra* note 3, at 131; *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 654-58 (1967) [hereinafter cited as 1967 *Hearings*].

<sup>100</sup> See, e.g., SPJGP 1942 5928, Dec. 17, 1942, 1 BULL. JAG 375.

<sup>101</sup> 57 Wash. L. Rptr. 286, 290, 20 C.O. Bull. 675, 687 (Sup. Ct. D.C. 1929).

The court found that because the officer's superiors had the book printed and because the officer was not obliged to reduce his lectures to writing (or that if he did so they did not become the property of his employer) material relating to his employment did not become the property of the Government.<sup>102</sup>

In the four *Rickover* opinions, the courts drew distinctions between the rights of authors who are "hired to prepare the publications"<sup>103</sup> and are thus ineligible to secure private copyright, and those who are permitted to copyright their works despite the "circumstance that the ideas for the literary product may have been gained in whole or in part as a result or in the course of [their] official duties."<sup>104</sup> The circuit court read the statutory provision as referring to materials "commissioned or printed at the cost and *direction* of the United States."<sup>105</sup> While the Supreme Court's decision turned on the declaratory judgment issue, on remand the district court in its findings of fact concluded that the writing and delivery of the speeches

were not part of Rickover's duties. . . . The speeches were not made in the furtherance of his duties. His duties did not call for the writing and delivery of these speeches, nor was he requested to deliver them by his superiors.<sup>106</sup>

In at least ten other passages of the final decision, the district court commented on the fact that the speeches did not constitute a part of Rickover's official duties,<sup>107</sup> and at one point noted that administrative practice (an issue in which the Supreme Court had expressed interest)<sup>108</sup> approved of government employees writing privately on matters within their field of expertise so long as the materials had not been prepared at the direction of official supervisors or as a part of the employee's official duties.<sup>109</sup>

These cases do not clearly differ between the terms which are used in the regulation: duties which are "express" and those which are merely "implied." If any such distinction is present it is between "official" duties, those prescribed by order or regulation and thus "contractual"; and those, which

<sup>102</sup> *Id.* at 290, 20 C.O. Bull. at 687.

<sup>103</sup> *Public Affairs Associates, Inc. v. Rickover*, 177 F. Supp. 601, 603 (D.D.C. 1958).

<sup>104</sup> *Id.* at 604.

<sup>105</sup> *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960) (emphasis added).

<sup>106</sup> *Public Affairs Associates, Inc. v. Rickover*, 268 F. Supp. 444, 453 (D.D.C. 1967) (finding number 26).

<sup>107</sup> *Id.* at 453, 454, 455, 456.

<sup>108</sup> See *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

<sup>109</sup> 268 F. Supp. at 455 (finding number 45).



although not "official" in the first sense, are performed under orders from competent authority. If the Army Regulation equates the first of these terms with "express" duties and the latter with "implied" duties, then the regulation is clearly in harmony with the cases, although the categories are somewhat misleadingly titled.<sup>110</sup>

Another category of works may, however, be included in the concept of materials produced in the course of an employee's "implied" duties. This type of work may be what Grieves and the Public Affairs Associates alleged was involved in their respective cases. This class of materials encompasses those materials which fit in neither of the categories noted above, but nonetheless are initiated by an author to further a governmental purpose. For example, had Sherrill written his book primarily for his military students (although totally on his own initiative) or had Admiral Rickover spoken to advance governmental objectives, their endeavors could be described as within their "implied" duties as that term is normally used.<sup>111</sup>

Such a reading of the term allows the author to characterize his work in the manner most favorable to his objectives: Sherrill could argue that his book was essentially a civilian publication which he merely permitted the Army to use; Rickover could insist that all his speeches were delivered in his private, rather than in his governmental capacity. By avoiding statements which could be construed to be official, they both could claim copyright in their works.<sup>112</sup> The author's characterization of the transaction makes a substantial difference in the copyright result, but in no other respect. So long as a governmental author adopts a private posture and views himself as a private individual when creating literary material, he can restrict the reach of the "implied" duties to something closely resembling "express" duties. This result is echoed by the *Rickover* court's finding of fact number 26.<sup>113</sup> Thus by engaging in work of their own volition, characterizing their work as "private" and avoiding "official" publication, government authors may write concerning matters within their official competence without

<sup>110</sup> A [work] produced by an officer or enlisted man pursuant to a willingly accepted assignment, the duties of which involved the production of such work, belongs to the Government of the United States.

... A work created by an officer or enlisted man in the course of his official duties but not by virtue of a specific assignment to create such work, belongs to the author thereof.

SPJGP 1942-5928, Dec. 17, 1942, 1 BULL. JAG 375-76.

<sup>111</sup> *But see id.*

<sup>112</sup> Mr. Justice Reed, writing for the District of Columbia Circuit in the *Rickover* case, characterized the purpose of section 8 as prohibiting copyright in "authorized expositions on matters of governmental interest by governmental authority." *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960).

<sup>113</sup> See text accompanying note 106 *supra*.

creating noncopyrightable "publications of the United States Government."<sup>114</sup>

The opinion in *Sawyer v. Crowell Publishing Company*<sup>115</sup> is in conflict with this interpretation. There the court asked whether the literary product in question "relates directly to the subject matter of the plaintiff's work"<sup>116</sup> and held that a map made by the plaintiff's subordinate could not be validly copyrighted. The court failed to cite the statute under which it purported to act; failed to mention or discuss *Sherrill v. Grieves* or any of the pertinent government publication cases; and has been criticized for incorrectly reading the cases upon which it relied to reach its decision.<sup>117</sup> Moreover, using the test the *Sawyer* court used, the *Rickover* court would have been compelled to reach the opposite result from its actual holding. For these reasons, the *Sawyer* case must be dismissed as unpersuasive, and the reading of the Army Regulation limited to cases where the creation of the work in question is expressly within the scope of the orders describing the author's responsibilities; directed by competent authority; or conceded by the author to be within the implied scope of his duties by actions inconsistent with private ownership of the work.

### 3. Governmental license in works created through the use of any governmental time, material or facilities.

A third provision of the regulation which does not seem compatible with the cases interpreting the copyright law is the provision which purports to give the Government a royalty-free license to utilize materials created with the aid of any governmental time, material or facilities. The courts and even The Judge Advocate General have stated that the use of governmental facilities to prepare copyrighted works is not a concern of the copyright laws. Although the Supreme Court indicated its concern with the "use . . . of government facilities and government personnel in the preparation of [Admiral Rickover's] speeches,"<sup>118</sup> each of the courts which considered the issue found that the slight use of governmental facilities and per-

<sup>114</sup> The Senate Report accompanying the recently enacted S. 22, see note 79 *supra*, suggests that this result will continue under the proposed legislation if it is enacted into law. "A Government official or employee should not be prevented from securing copyright in a work written at his own volition and outside his duties, even though the subject matter involves his Government work or his professional field." S. REP. NO. 94-473, *supra* note 98, at 56.

<sup>115</sup> 46 F. Supp. 471 (S.D.N.Y. 1942); see text accompanying notes 54-58 *supra*

<sup>116</sup> 46 F. Supp. at 473.

<sup>117</sup> See note 58 *supra*

<sup>118</sup> 369 U.S. 111, 113 (1962).

sonnel did not disqualify Rickover from obtaining copyright protection for his speeches. In fact, in the final decision which held Rickover's copyright in two of the speeches valid, the district court stated, "[T]he alleged use by Admiral Rickover of certain Department of Defense facilities in preparing the speeches [is] neither material to the case nor [a] proper [subject] of comment for this court."<sup>119</sup>

A 1942 opinion of The Judge Advocate General stated a similar view:

The rights of the Government to a work produced by an officer or enlisted man does [sic] not depend upon the production of such work during or outside or [sic off] office hours. . . . When copyrightable material . . . belongs to [an] officer or enlisted man, [it] may not be used . . . without the consent of the owner.<sup>120</sup>

However, it is not the copyright law itself which empowers the Government to utilize material created with government time, material or facilities, but rather the lack of a forum in which the copyright owner may assert his rights against the United States.

Prior to 1960 the Government could publish material from any source without fear of liability for infringement because it had never waived its sovereign immunity with respect to such suits. This facet of governmental immunity was the subject of some criticism,<sup>121</sup> and in 1960 Congress permitted certain infringement suits to be brought against the Government in the Court of Claims.<sup>122</sup> One of the clauses of the statute which waived this sovereign immunity provided that

This subsection shall not confer a right of action on any copyright owner . . . [whose] work was prepared as a part of the official functions of the employee [of the U.S. Government] or in the preparation of which Government time, material, or facilities were used. . . .<sup>123</sup>

Thus the royalty-free license of the Government stems not from the copyright law itself, but rather from the fact that a certain limited group of copyright owners is unable to sue the Government if it uses their works without authorization. Consequently, the provision has no effect on the validity of the copyright itself; the copyright may be enforced against any infringer other than the Government or its authorized agent.<sup>124</sup>

<sup>119</sup> 268 F. Supp. at 449.

<sup>120</sup> SPJGP 1942: 5928, Dec. 17, 1942, 1 BULL. JAG 375-76.

<sup>121</sup> See Gunnels, *Copyright Protection for Writers Employed by the Federal Government*, ASCAP COPYRIGHT SYMPOSIUM No. 11, at 138 (1960); Stiefel, *Piracy in High Places—Government Publications and Copyright Law*, ASCAP COPYRIGHT LAW SYMPOSIUM No. 8, at 1 (1957).

<sup>122</sup> Act of Sept. 8, 1960, Pub. L. No. 86-726, § 1, 74 Stat. 855.

<sup>123</sup> 28 U.S.C. § 1498(b) (1970).

<sup>124</sup> *Id.*

*B. BLATANT VIOLATIONS OF THE  
STATUTORY PROHIBITION*

Several examples will illustrate that government officers and employees have copyrighted works which are clearly prohibited from being the subject of copyright under the accepted interpretation of section 8. Beyond the few examples given here,<sup>125</sup> registrations in the Copyright Office indicate numerous instances of noncompliance with the terms of the statute,<sup>126</sup> a fact which has prompted one advocate of strict enforcement of the clause to suggest that the prohibition "is honored more by its breach than its practice."<sup>127</sup> Even if this observation is somewhat extreme, these incidents certainly manifest the creativity of governmental officials in forging justifications for illegal conduct. Moreover, each of the reasons presented to justify such copyrights directly conflicts with the theories underlying the prohibition of copyright in governmental publications.

Inadvertence is not to be overlooked as an explanation for the assertion of copyright in some materials. Clearly this was the case when President Kennedy's book, *To Turn the Tide*, was published with the statutorily prescribed notice of copyright in the author's name. No claim was made that the book was a work falling outside the prohibition; indeed the work's subtitle clearly indicated that the contents were "public statements . . . setting forth the goals of his first legislative year." The probable explanation for the assertion of copyright in this volume is that the publisher followed his normal practice and included the notice as a matter of course. The author quickly acknowledged the "mistake" and ensured that it would be corrected in future editions.<sup>128</sup>

Other intentional assertions of copyright have been justified by departmental officers who no doubt have had the best interests of the Government in mind. Unfortunately, their inter-

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<sup>125</sup> See also the example in the text accompanying notes 160-164 *infra*.

<sup>126</sup> Berger, *supra* note 32, at 34.

<sup>127</sup> *Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 222 (1965) [hereinafter cited as *1965 Hearings*] (testimony of Theodore A. Serrill).

<sup>128</sup> See Brucker, *Profits from Public Papers: The Government Copyright Racket* *SATURDAY REVIEW*, Aug. 11, 1962, reprinted in *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 651, 652 (1967) [hereinafter cited as *1967 Hearings*]. This practice continues. See Prugh, *Current Initiatives to Reaffirm and Develop International Law Applicable in Armed Conflict*, 8 *INT'L LAWYER* 266 (1974), copyrighted by the American Bar Association. The author was a government officer and the article was an extract of certain official testimony given before Congress on behalf of the Department of the Army.

pretations of what course would best serve the nation are in direct opposition to the congressionally mandated and judicially interpreted prohibition of copyright in governmental publications.

The 1961 Library of Congress study of copyright in government publications investigated the frequency of the registration of government written and produced materials in the Copyright Office and found a "substantial" number of such works to have been registered.<sup>129</sup> In many cases the government agency for which the work was initially produced supported the author's application for registration on the grounds that the work had been prepared outside the scope of the author's duties or on behalf of a nonappropriated fund agency.<sup>130</sup>

In other cases, publication outside governmental channels was alleged to justify the assertion of copyright. Because the publisher bore all costs and saved the Government the necessity of incurring such expenses, private copyright was justified.<sup>131</sup>

One of the more controversial, and now reportedly abandoned,<sup>132</sup> uses of copyright involved the Army's assertion of copyright in officially produced military histories. Unquestionably these materials were produced by government employees within the scope of their duties and they were printed at the Government Printing Office. The acknowledged purpose of the copyright restriction was, in the words of General C. G. Dodge, to "prevent quoting of material out of context."<sup>133</sup> Another Army officer commented that the copyright would prevent "sensationalizing"<sup>134</sup> of reported events. In addition to raising

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<sup>129</sup> Berger, *supra* note 32, at 34.

<sup>130</sup> *Id.* Berger's inclusion of military service schools as nonappropriated fund agencies must be an oversight. These instrumentalities are funded by congressional appropriations. See, e.g., *Sherrill v. Grieves*, 57 Wash. L. Rptr. 286, 290, 20 C.O. Bull. 675, 685 (Sup. Ct. D.C. 1929).

<sup>131</sup> Berger, *supra* note 32, at 34. One basis for justifying the procedure of extra-governmental publication, but not necessarily the assertion of copyright in such publications is a 1943 Bureau of the Budget Circular. See *id.* at 34 n.36. The assertion of copyright in such materials is directly contradictory to the Register's construction of section 8. See REPORT OF REGISTER, *supra* note 3, at 131.

<sup>132</sup> See 1967 Hearings, *supra* note 128, at 653. Compare, R. SMITH, THE ARMY AND ECONOMIC MOBILIZATION (1959) written by the Office of the Chief of Military History, Department of the Army and copyrighted in the name of Major General Richard W. Stephens, Chief of that Office with M. MATLOFF, STRATEGIC PLANNING FOR COALITION WARFARE, 1943-1944 (1959) which appears to begin a trend of omitting any assertion of copyright.

<sup>133</sup> See 1967 Hearings, *supra* note 128, at 653.

<sup>134</sup> *Id.* The desire to use copyright restrictions to prevent "inappropriate" use of military material is not new. A 1913 opinion of The Judge Advocate General considered an engineer's desire to copyright photographs "in order to insure that they would not

serious questions of censorship,<sup>135</sup> these assertions are flatly contrary to the major reasons for the prohibition of copyright in government publications.

### C. USE OF COPYRIGHT TO RESTRICT ACCESS TO DOCUMENTS

Although one of the guiding principles behind the statutory provision which prohibits copyright in government publications is that the widest possible public dissemination of such works should be fostered, the peculiar phrasing of the statute may in some cases permit an opposite result. Discussing the proper definition of the term "publication," Professor Nimmer suggests three possible meanings. First, he proposes that a publication can be "any writing (in the constitutional sense), whether or not published. . . ." <sup>136</sup> Next, he suggests that the term could mean a minimal or limited publication,<sup>137</sup> and finally that the word might be considered to mean a general publication.<sup>138</sup> Nimmer selects the first definition as the most persuasive on the ground that any construction which would allow the federal government to prohibit the dissemination of material because of its property interest in the document would run afoul of the first amendment.<sup>139</sup>

Putting this argument to the side for a moment, let us first consider the other alternatives beginning with the view that "publication" means a general publication. This interpretation of the term finds strong support in the history of the provision's enactment and in the particular language of the statute. Both these considerations have been dealt with in depth in a previous section of this article,<sup>140</sup> and it is important to note that

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be used for advertising purposes and general circulation." *Dir. Ops. JAG 1912-1940 Military Publications*, para. 8, at 946 (1913).

<sup>135</sup> See 1967 Hearings, *supra* note 128, at 653; Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 *STAN. L. REV.* 311, 320-22 (1974) [hereinafter cited as Nimmer].

<sup>136</sup> 1 M. NIMMER ON COPYRIGHT § 66, at 266.2 (1976).

<sup>137</sup> *Id.*, citing *MacMillan Co. v. King*, 223 F. 862 (D.C.D. Mass. 1914).

<sup>138</sup> 1 M. NIMMER ON COPYRIGHT § 66, at 266.2 (1976).

<sup>139</sup> *Id.* Nimmer recognizes that national security, as well as other considerations, could justify prohibition of or restrictions on disclosure. Army regulations require that certain official and unofficial speeches and writings be cleared before they are published or delivered. While security appears to be the only ground upon which clearance may be denied, see AR 360-5, paras. 4-3d & e; 4-4b(3), the requirement that active duty military members submit all material to be published in nationally circulated media for prepublication clearance, AR 360-5, para. 4-2a(2), may be unconstitutionally overbroad. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Vothers*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); *Vagts, Free Speech in the Armed Forces*, 57 *COLUM. L. REV.* 187, 198-204 (1957).

<sup>140</sup> See section IV, A, 1 *supra*.

the result they require is not unreasonable when viewed in conjunction with the reasons the statutory provision was enacted. The statute was undoubtedly enacted more to prevent individuals from obtaining private rights in publicly-created property<sup>141</sup> than to prevent the Government from dealing with its unpublished manuscripts. In fact, it is probable that this aspect of the problem was not even considered and is an outgrowth of current history rather than of the statute itself.

The argument that the term "publication" must be interpreted to mean a limited publication is based on the anomalous results that a stricter reading produces. Nimmer hypothesizes the situation where an inaugural address is delivered, but not generally published; the author retains his common law copyright and could forbid republication or dissemination of the speech.<sup>142</sup> Similarly, the Government could utilize its common law copyright to suppress dissemination of a written document which had only been distributed to a limited number of persons for limited purposes, and thus not published.<sup>143</sup>

While these results are contrary to some of the purposes behind the common law and statutory prohibitions of copyright in governmental publications, the history of the statutory provision again illustrates that interpreting the word "publication" as limited publication would be wholly outside the drafters' intent.<sup>144</sup> Likewise, the particular word chosen by the drafters certainly does not give any reason to suspect that the concept of limited publication was to have any relevance to the governmental copyright prohibition.

<sup>141</sup> "The legislative history of the initial prohibition in the Printing Law of 1895 indicates that it was aimed at precluding copyright claims by private persons in their reprints of Government publications." SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS 130 (Committee Print 1965).

<sup>142</sup> Nimmer, *supra* note 135, at 320-21.

<sup>143</sup> *Id.* at 320.

<sup>144</sup> This situation is all the more true because the concept of "limited publication" had not yet been clearly developed by the American courts at the time of the enactment of the 1909 statute. While the theory was discussed by commentators, see, e.g., DRONE, *supra* note 20, at 117 (written in 1879), the notion that presentation of a play was not in and of itself a general publication was not decided by the Supreme Court until 1912 in its decision in *Ferris v. Frohman*, 223 U.S. 424, 435 (1912). There had, however, been earlier decisions on point, see *Collins, Playright and the Common Law*, 15 CALIF. L. REV. 381 (1927). See also *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907) (public exhibition of painting not a general publication); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946) (public playing of song not a general publication); *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (delivery of Dr. M.L. King, Jr.'s "I have a dream" speech not a publication).

The application of these principles to a manuscript was first made in *White v. Kimmel*, 94 F. Supp. 502 (S.D. Cal. 1950), *rev'd on other grounds*, 193 F.2d 744 (9th Cir. 1952).

Nimmer's preference for the definition of the term as meaning a "writing (in the constitutional sense)" is subject to criticism on several grounds. First, and most basic, is the historical argument. It is clear that the Congress considered only printed matter and paid no consideration to unprinted material when it enacted the printing law's restriction. Second, use of the term "publication" is quite awkward if the intended term was "writings" in the constitutional sense.<sup>145</sup>

Most interesting, however, is the argument that the first amendment precludes the Government from asserting literary property in any of its documents so as to forbid any dissemination. Common law copyright arises outside the Constitution and is equally available to all authors. While the limitless nature of the right may raise some troublesome questions,<sup>146</sup> because the right has its origin in English common law, it is difficult to see precisely what law Congress has enacted to abridge freedom of speech or the press. Even if such a law be found, it is questionable how the government's assertion of property in a work impinges upon freedom of speech or the press any more than the enforcement of a private author's rights. Indeed, it is difficult to accept this one attack on the constitutionality of the copyright system without following the argument to its logical result: The copyright laws themselves are restrictions on a free press and thus unconstitutional.<sup>147</sup> In addition, this argument would call into question those statutory provisions which permit the United States to assert copyright in certain types of documents.<sup>148</sup> The overbreadth of this argument dooms its persuasiveness.

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<sup>145</sup> The current statute provides: "The works for which copyright may be secured under this title shall include all the writings of an author." 17 U.S.C. § 4 (1970). The revisers of the copyright law have implicitly concluded that the phrase "all the writings of an author" in section 4 "exhaust[s] the Constitutional power of Congress to legislate in this field." S. REP. NO. 94-473, *supra* note 98, at 50.

<sup>146</sup> The Constitution gives Congress the power to "secure[] for limited times to Authors . . . the exclusive right to their respective writings . . ." U.S. CONST. art. I, § 8, cl. 8 (emphasis added). In considering the pending revision of the copyright law, the Senate Judiciary Committee noted that the "limited Times" provision of the Constitution "has become distorted under the traditional concept of 'publication.'" S. REP. NO. 94-473, *supra* note 98, at 113.

<sup>147</sup> It is possible that many of the free speech questions raised by the copyright law are obviated by the doctrine of fair use. See note 148 *infra*.

<sup>148</sup> See Section IV D *infra*. Nimmer expends considerable energy wrestling with the conflict between copyright and the first amendment. 1 M. NIMMER ON COPYRIGHT § 9.2, at 28 through 28.31 (1976). Perhaps one significant source of this conflict is the increasing emphasis on the asserted right to freely disseminate information concerning newsworthy events. Nimmer's extensive analysis of the conflict between copyright and first amendment rights uses as examples the Zapruder film of President Kennedy's



In short, then, Professor Nimmer's reading of the term "publication" in section 8 is in all probability erroneous. The term must refer to printed material that has been generally published. If this interpretation of the statute is correct, an admittedly anomalous result follows: The Government may properly assert a common law copyright in material that has not been the subject of a general publication. This result is at odds with the policy of encouraging the ready availability of materials which the common law and section 8 of the copyright act seek to promote. Nonetheless, the Government can legally prevent the use of material which has not yet been generally published.

The Judge Advocate General of the Army is of the opinion that the Government possesses common law copyright in unpublished material<sup>149</sup> which can serve as a basis for preventing the dissemination of such material,<sup>150</sup> although in one recent case he advised against asserting that power for practical reasons.<sup>151</sup> In view of the definitional analysis of the term "publication" presented above, this view seems correct despite its apparent inconsistency with some of the goals the statute attempts to promote.

The theory behind the provision and the theoretical application of the copyright law will be harmonized if the House of Representatives passes and the President signs legislation similar to that passed by the Senate in the last two sessions of Con-

assassination in *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) and photographs of the My Lai incident. With regard to the former, "it gave the public authoritative answers that it desperately sought; . . .". NIMMER, *supra* § 9.232, at 28.24; and of the latter, "It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs." *Id.* § 9.232, at 28.23. It is clear that Nimmer favors increased public exposure of materials of public interest at the expense of copyright. Much of this tension is released by the doctrine of fair use, which at least one author contends has constitutional dimensions. "[I]t is here submitted that fair use—the right of reasonable access to copyrighted materials—has constitutional protection both directly and under the penumbra of the first and ninth amendments." Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAWYER 790, 791 (1975). However, whether this doctrine has any application to unpublished works under the current statute is open to question by the language of the copyright act:

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent: . . .

17 U.S.C. § 2 (1970) (emphasis added).

<sup>149</sup> DAJA-AL 1976:4233, 3 June 1976; DAJA-AL 1974:3455, 25 Feb. 1975.

<sup>150</sup> DAJA-AL 1976:4233, 3 June 1976.

<sup>151</sup> Particularly the probable unwillingness of the Department of Justice to pursue legal remedies under 17 U.S.C. § 2, and the possible mooted of the issue by proposed legislation.

gress.<sup>152</sup> The legislation proposed in the House and passed in the Senate contains two provisions, one technical and the other fundamental, which would bring about this change.

The language of the new provision which prohibits copyright in governmental materials denominates the category "work[s] of the United States Government"<sup>153</sup> and precisely defines the meaning of the term in a definitional section.<sup>154</sup> Even without this particular revision, the proposed legislation would eliminate the possibility that the Government, or indeed any author, could utilize a common law copyright to control access to all but a minute class of works. The congressional bills propose to eliminate the dual system of common law and statutory copyright protection by making statutory copyright protection the exclusive means of protecting works as soon as they are "created."<sup>155</sup> No longer will "publication" mark the dividing line between two different types of protection. As soon as a work is "fixed in a copy or phonorecord for the first time"<sup>156</sup> it obtains statutory protection for the indicated term, although the author may choose not to publish the work.<sup>157</sup>

Thus, through the enactment of a new law Congress can implicitly adopt Professor Nimmer's broad view that the Government should not be able to restrict access to its intellectual products by virtue of its property rights in them. This revision brings the statute into harmony with the theory behind the law that ready availability of public documents should be fostered.

#### D. COPYRIGHT IN MATERIALS PRODUCED UNDER GOVERNMENT CONTRACT

The prior sections have indicated that works created by employees of the Government can and have been copyrighted under the operation of the current statute. The pending revision of the copyright law will close two of the loopholes which permit the general purposes of the provision to be avoided. However, the current statute only precludes copyright in publications produced by employees within the scope of their du-

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<sup>152</sup> S. 22, 94th Cong., 1st Sess. (1975), which was passed by the Senate on February 17, 1976; and S. 1361, 93d Cong., 1st Sess. (1973) which was passed by the Senate on September 9, 1974.

<sup>153</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975).

<sup>154</sup> "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of his official duties." *Id.* § 101.

<sup>155</sup> *Id.* § 302. See also S. REP. NO. 94-473, *supra* note 98, at 112-14.

<sup>156</sup> *Id.* § 101.

<sup>157</sup> S. REP. NO. 94-473, *supra* note 98, at 115-16.

ties;<sup>158</sup> and while the proposed bills broaden the class of materials covered through substitution of the term "works," the status of the author as an "officer or employee" is still a crucial factor limiting the scope of the prohibition. No restriction is currently placed on governmental documents produced under contract or grant, and the proposed legislation will continue this practice.<sup>159</sup> This situation has produced numerous cases where the purposes of the prohibition are clearly flouted, and the authors and sponsors, as usual, have justified their actions on grounds diametrically opposed to the theory of the Congress which enacted the initial prohibition on copyright in government publications and judicial decisions predating and succeeding that legislation.

One of the more noted instances of copyright of a government sponsored publication is the dual publication of Professor Henry D. Smyth's *Atomic Energy for Military Purposes*<sup>160</sup> by the Princeton University Press and the Government Printing Office. The Atomic Energy Commission, which sponsored the work, reportedly authorized the commercial publication because it expected significant public demand for the book.<sup>161</sup> Both publications bore notice of Professor Smyth's copyright and both enjoyed notable sales.<sup>162</sup> The GPO edition went out of print, and the Princeton edition reportedly continues to sell despite its higher cost.

The questions of public policy raised by this publication are strikingly similar to those raised in connection with Mr. Richardson and his edition of the presidential messages. If the Government Printing Office could or would not meet the demand for a publication, any enterprising publisher could obtain

<sup>158</sup> See, e.g., REPORT OF REGISTER, *supra* note 3, at 131; 1967 Hearings, *supra* note 99, at 654-58.

<sup>159</sup> The H.L. [S. 22, 94th Cong., 1st Sess. (1975)] deliberately avoids making any sort of outright unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright [in such works] . . . Where under the particular circumstances, Congress or the agency involved finds that the need to leave a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

S. REP. NO. 94-473, *supra* note 98, at 56-57.

<sup>160</sup> The work was subtitled "The Official Report on the Development of the Atomic Bomb under the Auspices of the U. S. Government."

<sup>161</sup> See Hearings on H.R. 15638 superseded by H.R. 16897 Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics, 89th Cong., 2d Sess. 123 (1966) [hereinafter cited as *SRDA Hearings*].

<sup>162</sup> The Princeton edition reportedly outsold the GPO edition by a factor of three (125,000 to 40,000) despite its higher price. See DISCUSSIONS AND COMMENTS ON THE 1964 REVISION BILL (S. 3008, H.R. 11947, H.R. 12354), 88th Cong., 2d Sess. 51 (Committee Print Sept. 1965) (testimony of Mr. Manges).

a copy of the printing plates and meet the demand.<sup>163</sup> However, in this case that avenue was foreclosed by Mr. Smyth's copyright. In light of the Richardson controversy, why should a private copyright have issued to the author? In both cases the publication was an official report of the Government, and in both cases, money could—and if historical precedent is any guide—should have been appropriated for the author's compensation if his salary was insufficient to induce him to write the work.<sup>164</sup>

An analogous situation has developed with respect to materials produced under contract for the Office of Education. The large amount of money involved in research grants<sup>165</sup> generated interest in that Office's policy of permitting copyright in the results of funded research. While the Office must have originally permitted contractors to copyright the results of their work, in 1965 it reversed its policy and required all such materials to be placed in the public domain.<sup>166</sup> This policy, probably effectuated in order to comply with the spirit of the so-called Long Amendment,<sup>167</sup> also comports with the general theory which prohibits copyright in government materials.

However, this practice of prohibiting all copyright in government financed material ended in 1970.<sup>168</sup> At that time the Office of Education issued copyright guidelines which permitted the Commissioner of Education to authorize authors to secure copyright in work funded by that office to "preserve the integrity of the materials during development or as an incentive to promote the effective dissemination of final materials. . . ." <sup>169</sup> From its experience under the 1965 "public domain" policy, OE realized that publishers would not refine the contract ma-

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<sup>163</sup> 44 U.S.C. § 505 (1970).

<sup>164</sup> See text accompanying note 38 *supra*.

<sup>165</sup> This figure was reportedly \$100 million in 1967. See 1967 *Hearings*, *supra* note 99, at 649.

<sup>166</sup> 30 Fed. Reg. 9408-09 (1965).

<sup>167</sup> Senator Long would require that all material developed under government contract be placed in the public domain: "[A]ll information, copyrights, uses, processes, patents and other developments resulting from Government research expenditures will be freely available to the general public." 1965 *House Hearings*, *infra* note 202, at 1922-23. See the Senator's extended remarks in 111 CONG. REC. 9343-45 (1965) where he outlined legislative acts which have contained this provision. At least two of the statutes, the Saline Water Act of Sept. 22, 1961, Pub. L. No. 87-295, § 4(b), 75 Stat. 628 and the Coal Research and Development Act of July 7, 1960, Pub. L. No. 86-599, § 6, 74 Stat. 336, deal specifically with patent developments, but include a "catch all" provision for "all other developments."

<sup>168</sup> 35 Fed. Reg. 7317 (1970).

<sup>169</sup> *Id.* at § 1(e).

materials into a publishable format without a guarantee that their product could not be copied by competitors.<sup>170</sup> In short, the Office determined that a close alliance between contractors and private publishing houses was necessary to ensure the widest dissemination of materials created under OE contracts and grants, and thus make the most advantageous use of taxpayer money.<sup>171</sup> Under the OE authorizations for copyright, the Government retains an irrevocable, nonexclusive, royalty-free right to reproduce the material.<sup>172</sup>

The legal basis for this policy is questionable, although the practice is by no means limited to the Office of Education. While many agencies may permit copyright in government sponsored work on the basis of administrative practice, the Copyright Administrator of the Office of Education has asserted another justification. His position is that materials developed under contracts or grants are not subject to the prohibition of section 8 as a result of the Supreme Court's decision in *Rickover* which the Office of Education interprets as "limiting section 8 to works prepared by Government employees as part of their official duties."<sup>173</sup>

Such an interpretation of the Supreme Court's *Rickover* decision gleans a rather broad conclusion from a rather limited decision. As will be recalled, in *Rickover* the Court merely vacated the court of appeals' judgment and remanded the case to the district court because the record was insufficient to justify a decision on "matters of serious public concern . . . relat[ing] to claims of intellectual property arising out of public employment."<sup>174</sup> Nowhere did the Court intimate, much less state, that the situation in *Rickover* defined the outer limits of section 8.

Despite the questionable legality of these copyrights issued for material produced by OE contractors, none has been infringed and none has been judicially questioned.<sup>175</sup> This probably results from the general acceptance of the administrative practice of permitting authors or publishers to claim copyright in such materials. However, the factual basis upon which the

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<sup>170</sup> See U.S. OFFICE OF EDUCATION, COPYRIGHT PROGRAM INFORMATION 1 (rev. ed. 1972).

<sup>171</sup> BACHRACH, OE'S NEW COPYRIGHT POLICY (HEW reprint 1970).

<sup>172</sup> 35 Fed. Reg. 7319, §§ 8 & 9 (1970). Compare AR 27-60, para. 4-8b which deals with works prepared by employees.

<sup>173</sup> Letter from Morton Bachrach to Brian Price, March 5, 1976 [hereinafter cited as Bachrach letter].

<sup>174</sup> 369 U.S. 111, 112-13 (1962).

<sup>175</sup> Bachrach letter, *supra* note 173.

decision to authorize copyrights rests<sup>176</sup> is diametrically opposed to the theory underlying both the provision in the printing law and section 8 and its predecessors. Because Congress has declared that public dissemination is best achieved through the open competition which is inspired by free access to the material, any exception to this policy should come through legislation rather than federal agency regulation.

The Department of Commerce did obtain an express exception to the prohibition of copyright in government publications when it successfully sponsored the Standard Reference Data Act<sup>177</sup> in the mid-1960's. This Act was an outgrowth of the National Standard Reference Data System which was established in 1963 to serve as a centralized source from which the American scientific community could obtain important data relating to the atomic and chemical properties of various substances.<sup>178</sup>

Of importance to this article is the congressional approach to what became section 6(a) of the final legislation, the provision permitting the Secretary of Commerce to obtain a copyright in certain critically evaluated data.<sup>179</sup>

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<sup>176</sup> That public dissemination will be best achieved by giving one person a monopoly on the material.

<sup>177</sup> Act of July 11, 1968, Pub. L. No. 90-396, § 6, 82 Stat. 340, codified at 15 U.S.C. § 290 et seq. (1970).

<sup>178</sup> For a description of the background and purposes of the Standard Reference Data Act see *SRDA Hearings*, *supra* note 161, at 1-11. Because individual quantifications of the properties of nuclear materials and other complex matter are often never published, or if published are not readily accessible to researchers, enormous expenditures of time, material and effort are wasted duplicating already ascertained data. In addition, many of the published data have not been obtained under adequate controls and as a consequence are insufficiently precise for the uses to which they will be put. To eliminate many of these uneconomical practices, the system undertook to centralize management, control testing procedures, compile critically evaluated data, and disseminate or make the data available to the scientific and engineering community. For further background information regarding the development of the Act, see 1968 TECHNICAL HIGHLIGHTS OF THE NATIONAL BUREAU OF STANDARDS, ANNUAL REPORT, FISCAL YEAR 1968, at 17-18.

<sup>179</sup> Notwithstanding the limitations contained in section 8 of Title 17, the Secretary may secure copyright and renew thereon on behalf of the United States as author or proprietor in all or any part of any standard reference data which he prepares or makes available under this chapter and may authorize the reproduction and publication thereof by others.

Act of July 11, 1968, Pub. L. No. 90-396, § 6(a), 82 Stat. 340.

As initially introduced, this provision did not envision the assertion of a copyright on behalf of the Government. In fact, the position of the Department seems unclear and hesitating throughout the hearings. For instance, at one point the Department expressed its desire to utilize a symbol as a hallmark of quality in critical evaluation and at the same time make it illegal for anyone to copy officially imprinted data. The purpose of these provisions was to ensure the integrity of the data and prohibit its improper use by unauthorized parties.

No person shall, for profit or any other consideration, copy the Secretary's data designed

The comments of the Library of Congress on the bill<sup>180</sup> indicated that the combination of the mark and the restriction on publication created the equivalent of a copyright in the material, although the provision was not limited as to time. Although the testimony published in the committee hearings never explicitly details when or why the legislation was altered to provide for copyright in materials produced under the Act, probable explanations are the facts that the initial provisions could not control foreign use of the data,<sup>181</sup> and that the peculiar phrasing could open a broad exception to section 8. The Bureau proposed the additional justification that the copyright would tend to support sales prices for the material at a level above that which GPO could statutorily charge and above which unprotected works could obtain, thereby providing a level of self-sufficiency for the program.<sup>182</sup>

It is clear that none of the asserted justifications could withstand judicial scrutiny in an action testing the validity of a copyright obtained on material created by a government employee in the course of his duties. However, a mere change in form, having the material produced by a contractor rather than by an employee, reverses the result, at least under current administrative practice. This practice is explicitly recognized in departmental regulations,<sup>183</sup> and shows no sign of abating.<sup>184</sup>

Nonetheless, this practice is equally antithetical to the reasons underlying the prohibition of copyright in government publications as the practice of permitting employees to copyright works produced within the scope of their duties would be.

(a) use the Standard Reference Data symbol or mark adopted pursuant to section 6 of this act or any colorable imitation thereof; or

(b) copy any data compilation bearing the Standard Reference Data symbol or mark adopted pursuant to section 6 of this Act.

H. R. 15638, 89th Cong., 2d Sess. § 7 (1966).

<sup>180</sup> *SRDA Hearings*, *supra* note 161, at 60, 152-53.

<sup>181</sup> The testimony indicated that only through the use of copyright could the compilations be protected from unauthorized use abroad. *Id.* at 64-65, 95.

<sup>182</sup> *Id.* at 52, 57. See *Hearing on H. R. 37 Before the Subcomm. on Science Research and Technology of the House Comm. on Science and Technology*, 94th Cong., 1st Sess. 36 (1975) which showed that the system received \$91,000 in royalties in fiscal years 1973-75. See also 52 COMP. GEN. 332 (1972) for a description of the manner in which materials are published under the Act. The goal of providing self-sufficiency for a special program is also antithetical to the reasons for prohibiting copyright in government publications.

<sup>183</sup> See 41 C.F.R. § 3-16.950-315 A, § 15(a)-(c) (1975); 41 C.F.R. § 3-16.950-316, § 16(a)-(c) (1975) (Department of Health, Education and Welfare); 41 C.F.R. § 5-54.203 (1975) (General Services Administration); 41 C.F.R. § 9-15.5010-15 (1975) (Atomic Energy Commission).

<sup>184</sup> See note 159 *supra*.

Even before the statutory prohibitions were enacted, the common law precluded the assertion of copyright in expositions of the law because it accepted the premise that a no-copyright policy would foster the widest possible dissemination of material.<sup>185</sup> This judgment was reiterated in the printing law which gave printers an incentive to reproduce government documents by permitting the purchase of duplicate plates at a fraction over their cost.<sup>186</sup>

All the efforts to secure copyright on government financed materials proceed on exactly the opposite theory. The premise of the developers of the Smyth Report,<sup>187</sup> the Office of Education policy,<sup>188</sup> and the Standard Reference Data System<sup>189</sup> is that more effective dissemination of the material can be made if one publisher can monopolize production and distribution of an item. The argument is that without the protection accorded by the exclusive position a copyright gives no one will expend the necessary resources to adequately advertise or promote a work.<sup>190</sup> Although this argument does have a persuasive ring to it and has apparently been borne out in at least one field by the Office of Education's three policy reversals between the early 1960's and 1970,<sup>191</sup> a decision of such a fundamental nature is one to be made by Congress, not the executive departments.<sup>192</sup>

Similar to the common law rationale of free accessibility is the position taken by the Senate investigating committee following the enactment of the 1895 law. At that time the committee determined that the ready availability of documents to the public was more important than the savings in appropriated moneys that allowing a copyright in government documents would produce.<sup>193</sup> The Senate committee looking into the

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<sup>185</sup> See text accompanying notes 13-20 *supra*.

<sup>186</sup> See text accompanying notes 33-35 *supra*.

<sup>187</sup> See text accompanying note 160 *supra*.

<sup>188</sup> See text accompanying notes 166-172 *supra*.

<sup>189</sup> See text accompanying notes 177-182 *supra*.

<sup>190</sup> *But* see the statement of Senator Long of Louisiana reprinted from the *Congressional Record* which calls attention to the fact that at least five commercial editions of the Surgeon General's report on smoking and the Warren Commission's report on President Kennedy's assassination competed with the GPO edition. The statement also enumerated several government publications with sales in the millions. ("Infant Care," "Prenatal Care" and "Your Federal Income Tax" among others). 1965 *House Hearings*, *infra* note 202, at 1924.

<sup>191</sup> See Bachrach, *supra* note 171, at 1. See also text accompanying notes 161-172 *supra*.

<sup>192</sup> *Cf.* Kaplan v. Johnson, 409 F. Supp. 190 (N.D. Ill. 1976) (separation of powers doctrine precludes executive branch from restricting rights of employees of Veterans' Administration in parents where the Congress has failed to enact a general statute).

<sup>193</sup> See text accompanying notes 36-38 *supra*.



Richardson Affair concluded that what was saved in appropriated funds would be more than consumed by taxpayers' expenditures. Government funded authors and distributors who obtain copyright in their work effectively obtain compensation both directly from the Government and indirectly from the taxpayer-purchasers who pay premium prices for their material. Again, one purpose of the prohibition of copyright in government documents, to provide the widest distribution of material at the lowest possible price, is frustrated. The privately published Smyth Report cost five times the GPO price;<sup>194</sup> the SRDA has funneled almost \$100,000 back into the Treasury in the past three years;<sup>195</sup> and the Office of Education assumes that the extra compensation a copyright will bring is necessary to induce the publishers' best efforts.<sup>196</sup> For the same reason Congress objected to Richardson's royalty payments, so should Congress object to the assertion of copyright in government-financed works.

The argument that an individual producing a work for hire is entitled to a copyright in the material is subject to the same objections noted previously. The normal presumption is that the copyright in a work made for an employer under contract belongs to the employer.<sup>197</sup> Of course this presumption may be contradicted by the specific understanding of the parties,<sup>198</sup> but it has never been suggested that the Government could validly make such an agreement with its regular employees, at least with respect to materials clearly covered by the statute.<sup>199</sup> The only argument of any merit which could conceivably justify a difference in treatment is that a contractor is more "independent" and has a greater interest in his creation. Nonetheless, the arguments in favor of the widest dissemination of government works apply equally in this context and should override the author's interest.

The arguments that it is not permissible to allow authors to copyright materials for which they are otherwise paid and that the use of government facilities should preclude the assertion of a private copyright should apply with equal force to contractors and employees. The contractor presumably accounts for

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<sup>194</sup> Forty cents for the paper bound GPO edition as opposed to \$2.00 for the Princeton cloth-bound edition. Princeton subsequently published a paperback edition and charged \$1.00 for that issue, still 2½ times more than GPO. See *SRDA Hearings*, *supra* note 161, at 123.

<sup>195</sup> See note 182 *supra*.

<sup>196</sup> See Bachrach, *supra* note 171, at 1.

<sup>197</sup> 17 U.S.C. § 26 (1970).

<sup>198</sup> See, e.g., *Dielman v. White*, 102 F. 392 (C.C.D. Mass. 1900).

<sup>199</sup> *Bui cf. Sheir v. Universal Match Corp.*, 417 F.2d 497, 502 (Friendly, J., dissenting).

his costs in preparing his bid; and these costs should be frankly acknowledged and paid from appropriations<sup>200</sup> rather than by the taxpayer-purchasers.

### V. CONFORMING THE STATUTE AND ADMINISTRATIVE PRACTICE TO THE THEORY OF THE COPYRIGHT LAW

It is clear that the dichotomy in results allowed by the characterization of a work's author as an "employee" or as a "contractor" bears no rational relation to the reasons underlying the prohibition of copyright in governmental publications. The hearings on section 8 have not approached the problem from the perspective suggested in this article, but the initial proposals contained provisions which would have permitted occasional deviations from the general prohibition against copyright in government works.<sup>201</sup> However, despite support for this proposal from several federal agencies,<sup>202</sup> first the Register<sup>203</sup>

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<sup>200</sup> If the position taken by the Senate committee investigating the Richardson Affair can serve as a guide. See text accompanying note 37 *supra*.

<sup>201</sup> When the Register of Copyrights gave his report on the general revision of the copyright law, he included a proposal which would have permitted the Joint Committee on Printing to grant express exceptions to the government copyright prohibition in order to accommodate the particular needs of individual government agencies. REPORT OF REGISTER, *supra* note 3, at 158. Recommendation A8. See also H.R. 11947, 86th Cong., 2d Sess. § 4(c) (1964).

<sup>202</sup> The Department of Defense urged Congress to enact a limited exception to the general prohibition of copyright in government works. The Department's basis for its suggestion was that works not published through the Government Printing Office cannot, as a practical matter, be offered to commercial firms without offering the printer the protection of a copyright. Without this protection, it was argued, publishers will not take the risks of preparing and publishing materials and they would go unpublished. *Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess.* 1122, 1176-78 (1965) [hereinafter cited as 1965 *House Hearings*]. The Department of Defense, *id.*, the Atomic Energy Commission, *id.* at 1135-36, and NASA, *id.* at 1181-83, urged Congress to enact a limited exception to the general rule in order to allow private enterprises to market the publications, which they do more efficiently than GPO. An additional reason these agencies urged the adoption of such a provision was that publications which are not copyrighted in this country may be precluded from being copyrighted abroad as a result of Article IV of the Universal Copyright Convention. *Id.* at 1123.

<sup>203</sup> The arguments of the agencies were not persuasive to the Copyright Office and it recommended elimination of any exception because the cases requiring the invocation of the procedure would be "quite rare." SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAWS TO (Committee Print 1965), and insufficient in number to "justify setting up the elaborate procedures and safeguards to insure against abuse of privilege." 1965 *House Hearings, supra* note 202, at 1856 (testimony of Mr. Kaminstein, Register of Copyrights).

and then the Senate<sup>204</sup> retreated from this position. In fact the Senate, in its report accompanying its recently passed copyright bill, expressly acknowledged and confirmed the current administrative practice.<sup>205</sup>

Although the provision permitting exceptions to the general rule of the current section 8 was deleted from the copyright proposals sponsored by the Register and enacted by the Senate, it provides a convenient perspective from which to approach the question of how to conform the government publications exception to the reasons underlying the exception.

Briefly stated, the proposals would have allowed the assertion of copyright in certain employee created materials if the public interest would be better served by copyrighting the product. This decision would be made in conformity with administrative regulations and after certification by the head of the agency.<sup>206</sup> This provision, while applying only to works created by employees, makes a valuable contribution by shifting the question of copyrightability away from the author's status to a consideration of the work itself.

Today the Government produces a vast number of materials, many of which closely resemble works published by private concerns. The educational texts produced under contract and grant from the Office of Education are one example of this, and the tables of critical data produced through the Standard Reference Data System are another. The Government has assumed the responsibility for producing material of this nature for a number of reasons. It may develop educational materials to channel the national effort in a particular direction; and it may serve as a clearinghouse for scientific data because no other entity has the financial or organizational wherewithal to maintain such a project. Such situations present questions significantly different from the questions of whether a copyright can subsist in the text of a judicial opinion which interprets the law or whether an official speech outlining issues of foreign policy which concern the public<sup>207</sup> can become the exclusive property of the official who uttered it.

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<sup>204</sup> S. 22, 94th Cong., 1st Sess. § 105 (1975), passed by the Senate, 122 CONG. REC. S2047 (S. daily ed. 1976).

<sup>205</sup> See note 159 *supra*. But see introductory note, p. 19 *supra*.

<sup>206</sup> See H.R. 11947, 86th Cong., 2d Sess. § 4(c) (1964). See also S. 3008, 88th Cong., 2d Sess. (1964); H.R. 12354, 88th Cong., 2d Sess. (1964).

<sup>207</sup> See, e.g., Mr. Justice Reed's characterization of the purposes of section 8 as prohibiting copyright in "authorized expositions on matters of governmental interest by governmental authority," *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960) and "guides for official action." *Id.* at 269.

Perhaps a distinction similar to that which differentiates a state's sovereign and proprietary acts would provide an appropriate method to distinguish between particular governmental efforts. Where the Government is conducting the business of government, certainly the widest possible access to materials should be encouraged. The dissemination of materials generated in this process is for the direct benefit of the citizenry at large and would be best served by printing through the Government Printing Office and allowing reproduction by any enterprising printer. On the other hand, certain materials appeal only to a discrete, limited sector of the population. Because the Government merely serves as a clearinghouse for this group, and because the governmental status of the product is wholly incidental to the materials themselves, the considerations are different. No longer is the Government interested in obtaining the widest possible dissemination, but merely the widest dissemination within a select group. The Government, acting like a business, should not be precluded from using the most effective method of reaching its audience, and if need be, charging a price similar to what a private concern would charge. Consequently, when the Government acts in other than a sovereign capacity, the goals of promoting the widest possible dissemination of material at the lowest possible price which lie behind the prohibition of copyright in governmental works no longer apply. Likewise, the argument that the entire public should have unlimited access to the materials does not apply with equal vigor, because the general public's benefits are indirectly achieved through the contributions of those for whose primary benefit the materials were created.

This conclusion finds support in the British practice of claiming a Crown copyright in governmental publications. While any comprehensive analysis of the Crown copyright is beyond the scope of this article, discussion elsewhere provides authority for this brief reference.<sup>208</sup> Apparently the British law permits the Crown copyright to lie dormant,<sup>209</sup> and in practice most publications issued in a sovereign capacity are dedicated to the public. These documents include most Parliamentary materials such as committee reports, debates, and acts of Parliament, as well as official papers required to be placed before that body. According to the Treasury Minutes of 1887, the

<sup>208</sup> See Berger, *supra* note 32, at 37-38; Stiefel, *supra* note 32, at 19-21.

<sup>209</sup> Stiefel, *supra* note 32, at 20, quoting 69 GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS 1912-1913. "The rights of the Crown will not, however, lapse and should exceptional circumstances appear to justify such a course it will be possible to assert them."

Crown maintained a strict interest in maintaining proprietary control over works "of rather limited interest, . . . of the same general character as those published by private industry."<sup>210</sup>

Perhaps this practice merely recognizes explicitly a practice which has grown up in this country without much thought. It will be recalled that the earliest copyright provision was contained in the printing law and government publications were defined as materials ordered printed by the Congress.<sup>211</sup> Such congressional printing, which was usually accomplished by the Congressional Printer, now the Public Printer in the Government Printing Office, made all government documents government publications in the printing act sense, and consequently confirmed their noncopyrightability.

Even in the late 19th century executive documents were printed by the Congressional Printer and hence were government publications.<sup>212</sup> However, the great expansion of the executive departments and broad congressional grants of authority to those departments diverted some printing away from GPO.<sup>213</sup> Printing outside that office weakened the printing law basis for designating a document a government publication, despite the efforts of the Joint Committee on Printing<sup>214</sup> to compel GPO publication.

Thus by happenstance the United States appears to have stumbled into a practice which is the practical equivalent of the British solution with one slight twist. Official legislative and executive documents in both countries are not the subject of copyright; materials which are the equivalent to those produced by private enterprise are the subject of Crown copyright in Britain and often the subject of private copyright in the United States because they are produced under the terms of a special statute or by government contractors, not government em-

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<sup>210</sup> Stiefel, *supra* note 32, at 19, 20 n.50. Stiefel quotes the 1887 Treasury Minutes for the proposition that the Crown copyright would be asserted only with respect to literary or quasi literary works and charts and ordinance maps. See also Berger, *supra* note 32, at 37, which updates the British practice by noting a 1958 British Treasury circular which retains the distinction between governmental and "commercial" documents, and indicates a willingness to act as a private copyright owner with respect to the latter class, charging royalties for reproduction.

<sup>211</sup> See text accompanying notes 32-41 *supra*.

<sup>212</sup> 25 CONG. REC. 1462-63 (1893).

<sup>213</sup> See Ms. Comp. Gen. B-88494, 20 Jan. 1950 which affirmed the propriety of non-GPO publication of the results of government research. This approval was based on the broad language of the Atomic Energy Act of 1946, and the fact that a subcontractor received no *direct* compensation for the publication of the material. These broad grants of authority may be found in many acts. See, e.g., 20 U.S.C. § 2 (1970) (Office of Education).

<sup>214</sup> See Government Printing and Binding Regulations (1974) Nos. 36-1; 36-2; 38.

ployees. The British practice analyzes the situation by looking to the type of material; we look to the *author* with, in many respects, the same result.

One other comparison with the Crown copyright may be appropriate. In Britain the copyright vests in the government and it presumably may deal with it in the same manner that a private person may. Under government contracts and grants, however, the copyright vests in the contractor/author who often is required to provide the Government with a nonexclusive, royalty-free license.<sup>215</sup> Vesting the copyright in the contractor ostensibly protects his interest in developing the materials for publication and encourages him to use his best efforts to obtain the maximum distribution for the materials, because more sales produce more profit.

This procedure is, in the long run, probably no different than the British practice. Often the granting of a copyright to the contractor for his work is predicated on the condition that the copyright will be limited to a certain term, generally the time required to fulfill the requirements of the program.<sup>216</sup> This practice achieves the same object as giving the contractor a license to use the government's copyright in the material, or licensing the copyright that the contractor/producer obtained and assigned to the Government. It is possible, however, that substantial differences hinge upon the manner in which this result is effected. The current practice of limiting a contractor-obtained copyright to a number of years may be an unconstitutional derogation of the power vested in Congress<sup>217</sup> to ". . . secure for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ." <sup>218</sup>

Consequently, the better practice would be to either allow the Government to assert copyright in certain of the publications it sponsors, or to permit the author to assert copyright in his name, assign his rights to the Government and then produce the material under license from the Government. The latter solution probably is superior if only because it retains present procedures by not creating a new right in the Government and by utilizing presently contemplated provisions.<sup>219</sup>

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<sup>215</sup> See 35 Fed. Reg. 7317-18 (1970) (Office of Education).

<sup>216</sup> *Id.*

<sup>217</sup> *Kaplan v. Johnson*, 409 F. Supp. 190 (N.D. Ill. 1976). (The failure of Congress to enact a general statute dealing with Veterans' Administration employees' rights to patents precludes the executive branch from doing so under the separation of powers doctrine.)

<sup>218</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>219</sup> See 122 CONG. REC. S2049 § 105 (S. daily ed. 1976).

## VI. CONCLUSIONS

Current congressional initiatives to revise the copyright laws will reaffirm the basic principle that materials written by officers and employees of the Government within the scope of their duties may not be copyrighted. The law will still permit governmental authors to assert private copyright in literary or other works they have created, if the work is incidental to and not required by their duties, even though the work relates to their particular position. The provisions of the current Army Regulation which interpret the copyright law as prohibiting officers or employees from asserting copyright in materials prepared as part of their implied duties is unclear and must be read in conjunction with the cases which more clearly define the types of material which may not be copyrighted. The Department of the Army should clarify its regulation to conform precisely with the judicial interpretation of section 8, and until it does, military attorneys should recognize the imprecision of its provisions and so advise their commanders and clients.

Two provisions in the proposed legislation will conform fringe areas of the governmental copyright prohibition to the theoretical basis of the common law and statutory rules. No longer will a theoretical basis exist which will allow the Government to assert common law copyright in unpublished works or to claim copyright in works which are not publications in the sense that they are not printed materials.

However, the Congress has refused to legislatively resolve the difficult issue of whether material produced under government contracts or grants can be the subject of a private copyright. Permitting documents which relate to proprietary rather than sovereign governmental functions to be copyrighted would involve no conflict with the theoretical basis underlying the prohibition of copyright in governmental publications. The current approach of the copyright act which determines the permissibility of copyrighting government-sponsored works by looking to the status of the author concentrates on an issue which is irrelevant to the reasons behind the prohibition. A better practice would be to allow contractors to obtain copyright only in works which do not relate to sovereign governmental functions. It is unlikely that any such change will be made in the copyright law, however, and government agencies will remain able to secure copyright for any reason which is satisfactory to them by procuring the work by contract rather than having it produced by governmental officers or employees.





# THE LAW OF CONFESSIONS— THE VOLUNTARINESS DOCTRINE\*

Captain Fredric I. Lederer\*\*

## I. INTRODUCTION

Few areas of criminal procedure have proven as complex as the law of confessions. Basic issues of self-incrimination and voluntariness have been increasingly complicated by Article 31 warnings<sup>1</sup> and the *Miranda-Tempia*<sup>2</sup> rights to counsel.<sup>3</sup> Technically speaking, compliance with the Article 31—*Miranda-Tempia* rights warnings is an issue distinct from the voluntariness of the associated statement. However, in practice the two have become so interrelated as to be virtually identical. This is particularly true in the military, for the *Manual for Courts-Martial*<sup>4</sup> has declared that "Obtaining [a] statement in violation of Article 31(b) or other warning requirements" is an example of "coercion, unlawful influence, and unlawful inducement."<sup>5</sup> In day-to-day practice, most prosecutors laying a

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<sup>1</sup>The UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 800-940 (1970) [hereinafter cited as UCMJ] provides the statutory framework for the military criminal law system. Article 31 of that Code prohibits compulsory self-incrimination, and requires any person subject to the Code to inform any individual suspected of an offense of certain rights before interrogating or requesting a statement of such individual. UCMJ art. 31(a) & (b).

<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). In *United States v. Tempia* the United States Court of Military Appeals applied *Miranda* to military practice.

<sup>3</sup>See generally Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

<sup>4</sup>MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 140a(2) [hereinafter cited as MCM, 1969]. The Manual, promulgated by executive order, prescribes the procedures before courts-martial in conformity with the Uniform Code.

<sup>5</sup>MCM, 1969, para. 140a(2). This section was added as an interpretation of *Miranda*. U.S. DEPT OF ARMY, PAMPHLET NO. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, at 27-7 (1970) [hereinafter cited as DA PAM 27-2]. While this conclusion was not unreasonable when announced, it is clear that subsequent civilian cases have distinguished between confessions obtained

foundation for admission of an accused's statement understandably concentrate on the rights warnings and usually give little more than passing attention to common law or due process considerations of voluntariness. While this may normally be adequate, it can be suggested that we are not generally prepared to argue voluntariness issues.<sup>6</sup> This is likely to become particularly important in the near future as the Supreme Court appears embarked on a course designed to strictly limit *Miranda*.<sup>7</sup> While limitation or even elimination of this precedent will leave Article 31 intact, it is probable that the increased attention paid to voluntariness by civilian courts will cause a resurgence of military interest in the doctrine. Accordingly, it appears appropriate to review the voluntariness doctrine as it currently exists.

## II. DEFINITIONS

A confession is a statement by an individual admitting all of the elements of a crime. Historically a confession took place before the court and was the equivalent of a conviction.<sup>8</sup> Distinct from a confession, an admission is a statement admitting facts relevant to proof of a crime but less than a confession. In terms of admissibility there is generally<sup>9</sup> no difference between an admission and a confession.<sup>10</sup>

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in violation of *Miranda* and confessions found to be involuntary on non-*Miranda* grounds. Consequences may differ as in the case of the effect of erroneous admission of a "bad" statement. See Section IX *infra*.

<sup>6</sup> In reality, the rights warnings serve as a valuable prosecutorial tool. If a valid waiver can be shown in court there appears to be an implicit assumption that the statement was voluntary in the common law sense. Without the warnings the prosecution would have to devote a much greater amount of time to proving voluntariness.

<sup>7</sup> See, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971). *But see* *Doyle v. Ohio*, 423 U.S. 823 (1976).

<sup>8</sup> See, e.g., W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS 421 (Beacon Press ed. 1962); 3 J. WIGMORE, EVIDENCE § 818 (Chadbourne rev. 1970) [hereinafter cited as WIGMORE].

<sup>9</sup> In the past some jurisdictions distinguished between admissions and confessions for such matters as the effect of error in their admission at trial (admissions being more easily excused than confessions). While some differences may continue to exist in the states, see, e.g., *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973); *People v. Koch*, 304 N.E.2d 482 (Ill. App. 1973), there appears to be no difference in their treatment under the Constitution. See *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966). In this article reference to either admissions or confessions will include both possibilities unless otherwise indicated.

<sup>10</sup> Excusatory statements are those that deny wrongdoing. They were treated differently from admissions or confessions at common law. However, because of their use for impeachment, constitutional doctrine treats them as admissions. *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966).

A judicial confession is simply a confession made in court, usually by an accused who has taken the stand. A judicial confession frequently takes place when an accused admits commission of one offense while denying responsibility for another, more serious offense. All other confessions are technically extrajudicial ones but are usually referred to merely as confessions.

Adoptive admissions are those admissions, by speech or conduct, which although made by another are adopted by a witness or an accused.<sup>11</sup>

### III. AN INTRODUCTION TO THE ADMISSIBILITY OF CONFESSIONS

To successfully offer a confession into evidence, a counsel must comply with the hearsay rule, the voluntariness doctrine and the corroboration requirement. Admissions and confessions when made by a party to the trial are of course exceptions to the hearsay rule.<sup>12</sup> The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily. The doctrine is designed to ensure the reliability of evidence and to protect against unfairness. The corroboration requirement demands that before a confession can result in a conviction, enough other evidence must be shown to substantiate the commission of an offense or to establish the

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<sup>11</sup> Also known as tacit admissions, admission by silence has proven troublesome because of the *Miranda* warning that a suspect has the right to remain silent. Of what probative value is the silence of a suspect regardless of the circumstances if he has just been warned of his right to say nothing? The Supreme Court has finally held that admissions by silence after *Miranda* warnings are inadmissible. *Doyle v. Ohio*, 423 U.S. 823 (1976). See generally Comment, *Adoptive Admissions, Arrest, and the Privilege Against Self-Incrimination: A Suggested Constitutional Imperative*, 31 U. CHI. L. REV. 556 (1964); Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940 (1975).

<sup>12</sup> The underlying rationale for the recognition of the admission and confession exception to the hearsay rule is unclear. It would seem to be based in part on the need for the evidence, as the declarant will be uncompellable due to the privilege against self-incrimination; and partially on the same reasoning that underlies the rule which renders declarations against interest admissible. However, there are a number of types of admissions, including exculpatory ones, which prove difficult to explain under either rationale, and it may be that the rule should be considered as not falling within any one theory. See *State v. Kennedy*, 135 N.J. Super. 513, 343 A.2d 781 (1975). The requirement that the statement come from a party to the trial can be highly troublesome both in theory and practice. For those jurisdictions which lack the declaration against penal interest exception to the hearsay rule, it can result in the exclusion of a confession made by an individual not on trial.

reliability of the confession.<sup>13</sup> In addition to the rules discussed above, statements offered should be offered in their entirety (or the opposition may complete the statement)<sup>14</sup> and where applicable, compliance with presentation rules<sup>15</sup> or rights warnings requirements must be shown.<sup>16</sup>

From the 17th Century, Anglo-American law has been concerned that confession evidence be "voluntary" in the sense that it is not obtained by coercive measures. The reasoning behind this concern has been twofold: that involuntary statements are prone to be unreliable, and that coercion of statements is fundamentally unfair. While the development of the rule will be traced in the next section, brief consideration of the reliability of confession evidence seems appropriate, as it may be the most contradictory form of evidence available in a criminal trial. On the one hand, its effect is so sweeping and damning that for all practical purposes it is conclusive of the issue of guilt. On the other, while the law recognizes that confession evidence is in one sense "preferred" evidence, it also recognizes that confessions are highly likely to be unreliable and accordingly are to be carefully controlled. While it is apparent that under certain circumstances most persons would confess to almost anything, it is difficult to gauge the extent to which interrogation methods that do not utilize torture do in fact result in unreliable admissions. There is a surprising paucity of literature, legal or psychological, on why confessions result.<sup>17</sup> However, the material that does exist makes it abundantly clear that despite the absence of the "third degree,"

<sup>13</sup> The majority rule requires independent evidence to establish the commission of an offense (the *corpus delicti* rule) and the minority rule requires only that other evidence be admitted to show the reliability of the confession. See Section VIII.E. *infra*.

<sup>14</sup> See, e.g., *Williams v. State*, 542 P.2d 554 (Okla. 1975); MCM, 1969, para. 1 140a(6).

<sup>15</sup> E.g., that the accused was brought before a magistrate within the required time period, a rule designed to ensure that an accused will be informed of his rights and not subjected to police questioning for too long a time before judicial intervention takes place. The military lacks such a rule at present. See, e.g., *Burns v. Harris*, 340 F.2d 383 (8th Cir.), *cert. denied*, 382 U.S. 960 (1965).

<sup>16</sup> See generally, Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

<sup>17</sup> See, e.g., Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967); Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953); Horowitz, *Psychology of Confession*, 47 J. CRIM. L. C. & P.S. 197 (1956); Médaille, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965); Summers, *Science Can Get the Confession*, 8 FORD. L. REV. 334 (1939); Note, *Voluntary, False Confessions: A Neglected Area in Criminal Administration*,

good police techniques<sup>18</sup> can obtain admissions from most people. What is particularly disturbing is that even accepted police techniques can result in false admissions.

One motive for confessing is clearly to attempt to avoid possible violence or to gain favors. Beyond this obvious reason are a number of others which include:

- 1) Desire to mitigate possible future punishment of self or others;<sup>19</sup>
- 2) Desire to clear conscience of known offense;
- 3) Desire for punishment;
- 4) Desire for public attention (e.g. notoriety);
- 5) Desire for recognition of personal status;<sup>20</sup>
- 6) Desire for approval by authority (e.g. police); or
- 7) Feelings of general guilt because of arrest.<sup>21</sup>

For many people the comparative isolation, fear, and embarrassment that are likely to accompany arrest and interrogation may well trigger, due to the factors listed above, a desire to admit details of real or imaginary offenses. Indeed one commentator has pointed out that the *Miranda* rights warnings may have the effect of encouraging confessions rather than preventing them, because they present the interrogator as a fair, impartial officer and yet (unless the suspect refuses to talk at all) do nothing to affect the ability of the underlying situation to suggest that a confession is required.<sup>22</sup> The number of false confessions is unknown but their existence is well docu-

28 IND. L.J. 374 (1953); Note, *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). See also F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967); T. REIK, COMPULSION TO CONFESS 179-356 (1972 reprint).

<sup>18</sup> See, e.g., F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967). Many of the techniques suggested by Professors Inbau and Reid in their 1962 edition have been said to have been used by Russian and Chinese interrogators. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 37, 40-41 (1965) [hereinafter cited as Sterling]. While this is not to suggest that they are improper, it may suggest their efficiency.

<sup>19</sup> Despite the usual inference, this factor applies to the innocent as well as to the guilty. When the future looks frightening, a suspect may well prefer to confess in return for a small sentence rather than chancing a major penalty.

<sup>20</sup> This factor is distinguished from the others as it may apply when an individual of some social standing suddenly reacts to the total loss of that status and desires the interrogators to treat him with some of his former respect. See Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 58-59 (1968) [hereinafter cited as Driver].

<sup>21</sup> These feelings of guilt need not be related to any offense and may stem simply from the belief of the individual that his arrest means that he *must* have done something. See, e.g., Sterling, *supra* note 18, at 36.

<sup>22</sup> See Driver, *supra* note 20, at 59-61.

mented.<sup>23</sup> Whether their number is "sufficiently" substantial to cast general doubt on confession evidence is unknown.<sup>24</sup> The conclusion that can be drawn, however, is that confession evidence per se is at least partially suspect. A necessary result of this conclusion is that spontaneous confessions, made without any police questioning, may be no more reliable than confessions gained after hours or days of interrogation, for many of the factors will operate in the absence of even implicit coercion. However, to eliminate confessions would be to substantially increase police work. The ultimate balance is yet to be determined.

#### IV. THE HISTORICAL DEVELOPMENT OF THE VOLUNTARINESS DOCTRINE

Professor Wigmore found four stages in the English development of the law of confessions:<sup>25</sup> total acceptance of confession evidence until approximately 1750; limited exclusion of involuntary confessions from approximately 1750 to 1800; hypersensitivity to confessions resulting in almost wholesale exclusion;<sup>26</sup> and the current rule characterized in the United States by constitutional underpinnings. Differing slightly from Wigmore, Professor Levy finds that the voluntariness rule was at least partially recognized by 1726<sup>27</sup> and suggests that the pri-

<sup>23</sup> See, e.g., 3 WIGMORE, *supra* note 8, at §04 n.1.

<sup>24</sup> One may ask how many innocent men society would tolerate to be convicted as a consequence of unreliable confessions. It is particularly interesting to note that under Jewish Rabbinic law all confessions were inadmissible. See, e.g., G. HOROWITZ, *THE SPIRIT OF JEWISH LAW* § 338 (1973). It would be an interesting experiment if a jurisdiction chose either to ban confession evidence entirely or to accept only derivative evidence.

<sup>25</sup> 3 WIGMORE, *supra* note 8, at § 17.

<sup>26</sup> *Id.* at §§ 820 & 820a. Wigmore postulates the following explanations for the English approach during the early 1800's: the character of suspect (lower social class with a subordination to authority); the absence of a right to appeal and the resulting difficulty of obtaining a rule of general application; the inability of the accused to take the stand in his own behalf. It is also probable that the large number of offenses carrying the death penalty in the first quarter-century may have motivated exclusion.

<sup>27</sup> Lord Chief Baron Geoffrey Gilbert, in his *Law of Evidence*, written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, "this Confession must be voluntary and without Compulsion: for our Law . . . will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation: and therefore Pain and Force may compel Men to confess what is not the truth: Facts, and consequently such extorted Confessions are not to be depended on." *Reprinted in* L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 327 (1968).

mary justification for it was to prevent receipt of unreliable evidence. Although separate and distinct from the right against self-incrimination, the voluntariness doctrine plainly had its origins in the same complex of values and social conflicts that gave rise to the right. Because much of the objection to self-incrimination was based on opposition to torture-derived confessions, the groundwork was laid for exclusion of coerced confessions. Except during the period when exclusion of confession evidence may have served other purposes (such as mitigating overly severe sentences), the English voluntariness rule appears to have been based primarily on reliability grounds, although questions of fairness no doubt were also relevant. Although the right against self-incrimination per se had no remedy (for it only allowed an individual to remain silent, and once testimony was given the right was waived), the voluntariness doctrine created a remedy; for if an individual was compelled to confess, his statement could be excluded thus in effect attaching an exclusionary sanction to violations of the right against self-incrimination. This should not be misconstrued, for all coerced confessions were not inadmissible. Particularly during the 1700's in England, the question was one of apparent truthfulness rather than breach of a privilege.

As in the case of the right against self-incrimination, the voluntariness doctrine was transplanted to the American colonies. Formal recognition took place in Pennsylvania by 1792<sup>28</sup> at latest, for example. The common law voluntariness doctrine was the rule in the United States during most of the 19th Century, although presumably it did not carry with it the anti-confession bias common in England during the early 1800's. Despite the existence of the fifth amendment and later the fourteenth amendment (enacted in 1868), the Supreme Court failed to make use of constitutional rationales<sup>29</sup> until 1897 when the Court decided *Bram v. United States*.<sup>30</sup> In *Bram*, a murder case, the Court found the fifth amendment right against self-incrimination required reversal of the conviction due to the receipt in evidence of an involuntary confession. *Bram* was the high point of the application of the privilege

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<sup>28</sup> *Commonwealth v. Dillon*, 4 Dallas 116 (1792), cited in O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILTY* 23 (1973).

<sup>29</sup> The Court did apply the common law voluntariness test to federal cases. See *Wilson v. United States*, 162 U.S. 613, 621-25 (1896); *Spart v. United States*, 156 U.S. 51, 53-56 (1895); *Hopt v. Utah*, 110 U.S. 574, 584-87 (1884).

<sup>30</sup> 168 U.S. 532 (1897). Interestingly, the Court in *Bram* considered and rejected the argument that police interrogation was per se coercive. *Id.* at 566-58.

against self-incrimination to confessions and the Court retreated from its holding in that case.<sup>31</sup> Professor Otis Stephens<sup>32</sup> states that in respect to its review of federal confession cases, the Supreme Court, while emphasizing the reliability test for coerced statements, began to swing towards concern about fair trial generally.<sup>33</sup> In 1936, the Court in the state case of *Brown v. Mississippi*<sup>34</sup> held that admission of a coerced confession into evidence violated the fourteenth amendment's requirement of due process. The facts in *Brown* cried out for reversal. A white Mississippi farmer had been murdered. In order to obtain a confession from one black "suspect," a deputy sheriff accompanied by a mob hanged him twice from a tree. Having refused to confess, he was released, rearrested a day or so later, and beaten. He then signed the desired confession. The two other black suspects, including Brown, were jailed and beaten until they too confessed as their captors desired. It is clear that in reversing the conviction the Supreme Court was motivated by the specific facts and the obvious injustice of the case. However, it is also likely that the Court's extension of due process standards to confessions was motivated by the *Wickersham Report*,<sup>35</sup> which had confirmed the use of the "third degree" (physical violence) and psychological coercion

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<sup>31</sup> This may have been due to the Court's holding in *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964), that the fifth amendment right against self-incrimination was inapplicable to the states. *But see* the Court's admission that the voluntariness doctrine is grounded in the same policies giving rise to the privilege against self-incrimination, *Davis v. North Carolina*, 384 U.S. 737, 740 (1966).

<sup>32</sup> O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILTY* 26 (1973). Professor Stephens' work is a good introduction to the development of the law of confessions in the United States for those lacking a substantial background in the subject. For a review of the development of the doctrine beginning with *Bram*, see Bader, *Coerced Confessions and the Due Process Clause*, 14 B'KLYN. L. REV. 51 (1948); Gargi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1 (1974); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogations and Confessions*, 17 RUTGERS L. REV. 728 (1963).

<sup>33</sup> See, e.g., *Ziang Sung Wan v. United States*, 266 U.S. 1 (1924) (one week's incommunicado detention without arrest while ill with constant questioning; held, compulsion automatically required reversal).

<sup>34</sup> 297 U.S. 278 (1936). *Brown* held that a state conviction resting solely on a coerced confession required reversal. Later cases indicated that reversal was merited in almost all cases involving coerced confessions (the automatic reversal rule). See *Chapman v. California*, 386 U.S. 18 (1967); *Payne v. Arkansas*, 356 U.S. 560 (1958).

<sup>35</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [THE WICKERSHAM REPORT].



to obtain confessions across the country—particularly from the poor and disadvantaged. The Court's subsequent cases<sup>36</sup> tended to manifest a strong element of redress for racial discrimination as many poor blacks were the targets of brutal beatings designed to coerce confessions.

While the Court has consistently reaffirmed the voluntariness requirement of *Brown v. Mississippi*,<sup>37</sup> its actual application of the voluntariness doctrine has varied greatly. After *Brown*, the Court made use of its supervisory powers to require that federal defendants be promptly brought before magistrates, thus strictly limiting the time available for police interrogation.<sup>38</sup> In the state arena, the Court took an active role in preventing coerced confessions<sup>39</sup> and then turned temporarily to considering primarily the "trustworthiness"<sup>40</sup> of the coerced confession—a standard that emphasized reliability. Beginning in the mid-1950's the Court returned to its earlier philosophy and scrutinized confessions not so much from the perspective of reliability but more from the standpoint of the fairness of the procedure involved.<sup>41</sup> Ultimately the Court decided *Miranda v. Arizona*<sup>42</sup> which held that the innate coercion of custodial interrogation required that suspects be given rights warnings, including the right to counsel, to dispel the coercive effect. At present, the test used throughout the United States emphasizes

<sup>36</sup> See, e.g., *Ward v. Texas*, 316 U.S. 547 (1942); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Lomax v. Texas*, 313 U.S. 544 (1941); *White v. Texas*, 310 U.S. 530 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940) (lead case).

<sup>37</sup> 297 U.S. 278 (1936).

<sup>38</sup> *McNabb v. United States*, 318 U.S. 332 (1942).

<sup>39</sup> In *Lisenba v. California*, 314 U.S. 219 (1941), an exception and an unusually gruesome murder case, the Court upheld a coerced confession on the grounds that the defendant's will had not been overborne. The Court did state, however, that the aim of the due process requirement was "to prevent fundamental unfairness in the use of evidence, whether true or false." 314 U.S. at 236. The cynical reader must infer that had it not been for the nature of the crime involved, the case would have been reversed. In *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the Supreme Court recognized that psychological coercion, as well as physical brutality, could make a statement involuntary. *Ashcraft* also introduced the shortlived test of "inherent coercion," a test which looked to the nature of the police misconduct. The test, superseded by the "fair trial" test, eventually became a part of the contemporary voluntariness doctrine under a new name.

<sup>40</sup> *Stein v. New York*, 346 U.S. 156 (1953), *overruled*, *Jackson v. Denno*, 378 U.S. 368 (1964).

<sup>41</sup> See, e.g., *Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Leyra v. Denno*, 347 U.S. 556 (1954).

<sup>42</sup> 384 U.S. 436 (1966).

fairness rather than reliability and asks if the statement was the product of a free and unrestrained choice.<sup>43</sup>

## V. THE VOLUNTARINESS DOCTRINE TODAY

Although the voluntariness doctrine has been greatly affected by the Supreme Court's decision in *Miranda v. Arizona*,<sup>44</sup> it retains vitality for determining the admissibility of confessions.<sup>45</sup> Determining the exact nature of the doctrine is difficult, however, in view of the ambiguity inherent in the term "voluntary."<sup>46</sup> Every individual jurisdiction in the United States has its own statutorily<sup>47</sup> or judicially derived definition of "voluntary." Generally the states will suppress confessions that are the product of coercion, threats, or improper inducements just as they would be suppressed under the common law. The state provisions may differ, however, in respect to what constitutes improper inducements, what effect is to be given to the suspect's age, mentality and similar attributes, and the effect to be given to other relevant factors. Regardless of the individual state test, the federal constitutional test is paramount.<sup>48</sup> Under

<sup>43</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *United States v. Colbert*, 2 U.S.C.M.A. 3, 6 C.M.R. 3 (1952). See also MCM, 1969, para. 140a(2).

<sup>44</sup> 384 U.S. 436 (1966).

<sup>45</sup> While the term voluntariness is still used, generally the voluntariness of a confession means that the rights warnings required by *Miranda* were properly given to the accused and that visible coercion was lacking. See, e.g., MCM, 1969, para. 140a(2). However, the rights warnings are merely one component of voluntariness. See, e.g., *United States v. Chadwick*, 393 F. Supp. 763 (D. Mass. 1975). The English continue to use a strict common law standard. See C. HAMPTON, *CRIMINAL PROCEDURE AND EVIDENCE* 436-38 (London 1973).

<sup>46</sup> See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973).

<sup>47</sup> See, e.g., Georgia: "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury." GA. CODE ANN. § 38-411 (1974) and "The fact that a confession shall have been made under a spiritual exhortation, or a promise of secrecy, or a promise of collateral benefit, shall not exclude it." *Id.* § 38-412.

New York:

A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him: (a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or (b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him: (i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might likely incriminate himself; or (ii) in violation of such rights as the defendant may derive from the Constitution of this state or of the United States.

N.Y. CONF. CRIM. PROC. § 60.45.2 (McKinney 1971). See generally 3 WIGMORE, *supra* note 8, at § 831 n.2. Congress attempted to adopt the voluntariness doctrine (and avoid *Miranda*) in 18 U.S.C. § 3501 (1970).

<sup>48</sup> Obviously the state's test may be more beneficial to the accused in which case it is binding.

the due process clause, a court must determine whether a confession was "the product of an essentially free and unrestrained choice" by its maker.<sup>49</sup> If the individual's will was "overborne" by the interrogation, the resulting<sup>50</sup> confession will be involuntary and inadmissible. In determining the voluntariness of a statement, the trial court must look to "the totality of the circumstances" surrounding it. The primary purpose of the due process test is to ensure fairness; the truth or falsity of the resulting confession is irrelevant.<sup>51</sup> Of course the courts have assumed that voluntary statements are likely to be reliable ones.

While the due process test suggests a case by case approach that would seek to determine a causal connection between police<sup>52</sup> misconduct and a confession, analysis of the cases suggests that actually two separate rules are being applied.<sup>53</sup> In those cases where the misconduct appears extreme, as in cases of physical brutality, the courts will frequently find that the misconduct has rendered the statement involuntary *per se*.<sup>54</sup> In all other cases the courts will test the facts of the case to determine if the misconduct actually did overcome the will of the accused.<sup>55</sup> It is virtually impossible to set forth criteria,

<sup>49</sup> See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-26 (1973); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); *Rogers v. Richmond*, 365 U.S. 534, 544 (1961). "Voluntary" clearly does not mean that the decision to confess must be made without any pressure or with full awareness of the actual situation. The pressures inherent in arrest or questioning, for example, are not enough to render a statement involuntary.

<sup>50</sup> It is possible for an individual to confess to clear his conscience even after improper pressure. The test in such a case will be whether the statement was the product of true remorse and intent, or was in fact the product of the improper pressure and thus involuntary.

<sup>51</sup> *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961). See MCM, 1969, para. 140a(2); cf. *United States v. Tersiner*, 47 C.M.R. 769 (AFCMR 1973). Of course, if a statement was obtained correctly but is likely to be false, the trial judge should exclude it.

<sup>52</sup> The voluntariness doctrine applies to confessions coerced by anyone. However, problems relating to improper threats and inducements are likely to pertain only to public officials because they are typically involved in such instances. See N.Y. CODE CRIM. PROC. § 60.45.2 (McKinney 1971). See generally 3 WIGMORE, *supra* note 8, at §§ 827-830. But see *United States v. Carter*, 15 U.S.C.M.A. 495, 35 C.M.R. 467 (1965) (statement elicited in response to threats by heavyweight boxer held admissible on grounds that it was volunteered in an attempt to exculpate, rather than inculpate).

<sup>53</sup> See C. MCCORMICK, EVIDENCE 317-21 (2d ed. 1972); Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1, 30-31 (1974).

<sup>54</sup> See, e.g., *Brooks v. Florida*, 389 U.S. 413 (1967) (15 days' solitary confinement on a restricted diet while naked); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (thirty-six hours of constant questioning by relays of interrogators).

<sup>55</sup> See, e.g., *United States v. Carmichael*, 21 U.S.C.M.A. 530, 45 C.M.R. 304 (1972) (statement made after accused was led to believe that his failure to speak

other than torture, which will result in automatic exclusion. The situation is very much like the application of the famous *Rochin*<sup>56</sup> "shock the conscience" test used in search and seizure cases. Until the conscience is shocked one is unable to define the test.

The contemporary voluntariness doctrine consists of the due process standard complemented by those other rules, state and federal, which reinforce it. While the common law voluntariness doctrine was primarily concerned with the reliability of the statement, the areas addressed by a common law judge were not substantially different from those reviewed by a modern court applying constitutional and local rules. Thus the existence of coercion, threats and inducements in a case remains critically important. When considering the voluntariness issue using the totality of the circumstances test, a court must look to numerous factors. According to Wigmore,<sup>57</sup> among the factors to be considered are:

The character of the accused (health, age, education, intelligence, mental condition, physical condition);

Character of detention, if any (delay in arraignment, warning of rights, incommunicado conditions, access to lawyer, relatives and friends);

Manner of interrogation (length of session(s), relays, number of interrogators, conditions, manner of interrogators); and

Force, threats, promises or deceptions.

#### A. COERCION AND THREATS

Of all the possible forms of misconduct, the one most likely to result in automatic exclusion of a statement is physical coercion. Physical brutality, usually termed the "third degree," was of course at the heart of the Supreme Court's turn to due process standards<sup>58</sup> and is assumed not only to violate minimum standards of fairness but also to yield unreliable statements. When physical coercion is involved, it is generally irrelevant that the party responsible was not a policeman or

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would result in trial by Nationalist Chinese court rather than an Air Force court-martial held voluntary because of trial court's determination that it was not induced by the threat of foreign trial).

<sup>56</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>57</sup> 3 WIGMORE, *supra* note 8, at 352 n. 11.

<sup>58</sup> See Sections IV & V *supra*.

public official.<sup>59</sup> Because of the extreme concern that accompanies charges of police brutality, a number of states require in such cases that the government call all material witnesses who were connected with the alleged confession.<sup>60</sup> When discussing coercion, any attempt to create separate and distinct categories is doomed to failure. While beating, hanging and flogging are clearly forms of illegal coercion, other forms of mistreatment can also be considered as being identical in effect. In *Stidham v. Swenson*,<sup>61</sup> the United States Court of Appeals for the Eighth Circuit found that solitary confinement for eighteen months in subhuman conditions prior to the offense, and return to those conditions after twenty-five interrogation sessions without any food or water over a four-day period constituted coercion and rendered the petitioner's confession involuntary. Courts have condemned as improper coercion denial of medical treatment,<sup>62</sup> sustained detention,<sup>63</sup> sustained interrogation,<sup>64</sup> handcuffing for lengthy periods,<sup>65</sup> and brutal detention,<sup>66</sup> to mention only a few possibilities.<sup>67</sup> Other

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<sup>59</sup> See, e.g., N.Y. CODE CRIM. PROC. § 60.45.2(1) (McKinney 1971); Commonwealth v. Mahnke, 1975 Mass. Adv. Sh. 2897, 335 N.E.2d 660 (1975) (vigilante group); People v. Haydel, 12 Cal. 3d 190, 524 P.2d 866, 115 Cal. Rptr. 394 (1974); 3 WIGMORE, *supra* note 8, at § 833. Note the wording of UCMJ art. 31: "No person subject to this chapter"; and MCM, 1969, para. 150b: "A statement obtained from the accused by compelling him to incriminate himself is inadmissible against the accused regardless of the person applying the compulsion...."

<sup>60</sup> See, e.g., Smith v. State, 256 Ark. 67, 505 S.W.2d 504 (1974); Nabors v. State, 293 So. 2d 336 (Miss. 1974).

<sup>61</sup> 506 F.2d 478 (8th Cir. 1974). Stidham, imprisoned for robbery, was convicted of the murder of a fellow inmate during a prison riot. While the facts as portrayed by the majority are shocking, the dissent suggests an entirely different view. *Stidham* is an example of the difficulties sometimes caused by federal habeas corpus. The actual case had been affirmed by the Missouri Supreme Court thirteen years before the first federal attack was filed, making rebuttal of Stidham's charges difficult. Stidham had also charged he was beaten but the court discounted the allegation.

<sup>62</sup> Cf. Commonwealth v. Purvis, 485 Pa. 359, 326 A.2d 369 (1974).

<sup>63</sup> Cf. *Stidham v. Swenson*, 506 F.2d 478 (8th Cir. 1974); United States v. Acfalie, 12 U.S.C.M.A. 465, 469, 31 C.M.R. 51, 55 (1961) (The Government may not use its authority to order a servicemember to different geographical locations "as a coercive instrument for the purpose of removing him to a location at which he is effectively isolated and likely to succumb to police pressures."). While the issue may not yet be fully resolved, it would appear that the fact of an illegal arrest or detention will render a statement inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963).

<sup>64</sup> United States v. Houston, 15 U.S.C.M.A. 289, 35 C.M.R. 11 (1965) ("persistent questioning over a five-day period" in conjunction with other factors sufficient to raise the issue of voluntariness).

<sup>65</sup> See, e.g., People v. Holder, 45 App. Div. 2d 1029, 358 N.Y.S.2d 54 (1974).

<sup>66</sup> See, e.g., *Stidham v. Swenson*, 406 F.2d 478 (8th Cir. 1974); United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1957).

<sup>67</sup> See generally 3 WIGMORE, *supra* note 8, at § 833.

forms of coercion such as loss of employment<sup>68</sup> may also render a statement involuntary. Whether specific conditions other than physical punishment will render a statement involuntary must depend upon the facts of each case, although certain factors are obviously likely to be weighed more heavily than others.

Coercion can of course also be supplied through threats inasmuch as coercion includes the psychological as well as the physical.<sup>69</sup> Refusal to supply medication;<sup>70</sup> threats of violence,<sup>71</sup> of removal of wife or children,<sup>72</sup> of arrest or prosecution of friends or relatives,<sup>73</sup> of continued detention<sup>74</sup> or of harsher consequences if a confession is not given,<sup>75</sup> may all constitute sufficient coercion to render a statement involuntary.<sup>76</sup>

### B. PROMISES AND INDUCEMENTS

Like threats, promises and inducements may well result in involuntary confessions. Clearly a possibility of benefit may well result in an overborne will rendering a statement violative of due process. Under the common law test for voluntariness, which was mostly concerned with the reliability of the statement, some forms of inducements, such as religious appeals, were not considered likely to result in false or inaccurate confessions.<sup>77</sup> This may no longer be the case in view of the effect of *Miranda v. Arizona*.<sup>78</sup> In theory, any promise or inducement should be analyzed under the usual due process test. However, perhaps as a result of the common law heritage, many states will almost automatically suppress a confession that took place after a promise or inducement. Most improper promises tend to involve representations that the police will not arrest or

<sup>68</sup> *Garrity v. New Jersey*, 385 U.S. 493, 496-500 (1967).

<sup>69</sup> *Id.* at 496-97.

<sup>70</sup> See, e.g., *Northern v. State*, 254 Ark. 549, 518 S.W.2d 482 (1975).

<sup>71</sup> See, e.g., *United States v. Fowler*, 2 C.M.R. 336, 341 (ABR 1952) (threat of violence at hands of rape victim's relatives); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 140.3 & 150.2(6) (1975).

<sup>72</sup> See, e.g., *Lynnum v. Illinois*, 372 U.S. 528 (1963); *People v. Richter*, 54 Mich. App. 660, 221 N.W.2d 429 (1974).

<sup>73</sup> See, e.g., *People v. Helstrom*, 50 App. Div. 2d 685, 375 N.Y.S.2d 189 (1975); *People v. Haydel*, 12 Cal. 3d 190, 524 P.2d 866, 115 Cal. Rptr. 394 (1974).

<sup>74</sup> See, e.g., *United States v. Jourdan*, 51 C.M.R. 351 (AFCMR 1975).

<sup>75</sup> See, e.g., *Sherman v. State*, 532 S.W.2d 634 (Tex. Crim. App. 1976) (threat by chief of police that accused would receive the death penalty if he didn't confess).

<sup>76</sup> See generally, 3 WIGMORE, *supra* note 8, at § 833.

<sup>77</sup> *Id.* § 840.

<sup>78</sup> 384 U.S. 436 (1966). *Miranda* requires not only rights warnings but also that the suspect's decision to speak or not to speak not be affected in any way. Thus an exhortation to confess sin or to simply tell the truth is likely to be viewed as nullifying the right to remain silent and thus render a statement involuntary.

prosecute,<sup>79</sup> that leniency as to sentence will result,<sup>80</sup> or that friends or relatives will not be harassed, arrested or prosecuted.<sup>81</sup> Exhortations to tell the truth are not in violation of the traditional voluntariness test<sup>82</sup> although they may interfere with the *Miranda* rights warnings and invalidate a statement. Statements resulting from immunity or plea bargains will be inadmissible against the maker.<sup>83</sup> According to Wigmore, for

<sup>79</sup> See, e.g., *St. Jules v. Beto*, 371 F. Supp 470 (S.D. Tex. 1974); *United States v. White*, 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964) (promise of administrative discharge); *M.D.B. v. State*, 311 So. 2d 399 (Fla. App. 1975); *State v. Raymond*, \_\_\_ Minn. \_\_\_, 232 N.W.2d 879 (1975). But see *People v. Yerdon*, 51 App. Div. 2d 875, 380 N.Y.S.2d 141 (1976) (confession held voluntary even though deputy sheriff told defendant first that he would not arrest him; statement was obtained after proper warnings and was voluntary). While promises to assist with bail would seem logically similar to promises not to prosecute or to grant leniency (although in theory the nature of the benefit can be presumed to be smaller than a failure to prosecute or to receive leniency, and frequently time spent in jail before trial will be longer than that spent after conviction), the cases seem generally to hold such promises insufficient to render statements involuntary. See, e.g., *People v. York*, \_\_\_ Colo. \_\_\_, 537 P.2d 294 (1975); C. McCORMICK, EVIDENCE 323 (2d ed. 1972).

<sup>80</sup> See, e.g., *Freeman v. State*, 258 Ark. \_\_\_, 527 S.W.2d 909 (1975) (implied promise of leniency found when prosecutor said that he couldn't promise anything but that defendant probably wouldn't get more than 21 years in jail if he confessed); *People v. Pineda*, 182 Colo. 385, 513 P.2d 452 (1973) (police said that things would go easier for the accused if he testified); *People v. Ruegger*, 32 Ill. App. 3d 765, 336 N.E.2d 50 (1975) (police conveyed the impression that they would "go to bat" for the accused in getting him probation). Statements that cooperation would be the best course or that cooperation would be reported do not appear to necessarily result in suppression of statements. See, e.g., *United States v. Pomares*, 499 F.2d 1220 (2d Cir. 1974); *State v. Multin*, 286 So. 2d 36 (Fla. App. 1973); *State v. Smith*, 216 Kan. 265, 530 P.2d 1215 (1975); *People v. Bulger*, 52 App. Div. 2d 682, 382 N.Y.S.2d 133 (1976). These cases seem to assume that the effect of such an inducement is *de minimis*. Obviously the result will vary depending upon the exact facts of each case. There are cases that have excluded confessions after similar representations.

<sup>81</sup> See, e.g., *Jarriel v. State*, 317 So. 2d 141 (Fla. App. 1975) (police threat to arrest wife unless defendant confessed made resulting statement involuntary); *Witt v. Commonwealth*, 215 Va. 670, 212 S.E.2d 293 (1975) (defendant claimed that he confessed because of his belief that his pregnant wife would be arrested if he didn't; court found that even if the defendant drew the inference it was unreasonable and the confession was voluntary). Note that a defendant's belief that confession will assist a friend or relative, when held without any official representation to that effect will usually not invalidate a statement. See, e.g., *People v. Steger*, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976); *Witt v. Commonwealth*, *supra*.

<sup>82</sup> See, e.g., *State v. Rollwage*, \_\_\_ Ore. App. \_\_\_, 533 P.2d 831 (1975) ("If you confess you'll feel better" held simply an admonition to tell the truth and proper); 3 WIGMORE, *supra* note 8, at § 832. Cf. *United States v. Handsome*, 21 U.S.C.M.A. 330, 45 C.M.R. 104 (1972).

<sup>83</sup> See, e.g., *Mobley ex rel. Ross v. Meek*, 531 F.2d 924 (8th Cir. 1976) (Ross had confessed after making a plea bargain but then withdrew the agreement; held the confession was involuntary); *State v. Hooper*, 534 S.W.2d 26 (Mo. 1976); 3 WIGMORE, *supra* note 8, at § 834. See also *United States v. Dalrymple*, 14 U.S.C.M.A. 307, 34 C.M.R. 87 (1963) (promise of immunity).

such a promise to result in suppression it should be possible of fulfillment and thus its maker must have some influence.<sup>84</sup> An accused who *initiates* a bargaining session with authorities by offering a statement in return for some concession will not normally be heard to complain that his statement was involuntary.<sup>85</sup>

### C. PSYCHOLOGICAL COERCION

It is well recognized that coercion need not be physical to be effective.<sup>86</sup> Indeed, most successful interrogation techniques are almost purely psychological,<sup>87</sup> a fact which proved a major cause for the Supreme Court's decision in *Miranda v. Arizona*. Whether holding a suspect incommunicado, helping him to excuse the offense, supplying sympathy, or using a "Mutt and Jeff" routine,<sup>88</sup> use of psychological techniques by interrogators may have a coercive effect. The courts have recognized that such coercion may render a confession involuntary just as physical coercion may. However, in this area determination of what actually did take place and what its effect should be is particularly difficult and a final judgment is likely to depend upon the character and background of the suspect.<sup>89</sup> In *State v. Edwards*,<sup>90</sup> the Arizona Supreme Court found that the police actions of using sympathy, stressing "sisterhood" between the female suspect and a female officer, and minimizing the moral seriousness of the charge, were in conjunction with other vio-

<sup>84</sup> 3 WIGMORE, *supra* note 8, at §§ 827-830. The rule suggested is to examine each case individually to determine the relationship between the suspect and the promisor. See also *State v. Hess*, 9 Ariz. App. 29, 449 P.2d 46 (1969) (promise not to file a complaint held an improper inducement).

<sup>85</sup> See, e.g., *United States v. Faulk*, 48 C.M.R. 185 (ACMR 1973).

<sup>86</sup> See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *United States v. Josey*, 3 U.S.C.M.A. 767, 14 C.M.R. 185 (1954); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.4 (1975).

<sup>87</sup> See, e.g., F. INBAU & J. REID, *CRIMINAL INTERROGATIONS AND CONFESSIONS* (2d ed. 1967); Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963).

<sup>88</sup> An interrogation routine usually utilizing two interrogators, one of whom is hostile and aggressive and the other sympathetic and somewhat passive. The intent is to build a sympathetic relationship between the suspect and the second interrogator. The same routine can be used with only one interrogator who will simply change his approach as necessary. The Court of Military Appeals found a statement extracted through the use of such a technique admissible in *United States v. Howard*, 11 U.S.C.M.A. 252, 256-57, 39 C.M.R. 252, 256-57 (1969).

<sup>89</sup> See Section VI *infra*.

<sup>90</sup> 111 Ariz. 357, 529 P.2d 1174 (1974).



lations<sup>91</sup> more than enough to result in an overborne will rendering the resulting confession involuntary. Similarly in *State v. Pruitt*,<sup>92</sup> the North Carolina Supreme Court found that the interrogation of Pruitt by three police officers took place in a police-dominated atmosphere characterized by repeated comments that the suspect's story had too many holes, that he was lying, and that they did not want to fool around. The court found that the fear, augmented by a threat that things would be rougher if he did not cooperate, necessitated exclusion of the resulting statement. The decision of a court will of course depend on the specific facts of each case. In *State v. Iverson*,<sup>93</sup> the Supreme Court of North Dakota sustained the admissibility of a statement given after an interrogation session attended by a bloodhound and which included a suggestion that Iverson take a lie detector test. Testing the circumstances of the interrogation, the past experience of the suspect with the law, and the suspect's rational participation in the session, the court found that the statements were voluntary.

#### D. DECEIT

The police have frequently used deceit to obtain confessions. Examples include misrepresenting that an accomplice has confessed,<sup>94</sup> misrepresenting the seriousness of the offense or condition of the victim,<sup>95</sup> misrepresenting that evidence has been found,<sup>96</sup> and disguising police officers.<sup>97</sup> While numerous courts and commentators have joined in condemning deceit,<sup>98</sup>

<sup>91</sup> Other factors included continuous interrogation, a request that the suspect take a polygraph (and stating that a refusal indicated guilt) and most important, due to *Miranda*, ignoring the suspect's request for counsel. The last factor alone would have required suppression.

<sup>92</sup> 286 N.C. 442, 212 S.E.2d 92 (1975).

<sup>93</sup> 225 N.W.2d 48 (N.D. 1974).

<sup>94</sup> See, e.g., *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *People v. Houston*, 36 Ill. App. 3d 695, 344 N.E.2d 641 (1976); *Commonwealth v. Jones*, 457 Pa. 423, 322 A.2d 119 (1974).

<sup>95</sup> See, e.g., *In re Walker*, 10 Cal. 3d 764, 518 P.2d 1129, 112 Cal. Rptr. 177 (1974); *State v. Cooper*, 217 N.W.2d 589 (Iowa 1974).

<sup>96</sup> Cf. *State v. Oakes*, 19 Ore. 284, 527 P.2d 418 (1974) (defendant told that guns found in his possession were on the "hot sheet").

<sup>97</sup> See, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972) (police officer disguised as a cellmate); *United States v. Hinkson*, 17 U.S.C.M.A., 37 C.M.R. 390 (1967) (undercover agent attired as prisoner); cf. *State v. McCorgary*, 218 Kan. 358, \_\_\_, 543 P.2d 952, 957-58 (1975).

<sup>98</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege"); *Hileman v. State*, 258 Ark. \_\_\_, 535 S.W.2d 56 (1976); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 140.2 & 140.4(5) (1975).

most courts continue to sustain the admissibility of confessions obtained through its use. So long as the deceit does not nullify the *Miranda* warnings,<sup>99</sup> overcome another policy such as the right to counsel,<sup>100</sup> overbear the will of a person, or make it likely that a false statement might result,<sup>101</sup> a resulting statement is usually deemed voluntary and admissible.

### E. THE POLYGRAPH

While the results of polygraph or lie detector examinations are not yet generally admissible in evidence, the polygraph itself plays a major role in law enforcement. Invited to clear themselves via the machine, numerous suspects submit to a polygraph examination only to be trapped by their own fears of the machines, occasionally augmented by police commentary.<sup>102</sup> Both the pretest and the examination itself tend to create fear and apprehension that result in the suspect confessing and throwing himself on the interrogator's mercy.<sup>103</sup> The test itself is voluntary and cannot be compelled. Article 31 rights are required and if a custodial situation exists, *Miranda* rights warnings are required; yet confessions continue. While at least one court has stated that "the situation a lie detector test presents can best be described as a psychological rubber hose,"<sup>104</sup> courts across the country have ruled that the mere use of a polygraph will not render a confession involuntary.<sup>105</sup>

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\* The decision to speak must be voluntary; once made, deception appears acceptable. There are a number of cases holding that subterfuge does not necessarily preclude a knowing waiver of rights. See, e.g., *State v. Cooper*, 217 N.W.2d 589 (Iowa 1974); *Commonwealth v. Jones*, 457 Pa. 423, 322 A.2d 119 (1974) (being deceived that co-defendant had implicated him did not preclude a knowing waiver).

<sup>99</sup> See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964). But see *Milton v. Wainwright*, 407 U.S. 371 (1972).

<sup>100</sup> See, e.g., *United States v. McKay*, 9 U.S.C.M.A. 527, 561, 26 C.M.R. 307, 311 (1958); *In re Walker*, 10 Cal. 3d 764, 777, 518 P.2d 1129, 1136-37, 112 Cal. Rptr. 177, 184-85 (1974). The due process test remains paramount. However, reliability is frequently discussed in deceit cases and occasionally appears to be the primary test.

<sup>101</sup> See, e.g., *United States v. Handsome*, 21 U.S.C.M.A. 330, 45 C.M.R. 1041 (1972); *Johnson v. State*, 19 Crim. L. Rep. 2159 (Md. Ct. Spec. App. April 15, 1976).

<sup>102</sup> See *United States v. Bostic*, 35 C.M.R. 511, 523-24 (ABR), petition for reconsideration denied, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965); *United States v. Lane*, 34 C.M.R. 744, 756 (CGCMR 1964).

<sup>103</sup> *State v. Faller*, \_\_\_ S.D. \_\_\_, 227 N.W.2d 433, 435 (1976).

<sup>104</sup> See, e.g., *Suttor v. State*, \_\_\_ Ind. \_\_\_, 342 N.E.2d 844 (1976); *State v. Bowden*, 342 A.2d 281, 285 (Me. 1975); *People v. Wilson*, 78 Misc.2d 468, 478-79, 354 N.Y.S.2d 296, 307-08 (Nassau County Ct. 1974); *Jones v. Commonwealth*, 214 Va. 723, 204 S.E.2d 247 (1974).

What will create an involuntary statement, however, will be coercion to take the test,<sup>106</sup> or police misconduct.<sup>107</sup>

## VI. THE NATURE OF THE SUSPECT

Under the federal due process test, a confession will be involuntary if the person being questioned was denied the ability to make a free choice—in short, if his will was overborne. A court dealing with a challenged confession must not only explore the nature of the alleged coercion or inducement, but if the case does not involve inherent coercion must weigh the character and background of the person interrogated. The totality of the circumstances thus includes the suspect. As a general rule it can be stated that questions of age, intelligence, and mental or physical condition are simply factors that must be considered in determining voluntariness.

The fact that a minor is involved in a confession will not as such make a confession inadmissible.<sup>108</sup> Age and understanding will, however, be substantial factors to be considered by judge and jury.<sup>109</sup>

<sup>106</sup> See, e.g., *State v. Cullison*, 215 N.W.2d 309 (Iowa 1974) (woman told that she should either submit to a medical examination or to a polygraph examination or the police would "leave no stone unturned" in their investigation). Tests in the military are voluntary and the suspect must be fully warned of his rights. Army Reg. No. 195-6, Department of the Army Polygraph Activities, para. 1-5d (26 May 1976).

<sup>107</sup> Interestingly enough the courts, despite hostility to polygraphs, have not used accusations of lying or coaxing by police to invalidate confessions, but rather have tried to determine whether the suspect's will had been overborne. See, e.g., *State v. Bowden*, 342 A.2d 281, 285 (Me. 1975).

<sup>108</sup> See, e.g., *In re M.D.J.*, \_\_\_ D.C. App. \_\_\_, 346 A.2d 733 (1975); *In re Mellott*, 27 N.C. 81, 217 S.E.2d 745 (1975); *Commonwealth v. Wilson*, 458 Pa. 285, 329 A.2d 881 (1974).

<sup>109</sup> Age can be a determining factor. See, e.g., *United States v. Knooihuizen*, 16 C.M.R. 573 (AFBR 1954) (statement of 19-year-old airman made in reliance on interrogator's promise not to prosecute held inadmissible); *Commonwealth v. Eden*, 456 Pa. 1, 317 A.2d 255 (1974) (14-year-old who had been sniffing glue with drug experience found to lack sufficient understanding of *Miranda* warnings for his confession to be voluntary). Some states have chosen to treat juvenile confessions in a different manner than adult statements. Thus in some states a minor may not make a statement unless he has consulted with a parent. See, e.g., *Weatherspoon v. State*, 328 So. 2d 875, 876 (Fla. App. 1976) ("juveniles are afforded rights and considerations not available to adult offenders"); *Crook v. State*, 546 P.2d 648 (Okla. 1976) (statutory requirement that questioning be in the presence of guardian or legal custodian); *Commonwealth v. Stanton*, \_\_\_ Pa. \_\_\_, 351 A.2d 663 (1976). In others, a minor must be released to his parents or taken immediately to a juvenile court or detention home. Failure to do so will render the statement inadmissible. See, e.g., *State v. Wade*, 530 S.W.2d 736 (Mo.), *as modified*, \_\_\_ S.W.2d \_\_\_ (1976); *State v. Strickland*, 532 S.W.2d 912 (Tenn. 1975). At least one case has found the statement to be inadmissible when it

The mentally retarded are in the same legal position as any other group of people. If a retarded individual is an adult, or a minor in a state without a special provision, the retardation will be considered as simply another factor going into the voluntariness equation.<sup>110</sup> Similarly, the mentally ill are considered able to make a knowing, intelligent decision to confess in the absence of a specific condition that would interfere with their ability to cope with reality to a significant extent.<sup>111</sup>

Physical illness as such is treated as any other factor and each case will be determined by its specific facts.<sup>112</sup> Difficulties exist in the areas of intoxication and drug abuse. The traditional rule for intoxication is that "proof of [voluntary] intoxication amounting to mania or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words renders a confession so made by him inadmissible, but a lesser state of intoxication will not render the confession inadmissible."<sup>113</sup> Drug addiction per se does not make a confession involuntary.<sup>114</sup> However, withdrawal symptoms or threats or promises connected with withdrawal may make a statement inadmissible.<sup>115</sup> There appears to be a strong trend in the alcohol and drug cases towards emphasizing the reliability of the statement, perhaps to a greater extent than free choice. The law has never favored intoxication and it would

was made at the urging of the minor's mother who had not been informed of the child's right to remain silent. *Commonwealth v. Starkes*, — Pa. —, 335 A.2d 698 (1975).

<sup>110</sup> See, e.g., *State v. Pyle*, 216 Kan. 423, 532 P.2d 1309 (1975); *Commonwealth v. Tucker*, 461 Pa. 191, 335 A.2d 704 (1975) (19-year-old with second grade education, IQ of 75-79 and constitutional psychopath); *State v. Ross*, 320 So. 2d 177 (La. 1975) (low mentality and illiteracy); *People v. Langston*, 57 Mich. App. 666, 226 N.W.2d 686 (1975) (defendant mentally deficient and did not understand the situation; held his confession was involuntary).

<sup>111</sup> See, e.g., *United States v. Michaud*, 51 C.M.R. 541 (ACMR 1975); *Schade v. State*, 512 P.2d 907, 916 (Alas. 1973); *People v. Brown*, 18 *Crim. L. Rep.* 2514 (Nassau County Ct. N.Y., Feb. 9, 1976) (internal pressures did not make confession involuntary).

<sup>112</sup> See, e.g., *Barnett v. State*, 286 So. 2d 876 (Ala. Crim. App.), cert. denied, 51 Ala. 484, 286 So. 2d 890 (1973).

<sup>113</sup> *Patterson v. State*, 56 Ala. 359, 321 So. 2d 698 (1975), citing *Carter v. State*, 297 So. 2d 175 (Ala. Crim. App. 1975). See also *United States v. Sikorski*, 21 U.S.C.M.A. 345, 45 C.M.R. 119, 125-26 (1972); *State v. Arredondo*, 111 Ariz. 141, 526 P.2d 163 (1974); *People v. Durante*, 48 App. Div. 2d 962, 369 N.Y.S.2d 560, 561 (1975); *State v. Saxon*, 261 S.C. 523, 201 S.E.2d 114 (1973). But see *State v. Lloyd*, 538 P.2d 1278 (1975) (defendant in jail for detoxification could not understand *Miranda* warnings; statement suppressed).

<sup>114</sup> See, e.g., *Hayward v. Johnson*, 508 F.2d 322 (3d Cir. 1975); *United States v. Arcediano*, 371 F. Supp. 457 (S.D.N.Y. 1974); *People v. Deigado*, 30 Ill. App. 3d 890, 892-93, 333 N.E.2d 633, 635-36 (1975); *Fred v. State*, 531 P.2d 1038 (Okla. 1975).

<sup>115</sup> See, e.g., *United States v. Monroe*, 397 F. Supp. 726 (D. D.C. 1975).

appear that in this area as well, an intoxicated individual is considered to have waived his right to make a truly free and intelligent choice. However, if the alcohol or drug has rendered an individual peculiarly susceptible to some form of pressure, that factor will be taken into account.

## VII. THE EXCLUSIONARY RULE

An involuntary confession is normally inadmissible in evidence. Further, in most cases any evidence gained through the involuntary statement will also be inadmissible.<sup>116</sup> The exclusion of derivative evidence under the "fruit of the poisonous tree" doctrine is necessitated by the desire to prevent improper police conduct as well as by doubt as to the propriety of courts' using illegally obtained evidence. While exclusion of coerced or induced statements may also be justified on the ground that the evidence itself is unreliable, the same conclusion does not necessarily flow from possible use of derivative evidence.<sup>117</sup> Accordingly, the ban on derivative evidence must be presumed to stem from policy considerations rather than reliability grounds. While an involuntary statement will not automatically prevent a subsequent, voluntary interrogation from producing admissible evidence, the Court of Military Appeals has sug-

<sup>116</sup> See generally 3 WIGMORE, *supra* note 8, at § 859. Interestingly, MCM, 1969, para. 150b attempts to limit exclusion of derivative evidence to cases where "compulsion was applied by, or at the instigation or with the participation of, an official or agent of the United States, or any State thereof or political subdivision of either who was acting in a governmental capacity." While this rule has been ascribed to *Murphy v. Waterfront Comm.*, 378 U.S. 1 (1964), DA PAM 27-2, *supra* note 5, at 27-36, it is more likely that it is the product of *United States v. Trojanowski*, 5 U.S.C.M.A. 305, 17 C.M.R. 305 (1954). The interpretation is questionable. In *Trojanowski*, the Court of Military Appeals felt that little purpose would be served by extending the Article 31(d) exclusionary rule to service personnel acting as private citizens. In reaching this conclusion the court ignored the possibility that Congress had intended to extend individual rights beyond the minimal constitutional level by the enactment of Article 31 of the Uniform Code. More importantly, the legislative history suggests that Congress interpreted the phrasing of the military exclusionary rule, Article 31(d), to include derivative evidence. In the Hearings on the Uniform Code conducted on Article 31, Mr. Smart, a committee staff member, explained: "Subdivision (d) [of Article 31] makes statements or evidence obtained in violation of the first three subdivisions inadmissible. . . ." *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 984 (1949) (emphasis added).

<sup>117</sup> Derivative evidence (which could include proceeds of crime, weapons or equipment used to accomplish the crime, other witness, etc.) should usually be perfectly reliable and not susceptible to the doubts that accompany possibly inaccurate or false statements. Note that the key theoretical difference between the fourth amendment exclusionary rule and the fifth amendment rule is that questions of reliability are completely absent from questions of illegal search and seizure which generally supply "hard" evidence such as the proceeds.

gested that it will be difficult to overcome the taint resulting from the first involuntary statement.<sup>118</sup>

## VIII. THE VOLUNTARINESS DOCTRINE AT TRIAL

### A. STANDING

Because an involuntary statement must usually be excluded from evidence, the rule has evolved that before a party may challenge the admissibility of a statement on voluntariness grounds, he must have an adequate personal interest in its suppression. This requirement, known as standing, has been held to mean that a defendant can only object to a statement made by himself. Thus the general rule is that an accused is unable to challenge a statement made by or evidence derived from another person although offered to prove the guilt of the accused.<sup>119</sup> This can be particularly important in cases involving accomplices. Presumably this limitation is designed to balance the rights of the individual on trial against the societal interest in allowing as much probative evidence to be brought before the jury as possible.<sup>120</sup> One possible exception to the rule may exist, however. In *LaFrance v. Bohlinger*,<sup>121</sup> the United States Court of Appeals for the First Circuit determined that where the prosecution had attempted to impeach its own witness with an allegedly coerced confession, the trial court should have determined the voluntariness of the confession even though it had not been made by the defendant. The court's reasoning was primarily that "[t]he due process requirements of a fair trial clearly extend to matters dealing with a witness' credibility."<sup>122</sup> While the court limited its expansion of the traditional standing rule, the case does suggest that due process considerations may allow an accused to occasionally challenge statements made by other parties.

<sup>118</sup> *United States v. Seay*, 24 U.S.C.M.A. 7, 10, 51 C.M.R. 57, 60 (1975).

<sup>119</sup> *Cf. Alderman v. United States*, 394 U.S. 165, 174 (1969) (fourth amendment electronic eavesdropping case).

<sup>120</sup> Standing to challenge illegal searches and seizures appears to be broader, perhaps because the right involved is primarily one of privacy.

<sup>121</sup> 499 F.2d 29 (1st Cir. 1974).

<sup>122</sup> *Id.* at 34. In *LaFrance*, a Massachusetts habeas corpus case, the statement involved was alleged to be a police fabrication signed by an accomplice in jail while he was "strung out on drugs." It is questionable whether the court's decision would have been the same if a case of unlawful inducement had been claimed. Interestingly, the circuit court determined that despite the state rule requiring jury determination in the event of a ruling adverse to the defense by the trial judge on the voluntariness issue, only a decision by the trial judge was needed for this type of voluntariness issue.

## B. BURDENS

The general rule throughout the United States is that the prosecution must prove a confession or admission to have been voluntarily made before it can be received into evidence.<sup>123</sup> While the burden of proof is on the government, what has occasionally been called the burden of going forward is unclear. It appears that in many American jurisdictions, the defense must raise the issue of voluntariness or risk waiving the issue.<sup>124</sup> Once the defense has properly raised an objection, the government will be put to its burden. The degree to which the defense must object is unclear. As a matter of practice, it seems likely that many if not most jurisdictions shift the burden immediately upon defense objection or upon a recital of the nature of the alleged coercion or inducement. In other jurisdictions, the defense appears to have to present some evidence on the question before the prosecution must prove voluntariness.<sup>125</sup> Some states assume that confessions are prima facie involuntary until proven otherwise;<sup>126</sup> in such a jurisdiction the prosecution will have to prove voluntariness even in the absence of defense objection. The *Manual for Courts-Martial* requires the prosecution to prove the voluntariness of a statement unless the

<sup>123</sup> See generally *Jackson v. Denno*, 378 U.S. 368 (1964); MCM, 1969, para. 140a(2); 3 WIGMORE, *supra* note 8, at § 860. Some states had rules which held that confessions were prima facie admissible and placed the burden on the defense to show them to be involuntary. See 3 WIGMORE, *supra*, at § 860 n.5. However, these rules seem invalidated by the Supreme Court's decision in *Lego v. Twomey*, 404 U.S. 477, 489 (1972), holding "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." However, see note 126 *infra*. The prosecution additionally has the burden of showing that the proper Article 31—*Miranda-Tempia* rights warnings were given.

<sup>124</sup> See, e.g., FED. R. CRIM. P. 12; *United States v. Carter*, 431 F.2d 1093, 1096-97 (8th Cir. 1970); *Jacobsen v. California*, 431 F.2d 1017, 1018-19 (9th Cir. 1970) (in both cases the judge instructed the jury on voluntariness but failed to consider the issue himself). See also *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975):

Logic dictates that a pretrial motion to suppress filed by an accused does in fact cast the burden upon the movant to present facts necessary to sustain his position. . . . While the defendant must first present evidence in support of his motion to suppress which satisfies his burden of challenging the legality of the confession, we have recognized that the Government *must then* carry the countervailing burden of proving a waiver of the constitutional privilege against self-incrimination.

*Id.* at 1135. Cf. *United States v. Yamashita*, 527 F.2d 954 (9th Cir. 1975); *People v. Hawkins*, 58 Mich. App. 69, 226 N.W.2d 851 (1975); *State v. Blanchard*, 527 S.W.2d 37 (Mo. App. 1975); *State v. Helker*, 88 N.M. 650, 545 P.2d 1028 (1975). *But see* *Wainwright v. Sykes*, 528 F.2d 522 (5th Cir. 1976) (construing the Florida rule as rejecting waiver for failure to object).

<sup>125</sup> Cf. *United States v. Crocker*, 510 F.2d 1129, 1135 (10th Cir. 1975). See note 124 *supra*. The degree of objection or evidence required of the defense varies by jurisdiction; the degree to which the defense may be required to present evidence is unclear.

<sup>126</sup> See, e.g., *Jones v. State*, 292 Ala. 126, 290 So. 2d 165 (1974).

defense expressly waives the issue.<sup>127</sup> This would appear to place the burden of going forward in courts-martial on the prosecution rather than on the defense. Consequently a defense failure to raise the issue should certainly not result in waiver<sup>128</sup> unless the defense subsequently adopts the statement and argues it to the court. The contemporary practice has the defense counsel raising the voluntariness issue, usually by motion, in a procedure closely akin to that used in civilian courts. This optional technique is to be encouraged as it precludes a possible error by the prosecution which could require a mistrial. From the defense standpoint, it also has the advantage of attempting to raise the issue at a more advantageous time than the prosecution might choose. However, the procedure is not a required one under the Manual.

The nature of the prosecution's burden of proof has been settled only recently. In *Lego v. Twomey*,<sup>129</sup> the Supreme Court held that the government must prove voluntariness using a preponderance of the evidence standard.<sup>130</sup> While this specifies the minimum constitutional rule, a number of jurisdictions are requiring the government to prove voluntariness beyond a reasonable doubt.<sup>131</sup> The military uses a combined preponderance and reasonable doubt test.<sup>132</sup>

Some states have also required that in certain cases, usually those raising the issue of physical coercion or improper inducement, the prosecution must call all material witnesses rather than picking those it prefers to testify.<sup>133</sup>

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<sup>127</sup> MCM, 1969, para. 140a.

<sup>128</sup> *United States v. Graves*, 23 U.S.C.M.A. 434, 50 C.M.R. 393 (1975) (failure of defense counsel to raise voluntariness issue did not result in waiver; trial judge should have instructed sua sponte).

<sup>129</sup> 404 U.S. 477 (1972)

<sup>130</sup> *Id.* at 489.

<sup>131</sup> *See, e.g.,* *Burton v. State*, 260 Ind. 94, 292 N.E.2d 790 (1973); *State v. Peters*, 315 So. 2d 678, 682 (La. 1975); *State v. Bowden*, 342 A.2d 281, 285 (Me. 1975); *State v. Washington*, 135 N.J. Super. 23, 342 A.2d 559 (1975).

<sup>132</sup> Military courts-martial use a two-part test. The trial judge determines if the confession is voluntary using a preponderance standard. *cf. United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1964), and then, on defense request, will instruct the court members that they must be able to find the confession voluntary beyond a reasonable doubt before they can consider it. MCM, 1969, para. 140a(2). Unlike the defense, the prosecution does not get a second chance if the judge holds against it using the preponderance standard.

<sup>133</sup> *See, e.g.,* *Russey v. State*, 257 Ark. 570, 519 S.W.2d 751 (1975); *Evans v. State*, 285 So. 2d 786 (Miss. 1973); *cf. In re Lamb*, 61 Ill. 2d 383, 336 N.E.2d 753 (1975). *See* Section V.A. *supra*.



## C. PROCEDURE

There are two basic, constitutionally permissible procedures to determine the voluntariness of statements—the "orthodox" rule and the "Massachusetts" rule.<sup>134</sup> Under the orthodox rule, the trial judge determines the voluntariness of the statement out of the presence of the jury and his determination is conclusive.<sup>135</sup> Under the Massachusetts rule, in use in the military,<sup>136</sup> the trial judge makes a first determination out of the jury's presence<sup>137</sup> and then if the finding is against the defendant will instruct the jury that before it can consider the statement in evidence it must first determine the voluntariness of the confession or admission.<sup>138</sup> Thus under the Massachusetts rule, the accused receives two determinations. Under federal statute<sup>139</sup> it appears that all civilian federal courts are required to apply the Massachusetts rule.<sup>140</sup> While the orthodox rule is simpler and more efficient, at least one court has found it "contains aspects of harshness inconsistent with the general administration of criminal law . . . [attaching] to the preliminary determination of the court an aura of infallibility which . . . is not consistent with the general concepts of the right to jury trial."<sup>141</sup> Instructions to the jury in jurisdictions following the Massachusetts rule should not inform the jury that the judge has already determined the statement to be voluntary for such an instruction may prejudice the jury.<sup>142</sup>

Traditionally the military procedure to determine voluntariness was to litigate the issue when the challenged statement was offered into evidence. This is still possible, although the more usual procedure is for the defense<sup>143</sup> to raise the issue in an

<sup>134</sup> See generally *Jackson v. Denno*, 378 U.S. 368 (1964). In *Jackson* the Court invalidated the "New York" rule under which the trial judge made a preliminary determination of voluntariness but which required him to submit the issue to the jury unless "in no circumstances could the confession be deemed voluntary." 378 U.S. at 377. See generally 3 WIGMORE, *supra* note 8, at § 861.

<sup>135</sup> See, e.g., *State v. Langley*, 25 N.C. App. 298, 212 S.E.2d 687 (1975).

<sup>136</sup> MCM, 1969, paras. 53d(1) & 140a(2).

<sup>137</sup> See FED. R. EVID. 104(c): "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury."

<sup>138</sup> See, e.g., *Ross v. State*, 504 S.W.2d 862 (Tex. Crim. App. 1974); *State v. Harbaugh*, 132 Vt. 569, 578, 326 A.2d 821, 827 (1974).

<sup>139</sup> 18 U.S.C. § 3501(a) (1970).

<sup>140</sup> See, e.g., *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975).

<sup>141</sup> *State v. Harbaugh*, 132 Vt. 569, 579, 326 A.2d 821, 827 (1974).

<sup>142</sup> See, e.g., *United States v. Bear Killer*, No. 75-1814 (8th Cir., April 16, 1976); *Dempsey v. State*, 277 Md. 134, 147, 355 A.2d 455, 463 (1976); *People v. Cwikla*, 45 App. Div. 2d 504, 360 N.Y.S.2d 33 (1974).

<sup>143</sup> As the *Manual for Courts-Martial* indicates that the burden, in the absence of an express waiver, is on the prosecution to show the voluntariness of a statement,

MCM, 1969, para. 140a, the prosecution should raise this issue. However, it is more likely that the defense will be the first to do so in practice.

<sup>144</sup> *Cf. United States v. Mirabel*, 68 C.M.R. 803 (ACMR 1974).

<sup>145</sup> This is true even if the issue has been litigated before plea. *United States v. Dusenberry*, 28 L.S.C.M.A. 287, 49 C.M.R. 536 (1975).

<sup>146</sup> Under military law, coercion of a confession is a criminal offense. UCMJ art. 98. While no such prosecution is recorded in the reported cases, the remedy exists and perhaps needs only additional publicity, although the probability of prosecution of military police may be deemed minimal. *See generally Lederer, Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1, 8-9 (1976).

<sup>147</sup> In the military an accused may take the stand for the limited purpose of denying that any statement was made at all. MCM, 1969, para. 140a(3), or for the limited purpose of contesting the voluntariness of a statement. MCM, 1969, para. 140a(2).

Once the issue has been raised,<sup>147</sup> the prosecution has the burden of proving the voluntariness of the statements of the accused which have been offered into evidence. Normally this compels the government to call at least one witness to the actual taking of the confession who will testify to the surrounding circumstances and will attempt to show a completely voluntary act on the part of the accused. Because of the Article 31—*Miranda* rights warnings, usually this proof will follow, some-

#### D. PROOF

has not yet been determined by the Court of Military Appeals. Between the possible "chilling effect" and procedural efficiency should not be relevant to guilty plea cases. The balance between confessions exist<sup>146</sup> and the reliability consideration to alternate forms of attacking improper military procedures to police misconduct (to a much greater extent than reliability), habit. While the voluntariness doctrine does concern itself with that the choice is not one of those which the law should prohibit and a possible challenge to a confession. It can be suggested force an accused to choose between a good pretrial agreement great amount of judicial time and effort, it does frequently and seizure issues will be waived.<sup>145</sup> While this clearly saves a under the influence of a plea bargain, all confession and search the prosecution for if the accused should plead guilty, perhaps issue here is one of timing. Postponement may be desired by out of the presence of the court members in any event, the only sometime after plea. As the judge will make his determination motion or may treat the matter as an objection to the evidence to suppress. The trial judge may, in his discretion, hear the plea by a motion for appropriate relief in the nature of a motion formal suppression motion,<sup>144</sup> the issue is usually raised before ence of the court members. Inasmuch as the military lacks a Article 39(a) session before the trial judge and out of the pres-

times in an almost incidental fashion, the showing that those requirements were properly complied with. The defense will of course attempt to show a different picture of the interrogation. To minimize questions of proof, increased interest is being shown in recording police interrogations via either tape recording, movie or videotape. While videotape use will not resolve all questions and will require proper authentication procedures, it appears most likely to moot the usual battle as to what actually did take place at the interrogation.

### E. THE CORROBORATION REQUIREMENT

The same reluctance to convict defendants on the basis of confession evidence which helped give rise to the voluntariness doctrine gave rise to the corroboration requirement. Originally dealing primarily with crimes of violence, the rule requires that before a confession or an admission<sup>148</sup> may result in a conviction the statement must be corroborated by independent evidence.<sup>149</sup> Thus the courts have imposed an additional reliability check on confession evidence. Two primary corroboration rules exist in the United States. Under the majority rule, independent evidence must substantiate the *corpus delicti*, or in other words show that a criminal act has in fact occurred.<sup>150</sup> Independent evidence is not needed to show the identity of the perpetrator.<sup>151</sup> Under the minority rule, used by the civilian federal courts<sup>152</sup> and the military,<sup>153</sup> independent evidence must be received to show that the confession is trustworthy. As McCormick suggests,<sup>154</sup> the civilian federal courts have tended

<sup>148</sup> There is no difference in treatment between confessions and admissions in the federal courts, *Opper v. United States*, 348 U.S. 84, 90-92 (1954), although some jurisdictions may apply the rule only to confessions.

<sup>149</sup> See generally C. McCORMICK, EVIDENCE § 158 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE §§ 2070-2075 (3d ed. 1940).

<sup>150</sup> See, e.g., *Tanner v. State*, 57 Ala. App. 254, 327 So. 2d 749 (1976) (testimony showing that 988 tires were missing from inventory with value of \$33,000 corroborated the confession of the defendant); *People v. Ruckdeschel*, 51 App. Div. 2d 861, 862, 380 N.Y.S.2d 163, 164 (1976) (failure of independent evidence to show a larcenous taking from the victim resulted in insufficient corroboration and compelled reversal of conviction for first degree robbery); *Davis v. State*, 542 P.2d 532 (Okla. 1975) (independent evidence established that a dead body was found and the death was shown to have occurred as a result of multiple stab wounds, corroborating the confession).

<sup>151</sup> See, e.g., *People v. Reeves*, 39 Cal. App. 3d 944, 946-47, 114 Cal. Rptr. 574, 575-76 (1974). Usually this is the element of proof supplied by the confession.

<sup>152</sup> See, e.g., *Smith v. United States*, 348 U.S. 147 (1954); *Opper v. United States*, 348 U.S. 84 (1954); *United States v. Wilson*, 529 F.2d 913, 915 (10th Cir. 1976).

<sup>153</sup> MCM, 1969, para. 140a(5); *United States v. Crider*, 45 C.M.R. 815 (NCMR 1972).

<sup>154</sup> C. McCORMICK, EVIDENCE § 159 (2d ed. 1972).

to confuse the standards and frequently require that the *corpus delicti* be shown.<sup>155</sup> Because that standard almost always also establishes the trustworthiness of the confession, the difference between the two standards tends to be purely academic. Corroboration need not be shown beyond a reasonable doubt<sup>156</sup> and may in some jurisdictions, including the military, allow admission of evidence not normally admissible.<sup>157</sup> The presence of sufficient evidence to corroborate a confession is a question for the trial judge in some jurisdictions,<sup>158</sup> and for the jury in others.<sup>159</sup> The minimum constitutional requirement thus remains unsettled although in the light of *Jackson v. Denno*,<sup>160</sup> presumably a judicial determination is adequate. Traditionally the corroboration requirement has applied only to extrajudicial confessions and accordingly the rule will not apply to confessions made during trial by court-martial.<sup>161</sup>

#### F. THE BRUTON RULE

The *Bruton* rule is the outgrowth of joint trials of co-accused individuals in which one accused has made a confession that implicates another. In *Bruton v. United States*,<sup>162</sup> the Supreme Court held that the admission into evidence of a confession by one defendant that implicates a co-defendant deprives the second accused of his sixth amendment right to confrontation unless the first accused takes the stand and can be cross-examined about the incriminating statement. The two usual cures for the *Bruton* problem are severing the cases of the co-defen-

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<sup>155</sup> See, e.g., *United States v. Danilds*, 528 F.2d 705, 707-08 (6th Cir. 1976); *United States v. Fleming*, 504 F.2d 1045, 1048-49 (7th Cir. 1974).

<sup>156</sup> See, e.g., *Green v. State*, \_\_\_ Ind. App. \_\_\_, 304 N.E.2d 845 (1973).

<sup>157</sup> See, e.g., *United States v. Stricklin*, 20 U.S.C.M.A. 609, 44 C.M.R. 39 (1971) (hearsay evidence).

<sup>158</sup> See, e.g., *Felton v. United States*, 344 F.2d 111 (10th Cir. 1965); *State v. Kelley*, 308 A.2d 877, 885 (Me. 1973).

<sup>159</sup> See, e.g., *Burkhalter v. State*, 302 So. 2d 503 (Miss. 1974). The Court of Military Appeals has been unable to resolve this problem definitively and has held in *United States v. Seigle*, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973), that the issue is for the trial judge alone unless the evidence is "substantially conflicting, self-contradictory, uncertain, or improbable," in which case the court must, on defense request, instruct the court members on the issue.

<sup>160</sup> 378 U.S. 368 (1964).

<sup>161</sup> MCM, 1969, para. 140a(5). See also *Manning v. United States*, 215 F.2d 945, 950 (10th Cir. 1954). According to the Manual, the corroboration requirement also "does not apply to statements made prior to or contemporaneously with the act" or to statements admissible under another hearsay exception. MCM, 1969, para. 140a(5).

<sup>162</sup> 39 U.S. 123 (1968), overruling *Deli Paoli v. United States*, 352 U.S. 232 (1957) (which had sustained the propriety of a limiting instruction in such cases).

dants or redacting<sup>163</sup> the confession. The *Bruton* problem does not arise in a court-martial by judge alone,<sup>164</sup> when the maker of the confession takes the stand or if the co-defendant has also made a similar confession.<sup>165</sup> The courts have retreated from the original decision in *Bruton* and its long term vitality is open to question. A number of cases<sup>166</sup> have found *Bruton* errors to have been harmless beyond a reasonable doubt and thus not reversible error.

### IX. THE AUTOMATIC REVERSAL RULE

While every effort is made by the trial judiciary to prevent error from occurring at trial, error of various types is frequent, especially in the admission of evidence. While most error will be scrutinized for the likelihood of prejudice to the accused, the Supreme Court has promulgated a general harmless error rule dealing with violations of federal constitutional rights. In *Chapman v. California*,<sup>167</sup> the Court indicated that a violation of such a constitutional right must result in reversal of the conviction unless the error could be shown to have been harmless beyond a reasonable doubt. Most interestingly, however, the Court stated in addition that its "prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."<sup>168</sup> This phrase is the source of what has been termed the "automatic reversal rule." Under the rule, error involving such a basic right cannot be tested for prejudice and the conviction must be reversed regardless of the amount of untainted evidence properly admitted against the accused. Because the Supreme Court cited a coerced confession case<sup>169</sup> as an example of a basic constitutional right, a number of jurisdictions<sup>170</sup>

<sup>163</sup> Redaction is the deletion of all references to the co-accused. See, e.g., MCM, 1969, para. 140b. Because this may be practically impossible in many cases it is a limited solution. For a general discussion of this issue in the military context, see Corrigan, *Prejudicial Joinder—The Crazy-Quilt World of Severances*, 68 MIL. L. REV. 1 (1975).

<sup>164</sup> *United States v. Aponte*, 45 C.M.R. 522 (ACMR 1972).

<sup>165</sup> See *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45, 48-49 (2d Cir. 1975), cert. denied, 423 U.S. 872 (1976).

<sup>166</sup> See, e.g., *Brown v. United States*, 411 U.S. 223 (1973); *Schneble v. Florida*, 405 U.S. 427 (1972).

<sup>167</sup> 386 U.S. 18 (1967).

<sup>168</sup> *Id.* at 23.

<sup>169</sup> *Payne v. Arkansas*, 356 U.S. 560 (1958). Payne, a 19-year-old black, was charged with the murder of his white employer. Held incommunicado for three days, denied food for long periods, he was threatened with mob violence if he failed to confess. The Supreme Court reversed his conviction.

<sup>170</sup> See, e.g., *United States v. Wagner*, 18 U.S.C.M.A. 216, 39 C.M.R. 216 (1969);

have adopted a rule under which any case involving an improperly admitted confession<sup>171</sup> will be reversed automatically. Unfortunately the true meaning of the *Chapman* case is unclear.

The Court's reference to *Payne v. Arkansas* in *Chapman* can be read as creating an automatic reversal rule applicable to coerced confessions. However, even if one accepts that conclusion, it is unclear whether the rule should extend to other forms of involuntary confessions<sup>172</sup> (such as those obtained through improper inducements) or to confessions obtained through violations of the warning requirements of *Miranda v. Arizona*.<sup>173</sup> While the practical difference between the *Chapman* harmless error rule and the automatic reversal rule is extremely small in any event, future civilian clarification of this perplexing issue<sup>174</sup> can be anticipated.

The Court of Military Appeals, using *Chapman* as its basis, applies an automatic reversal rule to courts-martial in which a confession or admission has erroneously been admitted.<sup>175</sup> While the court's original reasoning may have been faulty, recent cases<sup>176</sup> suggest a nonconstitutional basis for the rule that is highly persuasive. The court has stated<sup>177</sup> that while it

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McKirley v. State, 37 Wis. 2d 26, 154 N.W.2d 344 (1967). See generally 3 WIGMORE, *supra* note 8, at § 863 n.1.

<sup>171</sup> California has distinguished between confessions which will invoke the automatic reversal rule and admissions which will not. *People v. Stout*, 66 Cal. 2d 184, 57 Cal. Rptr. 152, 424 P.2d 704 (1967).

<sup>172</sup> The Supreme Court failed to apply the automatic reversal rule to a violation of *Massiah v. United States*, 377 U.S. 201 (1964) in *Milton v. Wainwright*, 407 U.S. 371 (1972) (admissions made by defendant to a police officer posing as a cellmate found to constitute harmless error when improperly admitted at trial) and to violations of the sixth amendment *Bruton* rule. *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969). It may well be that an automatic reversal rule is not constitutionally required for any case.

<sup>173</sup> The majority rule appears to be that the automatic reversal rule does not apply to violations of the *Miranda* warnings requirements (although the usual *Chapman* harmless error rule does). See, e.g., *Smith v. Estelle*, 519 F.2d 1267 (5th Cir. 1975); *Null v. Wainwright*, 508 F.2d 340, 343 (5th Cir. 1975); *State v. Hudson*, 325 A.2d 56 (Me. 1974); *State v. Pursuitt*, 133 Vt. 354, 339 A.2d 750 (1975).

<sup>174</sup> See generally R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970); Mause, *Harmless Constitutional Error, The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969); Salzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814 (1970); Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

<sup>175</sup> See, e.g., *United States v. Kaiser*, 19 U.S.C.M.A. 104, 41 C.M.R. 104 (1969).

<sup>176</sup> *United States v. Ward*, 23 U.S.C.M.A. 572, 50 C.M.R. 837 (1975); *United States v. Hall*, 23 U.S.C.M.A. 549, 50 C.M.R. 720 (1975).

<sup>177</sup> *United States v. Ward*, 23 U.S.C.M.A. 572, 575 n.3, 50 C.M.R. 837, 840 n.3 (1975).

will apply the usual constitutional harmless error rule to constitutional violations, a higher standard must be applied in cases in which a violation of Article 31 rights has occurred. This reasoning recognizes the congressional interest in according service personnel greater procedural protection than that available to the general population, presumably to offset conditions peculiar to military life.

#### X. CONCLUSION

The admissibility into evidence of confessions and admissions has been of concern to Anglo-American lawyers since at least the 17th Century and the voluntariness doctrine has been the major tool through which the law has attempted to regulate the use of these statements. In recent years, however, there has been an understandable if misguided tendency to presume that the comparatively recent Article 31-*Miranda* rights warnings have subsumed the voluntariness doctrine. While the importance of Article 31 cannot be overestimated, it should be apparent that the American voluntariness doctrine both complements and expands Article 31. As the military tends to reflect civilian legal trends, there is every reason to believe that as *Miranda* is undercut by the Supreme Court the voluntariness doctrine will take on added importance. Expanded use of the voluntariness doctrine will have the effect of increasing the emphasis that both the defense and prosecution must place on the circumstances surrounding the taking of a statement. Whether for present or future practice, this doctrine merits increased attention by judge advocates.





# DISCHARGE FOR THE GOOD OF THE SERVICE: AN HISTORICAL, ADMINISTRATIVE AND JUDICIAL POTPOURRI\*

Lieutenant Colonel Donald W. Hansen\*\*

## I. INTRODUCTION

Private First Class Peter Poe robbed a taxicab driver on the Fort Wilderness Military Reservation after an argument over the amount of the fare. He was subsequently arrested and placed in pretrial confinement after which his unit commander preferred charges against him for robbery<sup>1</sup> under the *Uniform Code of Military Justice*.<sup>2</sup> Following consultation with his appointed defense counsel, Private Poe elected to request discharge from the Army for the good of the service<sup>3</sup> rather than stand trial. The case was processed to the Commanding General of Fort Wilderness who accepted the offer to resign. Fourteen days after the incident, Private Poe was given an Undesirable Discharge Certificate<sup>4</sup> and was released from the service with no further criminal action having been taken against him.

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

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<sup>1</sup> In *Relford v. Commandant*, 401 U.S. 355 (1971), the Supreme Court held that offenses which take place on an Army post meet the "service connection" requirement for courts-martial jurisdiction postulated in *O'Callahan v. Parker*, 395 U.S. 258, 272 (1969). As will appear, where jurisdiction is not so clear, a substantial question as to the propriety of accepting a request for discharge is present.

<sup>2</sup> UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ].

<sup>3</sup> Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 10 (C42, 14 Dec. 1973) [hereinafter cited as AR 635-200]. Similar options are available to officers who wish to resign their commissions in lieu of trial under the provisions of Army Reg. No. 635-120, Personnel Separations—Officer Resignations and Discharges, ch. 5 (C3, 21 Jan. 1970) [hereinafter cited as AR 635-120]. The terms "resignation" and "request for discharge" are used interchangeably for purposes of this article.

<sup>4</sup> Dishonorable and bad-conduct discharges are punitive and can only be issued by courts-martial. Honorable, general and undesirable discharges are administrative separations given in accordance with Army regulations. However, the loss of veterans' benefits is nearly identical for recipients of either a bad-conduct or undesirable discharge. See U.S. Dep't of Army, GTA No. 21-2-1, Benefits-Discharges (June 1969).

The case of Private Poe is not uncommon in the Armed Forces. In the United States Army, for example, use of the resignation procedure by those charged with offenses increased steadily from its inception in 1966 until fiscal year 1972 when over 25,000 soldiers initiated such requests for discharge.<sup>5</sup>

Fortunately, this trend has been reversed in subsequent years,<sup>6</sup> but whether the reduction in the number of soldiers seeking this form of administrative release from the service will continue may depend on the extent to which the Army is able to attract more highly motivated personnel and eliminate those factors and irritants which contribute to service dissatisfaction and the commission of court-martial offenses.<sup>7</sup> If, as a result of the termination of involvement in the Vietnam War and the full implementation of the Modern Volunteer Army Program, a substantial change in the attitude of the service member can be achieved, it may be increasingly against the interests of the individual soldier to resort to this expedient. Until that time,

<sup>5</sup> Letter from Department of the Army, PE-MPP, to the author, Oct. 23, 1972. The number of discharges by fiscal year since approval of the request for discharge procedure on 15 July 1966 until 1972 were as follows: 1967—295; 1968—384; 1969—444; 1970—6,911; 1971—12,012; and 1972—25,465. The source indicates that the percentages of enlisted losses through this procedure were as follows: 1967—.07%; 1968—.06%; 1969—.08%; and 1970—.96%. The data also show that during the fiscal years 1968 through 1970, 117 were given honorable discharges, 517 were given general discharges, and 7,275 were given undesirable discharges. *Id.*

<sup>6</sup> After fiscal year 1972, the number of discharges for the good of the service were as follows: FY 1973—21,047; FY 1974—17,640; FY 1975—14,784. Undesirable discharges under Chapter 10 in 1973 constituted 74% of the total undesirable discharges given as compared with 77% in 1974, and 78% in 1975. Of the discharges given under Chapter 10 from FY 1973 through FY 1975, 179 were honorable, 1,856 were general, 6,520 were under honorable conditions and 46,983 were undesirable [*sic*]. DAPE-MPE-PS Memorandum, 14 Nov. 1975, Subject: Questions Submitted for the Record.

<sup>7</sup> A major reason for the decrease in Chapter 10's may be the decline in absence offenses. Available data reflect the following rate per thousand troops for the periods indicated:

A. Desertion (AWOL for 30 days or more)

1971: 73.5  
 1972: 62.0  
 1973: 52.0  
 1974: 41.2

B. Absence without leave (AWOL less than 30 days)

1971: 176.9  
 1972: 166.4  
 1973: 159.0  
 1974: 130.0

however, resignations for the good of the service will be of interest to both the civilian community and the Armed Forces.<sup>8</sup>

This article will examine the provisions of Chapter 10, Army Regulation 635-200, which set forth the manner in which an individual may seek to avoid the complete adjudicatory processes of the *Uniform Code of Military Justice*. The focus of the analysis will be to determine whether the procedures are administrative or judicial in nature, with particular emphasis on the manner in which the regulatory provisions are put into practice by those charged with the responsibility of administering the system. The data and comments reflecting the manner in which the request for discharge procedure is administered were developed from a survey conducted by the author in September 1972,<sup>9</sup> of the practices then being followed in 39 general court-martial jurisdictions.

While the reasons motivating the soldier to resort to the process today may be different than many of those which provoked requests in 1972, the specific reasons motivating soldiers to utilize the procedure are only relevant to the initial decision to attempt to avoid trial. Elimination of the anti-war irritant as a reason for entering the system does not detract from the analysis of its operation, for as long as the number of soldiers seeking voluntary diversion from the criminal process remains high little change can be expected which would reduce the manner in which those numbers are handled. It is the opinion of this author that a study and analysis of the managerial or judicial aspects of the resignation process can be most productive when the data reflect the system operating at a high volume and under maximum stress as it was in 1971-1972, for it is at that time that errors and weakness in its operation are most apt to surface. To be sure, changes in the authorizing regulation may dictate different procedures or requirements which would

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<sup>8</sup> See, e.g., excerpts of an address by Major General George S. Prugh, The Judge Advocate General of the Army, to the Army Commander's Conference, Nov. 30, 1971, reported in *THE ARMY LAWYER*, Jan. 1972, at 4, where he cautioned the commanders to "[g]ive an especially watchful eye to the uses of the Chapter 10. Before accepting the Chapter 10 offer and imposing an undesirable discharge on the offender, the completed file should clearly show to you that the soldier is not rehabilitatable and that his conduct demonstrates the appropriateness of the undesirable discharge."

<sup>9</sup> See Appendix. The questions were designed to elicit open ended responses, and the author attempted to place the jurisdiction within the appropriate category of response depending on the comments made. In many instances individual comments were utilized to illustrate various views; however, except as noted the comment reflects only the view of the staff judge advocate concerned and should not be interpreted as an indication that others either agreed or disagreed with the expressed view. Comments from this survey are cited as "SJA Resp. 1," etc.

affect analysis of the previous practice; however, those changes will be identified in the appropriate section.

## II. THE FRAME OF REFERENCE<sup>10</sup>

### A. THE NEED FOR ANALYSIS

The administration of the military criminal law system has traditionally been an object of criticism by some segments of the civilian community.<sup>11</sup> It is highly likely that the utilization of the request for discharge procedure, both during the Vietnam era and thereafter, will be drawn within that circle of suspicion and distrust if for no other reason than that the procedures came into prominence during an exceptionally divisive time in our national history. Whether the criticism of military practices and procedures is based upon a lack of understanding of the substantially greater rights of the service member as compared to his civilian counterpart,<sup>12</sup> or an inability or unwillingness to accept the essential difference in the goals to be served by military and civilian penal law,<sup>13</sup> it is clear that the military

<sup>10</sup>The frame of reference utilized in this article is taken from H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* ch. 8 (1968) [hereinafter cited as PACKER].

<sup>11</sup>In *O'Callahan v. Parker*, 395 U.S. 258 (1969), Justice Douglas opined that "[w]hile the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265. Warming to his task, Justice Douglas continued by advising that:

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest desire of retributive justice. As recently stated, "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, *Justice and Captain Levy*, 32 *Columbia Forum* 46, 49 (1969).

*Id.* at 266. A contrary view has been expressed in Hansen, *A Judicial Function for the Commander?*, 41 *MIL. L. REV.* 11 (1968).

<sup>12</sup>See Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 *MIL. L. REV.* 1 (1971); Hansen, Article 31, UCMJ: The Fifth Amendment and the Brothers Poe—They March to Different Drummers, unpublished thesis presented to The Judge Advocate General's School, U.S. Army in 1972.

<sup>13</sup>"The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation." *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Forces*, 81st Cong., 1st Sess. 780 (1949) (General William T. Sherman, speaking in 1879). Recognition of this principle can surprisingly be found even in the opinion of Justice Douglas in *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969): "That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny." The military distinction has also been recognized in *Schlesinger v. Councilman*, 420 U.S. 738 (1975) and *Parker v. Levy*, 417 U.S. 733 (1974).

lawyer must be prepared to analyze military procedures in terms that will be meaningful in the civilian community.

The direction this analysis will take largely depends upon the view of the purpose to be served by the criminal justice system, and those diversionary practices associated with it. "For example, if the system is tested against a single concern—efficiency in processing the guilty—the questions that arise are likely to be somewhat different than if another concern—the extent to which regular procedures and adversary process are employed—is the frame of inquiry."<sup>14</sup> The view of the purpose to be served by the system is important because the criticism to be answered will persist as long as the critics "base their arguments on different expectations and standards of evaluation."<sup>15</sup> This does not, of course, mean that the critics' view of the desired result will necessarily be changed; however, it does provide a common meeting ground upon which discussions and analysis can take place. Perhaps equally important is that any significant shift in expectations of necessity requires that society provide a sufficient number of professional military personnel of the quality required to support the model having the basic values it deems most desirable.

Professor Packer suggests the creation of models by examining both the regulatory provisions and the manner in which they are put into practice.<sup>16</sup> Once created, the models

... afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions between competing claims.<sup>17</sup>

This article will attempt to note the nature of the value choices which have developed in the regulatory provisions of Army Regulation 635-200 as well as those choices which have been made in day-to-day operations, and compare them with analogous actions in military and civilian criminal processes.

Model building is not without its pitfalls.

There is a risk in an enterprise of this sort that is latent in any attempt to polarize. It is, simply, that values are too various to be pinned down to yes-or-no answers. The models are distortions of reality and, since they are normative in character, there is a danger of seeing one or the other as Good or Bad. ... The attempt here is primarily to clarify the terms of discussion by isolating the assumptions that underlie competing policy claims.<sup>18</sup>

<sup>14</sup> F. REMINGTON, D. NEWMAN, E. KIMALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 28 (1969) [hereinafter cited as REMINGTON].

<sup>15</sup> *Id.*

<sup>16</sup> PACKER at 152-53.

<sup>17</sup> *Id.* at 513.

<sup>18</sup> *Id.* at 153-54.

The application of any particular model to the resignation for the good of the service is particularly difficult. The process involves a number of personnel with varying views on the function of the system of criminal justice. From the accused, who desires to escape immediate punishment, through the chain of command whose contact with the individual decreases and whose desire to support subordinates increases with the distance from the offender, to the staff judge advocate and the approving authority who are concerned with discipline and justice within the command as a whole, different value judgments may be operating.<sup>19</sup>

### B. MODELS OF THE CRIMINAL PROCESS<sup>20</sup>

1. *The Administrative Model.*<sup>21</sup> The Administrative Model views enforcement of the law as the basic protector of social freedom. Disrespect for the law occasioned by the delay involved in screening suspects, bringing them to trial, and disposing of offenders after adjudication of guilt lowers the preventive impact of punishment with a corresponding failure to suppress crime. The net result is that the law fails to protect the law-abiding members of the society.

In order to achieve the goal of effective law enforcement, the Administrative Model depends on a high state of efficiency in which large numbers of cases can be quickly disposed of with a minimum of effort and resources. Professor Packer aptly compares this model to "an assembly-line conveyor belt."<sup>22</sup> The model looks to the preliminary determination of factual guilt made by the arresting officer and prosecuting attorney as so reliable that when "reduced to its barest essentials and operating at its most successful pitch, it offers two possibilities:

<sup>19</sup> "A person who subscribed to all of the values underlying one model to the exclusion of all values underlying the other would be rightly viewed as a fanatic." *Id.* at 154.

<sup>20</sup> In his book, Professor Packer refers to the models as the "Due Process Model" and the "Crime Control Model." Since the Armed Forces provide for the resolution of criminal conduct through both the judicial process, *i.e.*, the *Uniform Code of Military Justice*, and the administrative process, *i.e.*, AR 635-200, ch. 10, it appears more appropriate to reflect these options in the modular description. Professor Packer would apparently accept these modifications in a description of his framework as he has noted: "The Crime Control Model is *administrative* and managerial; the Due Process Model is *adversary* and *judicial*." Packer, *The Courts, The Police and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238, 239 (1966) (emphasis added).

<sup>21</sup> PACKER at 158-62.

<sup>22</sup> The image that comes to mind is an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product. It is to exchange the metaphor for the reality: a closed file.

*Id.* at 159.

an administrative fact-finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty."<sup>23</sup> 2. *The Judicial Model*.<sup>24</sup> The Judicial Model sees the intervention of the criminal process into an individual's personal life as the "heaviest deprivation that government can inflict on the individual."<sup>25</sup> It is permissible only when the state has met its full procedural and substantive burden.<sup>26</sup> It is in this respect that the Judicial Model insists that the criminal justice process must "be subjected to controls that prevent it from operating at maximum efficiency."<sup>27</sup> As a result Professor Packer sees this model as an "obstacle course"<sup>28</sup> in which legal guilt, as opposed to factual guilt, is determined only when "factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them."<sup>29</sup>

A basic disagreement between the two models relates to the manner in which the crucial fact finding is to be done. The Judicial Model insists upon

formal adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.<sup>30</sup>

In the adjudication process of this model, the "guiding hand of counsel"<sup>31</sup> is the essential ingredient to ensure that the prosecution fully meets its burden.

<sup>23</sup> *Id.* at 162-63.

<sup>24</sup> *Id.* at 163-72.

<sup>25</sup> *Id.* at 165.

<sup>26</sup> Factual guilt, as accepted by the Administrative Model, is not necessarily the same as legal guilt. "[B]y forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favorable outcome." *Id.* at 167.

<sup>27</sup> *Id.* at 166.

<sup>28</sup> "If the [Administrative Model] resembles an assembly line, the [Judicial Model] looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process." *Id.* at 163 (modular titles substituted).

<sup>29</sup> *Id.* at 166.

<sup>30</sup> *Id.* at 163-64.

<sup>31</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Packer comments:

I do not mean to suggest that questions about the right to counsel disappear if one adopts a model of the process that conforms more or less closely to the [Administrative Model], but only that such questions become absolutely central if one's model moves very far down the spectrum of possibilities toward the pure [Judicial Model]. The reason for this centrality is to be found in the assumption underlying both models that the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned, the state, and the accused.

PACKER at 172 (modular titles substituted).

3. *Criticism of the Models as Evaluating Standards.*<sup>32</sup> The thrust of the criticism of this framework is that Professor Packer has merely created one perspective with two modes, each of which attempts to secure favorable rules in the criminal justice system for either the state or the individual depending upon the value currently receiving support from the legislatures and the courts. In Professor Griffiths' view,

Packer consistently portrays the criminal process as a struggle—stylized war—between two contending forces whose interests are implacably hostile: the Individual (particularly the *accused* individual) and the State. . . . Since the metaphor of battle roughly suits this silent premise about the nature of the relationship of state and individual reflected in the criminal process, I shall use it to characterize Packer's position: the Battle Model of the criminal process.<sup>33</sup>

The only characteristic of the Battle Model to be discerned is the distinction between the two perspectives over the manner in which the contest is to be fought<sup>34</sup> with the "exile function of punishment"<sup>35</sup> as the issue. "The accused and his champion are fighting for his right to remain a member of the common society—not to be treated as an outcast."<sup>36</sup> Thus, in Professor Griffiths' view

what Packer does is to make distinct the competing directions in which that ideology leads and the resulting strains and compromises in our criminal process. But his Two Models will not help us come to real terms with the basic problems of the process.<sup>37</sup>

The only way to evaluate the criminal justice system, according to Professor Griffiths, is to devise a model in which the overall relationship is not based on hostility. He proposes a "Family Model"<sup>38</sup> which looks to preserving the ties between the individual and the society which has punished him:

Reconciliation takes place in the Family Model particularly in the energetic pursuit by society of the convict's interest in every way consistent with the

<sup>32</sup> See Griffiths, *A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970) [hereinafter cited as Griffiths].

<sup>33</sup> *Id.* at 367.

<sup>34</sup> Packer concedes that the Judicial Model "does not rest on the idea that it is not socially desirable to repress crime, although critics of its application have been known to claim so." PACKER at 163.

<sup>35</sup> Griffiths, *supra* note 32, at 368. "Based upon the conception of the criminal as a special kind of person who is the 'enemy' of society, and the trial as a battle in which (if guilty) he is vanquished, the exile function of punishment cuts him off sharply at that point from the total community." *Id.* at 379.

<sup>36</sup> *Id.* at 386.

<sup>37</sup> *Id.* at 410.

<sup>38</sup> This concept is "contained in the straight forward and simple reply a parent gives to a child who is anxious about the fundamental relationship because of his guilt at an offense or his reaction to its punishment: 'Of course I love you, but just now I don't like you.'" *Id.* at 376.



social need that he be punished. His sacrifice for the general good is kept to a minimum. The experience is made as painless and as beneficial for him as possible. In concrete ways we can make plain that while he has transgressed, we do not therefore cut him off from us, our concern and dedication to his well being will continue. We have punished him and drawn him back in among us; we have not cast him out to fend for himself against our systematic enmity.<sup>39</sup>

When this model is adopted, so the argument goes, a proper perspective is achieved in which the need for an adversary system is largely dissipated, and along with it the creation of rules and regulations so necessary for a system based upon battle.

Unfortunately, Professor Griffiths' efforts to extend the biological, psychological and social interactions between the parent and child cannot be readily transferred to a state-individual relationship.<sup>40</sup> A major indication of the failure to do so can be seen in the juvenile law field where the principles of reconciliation between the State and the minor have in recent years given way to procedures similar to those utilized in trials.<sup>41</sup> Accordingly, a system of analysis that fails to deal with what "Is" as well as what "Ought To Be" does not provide a meaningful frame of reference.<sup>42</sup>

Even more indicative of the inapplicability of Professor Griffiths' proposal to the topic of this article arises from his insistence that the frame of reference must be based upon a theory of reconciliation. This consideration would have more validity if the entire system of criminal procedures under the *Uniform Code of Military Justice* were being evaluated. Even then, however, it must be kept in mind that the criminal law processes in the Armed Forces are designed to serve a closed society in the sense that the Army is not primarily concerned with reconciliation or retention of those whose conduct and prospects for rehabilitation within the system have been of such a nature as to include some form of discharge as a part of the

<sup>39</sup> *Id.* at 411-12.

<sup>40</sup> But it is naive, at least for the foreseeable future to assume that offenders and officials will "start from an assumption of reconcilable—even mutually supportive—interests a state of love." It is equally naive to assume that many criminals, particularly of the Black communities or subcultures where violence is a norm, offend because they lack self-control. The problem is that their form of self-control may lead them in directions defined as criminal. And the paternalistic relationship of father to child is not effective in these instances.

Duffee & O'Leary, *Models of Correction: An Entry in the Packer-Griffiths Debate*, 7 CRIM. L. BULL. 329, 348 (1971).

<sup>41</sup> In *Kent v. United States*, 383 U.S. 541, 554-55 (1966) the Supreme Court, in holding that a hearing is required before the juvenile court can waive a case to the district court, commented: "The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness." See also *In re Gault*, 387 U.S. 1 (1967).

<sup>42</sup> See PACKER at 149-50.

punishment.<sup>43</sup> This was expressed by one staff judge advocate as involving "the prospects for future service of a quality sufficient to justify the expenditure of leadership effort (thereby depriving others of the benefit of leadership time so expended)."<sup>44</sup>

This is most strikingly demonstrated by the procedures for requesting discharge from the service. Once an individual has demonstrated that further rehabilitation efforts will be of no avail, he is "exiled" from the Army society as no longer fit to engage in the Profession of Arms.<sup>45</sup> Thus the underlying value of the Family Model, certainly with respect to discharge from the service, is inapplicable to the extent reconciliation is not a desired or practical end.

It is difficult to see any major difference between two models and one model with two perspectives. Moreover, it is unlikely that any system will fit entirely into either category as it may have features of each model. Nevertheless, the frame of reference provides a spectrum of choices that we may utilize in judging the outline of the criminal process. While the analysis

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<sup>43</sup> Army Reg. No. 190-4, Uniform Treatment of Military Prisoners, para. 1-2b(1) (C4, 25 June 1971) establishes a Correctional Training Facility for restorable prisoners who will have 35 days of confinement left to serve after arrival. The purpose is to carry out intensive training and correction treatment of individuals having some rehabilitative potential. Of the 3,508 trainees assigned in fiscal year 1972, about 180 had approved and suspended punitive discharges. Letter from the Staff Judge Advocate, U.S. Army Correctional Training Facility to the author, Oct. 26, 1972. During fiscal year 1972, the losses and percentages of 3,847 trainees were as follows: reassigned, 3,239 (84.2%); transferred to the U.S. Army Disciplinary Barracks, 1 (0.1%); dropped from the rolls, 55 (1.4%); discharged under AR 635-212 [now AR 635-200, ch. 13], 505 (13.1%); hardship discharges, 24 (0.6%); other discharges, 20 (0.5%); and miscellaneous losses, 3 (0.1%). THE U. S. ARMY CORRECTIONAL TRAINING FACILITY, ANNUAL REPORT, FISCAL YEAR 1971.

<sup>44</sup> SJA Resp. 16.

<sup>45</sup> The extent to which society chooses to make the Armed Forces an instrument of social reform will affect this assertion. See Paslick, *Project One Hundred Thousand—Its Significance to the Military Lawyer*, 13 AF JAG L. REV. 154 (Spring 1971) where the author reviews the Department of Defense program of lowering standards for admission to the Armed Forces as a social tool for assisting the educationally, mentally, and economically disadvantaged. The author indicates that during the period of the study the new standards group in the Air Force received 18% of the nonjudicial punishments administered and about 48% of the court-martial convictions although the group comprised only 7.2% of the no prior service enlisted population. The practice by some civilian judges of forcing young men to choose between "jail or the Army" caused The Judge Advocate General of the Army to advise the chief justices of the various civilian courts that such individuals face a "high potential for difficulties in the service." This letter was used to support the opinion of the United States Court of Military Appeals that such enlistments are void and military courts have no jurisdiction over such forced volunteers. *United States v. Catlow*, 23 U.S.C.M.A. 143, 48 C.M.R. 758 (1974).

in the following sections may show resignation procedures to be somewhere between the Administrative Model and the Judicial Model, partaking of various aspects of each, the analysis presented by Professor Packer permits an evaluation of policies underlying competing value choices, and will be followed in this article.

### III. THE PHILOSOPHICAL BASIS FOR THE REQUEST FOR DISCHARGE FROM THE SERVICE

The concept that an individual may avoid direct punishment for his misconduct by simply removing himself from the society whose law he has violated has no counterpart in current civilian criminal justice.<sup>46</sup> It is therefore not surprising to find increased congressional interest in such procedures.<sup>47</sup>

Moreover, the administrative handling of criminal charges has even been subjected to criticism within the military justice system by the United States Court of Military Appeals:

I am also aware of circumstances tending to indicate that the undesirable discharge has been used as a substitute for a court-martial, even in deprivation of an accused's rights under the Uniform Code of Military Justice. However, the remedy for this troublesome situation rests in the hands of Congress.<sup>48</sup>

Although Chief Judge Quinn did not appear to be speaking of the request for discharge procedures, his comments do reflect the concern that is felt over administrative methods used to resolve criminal matters.<sup>49</sup> Accordingly, it is appropriate to examine the source of authority for these procedures as well as their theoretical framework.

Requests for discharge from the service have no statutory foundation other than the general grant by Congress<sup>50</sup> to the Secretary of the Army to provide for the termination of service prior to its statutory expiration. Army Regulation 635-200 is

<sup>46</sup> Compare E. HALE, *THE MAN WITHOUT A COUNTRY* (1868).

<sup>47</sup> A discussion of the congressional activity concerning changes in administrative elimination board procedures may be found in Lane, *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95, 96-100 (1972) [hereinafter cited as Lane].

<sup>48</sup> *United States v. Phipps*, 12 U.S.C.M.A. 14, 16, 30 C.M.R. 14, 16 (1960) (Quinn, C. J., concurring).

<sup>49</sup> While all types of discharge procedures were considered, the bills, if enacted would have had a particularly strong impact on the Chapter 10 discharge. In S. 2247, 92d Cong., 1st Sess. (1971), section 943 prohibited administrative discharges for any "conduct which constitutes an offense punishable under" the Code; and section 955 allowed for a discharge for the good of the service in lieu of administrative discharge board action only. In H.R. 10422, 92d Cong., 1st Sess. (1971), one basis for an undesirable discharge would be "request for discharge in lieu of . . . trial by court-martial," a return to the original Chapter 10 concept. None of these bills was enacted into law.

<sup>50</sup> 10 U.S.C. § 1169 (1970); 50 U.S.C. APP. § 454(b) (Supp. V, 1975).

promulgated pursuant to that authority subject only to the minimum guidelines of the Department of Defense.<sup>51</sup>

Initially the regulation provided for a "request for discharge for the good of the service *in lieu of trial*."<sup>52</sup> The wording was eminently descriptive of the process by which the individual resigned from the service without trial and was generally understood to convey that impression—both in theory and in practice. However, if the language is used in a strict manner, a number of questions arise: Must the accused wait until his case has been referred to trial before submitting his resignation? Does the submission of a request preclude or suspend court-martial proceedings until action has been taken on the request? If the accused is tried before action can be taken on the request, must the findings and sentence be set aside in order to accept the resignation? If the resignation is "in lieu of trial" the answer to each of these questions is "yes."<sup>53</sup>

These questions apparently were not particularly troublesome until the Vietnam War buildup in troop strength when the volume of requests increased faster than they could be processed. This burden of increased volume was further complicated by the scattered location of units in the war zone which made administrative efficiency difficult. As a result, a number of requests for opinions on how to cope with resignations in lieu of trial were submitted to The Judge Advocate General.

The philosophical basis for elimination began to shift in 1967 when The Judge Advocate General pointed out:

Chapter 10, AR 635-200 is not a policy for the expedient discharge of personnel whose conduct has rendered them triable by courts-martial for offenses punishable by a bad conduct or dishonorable discharge but provides authority for discharge in lieu of trial when the commander determines in his best judgment that circumstances indicate that the interests of the service would be best served by this action. Facts relating to the conduct upon which the discharge is predicated should be considered together with past conduct.

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<sup>51</sup> Dept. of Defense Directive No. 1332.14, Enlisted Administrative Separations, § VII K, (30 Sept. 1975) [hereinafter cited as DoD Dir. 1332.14].

<sup>52</sup> AR 635-200, para. 10-1 (15 July 1966) (emphasis added).

<sup>53</sup> In *United States v. Gwaltney*, 43 C.M.R. 536 (ACMR 1970) the Court of Military Review set aside a sentence which included a punitive discharge and ordered the charges dismissed when the Secretary of the Army accepted a resignation after the trial. The court found that under Army Regulation 635-120, para. 5.2 (C1), 10 Dec. 1968) which pertained to resignations by officers, when the Secretary of the Army accepted the resignation, it was intended that it was to be "in lieu of trial." The court would not accept the rationale of JAGA 1970 4202, 6 July 1970, that the regulation should be read as pertaining to resignations "for the good of the service" rather than "in lieu of trial." The Court of Military Appeals in *United States v. Gwaltney*, 20 U.S.C.M.A. 488, 43 C.M.R. 328 (1971) declined to overrule this factual determination by the Court of Military Review.

whether an individual is amenable to rehabilitation and whether such discharge would best serve the interests of the Army.<sup>54</sup>

The official change in philosophical focus came in 1970 when The Judge Advocate General opined<sup>55</sup> that the resignation was for the "good of the service" rather than "in lieu of trial." The opinion noted that the Department of Defense Directive<sup>56</sup> was devoid of any such limiting language, and indeed the title of the regulation itself was "Discharge for the Good of the Service." This brought the resignation procedures for enlisted personnel into line with similar resignation procedures for officers.<sup>57</sup> The offending language was formally removed from the regulation in 1971.<sup>58</sup>

A number of consequences immediately flowed from this change in language as the answer to each of the above posed questions changed to "no." Of more importance, however, was a philosophical reorientation on the part of staff judge advocates.

One staff judge advocate, in the light of the change in language, took exception to the author's questions which inferentially posited that resignations are a substitute for trial by court-martial:

The difference is *not* merely semantic, nor "tongue in cheek." Considerations include the individual's entire history, by no means limited to, nor even restricted by probabilities of conviction on instant charges which produced the request for discharge. Naturally, this produces the possibility of essentially false charges, but the individual is guarded in two ways: one, he has counsel; and two, the request must originate from him.<sup>59</sup>

While some concessions can be made to this objection, a number of substantial military justice considerations still exist even though the resignation is no longer considered "in lieu of trial."

#### IV. OPERATION OF THE SYSTEM

It is generally accepted that the legislature bears the responsibility for establishing the substantive and procedural rules of criminal justice.<sup>60</sup> Even when the legislature's efforts to pro-

<sup>54</sup> JAGA 1967: 4362, 22 Sept. 1967.

<sup>55</sup> JAGA 1970: 4202, 6 July 1970.

<sup>56</sup> DoD Dir. 1332.14 § VII.K. (20 Dec. 1965) provided: "Discharge [may be accepted] by reason of resignation or request for discharge for the good of the service, with an Undesirable Discharge, where a member's conduct rendered him triable by court-martial under circumstances which could lead to a punitive discharge."

<sup>57</sup> AR 635-120, ch. 5 (8 Apr. 1968).

<sup>58</sup> AR 635-200, para. 10-1c (C25, 14 Jan. 1971).

<sup>59</sup> SJA Resp. 16.

<sup>60</sup> There are at least two different views as to the role the legislature should play in resolving important public policy issues which arise in criminal and juvenile justice administration.

The first is that public policy ought to be made by the legislature and the results expressed in clearly

vide policy guidance and directives are as detailed as the *Uniform Code of Military Justice*, there remain substantial opportunities and requirements for administrative interpretations and selection of values.<sup>61</sup> The verity of this principle is clearly illustrated by the fact that the entire *Manual for Courts-Martial*<sup>62</sup> which prescribes the procedure, modes of proof and maximum sentences before military courts-martial is promulgated by the President. The only guidance given to him by Congress is that he shall

*so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this [Code].*<sup>63</sup>

A more expansive grant of authority to administratively set judicial procedures can hardly be imagined.

Under these circumstances, it is not difficult to understand that while Congress has specifically provided for the manner in which a civilian will become a soldier, there is no similar provision for the manner in which the soldier will become a civilian merely to escape punishment for his crime. Indeed, it may not have occurred to Congress that such procedures were either necessary or desirable.<sup>64</sup>

Although an individual separated under this authority can receive the same adverse discharge as under other administrative discharge regulations<sup>65</sup> which provide substantial procedural protections,<sup>66</sup> the regulation providing for requests for discharge contains little guidance in comparison, and is set

United States. Consideration of democratic values are said to require this kind of legislative preference for the legislature speaks for the majority in our system of government. The second view is that it is not realistic to expect a high degree of legislative contribution and that the American system of government does not require the legislature to assume responsibility for resolving those administrative policy issues in the criminal world.

REMINGTON, *supra* note 14, at 1171-72.

<sup>61</sup> "Even if the legislature theoretically has ultimate responsibility for defining the criminal law and the system to be used in enforcing the law, the real meaning of the law and the real nature of the enforcement mechanism are inevitably settled more by courts and administrators, who operate the system." *Id.* at 1172. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1976 (Rev. ed.), para. 266 & c.

<sup>62</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969].

<sup>63</sup> UCMJ art. 36 (emphasis added).

<sup>64</sup> "[T]he criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so when it appears that a crime has been committed and that there is reasonable prospect of apprehending and convicting its perpetrator." PACKER at 155.

<sup>65</sup> E.g., AR 635-200, ch. 13 (C42).

<sup>66</sup> See Lane, *supra* note 47. In *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974), the Court of Military Appeals held that an order to provide urine

forth in four pages including the sample form. The difference between the adversary nature of the criminal justice system and the administrative elimination system and the consensual nature of the request for discharge procedure is the likely reason for the lack of detailed guidance and procedures. Because the process is not highly structured, any detailed understanding of the values being implemented in the discharge procedure must take into account both the regulatory provisions and the practical day-to-day decisions being made by those responsible for its administration.<sup>67</sup>

### A. ELECTION BY THE ACCUSED

Military justice is largely dependent upon the cooperation of a significant number of offenders.<sup>68</sup> It is essential to an understanding of this procedure to realize that the request for discharge must be the voluntary act of the soldier.<sup>69</sup> He may be informed of his right to submit the request by his commander, but, unlike other administrative regulations which provide for involuntary administrative discharge for misconduct, this procedure is not instigated by the commander.<sup>70</sup> Although this facet of the system places the initiative in the hands of the accused, he is not, willy-nilly, discharged from the service

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specimens was illegal when the results were to be used in an administrative rather than a judicial proceeding which could lead to a discharge which was other than honorable. See AR 635-200, ch. 16 (IC R 302228Z Mar 75).

<sup>67</sup> Because the [Administrative Model] is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the [Judicial Model] is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to super-legislative law, to the law of the Constitution.

PACKER at 173 (modular titles substituted).

<sup>68</sup> The number of individuals tried and convicted by fiscal years was as follows:

	GCM	SPCM	SCM
1971	2,507	25,920	13,907
1972	1,867	15,239	12,134
1973	1,493	12,802	6,627
1974	1,696	13,644	4,825
1975	1,462	9,424	3,727

For example, in fiscal years 1972, 1973 and 1974, guilty pleas accounted for slightly more than 50% of all GCM cases and a slightly higher percentage of BCD special courts-martial. Statistical data furnished by RC&A Division, Office of the Clerk of the Court, U.S. Army Judiciary. During the same period an additional 90,948 individuals were discharged under Chapter 10 for offenses under the Code. See notes 5 & 6 *supra*.

<sup>69</sup> "An individual who has committed an offense . . . may submit a request for discharge for the good of the service." AR 635-200, para. 10-1 (C42).

<sup>70</sup> "Commanders will insure that an individual will not be coerced into submitting a request for discharge for the good of the service." *Id.* para. 10-2.

merely because the mood strikes him nor because a disgruntled commander wishes to get rid of him. A number of specific requirements must be met before the accused may request administrative disposition of the charges pending against him.

*1. Necessity for Charges.* It is crucial to understand and accept the proposition that the request for discharge procedure requires that the accused be pending charges under the *Uniform Code of Military Justice*. Both administrative opinion<sup>71</sup> and judicial decision<sup>72</sup> have recognized the interrelation between the request for discharge and the charges. The relationship is that the request for discharge is not independent of the judicial process as it must be based on charges which meet certain legal standards.

*a. Jurisdictional Requirement.* In the normal course of events, charges are preferred with a view toward trying the accused by court-martial.<sup>73</sup> It is only the intervening circumstance of the accused requesting discharge that prevents this expectation from being realized. Accordingly, the initial act of preferring charges must look to the jurisdictional requirements which must be met. Similarly, when the discharge request is examined, jurisdictional considerations must be kept in mind.

Formerly the regulation required that the accused be charged with offenses "triable by court-martial"<sup>74</sup> before he could submit his offer to resign. The clear import of these words was that in order to be "triable" there must be jurisdiction over the accused and the offense. It is interesting to note that the current regulation has eliminated this language and now only requires that the accused has "committed an offense or offenses"<sup>75</sup> without regard to whether they are "triable." The opinion suggesting the change was unrelated to this question and apparently gave no consideration to the impact the superseded language might have on the need to find a jurisdictional base.<sup>76</sup> Subsequent paragraphs dealing with the approving authority's

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<sup>71</sup> An application to resign "cannot be submitted until certain prerequisites looking to a trial by court-martial have been met." JAGA 1970-4202, 6 July 1970.

<sup>72</sup> "Here, the appellant's resignation stemmed from the existence of the charges. The two actions, therefore, had a common source, and they were subject to mutual relationships." *United States v. Gwaltney*, 43 C.M.R. 536, 538 (ACMR 1970), *aff'd*, 20 U.S.C.M.A. 488, 43 C.M.R. 328 (1971).

<sup>73</sup> See MCM, 1969, paras. 29-32.

<sup>74</sup> AR 635-200, para. 10-1.

<sup>75</sup> AR 635-200, para. 10-1a (C42).

<sup>76</sup> JAGA 1971 5119, 21 Sept. 1971. The moving factor in this opinion was the confusion existing in the field as to what type of conduct should suffice for a request for discharge and whether the charges must be referred to a court-martial capable of imposing a punitive discharge.



discretion to hold disciplinary proceedings in abeyance, and the extent of his power to act on the sentence where the trial precedes action on the discharge all indicate the necessity for viable charges which meet jurisdictional requirements.

It is not within the scope of this article to review the law pertaining to jurisdictional matters. It is important only to note some of the problem areas where the lack of jurisdiction is likely to arise in order to highlight the need to closely examine the file.<sup>77</sup> A discharge under circumstances where there is a lack of jurisdiction over either the accused or the offense is unlikely to survive judicial review.

Because many resignations involve young enlistees who have become disenchanting with the service, the possibility of underage soldiers utilizing this procedure to defeat the basis for their elimination should not be overlooked. If the soldier is under the minimum age<sup>78</sup> established by Congress for enlistment, it will be unnecessary for him to resort to this procedure to secure his release as the court is without jurisdiction to try him for his offense.<sup>79</sup> What is more likely to happen is that his enlistment is merely voidable because of the failure to secure his parents' consent at the time of enlistment.<sup>80</sup> The court-martial convening authority, however, may have available evidence that the parents knowingly acquiesced in his enlistment,<sup>81</sup> or failed to demand his release until after commission of the crime.<sup>82</sup>

Other fruitful errors for consideration involving jurisdiction over the individual include irregularities in the induction pro-

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<sup>77</sup> See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969) (lack of jurisdiction over the offense); *Reid v. Covert*, 354 U.S. 1 (1957) (lack of jurisdiction over the person); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (loss of jurisdiction through discharge).

<sup>78</sup> The minimum age for enlistment is 17 years, 10 U.S.C. § 505a (Supp. V, 1975).

<sup>79</sup> *United States v. Overton*, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958) provides the rule that no change in status from civilian to soldier is achieved when the individual is under the minimum age for enlistment established by Congress. Accordingly, there would be no basis for court-martial jurisdiction. See AR 635-200, ch. 7 (C33, 8 Feb. 1972) for discharge procedures for minors.

<sup>80</sup> Between the ages of 17 and 18 an individual may enlist with parental consent. 10 U.S.C. § 505a (Supp. V, 1975). A parent may seek discharge of a minor where he has enlisted without parental consent. 10 U.S.C. § 1170 (1970).

<sup>81</sup> In *United States v. Scott*, 11 U.S.C.M.A. 655, 29 C.M.R. 471 (1960), the court found that the parents of the accused had ratified their son's enlistment through knowledge of his status and their receipt of a portion of his pay, and thereby waived their right to apply for his discharge.

<sup>82</sup> A nonconsenting parent is not entitled to custody of the minor prior to the expiration of the latter's crime when the parent has not sought his discharge until after commission of an offense triable by court-martial and punishable by military law.

*United States v. Bean*, 13 U.S.C.M.A. 203, 207, 32 C.M.R. 302, 306 (1962).

cess,<sup>83</sup> constructive enlistments,<sup>84</sup> and delayed discharges following the expiration of the term of service.<sup>85</sup> An allied area that must be approached with caution relates to the problems encountered in determining whether jurisdiction survives reenlistment.<sup>86</sup> In each of these situations, the convening authority must recognize the issue, and either be prepared to deny the request and litigate the issue, or, if he has locally available evidence which satisfactorily resolves the issue, he should include it in the file.

In *O'Callahan v. Parker*,<sup>87</sup> the United States Supreme Court delineated an aspect of jurisdiction over the offense that should be of concern in the administration of requests for discharge. In *O'Callahan* the Court held that a service member could not be tried for offenses in the United States<sup>88</sup> which are not "service connected."<sup>89</sup> Normally the specifications will contain sufficient information to indicate whether the offense is triable by court-martial in light of the Court's holding in *O'Callahan*.<sup>90</sup> Where the nature of the offense alleged<sup>91</sup> does

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<sup>83</sup> See *United States v. Scheunemann*, 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964).

<sup>84</sup> See *United States v. Hail*, 17 U.S.C.M.A. 88, 37 C.M.R. 352 (1967).

<sup>85</sup> The determining factor in retaining jurisdiction in discharge cases appears to be whether the individual has actually received his discharge. Compare *United States v. Scott*, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (delivery of discharge certificate terminates military jurisdiction) with *United States v. Taylor*, 19 U.S.C.M.A. 405, 42 C.M.R. 7 (1970) (expiration of term of service without receipt of discharge does not terminate military jurisdiction).

<sup>86</sup> UCMJ art. 31a) provides that in order to survive a break in service the offense must be punishable by confinement for five years or more and not triable in the federal or state courts. Where the soldier is discharged, even before the expiration of his normal term of service, for immediate reenlistment, the discharge operates to bar trial of offenses occurring prior to the discharge unless saved by the provisions of UCMJ art. 3(a). *United States v. Ginyard*, 16 U.S.C.M.A. 512, 37 C.M.R. 12 (1967). On the other hand, if there was no intent to effect a discharge, and the parties merely substituted terms of service, there is no intervening discharge. *United States v. Noble*, 13 U.S.C.M.A. 413, 32 C.M.R. 413 (1962).

<sup>87</sup> 395 U.S. 258 (1969).

<sup>88</sup> Offenses which take place outside the United States are not triable in either the state or federal courts. Accordingly, such cases do not come within the *O'Callahan* rule. *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). See generally Horbaly & Mullin, *Extraterritorial Jurisdiction and its Effect Upon the Administration of Military Criminal Justice Overseas*, 71 MIL. L. REV. 1 (1976).

<sup>89</sup> *O'Callahan v. Parker*, 395 U.S. 258, 272 (1969).

<sup>90</sup> E.g. MCM, 1969, app. 6c, form 23, alleging disobedience of an order of a superior officer.

<sup>91</sup> Compare MCM, 1969, app. 6a, para. 10 with *United States v. Rego*, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969) where service connection was found in a house breaking and larceny involving the off-post quarters of a fellow serviceman.

not clearly indicate the service connected nature of the offense, the supporting evidence in the file should do so.<sup>92</sup>

It is more likely that the form of the charges and specifications may present a jurisdictional problem. Where many charges are preferred at the unit level without the assistance of a legal advisor, the possibility that the charge fails to state an offense is rather high. Accordingly, the specifications should be closely checked against the forms contained in the *Manual for Courts-Martial*<sup>93</sup> to ensure that they conform to the models.<sup>94</sup> Those which do not properly set forth the elements of the offense should be amended and resworn in order to preclude subsequent attack.<sup>95</sup>

As a practical matter, in all of these cases, if the accused has a valid jurisdictional defense he will not submit a request for discharge. However, if his jurisdictional defense is weak, either factually or legally, he may elect to avoid immediate punishment with a view toward later raising the jurisdictional question in an administrative or judicial review procedure where the opportunity for success may be greater. Naturally, the acceptance of the request for discharge should only be granted in those cases which the command is confident will survive subsequent review.

*b. Punitive Discharge Requirement.* Once satisfactory jurisdictional bases have been found, the offense with which the accused is charged must be examined to determine whether it is punishable by a punitive discharge<sup>96</sup> under the Table of Maximum Punishments.<sup>97</sup> Obviously what was intended was to permit discharge only when the incident was serious enough to warrant imposition of an undesirable discharge, but not so serious as to demand trial. When the initial regulation authorizing this procedure was promulgated, it was limited to "an

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<sup>92</sup> See *Rice, O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 *M. L. REV.* 41 (1971).

<sup>93</sup> MCM, 1969, app. 6c.

<sup>94</sup> Merely completing the blanks will not assure a legally sufficient specification. The matters alleged must factually constitute the offense. See, e.g., *United States v. Strand*, 6 U.S.C.M.A. 297, 20 C.M.R. 13 (1955).

<sup>95</sup> Failure to attack a defective specification does not waive the objection, and it can be raised at any time. *United States v. Fout*, 3 U.S.C.M.A. 565, 13 C.M.R. 12f (1953). A plea of guilty does not preclude later attack because although it "admits all the facts pleaded [it] does not admit that those facts constitute a crime." *United States v. Petrec*, 8 U.S.C.M.A. 9, 12, 23 C.M.R. 233, 236 (1957).

<sup>96</sup> A bad conduct discharge and a dishonorable discharge are designated punitive discharges. They can only be awarded by a court-martial, having such power, after conviction of an offense which authorizes a punitive discharge. UCMJ arts. 18, 19 & 56.

<sup>97</sup> MCM, 1969, para. 127c [hereinafter cited as Table of Maximum Punishments].

offense punishable by a bad conduct or dishonorable discharge."<sup>98</sup> It therefore appeared that a series of minor offenses, showing a lack of rehabilitative potential, none of which authorized a punitive discharge, was not within the scope of the regulation. Although this was a permissible view, in light of the restrictive language of the regulation, it was not in accord with the policy<sup>99</sup> expressed by The Judge Advocate General of the Army that the overriding value to be served by such discharges is the best interests of the service—a situation normally present when the serviceperson's record demonstrates his lack of rehabilitative value. In many such cases, the elimination of the habitual, albeit minor, offender would be more appropriate than the elimination of one who commits a single, more serious offense which fortuitously may justify the imposition of a punitive discharge.

It seemed appropriate, therefore, in 1968, to amend the regulation to permit an accused to submit a request for discharge when he was subject to trial "under *circumstances* which could lead to a bad conduct or dishonorable discharge."<sup>100</sup> This change permitted use of the habitual and multiple offender provisions of the Table of Maximum Punishments which authorize the imposition of a bad conduct discharge where one is not otherwise authorized by the substantive offense.<sup>101</sup> However, subsequent changes to the regulation<sup>102</sup> have sharply limited the administrative efficiency of the process by eliminating use of the additional punishment provisions as a basis for the Chapter 10. The effect is to move this portion of the process toward the Judicial Model where the grounds for accepting "punishment" under the regulation are more limited.

*c. Referral to Trial Requirement.* Although there has always been a necessity for an offense or "circumstances" which are punishable by a punitive discharge, there has been some un-

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<sup>98</sup> AR 635-200, para. 10-1.

<sup>99</sup> See note 54 and accompanying text *supra*.

<sup>100</sup> AR 635-200, para. 10-1 (C8, 11 Oct. 1968) (emphasis added).

<sup>101</sup> Under section B, Table of Maximum Punishments, *supra* note 47, a punitive discharge is authorized as a permissible additional punishment because of the presence of prior convictions or because the total confinement of the charged offenses exceeds six months.

<sup>102</sup> AR 635-200, para. 10-1a (C42) eliminated the "under circumstances" language and spoke only of an "individual who has committed an offense or offenses, the punishment for which . . . includes a bad conduct or dishonorable discharge" as the appropriate basis for a Chapter 10 request for discharge. Recently, any uncertainty as to the applicability of section B was eliminated when the regulation was further amended to eliminate any further recourse to the additional punishment provisions of section B. AR 635-200/IC R 30 2229Z (Mar 76).

certainty as to whether the charges had to be referred to trial before a court empowered to adjudge a punitive discharge<sup>103</sup> before the request could be approved. The uncertainty was due to a change in the regulation in 1968 which required that the accused's conduct rendered him triable "under circumstances which could lead to"<sup>104</sup> a punitive discharge. This was of major concern in the Army where, because of administrative action,<sup>105</sup> punitive discharges could only be adjudged by a general court-martial. Accordingly, the principle of efficiency dictated by the Administrative Model was largely lost through the necessity for lengthy investigations and referral to trial following formal consideration and staff judge advocate advice.<sup>106</sup>

The issue was faced when the two major commands in Vietnam disagreed and requested an opinion from The Judge Advocate General on the point. The opinion noted that since the discharge was not "in lieu of trial" there was no requirement for the offense to be referred to a court at all, much less one empowered to adjudge a punitive discharge.<sup>107</sup> However, this opinion did not eliminate all the uncertainty with respect to this issue, and in 1972 the regulation was specifically amended to read:

The request for discharge may be submitted at any time after court-martial charges are preferred against him, regardless of whether the charges are referred to a court-martial, and regardless of the type of court-martial to which the charges may be referred.<sup>108</sup>

The change in the regulation appears to support the Administrative Model, and in general the staff judge advocates tend

<sup>103</sup> The jurisdiction of the general court-martial includes the power to adjudge a dishonorable and bad conduct discharge. UCMJ art. 18. The jurisdiction of the special court-martial includes the power to adjudge a bad conduct discharge provided a military judge was detailed to the trial; legally qualified defense counsel was detailed to defend the accused, and a complete and verbatim record of the proceedings and testimony was made. UCMJ art. 19. The jurisdiction of a summary court-martial does not include the power to adjudge a punitive discharge. UCMJ art. 20.

<sup>104</sup> AR 635-200, para. 10-1 (C8).

<sup>105</sup> The Secretary of the Army had directed that court reporters would not be appointed to special court-martial cases without his specific approval. Army Reg. No. 22-145, Summary and Special Courts-Martial, para. 7 (17 Aug. 1964).

<sup>106</sup> A formal pretrial advice by the staff judge advocate must be accomplished before charges can be referred to a general court-martial. UCMJ art. 34. "Thus it may be seen that something roughly analogous to the federal procedure of preliminary examination and grand jury indictment is obtained in the military through the use of a formal pretrial investigation and convening authority consideration." Latimer, *A Comparative Analysis of Federal and Military Criminal Procedure*, 29 TENN. L.Q. 1, 5 (1955).

<sup>107</sup> JAGA 1969: 3538, 25 Mar. 1969.

<sup>108</sup> AR 635-200, para. 10-1a (C36, 19 Apr. 1972). This provision is found in the present regulation. AR 635-200, para. 10-1a (C42).

to implement the regulation in a manner consistent with that model. All but seven<sup>109</sup> commands would accept the request for discharge even though a decision had not been made as to the level of court to which the charges would be referred for trial.<sup>110</sup> Near unanimous agreement was reached to accept requests for discharge where charges had been referred to a special court-martial not empowered to adjudge a bad conduct discharge,<sup>111</sup> but a substantial number would not accept a discharge where charges had been referred to a summary court-martial.<sup>112</sup> Moreover, all but one command<sup>113</sup> would accept a request for discharge even though there was some doubt that the accused would receive a discharge if referred to an appropriate court-martial. The affirmative response was frequently conditioned upon a finding that the accused's prospects for rehabilitation were poor, or he was a likely candidate for some other type of administrative elimination.<sup>114</sup>

A broader range of opinions was reported in the situation where an accused refuses nonjudicial punishment in order to have charges preferred against him which will support his request for discharge.<sup>115</sup> All but four responding commands<sup>116</sup> noted, in one degree or another, that the procedures were being used by the anti-military segment of the service as a means of avoiding duty. While a majority of these cases were undoubtedly associated with opposition to the war in Vietnam, the

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<sup>109</sup> SJA Resp. 14, 23, 25, 27, 32, 36 & 38.

<sup>110</sup> Opinions were expressed that most cases were handled in this manner. *e.g.*, SJA Resp. 8, and it is particularly true where the post has a Personnel Control Facility, SJA Resp. 1, which serves as a central processing point for those apprehended in a multistate area for absence without leave.

<sup>111</sup> The one dissenting command would accept the request for discharge if the staff judge advocate was of the opinion that the referral to a special court-martial was inappropriate. SJA Resp. 16. In order to ensure that the accused was making an informed choice, one command required him to sign a statement acknowledging the status of his case as not having been referred to trial, referred to trial by a court not authorized to adjudge a discharge, or referred to a punitive discharge court for trial. SJA Resp. 20.

<sup>112</sup> SJA Resp. 1, 2, 8, 9, 14, 16, 22, 35 & 39. Others did not utilize summary court-martial. SJA Resp. 3, or expressed reluctance to accept the request when referred to a summary court-martial, SJA Resp. 11, 12, 15 & 20.

<sup>113</sup> SJA Resp. 16.

<sup>114</sup> SJA Resp. 1, 11, 12, 20, 26, 28, 31, 38 & 39.

<sup>115</sup> Fifteen commands indicated they would not accept the request. SJA Resp. 1, 2, 7-9, 12, 14, 15, 19, 22, 23, 32, 35, 37 & 39; seven indicated they would accept the request. SJA Resp. 16, 24, 27, 28, 31, 34 & 36; three indicated they would probably not accept the request. SJA Resp. 3, 25 & 38; nine indicated they would if it were clear the soldier had no rehabilitative value. SJA Resp. 4-6, 17, 18, 20, 21, 26 & 33; and five were uncertain. SJA Resp. 10, 11, 13, 29 & 30.

<sup>116</sup> SJA Resp. 2, 9, 15 & 19.

prevalence of the practice is likely to continue whenever service dissatisfaction, whatever its source, is such that the prospects of an undesirable discharge are considered an attractive alternative to the performance of duty. All but ten<sup>117</sup> indicated they would not give favorable consideration to a request submitted under service avoidance conditions.<sup>118</sup> Where the Army is faced with favorable recruiting conditions which lead to an adequate source of new recruits, a more liberal policy of granting requests for discharge is possible; however, where the number of new recruits is not sufficient to meet manpower requirements, or in future periods of conflict where some men must be compelled to serve, principles of the Administrative Model may dictate a more restrictive use of the process.

Upon review, it appears that both models have been and are being followed in the preliminary stages of the procedure. The Judicial Model may be seen in the necessity for meeting the regulatory "obstacles" such as the need for preferring charges authorizing a punitive discharge and the various jurisdictional prerequisites. On the other hand, there is a substantial body of Administrative Model practice evident in the regulatory provisions which do not require actual referral to trial or any necessity for referral of the cases to a court authorized to adjudge a punitive discharge. The purpose behind these procedures is to accomplish separation of the unmotivated soldier as promptly and efficiently as possible.

A rather curious inconsistency develops in those commands which do not require referral, but would refuse the request should the chain accomplish the referral<sup>119</sup> by selecting a summary court-martial. In these circumstances both the interests of the accused and the subordinate commander's desire to rid himself of an unproductive soldier would dictate a desire for a delay in the judicial process to avoid referral to a court not authorized to adjudge a discharge.

These inconsistencies could be removed, at least on a theoretical basis, by a change in the regulation requiring the charges

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<sup>117</sup> SJA Resp. 4, 7, 16, 17, 20, 24, 32, 35, 37 & 39. Those who leave the possibility open, SJA Resp. 3, 5, 6, 9, 11, 17, 21, 25, 35 & 38, might accept the request for discharge depending "on his overall service record and our value judgment as to his rehabilitative potential considering many factors such as his age and level of intelligence." SJA Resp. 4.

<sup>118</sup> One staff judge advocate from a division in Vietnam indicated that the policy in his command was going to be changed to prevent the use of the resignation procedure to avoid service in a combat zone. SJA Resp. 7.

<sup>119</sup> In *United States v. Roberts*, 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956), the court held that because the referral power is judicial, it is personal to the commander and cannot be delegated to his staff judge advocate.

to be referred to a court empowered to adjudge a punitive discharge. The Administrative Model objection that the procedure would require a significant extra expenditure of time and effort is somewhat reduced by the Army's present use of the punitive discharge special court-martial.<sup>120</sup>

It is unlikely, however, that the change would have any significant impact on the number of discharges although it would provoke a major increase in the paper flow to be handled by the staff judge advocate and the convening authority. Those individuals who are determined to secure their release from the service at any cost will do whatever is necessary to meet the regulatory requirements. "There is no sense in forcing a determined, mature young man to commit another crime in order to obtain his desired release from duty."<sup>121</sup> Similarly, nothing is gained by requiring the soldier to commit enough serious offenses to permit the convening authority, in a proper exercise of his discretion, to refer the case to a punitive discharge court. *Indeed, if the offenses were serious enough to warrant trial by a court authorized to adjudge a punitive discharge, the convening authority may be precluded under the regulation from accepting the request because the "nature, gravity, and circumstances surrounding [an] offense require a punitive discharge and confinement."*<sup>122</sup> However, this potential result is not in keeping with the practice.

In any event, requiring referral to a general or BCD special court-martial would result in one of two undesirable procedures. First, the chain of command, considering the nature of the offense, and the admissible<sup>123</sup> evidence of his character and likely rehabilitative value, would be unable to refer the case to a punitive discharge court. The case would be tried before a regular special court-martial, and upon conviction an administrative board would be convened and the accused discharged. Thus the accused would have a court-martial conviction, would likely serve some confinement, and ultimately be in the same

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<sup>120</sup> Army Regulation No. 27-10, Legal Services—Military Justice, para. 2-16c (C12, 12 Dec. 1973) [hereinafter cited as AR 27-10], provides that court reporters may be detailed to a special court-martial in order to qualify them to render a punitive discharge if the court is convened by a general court-martial convening authority.

<sup>121</sup> SJA Resp. 11.

<sup>122</sup> AR 635-200, para. 10-4 (C42).

<sup>123</sup> Initially, the prosecution may only introduce evidence of prior convictions within the last six years and punishments under UCMJ art. 15 which have been kept in accordance with AR 27-10, para. 3-15b (C8). MCM, 1969, para. 75b(2) & d. It is only when the accused has offered matters in extenuation and mitigation relating to his character that the prosecution is permitted to show bad character. MCM, 1969, para. 75c(1) & e.



position as before. Similarly, the Government would have been compelled to have a trial and an administrative procedure at substantial cost with little benefit to legitimate governmental interests. This waste of time, money and effort cannot be justified if one keeps in mind that this procedure is a consensual one undertaken at the request of the accused.

A second possibility is that the processing of court-martial charges and discharge requests would result in a judicial "race to the courthouse." The defense counsel, prodded on by his client, races with the request in hand to advise the intervening commanders, before they make their recommendations on the disposition of the charges, that the accused will be expeditiously discharged from the service only if recommendations for a punitive discharge are made and accepted. Here the defense counsel, in an effort to assist his client in achieving desired goals, must actively seek to secure reference to a punitive discharge court. One can imagine a client's surprise when his counsel secures referral to a punitive discharge court in order to lay the basis for the administrative discharge, and finds that the general court-martial convening authority declines to approve the discharge.

It seems more appropriate to leave the operation of the system unchanged and in the hands of those who know the accused, are in a position to judge his rehabilitative value and can tailor an appropriate disposition for his case. Certainly any other approach would require major revision of the guidance presently given by the regulation.<sup>124</sup> All of the responding commands recognized the need to judge the rehabilitative value of the soldier regardless of the level of trial to which the case is referred. If the concern is with the number of discharges being approved, it must be kept in mind that no discharge can be approved unless it is first voluntarily submitted, and it seems unlikely that the determined soldier will be deterred from his goal of immediate discharge. The solution is not to limit the means of discharging the undesirable soldier by compelling him to commit additional and more serious offenses to reach his desired end, but rather to secure more highly motivated

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<sup>124</sup> AR 635-200, para. 10-4 (C36) provided: "Examples of such cases would include those involving individuals who are chronic disciplinary problems or who could qualify as candidates for administrative discharge by reason of misconduct or unfitness if court-martial action were not initiated." This illustration was eliminated on December 14, 1973 in Change No. 42 which provides that Chapter 10 approval is "appropriate and encouraged when the commander determines that the offense charged is sufficiently serious to warrant elimination from the Service and the individual has no rehabilitation [*sic*] potential."

soldiers and to eliminate service irritants. It is obvious that not all of these objectives have been reached as yet,<sup>125</sup> and given the nature of military service where the potential for combat service is always present, it is doubtful that they can ever be fully realized.

2. *Consent by the Accused.* A key principle of the Administrative Model is that the preliminary steps of investigation and preferral of charges are so reliable that the result will be the entry of a plea of guilty.<sup>126</sup> The accused, realizing the hopelessness of his case, seizes upon the plea bargaining process as the best means of ameliorating his plight. Setting aside the correctional values to be achieved,<sup>127</sup> this goal is desirable from an efficiency standpoint in that any slight shift in the number of guilty pleas to contested cases will impose a virtually impossible burden on the judicial process.<sup>128</sup>

The Supreme Court has lent specific approval to plea bargaining as an "essential component of the administration of justice."<sup>129</sup> Nevertheless, the Judicial Model, primarily con-

<sup>125</sup> In 1972 the Department of the Army expressed its concern as follows:

[T]he number of discharges approved . . . is increasing at an unexplained rate considering improvements in the past two years in qualitative standards for retention and accessions. Additionally, the input of higher quality accessions suggests that new soldiers currently possess a greater potential to serve in an acceptable manner and should therefore not be lost to the Army until every effort has been expended in their behalf.

Dep't of Army Message, JAAL P 291637Z Sept 72. Although the number of Chapter 10 discharges has not kept up with the rate experienced in 1972, it should remain a matter of concern. See note 6 *supra*.

<sup>126</sup> PACKER at 160-62.

<sup>127</sup> See Aschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

<sup>128</sup> It is an elementary fact, historically and statistically, that the system of courts—the number of judges, prosecutors, and all courtrooms—has been based on the premise that approximately 90 per cent of all defendants will plead guilty.

The consequences of . . . a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 85 per cent in guilty pleas requires the assignment of twice the judicial manpower and includes judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent would demand . . .

Address by Chief Justice Burger, American Bar Association Annual Banquet, reported in N.Y. Times, Aug. 11, 1970, at 24, col. 4.

Illustrative of the importance to one command having a Personnel Control Facility are the following data for the fourth quarter FY72:

	PCF	Other	Total
GCM cases tried	4	10	14
BCD SPCM cases tried	6	6	12
SPCM cases tried	216	67	273
Chapter 10 discharges	636	21	647

<sup>129</sup> Disposition of charges after plea discussions is not the only essential part of the process but a highly desirable part for many reasons. It tends to prompt and largely final disposition of most criminal cases; it avoids much of the unnecessary strains of extended detentions during pretrial confinement for those who are convicted without pending trial; it protects the public from those persons who are prone to continue criminal conduct even while in pretrial release; and by shortening the time between charge and con-

cerned with legal guilt as opposed to factual guilt,<sup>130</sup> discourages guilty pleas as tending to cut off "almost irrevocably, any disinterested scrutiny of the earlier stages of the process."<sup>131</sup> Even where such procedures are to be permitted<sup>132</sup> they should be "hedged about with safeguards designed both to cut down their incidence and to prevent their being used in cases where possible meritorious challenges to the process exist."<sup>133</sup>

Although the Supreme Court has approved a guilty plea bargain designed solely to avoid the death penalty,<sup>134</sup> it remains concerned that the innocent might "falsely condemn themselves"<sup>135</sup> through offers of leniency tendered in return for a plea. Although negotiated pleas are "no more foolproof than full trials to the court"<sup>136</sup> they are largely an "invisible process"<sup>137</sup> in which discretion is largely unstructured and thus inconsistent with the Judicial Model. Its presence within the criminal justice system is accepted

position: it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

*Santobello v. New York*, 404 U.S. 257, 261 (1971).

<sup>130</sup> See PACKER at 166-67. The importance of the distinction is that punishment cannot be imposed until legal guilt has been properly adjudicated even though the indicia of factual guilt are strong. A number of requirements involving such principles as the statute of limitations and speedy trial rights have nothing "to do with the factual question of whether the person did or did not engage in the conduct that is charged against him; yet favorable answers to any one of them will mean that he is legally innocent." *Id.* at 166.

<sup>131</sup> *Id.* at 224. Another commentator has stated:

Aside from the danger of the conviction of the innocent, there is the danger that the prosecution will use the power to induce guilty pleas to avoid trials that might publicly disclose official misconduct or other dysfunction in the machinery of justice. The trial serves as the explicit validator of justice, during which it is demonstrated that the system is working according to the rules and during which its operations are critically reviewed. . . . [E]xclusionary rules have no impact in cases in which there is no trial at which evidence must be submitted.

Resett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 73 (1967).

<sup>132</sup> It has been suggested that there may be value to defendants and society alike to have a trial, perhaps shorter and less encumbered with adversary rules, in every case. See Griffiths, *supra* note 32, at 397-99. "But if a trial can be seen as a goal in itself—a lesson in legal procedure, dignity, fairness and justice, for the public and for the accused (whether he is convicted or acquitted)—we would not want to lose its potential for good by encouraging short-circuits." *Id.* at 378.

<sup>133</sup> PACKER at 224.

<sup>134</sup> *Parker v. North Carolina*, 397 U.S. 790 (1970).

<sup>135</sup> *Brady v. United States*, 397 U.S. 742, 758 (1970).

<sup>136</sup> *Id.*

<sup>137</sup> "While reference is made in the text to the 'most visible' portions of the plea process, no part of the process can really be characterized as 'visible'; some are just less invisible than others. In this sense the guilty plea process is analogous to the iceberg, the majority of which is under water." Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U.L. REV. 111 n.1 (1972).

- <sup>137</sup> Brady v. United States, 397 U.S. 742, 758 (1970).
- <sup>138</sup> Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964), cert. denied, 381 U.S. 933 (1965).
- <sup>139</sup> Brady v. United States, 397 U.S. 742, 755 (1970) quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev'd on confession of error on other ground, 356 U.S. 26 (1958).
- <sup>140</sup> North Carolina v. Alford, 400 U.S. 25, 31 (1970).
- <sup>141</sup> However, the "Government has no obligation to act favorably upon [the request for discharge] because the right to refer criminal charges against the accused [for trial by court-martial] is reserved to the convening authority who may deny the request for discharge." United States v. Pinkney, 22 U.S.C.M.A. 595, 596, 48 C.M.R. 219, 220 (1974).

When an accused submits a request for discharge, he is in some respects engaging in plea bargaining. He is offering to leave the service under adverse circumstances rather than compel the Government to proceed to trial in order to secure his elimination with a punitive discharge.<sup>142</sup> But it is more than that, for favorable consideration of his request results in bypassing the judicial system entirely. The nature of the safeguards deemed appropriate under these circumstances must be such as will "insure the defendant what is reasonably due

to the defendant."<sup>141</sup>

Thus the issue is whether the "plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."<sup>140</sup>

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats or promises to discontinue improper harassment, misrepresentations (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).<sup>143</sup>

The vehicle by which the Supreme Courts "expectations" are to be realized is the guilty plea hearing required under Rule 11(e), Federal Rules of Criminal Procedure. The standard which is to be applied, according to the Supreme Court, is as follows:

The important thing is not that there shall be no "deal" or "bargain"; but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his rights, and the consequences of his plea, and is neither deceived nor coerced.<sup>144</sup>

This does not mean that the guilty plea procedures may not be used:

on our expectations that courts will satisfy themselves that pleas of guilty are voluntary and intelligently made by competent defendants with adequate advice of counsel; and that there is nothing to question the accuracy and reliability of the defendants' admission that they committed the crimes with which they are charged.<sup>145</sup>

him."<sup>143</sup> The essential feature, of course, is the requirement that the accused voluntarily submit<sup>144</sup> a request to be discharged for the good of the service. This importance can hardly be overemphasized, for once action has been taken to discharge the accused, if he desires to appeal

[h]e is at a disadvantage, for he must overcome the effect of his admissions and his waivers, which is a difficult task if the prosecution agencies have followed the relatively easy procedures of warning and have taken care to preserve a record of this deliberation and fairness.<sup>145</sup>

*a. The Requirement for Counsel.* The key to securing a discharge which is largely immune from successful collateral attack is the presence of defense counsel. Professor Packer's view is that of "all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one's model of the process looks like."<sup>146</sup> The criminal justice system expresses the values of the Judicial Model in its requirement that an accused have counsel, unless he waives that right, before he may enter a guilty plea.<sup>147</sup>

A trend toward the Judicial Model in the Chapter 10 process is apparent insofar as the right to consult with counsel is concerned. At the time the author's survey was conducted, the regulation provided the soldier "a reasonable time (not less than 48 hours) to consult with counsel and to consider the wisdom of submitting such a request for discharge."<sup>148</sup> The current regulation retains this provision, but increases the emphasis on the importance of counsel in a manner consistent with the Judicial Model:

A member, nevertheless, may not waive consultation with a consulting counsel. If the member refuses to consult with a consulting counsel, he will be ordered to do so by his commander. If he persists in his refusal, a statement to this effect will be prepared by the commander and included in the file.<sup>149</sup>

Where the soldier persists in his refusal to consult with counsel,

<sup>143</sup> Santobello v. New York, 404 U.S. 257, 262 (1971).

<sup>144</sup> "Commanders will insure that an individual will not be coerced into submitting a request for discharge for the good of the service." AR 635-200, para. 10-2 (C42).

<sup>145</sup> REMINGTON, *supra* note 14, at 32.

<sup>146</sup> PACKER at 172.

<sup>147</sup> See Brady v. United States, 397 U.S. 742 (1970), for the importance the Supreme Court attaches to the presence of counsel in determining whether a guilty plea is voluntary.

<sup>148</sup> AR 635-200, para. 10-2 (C36). Counsel must be a commissioned officer of the Judge Advocate General's Corps. AR 635-200, para. 1-3c(C42).

<sup>149</sup> AR 635-200, para. 10-2c(C42).

the approving authority may properly refuse to accept the request for discharge.<sup>150</sup>

*b. The Requirement for Advice.* A plea of guilty is of major importance to an accused as it waives substantial constitutional rights, including the fifth amendment privilege against self-incrimination; the sixth amendment right to a trial by jury; and the sixth amendment right to confront one's accusers.<sup>151</sup> The nature of the inquiry which must be shown in order to find a voluntary waiver of the foregoing rights includes an understanding of the nature of the charge and the consequences of the plea.<sup>152</sup> "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."<sup>153</sup>

Similar requirements have been incorporated into military law as a result of the Supreme Court's decision in *Boykin v. Alabama*,<sup>154</sup> even though the *Uniform Code of Military Justice* has required a detailed inquiry since 1951.<sup>155</sup> In *United States v. Care*,<sup>156</sup> the Court of Military Appeals expressed its concern that the number of post-trial attacks on guilty pleas<sup>157</sup> indicated that its earlier recommendation<sup>158</sup> to fully inquire into the *providency of such pleas was not being followed*. The court then set forth a detailed procedure for inquiring into the *providency of the guilty plea which must be reflected in the record*:

[The record] must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where that is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty . . .

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<sup>150</sup> *Id.*

<sup>151</sup> See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

<sup>152</sup> FED. R. CRIM. P. 11(c).

<sup>153</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

<sup>154</sup> *Id.* at 238.

<sup>155</sup> UCMJ art. 45; MCM, 1969, para. 70b. See *Hearings Before House Armed Services Comm. on H.R. 2498*, 81st Cong., 1st Sess. 1052-57 (1950).

<sup>156</sup> 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

<sup>157</sup> In large measure, the frequency of such attacks in the military service is directly related to the fact that seldom are trial and appellate counsel the same. Accordingly, there is no reluctance on the part of appellate counsel to attack the *providency of a plea negotiated by the trial defense counsel*.

<sup>158</sup> *United States v. Chancellor*, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1961). The Court of Military Appeals urged the "services to take remedial action and insure compliance with the statutory and regulatory inquiry to be made into guilt in fact." *Id.* at 300, 36 C.M.R. at 456.

Further, the record must also demonstrate the military trial judge . . . personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses against him; and that he waives such rights by his plea. Based upon the foregoing inquiries and such additional interrogations as he deems necessary, the military trial judge . . . must make a finding that there is a knowing, intelligent, and conscious waiver in order to accept the plea.<sup>159</sup>

Although the regulation provides that the formal advice must be given by counsel, there appears to be no lack of knowledge as to the availability of the request for discharge option.<sup>160</sup> For the unknowledgeable individual, either his commanding officer<sup>161</sup> or other personnel who are enmeshed in the toils of the law stand ready to make him aware of an alternative to standing trial and remaining in the service.<sup>162</sup> The possibility that some element of coercion or overreaching of the accused may be present in the emphasis placed on the availability of the discharge procedure may have been behind the report of one staff judge advocate who "discourage[d] unit commanders from bringing it up initially."<sup>163</sup> This approach is not in keep-

<sup>159</sup> *United States v. Care*, 18 U.S.C.M.A. 535, 541-42, 40 C.M.R. 247, 253-54 (1969) (citation omitted). The complexity of the required advice which made reversal a likely possibility led some military judges to refuse to accept guilty pleas where the case could be proved with minimal effort. Under Federal Rule 11 the acceptance of a plea of guilty is discretionary with the judge; however, the importance that the military service attributes to a guilty plea as an indication of repentance and a first step toward rehabilitation has led the Court of Military Review to hold that participation in a "sham" plea of not guilty by defense counsel reflects his inadequacy, *United States v. Schoolcraft*, 43 C.M.R. 499 (ACMR 1970), and that it is an abuse of discretion for the military judge to refuse to entertain a plea of guilty solely to avoid the necessity of making the appropriate inquiry, *United States v. Williams*, 43 C.M.R. 579 (ACMR 1970).

<sup>160</sup> All but two commands, SJA Resp. 18 & 38, reported that the procedures are well known among the soldiers, although no jurisdiction indicated any affirmative effort to publicize the procedures.

<sup>161</sup> SJA Resp. 5, 6, 11, 14, 19, 20, 25, 27, 29, 30 & 33-36. Nearly all jurisdictions indicated that this was an option which the appointed defense counsel normally discussed with his client.

<sup>162</sup> Knowledge of the right to submit a request for discharge is apparently well known at the stockade (SJA Resp. 3 & 13), the Personnel Control Facility (SJA Resp. 13) and among those returning from extended periods of absence without leave (SJA Resp. 19 & 32).

<sup>163</sup> I try to discourage defense counsel from dwelling on [the request for discharge] when they counsel the accused. It is an option available to the accused and defense counsel are advised to mention it as such particularly when counsel concludes the evidence indicates the lack of a reasonably good defense. Defense counsel are urged to discourage it Chapter 10 when there appears to be a valid defense in any case and in those cases where trial will be before a court not authorized to adjudge a punitive discharge.

SJA Resp. 25. This command reported trying 40 cases and accepting 14 resignations in 9 months which indicated the process did not play a major part in disposing of criminal charges.

ing with the Administrative Model where efficiency in eliminating an undesirable soldier would at least dictate advising the accused that such a right exists<sup>164</sup> and that such advice be given at an early stage in the process. As with plea bargaining, it is not enough that counsel merely lend his name to the discharge process; however, if the commander merely advises the accused of his right to apply for discharge, and leaves it to counsel to provide the details on his rights and the consequences of exercising this option in a particular way, the request should not be considered involuntary.

The accused has always been required to initiate his application with a certificate detailing the advice which he has received from his counsel. The certificate used in 1966<sup>165</sup> was limited to advice concerning the collateral consequences of the discharge. Except for minor word changes, no additions were made to expand the cautionary advice which assures a knowing and intelligent waiver until the regulation was changed in 1972.

Following the decisions of the Supreme Court in *Boykin* and the Court of Military Appeals in *Care*, a major revision of the sample application form included in the regulation was accomplished. The major changes dealt with advice concerning the charges which had been preferred, and the availability of defenses to the charges.<sup>166</sup>

While the expanded advice represented substantial movement away from the Administrative Model,<sup>167</sup> it did not fully meet the requirements of the Judicial Model as reflected in *Boykin* and *Care*. One could contend that the certificate re-

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<sup>164</sup> The author can recall situations where a unit commander, after preferring charges and notifying the accused of his right to request discharge, would at the accused's request, immediately arrange for the necessary judge advocate counseling. Elimination in such cases was often accomplished in one or two days as there was no need to await processing of the charges.

<sup>165</sup> AR 635-200, figure 2. An accused was advised that the consequences of the request for discharge were: that he might receive an undesirable discharge; that if he did receive such a discharge, he would lose any veteran's rights he might have under both federal and state law; and that as a result of his discharge, he could expect to encounter substantial prejudice in civilian life.

<sup>166</sup> AR 635-200, figure 10-1 (C38, 23 Aug. 1972) provided:

"[Counsel] has advised me of the nature of my rights under the Uniform Code of Military Justice at the various possible stages of the proceedings including those of appeal involved in a trial by court-martial, counsel has fully informed me of the elements of the offense(s) with which I am charged and the facts which may be established to sustain a finding of guilt, and counsel has explained the possible defenses which I might use with respect to the charges against me."

"The general run of criminal defendants are perfectly capable of making up their own minds about whether they want to plead guilty. . . . All that is required for a plea of guilty is that the defendant understand its nature and consequences in a general kind of way and that he enter it of his own free will." *PACER* at 223.



quired the defense counsel to as fully inform the soldier of the military justice aspects of the offense and available defenses as he would be required to do where the individual was contemplating entering a guilty plea at trial.<sup>168</sup> However, the distinguishing feature between the discharge request and the guilty plea was that the application for discharge did not then contain an admission of guilt, nor did the regulation require the individual to acknowledge his guilt, a matter which will be more fully addressed in a subsequent section. If the advice were limited<sup>169</sup> to whether the soldier should seek to avoid a determination of legal guilt at trial by means of resignation, the request entirely avoids the adjudicatory process of the Judicial Model. Under the Administrative Model the request for discharge, as far as the accused is concerned, dispenses with the issue of legal guilt, and leaves to the convening authority the determination of factual guilt from the information in the file.

Although few complaints were noted by the staff judge advocates concerning the advice received by soldiers,<sup>170</sup> in 1973 a significant amendment to the regulation was made. Both the substantive provision in the regulation<sup>171</sup> and the form requesting discharge reflect a necessity to provide the soldier with substantial information on the criminal law aspects of his case

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<sup>168</sup> In speaking of the need for the military judge to fully inquire into the plea, the Court of Military Appeals has placed a similar requirement on the defense counsel: "We believe the counsel, too, should explain the elements and determine that there is a factual basis for the plea." *United States v. Care*, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969).

<sup>169</sup> It was suggested that because of the attorney-client relationship, the command could not determine what advice was to be given. Major reliance had to be placed on counsel not submitting requests where they knew their clients were not guilty. SJA Resp. 26.

<sup>170</sup> Eight commands reported receiving complaints from individuals that they had not been properly advised on the impact of the discharge. SJA Resp. 1 & 32 (the command was able to rebut the allegation); 2 (command modified the procedure to require defense counsel to advise the accused that 99 out of 100 get an undesirable discharge); 7 (readvised the accused); 11 (required written statement from the accused); 29 (one or two); 31 (complaints declined with use of new Department of Army form); 33 (effects of discharge). Where the complaint was that the unit commander did not make the recommendation he promised, one command permitted the accused to withdraw his request. SJA Resp. 25.

<sup>171</sup> AR 635-200, para. 10-2b(C42).

Consulting counsel will advise the member concerning the elements of the offense or offenses charged, burden of proof, possible defenses, possible punishments, provisions of this chapter, requirement of voluntariness, type of discharge normally given under the provisions of this chapter, rights regarding the withdrawal of his request, the loss of Veterans Administration benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. Consulting counsel may advise the individual, regarding the merits of this separation action and the offense pending against him.

before he makes his election to request diversion from the criminal process. The form reflects:

I have consulted with counsel for consultation who has fully advised me of the nature of my rights under the Uniform Code of Military Justice, (the elements of the offense(s) with which I am charged, any relevant lesser included offense(s) thereto, and the facts which must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if found guilty). . . . (Although he has furnished me legal advice, this decision is my own.)<sup>172</sup>

By expanding the scope of counsel's advice to the soldier concerning the relative merits of the underlying criminal charges, a substantial step has been taken under Chapter 10 to bring the process into accord with the Judicial Model as reflected in *Care*.

The right to confront his accusers presents a similar problem but with a more practical solution. The request for discharge includes an opportunity for the accused to submit statements in his own behalf which could, in theory, provide the accused the opportunity to meet the allegations against him should he so desire.<sup>173</sup> While this procedure does not satisfy the right of confrontation, assuming the full applicability of the sixth amendment to administrative procedures of this nature,<sup>174</sup> it does permit the accused to submit matters in extenuation and mitigation<sup>175</sup> even though they do not directly reflect on the issue of guilt. Normally, if he is requesting discharge, an individual would not desire to submit such material for exculpatory purposes, but rather to lessen the seriousness of the offense in an effort to secure a more favorable type of discharge. The difficulties raised by accepting a request for discharge under Chapter 10 despite the soldier's protestation of innocence are mooted by the overwhelming practice of staff judge advocates not to accept requests for discharge where any protestations of innocence exist either in the file or accompanying the request for discharge.<sup>176</sup> Although not constitutionally required,<sup>177</sup> an individual who, in effect, asserts his innocence will not be per-

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<sup>172</sup> *Id.* figure 10-1.

<sup>173</sup> *Id.* para. 10-3b(4).

<sup>174</sup> See Lane, *supra* note 47, at 110-13.

<sup>175</sup> Matter in "extenuation" explains the circumstances surrounding the crime, and may include the reasons for the accused's conduct not rising to legal justification or excuse. See MCM, 1969, para. 75(c)(3). Matter in "mitigation" normally relates to factors concerning the accused such as prior good conduct and reputation. See MCM, 1969, para. 75(c)(4). Both have as their purpose the lessening of the sentence to be imposed.

<sup>176</sup> See notes 358-367 and accompanying text *infra*.

<sup>177</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

mitted to waive his right of confrontation and bypass the judicial system.<sup>178</sup>

Of all the rights subject to waiver, the right to a trial by a court presents the most difficulty. This difficulty is not rendered less pressing by eliminating the concept that the discharge is "in lieu of trial."<sup>179</sup> The fact remains that the accused is waiving his "right" to a trial, and that a "sentence"<sup>180</sup> in the form of an undesirable discharge having a major punitive impact will result. While both the guilty plea and the request for discharge waive the adversary process, the guilty plea still requires a factual determination of guilt by a court. This judicial determination is waived by the request for discharge and thereafter accomplished by the approving authority. Under these circumstances there is only minor difference between the waiver of a right to a trial where the purpose is to enter a guilty plea, and a request for discharge from the service because of existing criminal charges. It may be that this is a significant difference requiring, in the Administrative Model, a more detailed waiver reflecting "an intentional relinquishment or abandonment of a known right or privilege."<sup>181</sup>

### 3. *Timely Processing.*

*a. Submission by the Accused.* An accused may submit his request for discharge any time after charges have been preferred.<sup>182</sup> As a practical matter, it is common for the accused to submit his request prior to referral to trial.<sup>183</sup> The accused may, however, submit his request at any time prior to the final action of the convening authority on his court-martial.<sup>184</sup> Submission of the request after the convening authority's action is limited to those circumstances where the court has adjudged a punitive discharge, and the convening authority has suspended the discharge in his action.<sup>185</sup>

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<sup>178</sup> AR 635-200, figure 10-1 (C42) requires the soldier to acknowledge guilt of the charged offense or a lesser included offense which would authorize a punitive discharge.

<sup>179</sup> See notes 46-59 and accompanying text *supra*.

<sup>180</sup> See notes 437-446 and accompanying text *infra*.

<sup>181</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

<sup>182</sup> AR 635-200, para. 10-1a (C42).

<sup>183</sup> Submission of a request for discharge prior to knowing what the possible maximum punishment is reflects support for the proposition that the procedure is being used to avoid military service at almost any cost. See notes 116-118 *supra*.

<sup>184</sup> AR 635-200, para. 10-1a (C42). Every court-martial must be approved by the convening authority. UCMJ art. 60. He may approve only that portion which "he finds correct in law and fact and as he, in his discretion, determines should be approved." UCMJ art. 64.

<sup>185</sup> AR 635-200, para. 10-1a (C42).

The value of prompt submission of the request, where it is likely to be accepted, is to avoid any further waste of time and effort processing charges which are not going to be tried. The Administrative Model is not satisfied by the regulatory provisions that the submission of a request does not preclude trial,<sup>186</sup> nor that a request can be accepted after trial without the necessity of disapproving the findings.<sup>187</sup> In either event, a duplication of effort has been required which substantially reduces the efficiency of the system.

Staff judge advocates have resorted to a number of administrative procedures designed to expedite the submission and prompt processing of the requests.<sup>188</sup> The most advantageous procedure is to put the accused into early contact with his counsel.<sup>189</sup> Although this approach has surface appeal, the recent changes requiring counsel to evaluate the facts of the case and the possible defenses<sup>190</sup> will delay the advice and request except to the extent other procedures are available to ensure prompt availability of files and the preferral of charges.<sup>191</sup>

Establishment of arbitrary time frames within which to submit the requests would be contrary to the regulation and legally objectionable.<sup>192</sup> However, the delay occasioned by defense counsel or his client could be taken into consideration when the command considers whether to accept the resignation<sup>193</sup> or delay the trial.<sup>194</sup>

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<sup>186</sup> *Id.* para. 10-1b.

<sup>187</sup> *Id.* para. 10-1c. The convening authority should not approve a punitive discharge and should approve only that portion of confinement that has been served.

<sup>188</sup> Thirteen responding staff judge advocates indicated that prompt submission was no problem requiring special emphasis in their office. SJA Resp. 5, 6, 8, 12, 15, 18-22, 33, 35 & 36. The remainder found such requirements necessary.

<sup>189</sup> SJA Resp. 4 (requiring defense counsel to see absence without leave cases within 24 hours of confinement and felony cases prior to confinement), 10.

<sup>190</sup> See notes 171 & 172 and accompanying text *supra*.

<sup>191</sup> It is unlikely that either of these circumstances can be met within the time frame postulated by SJA Resp. 4, note 189 *supra*. Processing may take as long as six months depending on the availability of relevant records in absence without leave cases. SJA Resp. 11.

<sup>192</sup> JAGA 1971:4072, 23 Apr. 1972.

<sup>193</sup> SJA Resp. 9: "The accused is not permitted to 'ride two horses,' e.g., he must select his options before the government commits itself to other than a trial by general court-martial." SJA Resp. 11.

<sup>194</sup> A number of formulae have been developed to press the defense for prompt submission of the request if the trial is to be delayed: SJA Resp. 25 (must be submitted in sufficient time for resolution prior to the scheduled trial), 28 (the defense must request a continuance in an Article 39(a) session); 31 (the file must be in the hands of the SJA and ready to go to the approving authority to get a delay in the trial date); 34

*b. Action by the Command.* A more fruitful area in which action may be taken to eliminate delays involves the prompt processing through the chain of command.<sup>195</sup> It is important to get resignations under control as soon as they are submitted. This can be accomplished by personal monitoring by the staff judge advocate<sup>196</sup> or the legal advisor to the major subordinate commander.<sup>197</sup> When it is submitted, the recommendations<sup>198</sup> of the subordinate commanders must be promptly secured. This can be done either by telephone,<sup>199</sup> or a requirement that the file be handcarried between headquarters,<sup>200</sup> or through the use of a special resignation clerk at the general court-martial level who walks the file through the recommending headquarters.<sup>201</sup> When the accused remains in the unit, the self-interest of the command normally promotes rapid processing. On the other hand, when the accused is in pretrial confinement, the processing may be somewhat slower due to the operation of the principle of "out of sight, out of mind."<sup>202</sup> One of the more effective policies in cases of this sort is to require the chain of command to process the request within a specified number of days or the accused is removed from confinement and returned to his unit.<sup>203</sup>

Where the process adopted does not achieve the desired result, the general court-martial convening authority may elect to hold the court-martial in abeyance pending his decision on the request for discharge.<sup>204</sup> The regulation provides no guide-

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(within 30 days of restraint or preferal of charges); 39 (submitted not less than 5 days prior to the scheduled trial).

<sup>195</sup> The estimated average processing time among the various commands from initiation of the request for discharge by the accused until his departure is as follows: under 14 days—11; 14 to 21 days—16; over 21 days—9.

<sup>196</sup> SJA Resp. 24.

<sup>197</sup> SJA Resp. 1.

<sup>198</sup> AR 635-200, para. 10-3b (C42) requires the intervening commanders to "recommend either approval or disapproval with the reasons for the recommendation; and if approval is recommended, the type discharge to be issued also will be recommended."

<sup>199</sup> SJA Resp. 35. Although this method provides the most expeditious way of securing the recommendations, care must be exercised to ensure that there is sufficient information concerning the reasons for the recommendations. See AR 635-200, para. 10-3b (C42).

<sup>200</sup> SJA Resp. 17.

<sup>201</sup> SJA Resp. 23.

<sup>202</sup> See notes 429 & 432 *infra*.

<sup>203</sup> SJA Resp. 7. This practice may well be improper in light of current pretrial release policies. See Army Reg. No. 190-47, The United States Army Correctional System, para. 4-4a (C1, 3 Mar. 1976).

<sup>204</sup> AR 635-200, para. 10-1b (C42). SJA Resp. 26 suggests the following procedure:

lines, however, and the decision appears to be left to the sole discretion of the approving authority.<sup>205</sup> Accordingly, the approving authority normally seeks to minimize any further unfruitful expenditure of effort. This can be done by delaying the trial<sup>206</sup> provided arrangements can be altered without undue expense or inconvenience to the Government,<sup>207</sup> and the accused is willing to request the delay.<sup>208</sup> Even when the delay can be properly attributed to either the defense counsel or his client,<sup>209</sup> it may be necessary to oppose a defense request for a continuance submitted by the accused at his trial<sup>210</sup> if command insistence in prompt submission of requests for discharge is to remain credible.

Although the general court-martial convening authority may delay the case, he may also permit it to go to trial and accept the request after trial.<sup>211</sup> Where the request for discharge is approved prior to the action on the court-martial sentence,

The rule will be a written statement of policy that if a set of court-martial charges [is] received by the Chief of Military Justice and docketed for trial prior to the receipt in this office of either a request for delay due to Chapter X or receipt of the Chapter X request itself, fully documented, through channels, the case will proceed and the Chapter X will be considered thereafter in light of the results of trial. If an actual trial resulted the request would be disappointed. If a conviction resulted but no discharge was adjudged, the accused would be asked whether he desired to withdraw or reaffirm his request for discharge, even after the result of the court-martial. Action would be taken accordingly. If a conviction and punitive discharge resulted, the approving authority would be given his choice, based on the Staff Judge Advocate's recommendations as to when he would approve. It is believed that such a policy will greatly encourage the timely submission of requests for delay, and thus at least clarify the coexisting of cases.

<sup>205</sup> In actual practice these decisions are normally made by the staff judge advocate by virtue of his control over the scheduling of cases. A directive suspending trial in all cases would be unlawful command influence in violation of UCMJ art. 37. JAGA 1970 4878, 5 Nov. 1970. A more practical reason for leaving the decision up to the approving authority is to avoid giving the accused an opportunity to delay the court-martial proceedings by merely submitting his resignation. In *United States v. Wolzok*, 23 U.S.C.M.A. 492, 50 C.M.R. 572 (1975), the Court of Military Appeals held that administratively assigning docketing responsibility to the judge did not relieve the command of the responsibility for bringing the accused to trial in a timely manner.

<sup>206</sup> SJA Resp. 2 & 17.

<sup>207</sup> SJA Resp. 16.

<sup>208</sup> SJA Resp. 7; see Tichenor, *The Accused's Right to a Speedy Trial in Military Law*, 52 MIL. L. REV. 1 (1971).

<sup>209</sup> In order to toll the running of the *Burson* clock, the accused must specifically request the delay, and the request must in fact cause delay. See *United States v. O'Brien*, 22 U.S.C.M.A. 557, 48 C.M.R. 42 (1973); *United States v. Walker*, 50 C.M.R. 213 (ACMR 1975); *United States v. Bush*, 49 C.M.R. 97 (NCMR 1974); *United States v. Abner*, 48 C.M.R. 557 (ACMR 1974); *United States v. Fernandez*, 48 C.M.R. 450 (NCMR 1974); *United States v. Bartie*, 48 C.M.R. 317 (ACMR 1974); *United States v. Parker*, 48 C.M.R. 241 (ACMR 1973).

<sup>210</sup> SJA Resp. 25.

<sup>211</sup> AR 635-200, para. 10-1c (C42). Close coordination in special court-martial cases is required because the discharge approving authority is normally not the special court-martial convening authority.

the convening authority should not approve a punitive discharge, nor any confinement or hard labor without confinement in excess of that already served.<sup>212</sup> It has also been held that because the trial and the discharge action are separate and distinct, the request, if submitted in a timely manner,<sup>213</sup> can be accepted any time prior to final appellate review.<sup>214</sup> The significant feature, however, is that in order to accept the request for discharge, the approving authority need not dismiss the findings of guilty,<sup>215</sup> nor will his action in accepting the request defeat appellate jurisdiction.<sup>216</sup>

The interrelation between timely submission and available courses of action following trial appears to have little practical significance. Over one-half of the staff judge advocates have never deferred a request for discharge until after trial, and can imagine no circumstances when it would be appropriate.<sup>217</sup> The most common illustration of when deferment takes place involves the situation where trial is set and the timing is such that the request does not reach the approving authority in time.<sup>218</sup> This circumstance tends to indicate that no actual deferment takes place, but that the trial continues in default of affirmative action being taken by the approving authority to delay the trial.

<sup>212</sup> *Id.*

<sup>213</sup> *E.g.*, the request for discharge must be submitted prior to trial involving special courts-martial not authorized to adjudge a punitive discharge, and may be submitted after action where a punitive discharge has been adjudged, approved and suspended. AR 635-200, para. 10-1a. (C42). The regulation does not address itself to the submission of a request for discharge after trial in which a punitive discharge is adjudged, but before action to suspend it is taken, or the case where a punitive discharge is approved and not suspended. In the latter case, there would be little purpose in approving a request for discharge. Nevertheless, because a punitive discharge can be suspended at any time prior to its being ordered into execution, it would not be legally objectionable to approve the request. JAGA 1971:4557, 1 July 1971.

<sup>214</sup> JAGA 1969:3739, 2 May 1969. This was in response to a problem in the 1st Logistical Command, Vietnam, where a special court-martial trial date would often arrive before the resignation could be processed through the chain of command to the general court-martial convening authority. The opinion held that since a resignation was not "in lieu of trial" the resignation could be accepted after trial.

<sup>215</sup> JAGA 1970:4202, 6 July 1970.

<sup>216</sup> "It may be that the administrative discharge process has been abused by the Armed Services but that is a matter for legislative concern and not something over which we may exercise judicial power." *United States v. Entner*, 15 U.S.C.M.A. 564, 565, 36 C.M.R. 62, 63 (1965).

<sup>217</sup> SJA Resp. 1, 3-6, 8-11, 15, 17-19, 21, 22, 25, 29, 32, 33 & 39

<sup>218</sup> SJA Resp. 2 (when the trial is in progress); 16 (when the timing of the request is such that it is appropriate to continue with the trial); 25, 26 (when the approving authority is not available before trial); 27 (when the request is submitted late); 30 (when the trial date has been set); and 34 (when it is necessary to hold the trial in abeyance).

The strongest objection to deferment was voiced by one staff judge advocate whose position was limited to consideration of the findings:

Under no circumstances whatsoever [would I defer a request]. If the discharge is to withstand subsequent attack by the member, deferment of action can only aid his future assault. If he is convicted we would gain nothing for our effort. If he is acquitted, we can not expect acceptance to stand up under the harsh light of a federal court's inquiry.<sup>219</sup>

While the opinion correctly states the practical results of an acquittal, a number of different reasons were suggested where a deferment may be of value. The suggested reasons for deferring action include the situations where the accused deserves a punitive discharge but there is some doubt that he will receive one,<sup>220</sup> where the needs of discipline require some affirmative public act of punishment,<sup>221</sup> and where there are additional charges under investigation.<sup>222</sup> In addition, there may be a deferment because there is some indication that the accused is undergoing a change of heart with some prospect of rehabilitation.<sup>223</sup> or

[I]f it appears the accused was not acting in his own interests and did not really comprehend the impact of his decision or if there [is] doubt as to the value of approval and it were necessary to conduct the trial before losing necessary witnesses.<sup>224</sup>

The validity of these reasons largely depends on whether the adjudged punishment is sufficient, whatever its degree, to achieve the purpose. On the other hand, if it does not include a punitive discharge, the Government will have lost its advantage, as the accused has now gained a *right* of withdrawal of his request for discharge.

**4. Powers of Withdrawal.** The opinion has been expressed that the Government may accept the request at any time irrespective of the results of trial and subject only to the accused's right to withdraw.<sup>225</sup> This right is limited to those circumstances where the decision has been deferred pending trial and the accused has either been acquitted or received a sentence which did not include a punitive discharge. If a major government

<sup>219</sup> SJA Resp. 11. Certainly the advantage of avoiding the time and effort involved in holding the trial has been lost. SJA Resp. 39.

<sup>220</sup> SJA Resp. 3.

<sup>221</sup> SJA Resp. 13, 23, 24 & 27. The writer recalls one case which received substantial newspaper publicity a number of years ago in which a Marine Corps commander was severely criticized for assembling his command and formally "drumming out" the discharged soldier.

<sup>222</sup> SJA Resp. 14 & 36.

<sup>223</sup> SJA Resp. 7.

<sup>224</sup> SJA Resp. 20.

<sup>225</sup> JAGJ 1970 8008 14 July 1970.



benefit<sup>226</sup> is to avoid the necessity for both a trial and a subsequent administrative proceeding, either situation would theoretically support a discretionary decision to execute the discharge provided the accused wished to continue. Acceptance of a request in this situation may, however, be limited by the general principles of the regulation which prohibit consideration of conduct which was the subject of a trial which resulted in an acquittal or which was the subject of a trial in which the accused could have received a punitive discharge but did not.<sup>227</sup> In any event, the Government has no cause to complain having deferred its decision on the request pending trial.

Unless the accused finds himself in a deferred resignation situation where the result of trial has given him the right to withdraw, he may do so only with the consent of the general court-martial convening authority.<sup>228</sup> The regulation provides no guidance as to how the request should be withdrawn, or on what grounds the accused should be permitted to do so.<sup>229</sup> The practice is far less strict than the regulation allows, and indicates an effort on the part of most commands to ensure that the accused's request is fully voluntary. First, very few requests to withdraw are submitted.<sup>230</sup> This should come as no surprise as it is consistent with the accused's desire to get out of the service. Nineteen commands expressed the view that the accused should be, or is, permitted to withdraw whenever he chooses, with four more specifying there should be some indication of rehabilitative potential.<sup>231</sup> Only four com-

<sup>226</sup> See notes 482-484 and accompanying text *infra*.

<sup>227</sup> The administrative double jeopardy provisions of para. 1-13a(1) & (3), AR 635-200 (C42), do not apply to requests for discharge under Chapter 10. Nevertheless, The Judge Advocate General has opined that approval of a Chapter 10 request after acquittal would be improper even though the request was not withdrawn. DAJA-AL 1974:4151, 5 June 1974. However, a different result is reached where an individual does not receive a punitive discharge, but is convicted. In *United States v. Gwaltney*, the Court of Military Review noted that "the appellant's resignation stemmed from the existence of the charges. The two actions, therefore, had a common source, and they were subject to mutual relationships." 43 C.M.R. 536, 538 (ACMR 1970) (emphasis added). As long as there are in fact charges which would have authorized the discharge, the deferred request can be approved absent withdrawal under paragraph 10-5, for paragraph 10-1 requires only a mechanical test of what the maximum punishment is, rather than consideration of whether a punitive discharge is still possible.

<sup>228</sup> AR 635-200, para. 10-5 (C42).

<sup>229</sup> Compare FED. R. CRIM. P. 32(d): "A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

<sup>230</sup> E.g., SJA Resp. 13 ("not a single withdrawal"); 18 ("none"); 25 (1).

<sup>231</sup> SJA Resp. 3 ("desire to serve"); 4 ("high rehabilitative potential"); 20 ("indicates sincerity of desire to serve"); 24 ("soldier professed desire to serve"); 34 ("when-  
ever rehabilitation seems likely").

mands<sup>232</sup> reported cases where reasons given to permit withdrawal contained elements indicative of "manifest injustice" which the accused is required to prove under the Federal Rules of Criminal Procedure<sup>233</sup> and the American Bar Association Standards.<sup>234</sup>

Thus the practice differs substantially from the regulatory provisions. Even though the Secretary of the Army has provided maximum latitude for the approving authority to exercise his discretion in a manner that would ensure, once the accused submits his application, a successful resolution of the case through discharge, in actual practice every benefit is given to the accused if he desires to exercise his right to trial.

### B. ADJUDICATORY PROCESS

A request for discharge does not result in a "trial" in the sense employed in the Judicial Model. This model insists

on formal, adjudicative, adversary fact finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.<sup>235</sup>

This does not mean, however, that there are no decisions being made which will have an important impact on the accused's future. What is taking place is more consistent with the Administrative Model where the regulation "places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerable account of what actually took place in an alleged criminal event"<sup>236</sup> and what should be done about it.

Following submission by the accused, each officer in the chain of command and those actually involved in the final decision must address themselves to two ultimate questions:

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<sup>232</sup> SJA Resp. 8 (denial of guilt); 25 (dispute over what recommendation of unit commander would be); 26 (where the case was deferred and the accused did not get a discharge at his trial); 28 (insufficient evidence).

<sup>233</sup> FED. R. CRIM. P. 32(d); see note 229 *supra*.

<sup>234</sup> AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.1 (1967) (adopted, as amended, in 1968) [hereinafter cited as ABA STANDARDS]. "Manifest injustice" is present if the accused was denied effective assistance of counsel, the plea was not entered by the accused or on his behalf, the plea was involuntary or not knowledgeably entered, or he did not receive the concessions contemplated by the agreement. Only two commands reported considering some necessity for the accused to make an allegation of innocence. SJA Resp. 8 & 25.

<sup>235</sup> PACKER at 162-64.

<sup>236</sup> *Id.* at 163.

Should the accused be permitted to bypass the judicial process by receiving favorable consideration of his request for discharge? If so, what should be the character of his discharge? Professor Packer points out that the "animating presuppositions that underlie both models in the context of the American criminal system relegate the adjudicatory agents to a relatively passive role, and therefore place central importance on the role of counsel."<sup>237</sup> It will be the purpose of this section to determine which of the models predominates.

*1. Adversary Process.* The regulation provides little guidance for the defense counsel beyond requiring that he advise the accused of his rights, the consequences of his request and then secure an appropriate election. One of the grounds common to both models "is the agreement that the process has, for everyone subject to it, at least the potentiality of becoming to some extent an adversary struggle."<sup>238</sup> The defense counsel may look to his duties before courts-martial as a source of support for his efforts on behalf of his client.<sup>239</sup>

The analogy is not completely accurate, however. As we have seen, the request for discharge has been initiated by the accused as a matter which he desires to see accomplished, and he does so with full recognition of the possible outcome.<sup>240</sup> Further, once the request has been submitted there is no "right" to withdraw it except in the circumstances previously noted. Accordingly, the defense counsel's scope of representation is generally limited to persuading the adjudicator to accept the discharge, and to secure the most favorable discharge possible.

The extent to which defense counsel engage in adversary representation with the chain of command varies considerably. Those responding considered that the question was one of tactics which the defense counsel handles as he feels appropriate.<sup>241</sup> The words used to characterize the extent of defense

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<sup>237</sup> *Id.* at 172.

<sup>238</sup> *Id.* at 157.

<sup>239</sup> MCM, 1969, para. 48a provides that the defense counsel will "guard the interests of the accused by all honorable and legitimate means known to the law" and will "represent the accused with undivided loyalty."

<sup>240</sup> The soldier may not condition his request by limiting the character of the discharge which may be approved by the approving authority. DAJA-AL 1973 4503, 9 Aug. 1973. However, if the approving authority does act on the request he may only do so as conditionally submitted, and may not approve an undesirable discharge. *Id.*

<sup>241</sup> See, e.g., SJA Resp. 26: This "is a matter of personal tactics with counsel which I will not dictate or even recommend." Only four jurisdictions reported that counsel did not contact the lower commanders. SJA Resp. 19, 23, 32 & 38. All others indicated that it was largely a matter within the discretion of counsel.

counsel's discussions with the commanders do not carry conviction that the adversary process as it is thought of in the Judicial Model is at work.<sup>242</sup> Even fewer adversary tactics are shown in dealing with the approving authority. The reports indicated that in only rare instances<sup>243</sup> did the defense counsel argue his case before the approving authority. Occasionally the defense counsel submits a written brief<sup>244</sup> or has a "private discussion"<sup>245</sup> with the approving authority. Although many<sup>246</sup> saw no objection to having the defense counsel present, four<sup>247</sup> staff judge advocates would not permit their defense counsel to accompany them during discussions with the approving authority.

The infrequency of the defense counsel meeting with the approving authority may be due to the fact that the "general pattern of activity has been sufficiently consistent that counsel know whether a request will 'fly'."<sup>248</sup> In addition, once the defense counsel is informed what the staff judge advocate's recommendations will be,<sup>249</sup> the high compatibility between the staff judge advocate's recommendations and the decision of the approving authority,<sup>250</sup> even when contrary to the rec-

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<sup>242</sup> SJA Resp. 15, 22 & 12 ("usually"); 1 ("frequently"); 2-5, 7, 10, 21 & 25 ("sometimes"); 11 ("varies"); 19 ("unusual cases"); 30 ("appropriate cases"). The difficulty with the question may be that the staff judge advocate does not know the extent to which counsel engage in adversary work prior to submitting such requests. SJA Resp. 17 & 18. The extent to which counsel has time to devote to the request for discharge, considering that it is initiated by the desires of his client, may be a factor in his lack of adversary representation. *E.g.*, SJA Resp. 2 (in a 9-month period the command tried 414 cases and acted on 212 requests for discharge); 10 (in an 8-month period the command tried 291 cases and acted on 750 requests for discharge); 16 (in an 8-month period the command tried 446 cases and acted on 4,506 requests for discharge).

<sup>243</sup> SJA Resp. 2, 8 & 27.

<sup>244</sup> SJA Resp. 19 & 30. AR 635-200, figure 10-3 (C38) provides for the accused to submit statements on his behalf to accompany the request.

<sup>245</sup> SJA Resp. 11.

<sup>246</sup> SJA Resp. 2 & 7 ("if he requests"); 14 ("no prohibition"); 20 ("allowed on request"); 27 ("infrequent, but not opposed").

<sup>247</sup> SJA Resp. 1, 22, 25 & 26 ("There is no indication in Chapter X that that action is intended to be *adversary* in nature.").

<sup>248</sup> SJA Resp. 11.

<sup>249</sup> SJA Resp. 13 & 16. Some counsel seek an advisory opinion (SJA Resp. 30); or seek support from the SJA against adverse recommendations from the chain of command (SJA Resp. 34). Only five commands reported the defense counsel did not consult the SJA. SJA Resp. 23, 31, 33, 36 & 37.

<sup>250</sup> Of those commands which were able to estimate a percentage, the approving authority accepted the staff judge advocate's recommendations in 97.3% of the cases. Seven reported 90% or below compatibility: SJA Resp. 4 (90%); 12 (90%); 15 (75%); 23 (75%); 34 (90%); 36 (90%); & 37 (90%).

ommendations of the chain of command,<sup>251</sup> provides little opportunity for adversary success.<sup>252</sup> While neither the staff judge advocate nor the commanders should be a "rubber stamp" for the other,<sup>253</sup> a significant amount of disagreement on the decisions being made should be a matter of concern for the staff judge advocate.<sup>254</sup>

A significant feature is that while the staff judge advocate's decisions generally agree with those of the convening authority, agreement with the remainder of the chain of command is not so frequent. Moreover, when the SJA disagrees with the chain of command, his advice is not followed by the approving authority in a substantial number of cases. The reasons behind the apparent conflict can perhaps be attributed to the results the program achieves. For the overworked and understaffed staff judge advocate, the program represents a method to reduce the stockade population and assist in clearing up an overcrowded trial docket.<sup>255</sup> To the line commander, who is charged with maintaining discipline in his unit, the program has little deterrent effect as compared to the impact of punishment that can be meted out by a court-martial. The commander may not view the advantages of expeditiously ridding his organization of a disciplinary problem as sufficient to justify the apparent lack of punishment which the remainder of his command would observe. We will return to this problem in a subsequent section.

As will be seen,<sup>256</sup> staff responsibility for processing re-

<sup>251</sup> Of those commands which were able to estimate a percentage, the approving authority accepted the staff judge advocate's recommendations when contrary to those of the chain of command in 88.5% of the cases. Six reported 90% or below compatibility: SJA Resp. 4 (1%); 5(90%); 6 (75%); 23 (5%); 34 (50% but disagreement primarily over character of the discharge); 36 (80%).

<sup>252</sup> The reasons for the high degree of compatibility are uncertain, but one might speculate that it may be due, in some part, to the lack of adversary procedures and practices.

<sup>253</sup> The staff judge advocates agreed with the recommendations of the chain of command in 90.6% of the cases. Twelve reported below 90% compatibility: SJA Resp. 8 (85-90%); 12 (80-90%); 20 (75%); 24 (75%); 25 (90%); 27 (75-85%); 28 (90%); 31 (80%); 33 (85-90%); 34 (80%); 36 (80%); 39 (90%).

<sup>254</sup> Compare SJA Resp. 27: "Our present Commanding Officer has disagreed with us several times. His predecessor hardly ever disagreed. Now that we know what he looks for there is not much disagreement.", with SJA Resp. 26: "I believe the main issue is rehabilitative potential; if then, the recommendations of the commanders concerned address themselves to that issue specifically, unless the file expressly contradicts their opinion, I believe the higher commanders and staff must rely on the recommendations of the subordinate commanders concerned."

<sup>255</sup> The responses were unanimous that use of the program was helpful to the staff judge advocate in either reducing backlog, or clearing out the stockade, although one response indicated "it was not a tool, it just happens that way." SJA Resp. 33.

<sup>256</sup> See notes 273-276 and accompanying text *infra*.

quests for discharge has been assumed by most of the staff judge advocates. In reviewing the file for the approving authority, he ensures that the request is made voluntarily and with an understanding of the consequences, and that the charges are legally sufficient. Although the staff judge advocate is not the approving authority, the high degree of reliance the approving authority places on his recommendations leads to a conclusion that the staff judge advocate occupies a position not unlike that of the judge who rules on a proposed guilty plea. This immediately raises the question of whether the staff judge advocate may properly take an active role in the preliminary negotiations.

The reasons for not permitting the judge to engage in plea bargaining with the accused prior to entry of a plea were succinctly set out in *United States ex rel. Elksnis v. Gilligan*:<sup>257</sup>

When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.

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It impairs the judge's objectivity in passing upon the voluntariness of the plea when offered. As a party to the arrangement upon which the plea is based, he is hardly in a position to discharge his function of deciding the validity of the plea.<sup>258</sup>

A similar position has been taken in the American Bar Association Standards Relating to Pleas of Guilty:

There are a number of valid reasons for keeping the trial judge out of the plea discussions, including the following: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.<sup>259</sup>

On the other hand, it has been held there is no objection *per se* to having the judge participate in discussions leading to a plea,<sup>260</sup> provided he does not overstep the bounds of judicial

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<sup>257</sup> 256 F. Supp. 244 (S.D.N.Y. 1966).

<sup>258</sup> *Id.* at 254-55.

<sup>259</sup> ABA STANDARDS, *supra* note 234, at § 3.3(a), commentary. FED. R. CRIM. P. 11(e)(1) adopts this position by prohibiting the court from participating in the plea negotiations.

<sup>260</sup> *United States ex rel. McGrath v. LaVallee*, 348 F.2d 373 (2d Cir. 1965).

propriety. Indeed, where the discussion is with the defense counsel, there may be substantial value to the accused where his counsel actively seeks out the trial judge to secure a favorable arrangement. A contrary result

could only have the effect of depriving an accused defendant of what little bargaining power he may have. In many, or even most, cases, the only defense available is the determination and nerve of the defense counsel. To deprive the attorney of the opportunity to talk to the judge about a guilty plea before a defendant has made up his mind to plead guilty, would deprive him of one of the most valuable tools of his defense.<sup>261</sup>

The reasons advanced by *Elksnis* and the American Bar Association Standards are not generally persuasive when related to the discharge procedure. The staff judge advocate does not deal with the accused directly, although any tacit understanding as to the staff judge advocate's recommendation is undoubtedly communicated to him. But more importantly, in the event the accused does not submit the request for discharge or it is disapproved, the staff judge advocate has no control over the sentence of the military judge.<sup>262</sup> Accordingly, there is no direct risk to the accused that either his sentence or a determination of his guilt will suffer from failing to submit his request for discharge or for withdrawing it, as might be the case when such action takes place before the trial judge in the context of an improvident plea. However, the possibility that prior negotiations may raise some questions concerning the voluntariness of the request was suggested as a reason for not becoming involved in preliminary discussions with the defense counsel.<sup>263</sup>

Despite the importance of the staff judge advocate's recommendations, there is no pattern of extensive defense advocacy. The general rule seems to be that the "exceptional cases or a case wherein counsel wants a deviation from the prior pattern has resulted in persuasive efforts by counsel."<sup>264</sup> In part, this may be due to a desire to avoid making a commitment until the entire file has been reviewed,<sup>265</sup> but it is more likely that

<sup>261</sup> *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970).

<sup>262</sup> See UCMJ art. 26(c).

<sup>263</sup> "I attempt to avoid any involvement with the Chapter X process. . . . I believe that in order for the Chapter X process to be entirely free of improper influence and to be entirely voluntary on the part of the accused, the Staff Judge Advocate must 'stay out of it' at the initial stages where the accused and his counsel are formulating their decision of whether to submit a request for discharge at all." SJA Resp. 26.

<sup>264</sup> SJA Resp. 11.

<sup>265</sup> SJA Resp. 12 & 16 ("Generally our recommendations are influenced by those of the commanders. Consequently, we are in no position to decide on un-submitted requests.").

the reluctance of the defense counsel is due to a strong policy of the staff judge advocates of not engaging in "plea bargaining" either as to the underlying charges or the character of the discharge.<sup>266</sup> Exceptions are sometimes made where the evidence is weak and the accused insists on a discharge.<sup>267</sup> The lack of interplay between the staff judge advocate and the defense counsel may be a major reason for the substantial practice of submitting the request for discharge even though the staff judge advocate is going to make unfavorable recommendations to the result sought by counsel.<sup>268</sup>

The author's experience has been that where a legal advisor does not assist in drafting the charges, a number of factually deficient cases will result. In all but five commands,<sup>269</sup> the evidence upon which the request for discharge is made is reviewed for legal sufficiency and, presumably these commands either bolster the evidence or dismiss the request when the evidence cannot sustain the charges upon which the request is predicated.<sup>270</sup> If this examination does not take place, "plea bargaining" can suffice as a substitute to ensure that the file contains only charges which can be proved. However, where neither is done, there is a possible risk that an individual may be requesting discharge on the basis of groundless charges despite the advice of his counsel. Those are the cases which are most likely to be set aside upon subsequent attack.

Although there are a number of theoretical opportunities for adversary processes, they are not being utilized. Indeed the opportunities may be illusory. It is the client's desire to be discharged, usually without regard for the consequences. Even in those cases where the character of the discharge is of concern, the necessity to find that the accused lacks any rehabilitative value whatsoever before approving his request for discharge virtually dictates the character of the discharge. Under these circumstances, it is reasonable to expect counsel to direct their

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<sup>266</sup> As one staff judge advocate expressed: "I do not bargain with defense counsel." SJA Resp. 25. Only nine commands engaged in "plea bargaining" in the request for discharge process. SJA Resp. 1, 4, 5, 23, 27, 28, 34, 35 & 38. Indeed, conditional requests for discharge are not permitted. See note 240 *supra*.

<sup>267</sup> SJA Resp. 20, 23 & 27.

<sup>268</sup> Nineteen commands affirmatively stated that counsel will proceed with the request for discharge even when they know that the staff judge advocate's recommendation either as to acceptance or the character of the discharge will be unfavorable.

<sup>269</sup> SJA Resp. 3, 6, 23, 25 & 32.

<sup>270</sup> Eight jurisdictions do not attempt to bolster the file where the evidence is weak if the case is to be disposed of without trial. SJA Resp. 9, 14, 21, 22, 24, 32, 35 & 38.



efforts to cases where adversary representation is more productive and consistent with the client's wishes.

2. *Decision Maker.*

a. *Participants.* Although a great deal of stress has been placed on the staff judge advocate's position in the decision-making process, it should be kept in mind that the decision to order the discharge is a command function exercised by the officer who has general court-martial authority over the accused.<sup>271</sup> The regulation also requires that those officers in the accused's chain of command also provide recommendations on whether the request for discharge should be approved, and if so, what discharge should be awarded.<sup>272</sup>

The Adjutant General is assigned staff responsibility for this regulation and processes all other discharges under it. One of the most interesting aspects of the request for discharge is the manner in which the staff judge advocate has assumed staff responsibility. In all but one command<sup>273</sup> the staff judge advocate is the action officer. The shift of responsibility reflects the emphasis being placed on the legal determinations that must be made, as well as on the need for efficiency. Each request has a major impact on the processing of court-martial charges. It has been the author's experience that the Adjutant General's office is institutionally incapable of providing the prompt and expeditious processing of the request for discharge which is necessary to avoid delays in the judicial process.

As a result, the Adjutant General is reported as participating in the process leading to the decision in only eight commands,<sup>274</sup> and in three of those he is not involved in cases arising in the Personnel Control Facility. Surprisingly, one staff judge advocate<sup>275</sup> reported that neither he nor the Adjutant General was involved in cases arising in the Personnel Control Facility despite the large numbers of cases normally associated with that processing point.<sup>276</sup> In addition, some commands have included the Command Sergeant Major,<sup>277</sup> the Secretary to the General Staff,<sup>278</sup> and the Chief of

<sup>271</sup> AR 635-200, para. 10-7 (C42).

<sup>272</sup> *Id.* para. 10-3b.

<sup>273</sup> SJA Resp. 30.

<sup>274</sup> SJA Resp. 1, 2, 16, 19, 28, 34, 37 & 38.

<sup>275</sup> SJA Resp. 19.

<sup>276</sup> SJA Resp. 28 reports that in the 4th Quarter, Fiscal Year 1972, there were 636 cases in the Personnel Control Facility but only 11 in the remainder of the command. Army wide in FY 1972, close to 21,000 out of 25,465 cases were processed in Personnel Control Facilities. See note 5 *supra*.

<sup>277</sup> SJA Resp. 18 & 26 (exceptional cases).

<sup>278</sup> SJA Resp. 1.

Staff.<sup>279</sup> It is assumed that in each case the command concerned believes that the additional parties provide some degree of expertise not otherwise found in those normally associated with the adjudicatory process. Although there may be some value in having the command's highest enlisted member participate in the decision-making process, it is difficult to justify the others.

*b. Delegation of Authority.* The Judicial Model, as exemplified by the *Uniform Code of Military Justice*, would require that in determining whether the discharge should be granted and the character of any such discharge, the approving authority is performing a "judicial function."<sup>280</sup> Normally, in such cases, the power is personal to the commander and may not be delegated.<sup>281</sup>

The regulatory scheme for approving requests for discharge provides that the general court-martial convening authority may delegate his discretion to a general officer in command who has a judge advocate on his staff.<sup>282</sup> Although the parceling out of authority provides a more efficient and quicker method of resolving the request for discharge, it does not necessarily follow that an adjudicative process which permits delegation in this manner fully embraces the Administrative Model.

The distinction to be drawn revolves around the authority for the delegation and the individual to whom the grant is given. For example, the regulation<sup>283</sup> providing for administrative elimination of those whose misconduct or unsuitability renders such action appropriate also permits certain delegation of authority<sup>284</sup> except when an undesirable discharge is to be awarded. The delegation may be to the general court-martial convening authority's principal assistant or some other officer in the headquarters. Within the same regulation, the absence of a specific provision authorizing delegation was held to preclude such action in order to waive counseling and rehabilitative efforts before an individual could be administratively eliminated.<sup>285</sup>

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<sup>279</sup> SJA Resp. 2 & 10.

<sup>280</sup> See Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1, 40-50 (1968).

<sup>281</sup> In *United States v. Roberts*, 7 U.S.C.M.A. 372, 22 C.M.R. 12 (1956), the court held that the power to refer a case to trial is personal to the commander and cannot be delegated to his staff judge advocate.

<sup>282</sup> AR 635-200, paras. 2-17b & 10-7(C42).

<sup>283</sup> *Id.* ch. 13.

<sup>284</sup> *Id.* para. 13-26b.

<sup>285</sup> DAJA-AL 1972 3592, 22 Feb. 1972.

In both of these circumstances, the goal is to exercise the approving authority's power for him, and in the manner in which he would exercise his power if he personally performed the act. On the other hand, the delegate acting on requests for discharge submitted by his troops is exercising his own discretion, although pursuant to the authorization of his superior commander. In either event, it remains subject to the "obstacles" of the Judicial Model that have been discussed.

### 3. *Decision Making.*

#### *a. Discretion.*

(1). *Regulatory guidance.* The decision-making process, as has been indicated,<sup>286</sup> is largely managerial rather than adversary in nature. Although the procedure for obtaining a discharge under Chapter 10 is also voluntary on the part of the accused, the discretion of the approving authority is structured as to those circumstances in which the request will be accepted.<sup>287</sup>

The current structure limits acceptance to those cases where the seriousness of the offense does not require the imposition of a punitive discharge and confinement or where the facts do not establish a "serious" offense notwithstanding the maximum punishment authorized for the offense. Thus the regulation provides a balance between the administrative burdens of trial and confinement on the one hand, and the impact punishment will have on the rehabilitative prospects of the offender on the other. The balance is to be drawn with the benefits to be achieved by the Army and society in mind. The regulation specifically approves the practice of accepting requests for discharge in those cases involving situations "where the offense charged is sufficiently serious to warrant elimination from the Service and the individual has no rehabilitative value."<sup>288</sup>

This guidance worked reasonably well during a period when the Army was undergoing a phasedown in troop strength. Commanders could justify an expansive interpretation of the regulation on the ground that they were making a significant contribution to the strength reduction program by eliminating their undesirable soldiers. Whether that philosophy can continue under the post-war circumstances remains to be seen. Both the desire to attain an all-volunteer Army and the claimed input of higher quality accessions suggest that newly-enlisted soldiers possess a greater potential to serve in an acceptable manner.

<sup>286</sup> See notes 215-270 and accompanying text *supra*.

<sup>287</sup> See AR 635-200, para. 10-4 (C42).

<sup>288</sup> *Id.*

These factors would also indicate that greater rehabilitative efforts must be made before requests for discharge should be accepted.

The result of this approach may be to further structure the discretion of the commander. Efforts in this regard have been made. The Judge Advocate General has reiterated the Army's success in attracting higher caliber personnel and has encouraged staff judge advocates to be more selective in their recommendations concerning requests for discharge.

The entire record of the service member as well as the offense itself should be carefully reviewed to eliminate any arbitrary use of [the procedure]. Particular attention should be devoted to first offenders who have rehabilitative potential. The individual's total record should be considered to assess the possibility that perhaps under different leadership, with guidance and counselling, the individual may become a good soldier.<sup>289</sup>

Many of these views have been incorporated into the regulation as it has been amended. Such changes tend to reduce the efficiency with which this procedure has operated in the past by restricting the exercise of the commander's discretion.<sup>290</sup> Nevertheless, the present structure affords the commander a significantly wide latitude within which to operate even though he must make a "fair amount of revision of guidelines from time to time as views on the subject of Chapter 10 have a unique way of changing in line with the political spectrum of the time."<sup>291</sup>

(2). *Discretionary practice.* The flow of the criminal justice process touches upon a number of key points where largely unstructured discretionary decisions are made. The policeman's decision to arrest,<sup>292</sup> the prosecutor's decision to charge,<sup>293</sup> and the judge's decision to accept a plea<sup>294</sup> are those administrative adjudications which will primarily govern the disposition of the case. They are also the points which are least subject to adversary proceedings and controls over the exercise of discretion.

The regulation governing requests for discharge, however, is highly structured in terms of the manner in which it operates. Indeed nineteen responses indicated no further policy guidelines were necessary.<sup>295</sup> One staff judge advocate correctly

<sup>289</sup> Dep't of Army Message, P 291637Z Sep 72, Subject, Discharge for the Good of the Service.

<sup>290</sup> See AR 635-200, para. 10-4 (C42).

<sup>291</sup> SJA Resp. 12.

<sup>292</sup> See REMINGTON, *supra* note 14, at 276-325.

<sup>293</sup> See *id.* at 422-44.

<sup>294</sup> See *id.* at 586-607.

<sup>295</sup> SJA Resp. 2, 5, 7-9, 12, 14-18, 20, 21, 26-28, 32, 36 & 37.

summarized the requirements of the regulation in the following manner:

Summarily stated, and of course subject to many conditions and facts of individual cases, the determination practically rests on three considerations: is there a prospect of valid rehabilitation to which trial and punishment will contribute; does the individual know what he is doing, the consequences of his action, and genuinely insist on the discharge; and what are the prospects for future service of a quality sufficient to justify the expenditure of leadership effort . . . necessary to achieve that service from the individual.<sup>296</sup>

Five<sup>297</sup> additional commands suggested that their main consideration was the rehabilitative value of the individual to the service. This test was expressed as follows:

Chapter 10's should be approved in all cases where the individual's conduct indicates he is unfit for further military service and should be eliminated pursuant to [AR 635-200, Chpt. 2, for misconduct].<sup>298</sup>

Two<sup>299</sup> commands reported that their decision was largely unstructured in any manner. Significantly, only three<sup>300</sup> commands reported the existence of specific written guidelines in addition to the regulatory provisions.

Although these organizations deny any established rules, there surely develops a "common law" of discharge arising from the favorable or unfavorable action taken in other cases. The practice develops "informal guidelines for administrative purposes"<sup>301</sup> to which interested parties may refer.<sup>302</sup> The guidelines may coalesce into administrative considerations<sup>303</sup>

<sup>296</sup> SJA Resp. 16.

<sup>297</sup> SJA Resp. 4, 6, 10, 25 & 31.

<sup>298</sup> SJA Resp. 31.

<sup>299</sup> SJA Resp. 18 ("case by case determination") & 33 ("no concrete rules, but each case is decided on its own merits, with all considerations taken into account").

<sup>300</sup> SJA Resp. 3 & 34. The guidelines were utilized in absence without leave cases. The large number of such cases makes them conducive to application of rather mechanical rules for disposition depending on the length of absence, and the location of the accused's unit at the time of the absence. SJA Resp. 38 indicates the guidelines were that offenses involving moral turpitude and those where the interests of discipline were paramount were normally not approved.

<sup>301</sup> SJA Resp. 19.

<sup>302</sup> "The only known criticism occurred in one case where civilian defense counsel asserted in a pretrial motion that the standards for granting Chapter 10's at Fort . . . lacked uniformity thus denying his client the equal protection of the law." SJA Resp. 28. This command had no formal guidelines other than those contained in the regulation. See *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967):

To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task, of course this concept would negate discretion. Myriad factors can enter into the prosecutor's discretion. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty, or tradition to treat them the same as to charges. . . . [D]eviations from his duty . . . are to be dealt with by his superiors

*Id.* at 481-82.

<sup>303</sup> *E.g.*, SJA Resp. 1.

or rules relating to the nature of the offense.<sup>304</sup> The latter is more prevalent where large numbers of similar type offenses such as absence without leave are processed and the nature of the offense permits routine handling.<sup>305</sup>

The reluctance to provide specific guidelines is understandable. First, it leads to problems of unrealized expectations,<sup>306</sup> particularly if the guideline leads an accused to believe he will receive more favorable consideration than he actually receives. Normally, this can be corrected by permitting the accused to withdraw his request whenever he chooses.<sup>307</sup> The more crucial consideration appears to be that of possible later review of the manner in which the discretion is exercised:

The pattern surrounding the use of "Chapter 10" discharges has been kept as unstructured as possible. There is a reasonable belief that this program will be subject to review by agencies outside the Army and it is felt that the unstructured program is most adaptable to changing events.<sup>308</sup>

The problem of unstructured discretion is, of course, a matter of basic concern to both the Administrative and Judicial Models. Maximum efficiency would be achieved in the processing of cases if defense counsel<sup>309</sup> were fully aware of the circumstances which would result in favorable action on any request. Greater understanding of the practical rules of the game might result in the submission of fewer requests which are certain to be denied contrary to the recommendations of the staff judge advocate. This, of course, requires affirmative notice to the defense counsel of the approving authority's

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<sup>304</sup> E.g., SJA Resp. 10: "Normally we do not recommend accepting Chapter X resignations for the offenses of larceny, robbery, housebreaking, assault, sale of drugs or other serious offenses."

<sup>305</sup> The Administrative Model is geared to informal and uniform operation because "[r]outine, stereotyped procedures are essential if large numbers are being handled." PACKER at 159. "The Personnel Control Facility, out of which most requests for discharge originate, is more proficient in processing the discharge than other units due to the frequency of such actions in that unit." SJA Resp. 30.

<sup>306</sup> In the absence of specific guidelines, the accused's reliance upon the "practice" may also be misplaced. "One further type of plea bargaining merits attention. This may be called the 'tacit bargain.' In this instance, there are no formal or explicit negotiations between the defense and the prosecution. Defendant, aware of an established practice in the court to show leniency to defendants who plead guilty, pleads guilty to the charges in the expectation that he will be so treated." Enker, *Perspectives on Plea Bargaining*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 111 (1967).

<sup>307</sup> See notes 225-234 and accompanying text *supra*.

<sup>308</sup> SJA Resp. 11.

<sup>309</sup> It is suggested that it also permits an accused to tailor his misconduct to that minimum requirement which will assure his discharge. SJA Resp. 34.

policies<sup>310</sup> rather than an assumption that such policies are known through practice in the jurisdiction.<sup>311</sup>

*b. Review of the Evidence.* A major concern of the guilty plea process has always been that the plea accurately reflect the guilt of the accused.<sup>312</sup> In the federal system, the Federal Rules of Criminal Procedure require the court to ensure there is a factual basis for the plea: "[T]he court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."<sup>313</sup> Under this rule, acceptance of a plea of guilty is discretionary with the judge and he need not accept the plea unless he is satisfied that the underlying facts warrant a conviction for the offense.<sup>314</sup> If this factual basis is met, the plea may be accepted even though the accused maintains his innocence.<sup>315</sup> Although the military rule does not permit an accused to plead guilty and also maintain his innocence, the factual predicate of guilt is also required.<sup>316</sup>

The problem is that the presence of plea bargaining itself may operate to defeat both the voluntariness and the accuracy of the plea. Where inducements are tendered, the efficacy of the guilty plea can be weakened by the possibility that an innocent defendant might bargain the risk of conviction and sentence for a promise of leniency.

The extent of the inquiry which will be made into the motivation of the accused depends on the model to which the approving authority subscribes. His perception of the goals the system serves also determines the extent to which he will inquire into the sufficiency of the evidence used to support the charges upon which the request for discharge is based. The Administrative Model sees the process of having both counsel and approving authority make factual determinations as unreasonably unproductive:

The judge need not inquire into the factual circumstances underlying the commission of the offense except to the extent that he thinks it will help him perform his sentencing function. . . . Any requirement that the judge inquire

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<sup>310</sup> SJA Resp. 30.

<sup>311</sup> SJA Resp. 6.

<sup>312</sup> REMINGTON, *supra* note 14, at 570.

<sup>313</sup> FED. R. CRIM. P. 11(f).

<sup>314</sup> Maxwell v. United States, 368 F.2d 735 (8th Cir. 1966).

<sup>315</sup> North Carolina v. Alford, 400 U.S. 25 (1970). The commentary to FED. R. CRIM. P. 11(f) suggests that in such cases the plea should be dealt with as a plea of *nolo contendere*, acceptance of which must be consistent with "the interest of the public in the effective administration of justice." See FED. R. CRIM. P. 11(b).

<sup>316</sup> See notes 156-159 and accompanying text *supra*.

into the issue of guilt before accepting a plea would impair the efficiency of the process and undermine the plea of guilty by converting the arraignment into an abbreviated trial on the merits.<sup>317</sup>

The dangers of an innocent soldier requesting discharge are of major concern to the military as well:<sup>318</sup>

Naturally, [the broad spectrum of factors to be considered in acting on a request for discharge] produces the possibility of essentially false charges, but the individual is guarded in two ways: one, he has counsel; and two, the request must originate from him.<sup>319</sup>

A similar view was taken by another staff judge advocate when he indicated that he did not usually review the file for sufficiency of evidence to support the charges:

[F]or two reasons: (a) I believe the Staff Judge Advocate is entitled to place some reliance on the defense counsel's advice to the accused (Counsel may not ethically submit a request for discharge when he knows the accused is not guilty); and (b) in most cases, the Chapter X request does not reach me until charges have been referred. [The convening authority is required to find that the charge is "warranted by evidence indicated in the report of investigation".<sup>320</sup>] <sup>321</sup>

Both expressions miss the mark insofar as the participation of counsel is concerned. The request for discharge regulation focuses on the most visible aspects of this process: the right to counsel and the inquiry into the appropriateness of the discharge. What it does not focus on is the "invisible"<sup>322</sup> part involving the defense counsel and his client. The defense counsel is required to advise his client of the elements of the offense, the facts which must be proved and the defenses which may be available.<sup>323</sup> During the course of the advice, it is reasonable to assume that counsel will assess the client's prospects and provide advice on whether the client should request discharge. He may even counsel against submitting the request;

<sup>317</sup> PACKER at 223; see note 321 *infra*.

<sup>318</sup> Surprisingly, the regulation has never addressed itself to a requirement that a factual review of the underlying charges be conducted. As long as a requirement existed to have the charges referred to trial, the necessary review was accomplished; however, since no referral is required under the regulation, an independent examination of the supporting evidence should be accomplished. See notes 103-116 and accompanying text *supra*.

<sup>319</sup> SJA Resp. 16.

<sup>320</sup> UCMJ art. 34(a).

<sup>321</sup> SJA Resp. 26.

<sup>322</sup> See note 137 *supra*. The Court of Military Appeals has condemned unwritten "gentlemen's agreements." *United States v. Troglin*, 21 U.S.C.M.A. 13, 44 C.M.R. 237 (1972). In *United States v. Elmore*, 24 U.S.C.M.A. 81, 51 C.M.R. 254 (1976), Chief Judge Fletcher, concurring in the result, opined that the "trial judge should secure. . . assurance that the written agreement encompasses all of the understandings of the parties." *Id.* at 83, 51 C.M.R. at 256.

<sup>323</sup> See notes 171, 172 & accompanying text *supra*.



however, there is no requirement for the client to accept that advice<sup>324</sup> nor is there a requirement for counsel to concur in the client's request for discharge. Just as with other aspects of the adversary process in the Judicial Model, neither counsel nor the accused is required to account for the process by which the decision is reached.<sup>325</sup>

It follows, therefore, that the concern for accuracy in the charges is not totally satisfied by the presence and advice of counsel. Something more is required if the system is to be satisfied that the accused's desire for discharge is not prompted by improper inducements in the form of immediate release from pretrial confinement,<sup>326</sup> release from the service where that is the abiding goal to the exclusion of all other considerations,<sup>327</sup> and avoidance of the possibility of a federal conviction and punitive discharge.<sup>328</sup>

The Judicial Model, on the other hand, would require the approving authority to satisfy himself that there is "probably sufficient evidence to sustain a conviction on the charge or charges against the defendant."<sup>329</sup> The evidence, under this model, would have to be admissible under the strict rules of evidence, and the approving authority would be required to make an affirmative determination that no evidence had been illegally obtained and that no other constitutional or statutory violations had taken place. "Only after he is satisfied that the record is clear in these two general aspects—the establishment

<sup>324</sup> A rationale for this situation was suggested by one staff judge advocate:

All of the soldiers who put in requests were counseled by a judge advocate. Naturally, such advice was confidential, but it can be assumed that each soldier was counseled as to the probable type of court which would be convened, and what his chance was of getting a punitive discharge. It can also be assumed that the judge advocate advised against a request for a Chapter 10 discharge in any case where it was unlikely that a punitive discharge would result. However, I believe that even in those cases, the judge advocate may have sometimes recommended submission of the request, if the soldier wanted out of the service so badly that even absent a punitive discharge, he indicated a course of action to obtain a discharge in any event. In addition, a number of records of trial by special court-martial revealed that the accused testified he wanted a discharge and would not serve if returned to duty. It is believed that with this experience, defense counsel felt duty bound to assist in Chapter 10 requests as a lesser evil which the soldier would inflict upon himself.

SJA Resp. 36. In the current application form the soldier is required to note that he has received the necessary advice, that "I hereby state that under no circumstances do I desire further rehabilitation, for I have no desire to perform further military service," and "Although [counsel] has furnished me legal advice, this decision is my own." AR 635-200, fig. 10-1 (C42).

<sup>325</sup> Before the regulation was changed to require an admission of guilt, two commands required additional statements from the soldier where he indicated his innocence or where potential defenses were revealed in the record. SJA Resp. 28 & 33.

<sup>326</sup> See notes 426-433 and accompanying text *infra*.

<sup>327</sup> See notes 493-497 and accompanying text *infra*.

<sup>328</sup> See notes 489-491 and accompanying text *infra*.

<sup>329</sup> PACKER at 225.

of guilt and the absence of abusive practices at earlier stages of the process—should the judge accept a plea of guilty.”<sup>330</sup>

The Court of Claims has made it clear that some evidence sufficiency examination must be made. In *Neal v. United States*,<sup>331</sup> the accused accepted an administrative discharge under threat of court-martial for commission of homosexual acts. The court held the discharge invalid because it was based on a confession for which there was no *corpus delicti*. Similarly in *Middleton v. United States*,<sup>332</sup> the Court of Claims held it was improper to offer a member an opportunity to request discharge where there was no underlying charge subject to trial by court-martial. Middleton had been tried and ultimately acquitted for acts of sexual perversion by the civil authorities. Navy regulations generally prohibited trial by court-martial under such circumstances. Accordingly, Middleton “was denied due process and fair treatment by being faced with a harsh and disagreeable option which simply did not exist.”<sup>333</sup>

It therefore seems surprising that five<sup>334</sup> commands do not examine into the sufficiency of the evidence relating to the charges. Where the command does not accept requests for discharge until after referral to trial,<sup>335</sup> it may rely on the presumption that the convening authority has properly performed his duty and determined that the charge is “warranted by evidence indicated in the report of investigation.”<sup>336</sup> The remaining four<sup>337</sup> commands which accept requests for discharge based upon charges which have not been referred to trial and do not examine the charges for legal sufficiency are not fulfilling the expectations of the Judicial Model.

Even among those who do examine the charges for legal sufficiency there is a wide range of practice on what should be done when the file is legally insufficient to establish the offense.

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<sup>330</sup> *Id.*

<sup>331</sup> 177 Cl. Cl. 937 (1966). “There is no difficulty in finding the Discharge Review Board in error in holding that the evidence before it would have warranted plaintiff’s trial by court-martial.” *Id.* at 946.

<sup>332</sup> 170 Cl. Cl. 36 (1965).

<sup>333</sup> *Id.* at 41.

<sup>334</sup> SJA Resp. 3, 6, 23, 26 & 32.

<sup>335</sup> SJA Resp. 32.

<sup>336</sup> UCMJ art. 34(a). It should be noted, however, that this statutory requirement is limited by its terms to trial by general court-martial. It is felt that because the power to refer cases to trial is judicial, *United States v. Roberts*, 7 U.S.C.M.A. 322, 22 C.M.R. 112 (1956), there is a similar requirement for special court-martial convening authorities to make the requisite finding.

<sup>337</sup> SJA Resp. 3, 6, 23 & 26: “In non-AWOL cases, usually charges have not gotten beyond the referral stage unless the evidence is fairly strong.” SJA Resp. 34.

A number of commands<sup>338</sup> do not bolster the evidence when they find it weak. Indeed the opinion was expressed that "bolstering the evidence is a problem separate and apart from the Chapter 10."<sup>339</sup> If the review is to be meaningful in terms of ensuring that "it will withstand subsequent attack by the member,"<sup>340</sup> the file must be bolstered or the request denied.<sup>341</sup>

(1). *Standard of persuasion.* While the Army standard for administrative determinations is "substantial evidence,"<sup>342</sup> it has been persuasively argued<sup>343</sup> that administrative board eliminations, because of the risk of an undesirable discharge, should be governed by a preponderance of the evidence standard:

[I]t is definite, can more easily be applied in a uniform manner, and is not so demanding that the administrative system will become ignored. It brings the weight and credibility of *all* the evidence into direct consideration in the decision making process. Finally, it requires a degree of proof more in balance with the detriment of the undesirable discharge.<sup>344</sup>

As a matter of practice, among those commands which test for sufficiency, three<sup>345</sup> require substantial evidence, one<sup>346</sup> requires a preponderance of the evidence, four<sup>347</sup> require a standard sufficient to refer the case to trial, four<sup>348</sup> require proof beyond a reasonable doubt, and twenty-five require a prima facie case.<sup>349</sup>

These differences largely reflect the values involved in the difference between legal guilt and factual guilt in the two models. The presumption of guilt involved in the Administrative Model is the "operational expression of [the] confi-

<sup>338</sup> SJA Resp. 7 ("not necessarily"), 9, 12, 14, 17, 21, 22, 29, 32 & 38.

<sup>339</sup> SJA Resp. 12. Two commands indicated that bolstering takes place because of preparation for possible trial, and not because of the request for discharge. SJA Resp. 25 & 26.

<sup>340</sup> SJA Resp. 11.

<sup>341</sup> SJA Resp. 11, 14, 22 & 30.

<sup>342</sup> "Each finding must be supported by substantial evidence, which is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion." Army Regulation No. 15-6, Procedure for Investigating Officers and Boards of Officers Conducting Investigations, para. 20 (12 Aug. 1966).

<sup>343</sup> Lane, *supra* note 47, at 118-24.

<sup>344</sup> *Id.* at 123-24.

<sup>345</sup> SJA Resp. 7, 24 & 26.

<sup>346</sup> SJA Resp. 21.

<sup>347</sup> SJA Resp. 17, 18, 22 & 37.

<sup>348</sup> SJA Resp. 2, 8, 13 & 39.

<sup>349</sup> "[P]robable cause to believe the accused is guilty of the crime charged" when referring the case to trial may be the same as a prima facie case. *United States v. Muffett*, 10 U.S.C.M.A. 169, 170, 27 C.M.R. 343, 344 (1959).

dence"<sup>350</sup> reposed in the "reliability of informal administrative fact-finding activities that take place in the"<sup>351</sup> preceding stages of the criminal process and administrative process. Thus the accused may be discharged "merely on a showing that in all probability, based on reliable evidence, he did factually what he is said to have done."<sup>352</sup> This approach was recognized by one staff judge advocate who noted, while commenting on the evidentiary significance of the accused's submitting a request for discharge:

Generally, it must be assumed that by electing to submit the request, the accused is admitting involvement and much of the factual allegations. . . . While the accused may or may not be admitting technical, criminal guilt, he obviously would not request discharge if the charges were totally false.<sup>353</sup>

By submitting the request for discharge, the accused elects not to employ the Judicial Model where

he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him if various rules designed to protect him and to safeguard the integrity of the process are not given effect.<sup>354</sup>

Because the "presumption of innocence is a directive to officials about how they are to proceed, not a prediction of outcome,"<sup>355</sup> the accused, by submitting a request for discharge, renders himself subject to having action taken against him on the basis of factual probabilities. It follows, therefore, that the approving authority need only find that degree of evidence which satisfies the standard for referral to trial,<sup>356</sup> which is in all likelihood only a prima facie case.

(2). *Weight to be given to the submission of the request for discharge.* The significance which will be given to the request for discharge may depend on how one characterizes the process. The analogy to the guilty plea process of the Judicial Model affords some insight into the necessity for independent examination of the evidence supporting the charges. In *Kercheval v. United States*<sup>357</sup> the Supreme Court stated:

A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is

<sup>350</sup> PACKER at 161.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 166.

<sup>353</sup> SJA Resp. 20.

<sup>354</sup> PACKER at 166.

<sup>355</sup> *Id.* at 161.

<sup>356</sup> See *United States v. Muffett*, 10 U.S.C.M.A. 169, 27 C.M.R. 343 (1959).

<sup>357</sup> 274 U.S. 220 (1927).

conclusive. More is not required; the court has nothing to do but give judgment and sentence.<sup>355</sup>

Can it be contended that the act of tendering a request for discharge, assuming a finding of voluntariness, may be considered as an admission of guilt which eliminates the necessity for reviewing the sufficiency of the evidence?

Prior to 1973 there was no requirement in the regulation that an accused admit guilt of the charges when he submitted his request for discharge. As a consequence, most of the commands drew no evidentiary significance from the mere submission of the request.<sup>359</sup> Among those which did not find any evidence of guilt, a substantial number<sup>360</sup> would nevertheless accept the request even though the accused made some claim of innocence provided the issue was resolved prior to action on the request. The devices suggested were all designed to ensure some degree of accuracy in the adjudicative process such as requiring the accused to submit a statement admitting guilt,<sup>361</sup> ensuring the defense counsel has adequately considered the case,<sup>362</sup> requiring the defense counsel to submit a satisfactory resolution of the apparent conflict,<sup>363</sup> and requiring specific admissions by the accused in all cases.<sup>364</sup>

The staff judge advocates who equated the tendering of a request for discharge, in some manner, to a plea of guilty were a decided minority.<sup>365</sup> Those who were at least amenable to the proposition that the tender has evidentiary significance also sought prophylactic support for the request where there were indications of innocence in the file. This was found either in other convincing evidence in the file which reflected the accused's guilt,<sup>366</sup> or by requiring a statement from the accused indicating that he knew of the availability of the defense but wished to persist in his requested discharge.<sup>367</sup>

<sup>355</sup> *Id.* at 223.

<sup>356</sup> SJA Resp. 3-9, 12, 15-19, 21, 23, 25-27, 30, 32, 34, 37 & 38. This approach may be due to the opinion that the motive of the accused, SJA Resp. 27, is of no consequence as "the individual has merely decided that for the good of the service, and probably for his own good, he will request discharge in lieu of court-martial." SJA Resp. 34.

<sup>357</sup> SJA Resp. 4, 6, 12, 16, 17, 21, 26, 30, 34 & 38.

<sup>358</sup> SJA Resp. 4. "By 'Gentlemen's Agreement' this statement will not be used if the accused is tried by court-martial rather than administratively discharged." *Id.*

<sup>359</sup> SJA Resp. 12 & 17 (expressed doubt that the defense counsel would submit a request where the accused asserts his innocence).

<sup>360</sup> SJA Resp. 26.

<sup>361</sup> SJA Resp. 4 & 28. *Cf.* FED. R. CRIM. P. 11(c)(5).

<sup>362</sup> SJA Resp. 1 ("at least an admission of guilt"), 2, 13, 14, 22, 24, 28 & 31.

<sup>363</sup> SJA Resp. 24; see *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>364</sup> SJA Resp. 28 "The accused will submit a statement acknowledging that the defense which he raises is a question of fact which may be decided against him in a

However, in 1973, the regulation was changed to require an acknowledgment of guilt in the application for discharge. The current form contains the following language:

By submitting this request for discharge, I acknowledge that I am guilty of the charge(s) against me or of (a) lesser included charge(s) therein contained which also authorize(s) the imposition of a bad conduct or dishonorable discharge.<sup>368</sup>

Although this language does sharply limit the accused's subsequent efforts to assert his innocence in a collateral attack upon his discharge, it does not satisfy either the Judicial or Administrative Model, and does not do away with the necessity to find a prima facie case in the file materials.

Basic to the providency of a guilty plea under both the federal and military rules is a detailed factual inquiry of the accused.<sup>369</sup> The inquiry is designed to ensure that there is a factual basis for the plea. Because of the administrative nature of the process, any factual examination must be made of the accompanying file and not of the accused. Thus, under the Judicial Model, the submission of the request even though accompanied by an admission of guilt is not the source of the inquiry, but merely one factor to be considered in evaluating the file.

It was suggested<sup>370</sup> in the survey that the tendering of a request for discharge could be equated to a plea of *nolo contendere*. Decisions on the impact of a *nolo contendere* plea do yield relevant comparison, although the final conclusion is not free from doubt. The impact of such a plea has been considered by the Supreme Court on a number of occasions, but prior to *North Carolina v. Alford*,<sup>371</sup> it was not considered in a setting dealing with its significance as an evidentiary matter. In *Hudson v. United States*,<sup>372</sup> it was considered as an "admission of guilt for the purposes of the case." It is possible to render judgment based on the plea alone "for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record."<sup>373</sup> Although it is a

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court of law and that realizing this, he, upon advice of counsel, believes the submission of the Chapter 10 is in his own best interest." SJA Resp. 33; see *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969).

<sup>368</sup> AR 635-200, figure 10-1(C42).

<sup>369</sup> See notes 154-159 & accompanying text *supra*.

<sup>370</sup> SJA Resp. 11. Even utilizing this approach the staff judge advocate expressed the view that the "member ought not to expect approval when he sets up a defense to the allegations." *Id.*

<sup>371</sup> 400 U.S. 25 (1970).

<sup>372</sup> 272 U.S. 451, 455 (1926).

<sup>373</sup> *United States v. Norris*, 281 U.S. 619, 623 (1930).

"confession of the well-pleaded facts of the charge,"<sup>374</sup> the court must still pronounce judgment.

The analogy to *nolo contendere* so far as considering the request for discharge as an indication of guilt is concerned has some value.<sup>375</sup> Under Rule 11(b) of the Federal Rules, it is sufficient for the court to give "due consideration [to] the view of the parties and the interest of the public in the effective administration of justice." In *North Carolina v. Alford*,<sup>376</sup> the Supreme Court reviewed the law and concluded that it

is impossible to state precisely what a defendant does admit when he enters a *nolo plea* in a way that will consistently fit all the cases.

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Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.<sup>377</sup>

Although the current form appears to go beyond the significance of a plea of *nolo contendere*, the latter principle does explain the absence of a factual examination of the accused. The Federal Rules of Criminal Procedure<sup>378</sup> fill this gap by permitting entry of a *nolo contendere* plea without the necessity for inquiring into the factual basis of the plea as required in the case of a plea of guilty.

Moreover, the limited effect of the admission of guilt noted by the Supreme Court in *Alford* has found both judicial and administrative support in the Army. In *United States v. Pinkney*,<sup>379</sup> a case prior to the change in the regulation, the Court of Military Appeals held that it was error to bring out on cross-examination that the accused had unsuccessfully submitted a request for discharge. In reviewing the philosophy of the program, the court expressed the view that

[n]eedless to say, an accused need not incriminate himself when he requests discharge in lieu of court-martial, and a convening authority does not necessarily express a personal opinion on guilt or innocence or on the appropriateness of any punishment other than the requested discharge when he denies such a request.<sup>380</sup>

<sup>374</sup> *Lott v. United States*, 367 U.S. 421, 426 (1960).

<sup>375</sup> Evidence is heard only to assist the judge in fixing the sentence. *Crowley v. United States*, 113 F.2d 334 (8th Cir. 1940).

<sup>376</sup> 400 U.S. 25 (1970).

<sup>377</sup> *Id.* at 35-36 n.8.

<sup>378</sup> FED. R. CRIM. P. 11(f). The notes of the Advisory Committee make it clear that no factual finding of guilt was deemed necessary beyond the plea. In other respects, however, the court's duty to advise and make inquiry is the same for pleas of guilty and *nolo contendere*.

<sup>379</sup> 22 U.S.C.M.A. 596, 48 C.M.R. 221 (1974).

<sup>380</sup> *Id.*

It may be that the opinion of the court was primarily a result of its determination to ensure that

when an accused seeks to avail himself of this administrative means to dispose of the criminal charges against him, no harm should come to him as a result of the failure to so resolve the case by administrative rather than criminal trial.<sup>381</sup>

The decision in *Pinkney* was rendered at a time when the accused was not required to admit guilt of the underlying charges. If the admission is to be given effect beyond the immediate administrative action,<sup>382</sup> a different result would obtain under the present regulation. However, The Judge Advocate General of the Army has reaffirmed<sup>383</sup> the *Pinkney* result under the current regulation, thus rendering some support for the Administrative Model reflected in the plea of *nolo contendere*.

However, the Administrative Model is not fully satisfied by the addition of the admission of guilt in the application. The efficient operation of an administrative system would dictate that only the admission of guilt to well pleaded charges need be examined to speed the soldier on his way. But as the Court of Claims has made clear in *Neal*<sup>384</sup> and *Middleton*,<sup>385</sup> sole reliance on the admissions made by the applicant may be fatal on appeal. Review of the underlying charges is still necessary, but if one accepts the analogy that the request for discharge determination is similar to the action of a grand jury,<sup>386</sup> limitations on admissibility of evidence are of little consequence. Where an effort is being made to corroborate the admission contained in the application, hearsay evidence,<sup>387</sup> incompetent

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<sup>381</sup> *Id.* at 566-67, 48 C.M.R. 220-21. The court has often sought to ensure that the exercise of certain rights will not redound to an accused's detriment. See, e.g., *United States v. Barber*, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963) (admissions made during providency hearing not admissible during rehearing); *United States v. Stivers*, 12 U.S.C.M.A. 315, 30 C.M.R. 315 (1961) (testimony in mitigation and extenuation not admissible on merits at rehearing); *United States v. Daniels*, 11 U.S.C.M.A. 22, 28 C.M.R. 276 (1959) (stipulation made by an accused in connection with a guilty plea may not be used by the prosecution at a rehearing). However, FED. R. CRIM. P. 11(c) reaches a similar result without detracting from the evidentiary significance of the *nolo contendere* plea.

<sup>382</sup> Even though it may be an administrative action, SJA Resp. 4, which does not require a review of evidence, SJA Resp. 6, when considered in light of the evidence of a particular case, submission of the request "may certainly constitute an indication of a guilty state of mind." SJA Resp. 30.

<sup>383</sup> See DAJA-AL 1974-3711, 26 May 1974; DAJA-MJ 1974-11185.

<sup>384</sup> See note 330 & accompanying text *supra*.

<sup>385</sup> See notes 331, 332 & accompanying texts *supra*.

<sup>386</sup> "We are of the opinion that in referring a case to trial the convening authority acts in a capacity similar to that of a grand jury." *United States v. Moffett*, 10 U.S.C.M.A. 169, 170, 27 C.M.R. 243, 244 (1959).

<sup>387</sup> *Costello v. United States*, 350 U.S. 359 (1956).



evidence,<sup>388</sup> and illegally seized evidence<sup>389</sup> may be considered, as all have been found sufficient to support a grand jury indictment.

Because there is to be no adjudication of legal guilt by a judicial body, factual guilt may be based on the accused's assertion of guilt when he submits his request for discharge and meets the other requirements of the regulation. Based upon that assertion and the other evidence in the file, the approving authority may then proceed to determine whether the request should be approved, and if so, what "sentence" should be adjudged.

### C. "SENTENCING"

The closest parallel to the administrative discharge in the civilian sector is being "fired" from a job when the employer determines that the employee is undesirable for further employment. However, if congressional testimony<sup>390</sup> is to be believed, the nature of the stigma attached to being fired by the Armed Forces is significantly greater.

It is because of the Army's "right to punish"<sup>391</sup> through administrative action that the discretionary power involved in the request for discharge takes on added importance. The punitive effects, for example, accompanying a discharge for homosexuality are significant.

[H]er reputation as a decent woman was officially destroyed, her rights to her accrued pay and accrued leave, and to numerous benefits conferred by the nation and many of the states upon former soldiers were forfeited.<sup>392</sup>

Indeed, to characterize an individual as "undesirable" for military service may have greater impact than a discharge for acts of misconduct.

1. *Regulatory Guidance.* Although the regulation contains rather detailed guidance on when to accept a request for discharge, there is little assistance given on what principles should be followed in determining the character of the discharge to be awarded. It may be that the punishment function, whether administrative or judicial, is such that structured discretion is not possible. Indeed, the failure to consider sentencing in his models of criminal justice processing was a major point of criticism<sup>393</sup> of Professor Packer's thesis.

<sup>388</sup> *Holt v. United States*, 218 U.S. 245 (1910).

<sup>389</sup> *United States v. Calandra*, 414 U.S. 339 (1974).

<sup>390</sup> Lane, *supra* note 47, at 98.

<sup>391</sup> *Bland v. Connally*, 293 F.2d 852, 858 (D.C. Cir. 1961).

<sup>392</sup> *Clackum v. United States*, 148 Ct. Cl. 404, 407 (1960).

<sup>393</sup> Griffiths, *supra* note 32, at 378-80.

For the administrative discharge, guidance as to the character of the discharge to be awarded is contained in only two sentences: "An undesirable discharge certificate will normally be furnished an individual who is discharged for the good of the service. However, the discharge authority may direct an honorable or general discharge if warranted."<sup>394</sup> Another section of the regulation<sup>395</sup> provides guidelines for the general characterization of discharges, but this has been interpreted as not preemptive where the soldier is being discharged under regulations which authorize other than an honorable discharge.<sup>396</sup>

The importance of this decision to the accused cannot be overestimated. While acceptance of the request for discharge is a major goal of the accused, the characterization of his service as undesirable may "brand him for life."<sup>397</sup> However, in light of the minimal guidance provided in the regulation, it is to the customary practice that the accused must look if he is to receive any meaningful information on the character of the discharge he is most likely to receive.

2. *Discretionary Practice.* Although the approving authority is not required to follow criteria permitting an honorable or general discharge where the accused "has been awarded a personal decoration,"<sup>398</sup> the practice is not uncommon.<sup>399</sup> In the absence of these exceptional cases,<sup>400</sup> the need to retain a "man in the service unless he shows little rehabilitation merit"<sup>401</sup> almost dictates the award of an undesirable discharge:

In my opinion, if an individual is indeed a *proper* Chapter X candidate, and if he indeed has no rehabilitative potential—mainly meaning that he does not want to serve properly—then he is literally an "undesirable" member of the military and it is neither unwarranted (factually) nor unfair to so characterize his service.<sup>402</sup>

As a result, the regulatory provision that an accused would "normally" receive an undesirable discharge is viewed as the "norm,"<sup>403</sup> "the rule, not the exception,"<sup>404</sup> and "required."<sup>405</sup> It is, therefore, not surprising that the overwhelming majority

<sup>394</sup> AR 635-200, para. 10-8 (C42).

<sup>395</sup> *Id.* ch. 1, § III.

<sup>396</sup> DAJA-AL 1972 3701, 8 Mar. 1972.

<sup>397</sup> SJA Resp. 30.

<sup>398</sup> AR 635-200, para. 1-9f(1) (C42).

<sup>399</sup> SJA Re-p. 25-28.

<sup>400</sup> "If the case does not warrant [undesirable] characterization of service, it might not warrant discharge at all." SJA Resp. 26.

<sup>401</sup> SJA Resp. 27.

<sup>402</sup> SJA Resp. 26.

<sup>403</sup> SJA Resp. 13 & 26.

<sup>404</sup> SJA Resp. 27.

<sup>405</sup> SJA Resp. 28.

of discharged soldiers are awarded undesirable discharge certificates.<sup>405</sup>

As viewed by the staff judge advocates, the primary purpose of giving so many undesirable discharges is to suitably characterize<sup>407</sup> the accused's service in terms of his present offense and his record. A by-product of ensuring proper recognition of unsatisfactory service is to enhance and maintain the integrity of the honorable discharge:

Those who are quick to find fault with the Chap. 10 often overlook the good soldier who elects to do his job but must serve until his ETS to get his good discharge and Govt. benefits.<sup>408</sup>

These reasons are founded in the belief that the individual who does not serve should not receive any of the various benefits<sup>409</sup> "bestowed by a benevolent (vote conscious) Congress."<sup>410</sup>

Although there is some support<sup>411</sup> for the proposition that an undesirable discharge should be issued to deter unsatisfactory service, none of the commands suggesting this purpose was of the opinion that it has that effect. There were only three<sup>412</sup> responses which indicated a belief that there was any deterrent effect in the prospect of receiving an undesirable discharge, although it may serve as some incentive for those who satisfactorily complete their full military obligation.<sup>413</sup>

<sup>405</sup> At the time of the survey, in the first six months of 1972, 12,436 out of 14,003 individuals received undesirable discharges. See notes 5 & 6 *supra*.

<sup>407</sup> SJA Resp. 1, 3, 4, 7, 8, 14-16, 20, 21, 23-26, 28, 30-33, 35 & 37-39.

<sup>408</sup> SJA Resp. 21.

<sup>409</sup> SJA Resp. 1, 3, 10, 22, 24 & 26.

<sup>410</sup> SJA Resp. 13. This response is based on a belief that "an individual who wants to fulfill his obligation to serve is given every opportunity to earn an honorable discharge." *Id.* Similar views have been expressed by Department of Defense officials and congressmen. See Lane, *supra* note 47, at 100 nn. 27-29.

<sup>411</sup> SJA Resp. 5-7 & 32.

<sup>412</sup> SJA Resp. 9, 17 ("some"); 36 ("very little"). It may have some value *after* the accused's request has been approved as he may refrain from additional misconduct to avoid jeopardizing his discharge. SJA Resp. 30. Twenty-eight affirmative responses indicated that the accused is counseled concerning his duty to "soldier" until action is taken on the request. Ten responses indicated the defense counsel provided the counseling. SJA Resp. 1, 4, 7, 13, 20, 25, 31, 34, 35 & 37. Two viewed it as a responsibility of command, SJA Resp. 12 & 36; and three believed both the defense counsel and the unit commander participated in the counseling. SJA Resp. 26, 27 & 33. Three listed the failure of the accused to perform duty after submitting a request for discharge as a ground for disapproval. SJA Resp. 1, 2 & 34. Although no deterrent is involved, the prompt elimination of those who will continue to commit offenses in order to secure their discharge will have an impact on the number of offenses committed. SJA Resp. 20, 25 & 28.

<sup>413</sup> SJA Resp. 3 & 34.

The possibility that using the undesirable discharge as a punishment<sup>414</sup> tool, to "extract a 'pound of flesh',"<sup>415</sup> or to "brand him for life"<sup>416</sup> may not produce the desired effect is not all there is to the problem. The view was expressed that it may actually encourage misconduct which will be counter-productive in both the long and short run.<sup>417</sup> Those organizations with Personnel Control Facilities with large numbers of individuals being held for absence without leave indicate the availability of this program may contribute to the commission of offenses by those desiring to terminate their service on the most advantageous terms.<sup>418</sup> If this is true of other offenses as well, the discretion currently being exercised in favor of discharge may have to take into greater account the criticisms being expressed by the chain of command.

It is significant to note in this regard that few objections to the elimination procedure are being expressed by the commanding generals.<sup>419</sup> The criticism is being voiced in the main by the lower echelons of command. These commanders complain that permitting an accused to obtain a discharge without adequate punishment undermines the disciplined environment they are attempting to create. The commanders who are most closely associated with unit discipline have "philosophical difficulties in accepting the fact that an undesirable discharge is punitive. The act of bringing an accused to trial seems to have psychological benefits."<sup>420</sup>

While the responses did not indicate how widespread the complaints are within the jurisdictions, the fact that seventeen commands<sup>421</sup> noted some degree of dissatisfaction is signifi-

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<sup>414</sup> Awarding an undesirable discharge "satisfies the need of command to believe that they have acted so as to persuade the troops that the member has been 'punished' for his offense against the Army's discipline." SJA Resp. 11.

<sup>415</sup> SJA Resp. 37.

<sup>416</sup> SJA Resp. 3.

<sup>417</sup> SJA Resp. 11.

<sup>418</sup> SJA Resp. 14, 16 & 28.

<sup>419</sup> Only two commands reported reluctance on the part of the approving authority to make maximum use, consistent with the Department of Army directives, of the request for discharge authority. SJA Resp. 23 & 27. This reluctance was not due in any part to the opposition of local attorneys or bar associations. Only two cases of unfavorable criticism by attorneys were reported. In one case the accused did not get the discharge which had been recommended by the chain of command. SJA Resp. 2; and in the other, the accused was not permitted to resign as he had hoped. SJA Resp. 28. Three commands reported that civilian attorneys are as quick as military counsel to advise clients to request discharge in appropriate cases. SJA Resp. 3, 16 & 19.

<sup>420</sup> SJA Resp. 32. Local German prosecutors apparently have the same difficulty in understanding the "punishment." SJA Resp. 17.

<sup>421</sup> SJA Resp. 2-4, 7-9, 11, 13, 19-21, 27, 30, 31, 33, 35 & 36.

cant. The staff judge advocate who blithely encourages favorable action on requests for discharge primarily because of factors relating to his own operation may be in the same position as the prosecutor who encourages guilty pleas: "It apparently never occurred to them that the role they had assumed of 'protecting society' as vigorously as possible might be criticized."<sup>422</sup> The fact that both the staff judge advocate and the prosecutor do not insist upon full payment of the debt owed to their respective societies because of tactical and administrative considerations may be of little consequence to those most directly concerned with the offender and the results of his misconduct.<sup>423</sup>

The discretionary power to impose an undesirable discharge must be exercised with great care. The individual who has intentionally sought discharge from the Army may be deserving of no consideration:

While I may feel sorry for him, because I believe he is misguided in his approach to life; and while I would advise him against such action, were I his defense counsel; nonetheless it is a fact that such an individual is worthless, and is not and probably never would be an acceptable member of the baseline force.<sup>424</sup>

Nevertheless, the significant consequences which attend being designated as "undesirable" are matters of deep and abiding concern for those charged with the power to accomplish that action. As one staff judge advocate noted, "The problem which haunts me is the knowledge that a 19 year old who is adamant in his present decision not to serve will, at age 25, bitterly regret it."<sup>425</sup> Nevertheless, the "regret" often comes at a time when the emergency for which he was called to serve has been met by others, and no longer presents the menace which may have prompted his original decision to seek discharge.

### 3. *Impact of the Discharge.*

*a. On the accused.* If the accused is in pretrial confinement, the most immediate impact may be upon his confinement status. The general practice<sup>426</sup> is to release the accused from confinement immediately or within a short period to allow for

<sup>422</sup> Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968).

<sup>423</sup> "The consequence of these vices is likely to be increased fear that the innocent will be convicted, that serious offenders will escape with undeserved leniency, and that a sense of hucksterism and venality pervades the halls of justice." Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70, 73 (1967).

<sup>424</sup> SJA Resp. 26.

<sup>425</sup> SJA Resp. 16.

<sup>426</sup> Twenty-two commands immediately released the accused. Two commands reported release prior to final action where it appeared likely that favorable consideration would be given SJA Resp. 19 & 28.

out-processing.<sup>427</sup> The theory given is that a "decision has been made not to go forward with a trial. There being no trial contemplated, pretrial confinement becomes legally objectionable."<sup>428</sup> Exceptions to this rigid rule are present in commands with Personnel Control Facilities where the recidivous tendency of absence without leave provides a ground for retention in confinement.<sup>429</sup>

A minority of commands<sup>430</sup> do not release the accused immediately. The theory advanced is that pretrial confinement in the judicial system and the administrative elimination procedures are entirely separate.<sup>431</sup> Because charges are not dismissed upon approval, they provide a valid legal basis for confinement until the discharge is actually accomplished. In general, the confinement issue has not been a practical problem for some of the commands because confinement is so closely controlled that individuals whose cases are appropriate for approval and discharge are normally not in confinement,<sup>432</sup> or the period between approval and discharge is so short as to be reasonable under the circumstances.<sup>433</sup>

As a general practice,<sup>434</sup> no formal action is taken to dismiss the pending charges. It would appear that the rationale utilized to necessitate immediate release from confinement would also suggest affirmative action be taken on the charges. Nine commands<sup>435</sup> dismiss the charges, generally through the action of the approving authority.<sup>436</sup> As a practical matter, except for the administrative loose end of having charges in existence, the discharge of the accused operates to "dismiss" the charges because of a loss of jurisdiction over the individual.<sup>437</sup>

<sup>427</sup> Nine commands retained the accused in confinement pending processing which takes from 24-72 hours. SJA Resp. 2, 5, 12, 16, 24, 33, 34, 35 & 39. This practice may no longer conform with Department of the Army policy. See note 203 *supra*.

<sup>428</sup> SJA Resp. 25.

<sup>429</sup> SJA Resp. 4, 11 & 31. The opinion was expressed in one command that where there is delay, the individual will normally remain around to receive his discharge. SJA Resp. 16. In those cases where lengthy delay is anticipated, the accused is placed on excess leave. SJA Resp. 19.

<sup>430</sup> SJA Resp. 8, 10, 13, 24, 25 & 28.

<sup>431</sup> SJA Resp. 10, 13.

<sup>432</sup> SJA Resp. 10.

<sup>433</sup> SJA Resp. 13 (4 days); 25 (1-3 days); 28 (7-10 days). One command reported retention in confinement for 30-45 days. SJA Resp. 8. Two reported retention in confinement until a port call could be secured. SJA Resp. 24 & 35.

<sup>434</sup> Twenty-nine commands reported no affirmative action is taken to dismiss the charges.

<sup>435</sup> SJA Resp. 1, 2, 14, 16, 18, 22, 30, 32 & 36.

<sup>436</sup> SJA Resp. 1 & 22. One command uses a conditional dismissal, incorporated into the approving authority's action. SJA Resp. 11.

<sup>437</sup> It seems highly unlikely that the accused would ever again be subject to

The most important impact upon the individual is, of course, the character of the discharge. The importance it may have, at least in the eyes of one federal court, bears repeating:

There can be no doubt that [an undesirable] discharge . . . is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, *prima facie* evidence against a serviceman's character, patriotism or loyalty.<sup>438</sup>

It also has a direct impact upon the federal and state<sup>439</sup> benefits that the individual can expect to receive.

Federal benefits vary according to the nature of the benefit involved and the character of the discharge. For undesirable discharges, the Veterans Administration has extensive discretion with which to act. The relevant statute provides:

The term "veteran" means a person who has served in the active military, naval, or air service, and who was discharged or released therefrom under *conditions other than dishonorable*.<sup>440</sup>

It is in the interpretation of the words "conditions other than dishonorable" that the Veterans Administration has virtually exclusive authority and discretion.<sup>441</sup>

Where the discharge is either honorable, general or dishonorable, there is no exercise of discretionary authority by the Veterans Administration. The individual is either entitled to the benefits of his service, or not, according to the title on his discharge certificate. When the actions of the soldier result in an undesirable discharge, the Veterans Administration must exercise its discretion to determine whether the discharge was issued under "conditions other than dishonorable." The governing Veterans Administration regulation provides:

(d). A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

....

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

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military jurisdiction. See UCMJ art. 3(a). However, until his departure if the charges have not been dismissed, he can be sent to trial with minimum delay in the event he withdraws his request or the Government elects to try him because of subsequent misconduct.

<sup>438</sup> *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970).

<sup>439</sup> Availability of state benefits is normally determined by the character of the discharge.

<sup>440</sup> 38 U.S.C. § 101(2) (1970) (emphasis added).

<sup>441</sup> 38 U.S.C. § 211(a) (1970) provides in part: "[T]he decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veteran's Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

Review Board seeking to set aside undesirable discharges. During that period only 9,398 or 14.2% have resulted in an upgrading of the character of the discharge. 21 Army, July 1971, at 51. However, in calendar years 1973-1975 the number who were

447 From 1944 through 1970, there were 65,853 appeals to the Army Discharge

448 SJA Resp. 3.

449 See notes 5 & 6 *supra*.

450 SJA Resp. 3, 10, 24 & 38.

451 See AR 635-200, para. 10-4 (C42).

452 38 C.F.R. § 3.12(d) (1975). See generally Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veteran's Benefits*, 13 MIL. L. REV. 121 (1967).

tion of discharges have been singularly unsuccessful.<sup>447</sup> burdened some in the long run as efforts to secure recharacterization of discharges have been singularly unsuccessful.<sup>447</sup> endowed soldiers in upgrading their discharges may be equally life<sup>446</sup> as "undesirable." The successful results of more highly in addition to his own difficulties has now been "branded for for the undereducated, low IQ, or minority race member who bodes ill for society.<sup>445</sup> It is a particularly punishing burden b. *On Society*. The large number of undesirable discharges

ministrative procedure. his burden is greater than that. He must do so in another administrative adjudication which he actively sought to achieve, but former soldier is then faced with upsetting an earlier administrative adjudication which to deny the benefits administered by that agency. The the Veterans Administration will have a proper basis upon as the lack of "honest, faithful and meritorious" service and tions, the record should reflect the basis for his action, as well. If the approving authority has properly performed his function upon a finding of "willful and persistent misconduct."

in applying its regulation will deny eligibility for benefits only turpitude.<sup>444</sup> Thus, in many cases the Veterans Administration could be considered common law offenses involving moral charge in cases of military offenses as opposed to those which charge in cases of military offenses as opposed to those which Similar, some commands will only approve requests for discharge. It might be inappropriate to approve the request.<sup>443</sup> martial, it might be inappropriate to approve the request. facing are serious enough to warrant trial by general court request for discharge. Indeed, if the charges an accused is a general court-martial before the charges can be referred to most commands do not require that the charges be referred to respect to an individual's eligibility for benefits. For example, the Veterans Administration to make a proper decision with discharge procedure in his command will affect the ability of The manner in which the approving authority operates the

(4) Willful and persistent misconduct . . . . A discharge because of a minor offense will not, however, be considered willful and persistent misconduct. If service was otherwise honest, faithful, and meritorious.<sup>442</sup>



There may be segments of our society which would applaud such individuals. Inability to adjust to a military environment requiring self-discipline and team effort may be thought of as a healthy and commendable trait. But the fact remains that those whose conduct has rendered them "undesirable" may expect substantial prejudice in civilian life.<sup>448</sup> The inability to acquire satisfactory employment or to secure financial assistance for personal or business undertakings substantially reduces the individual's stake in society. The result will often be additional and more serious acts of misconduct as grist for the criminal justice mill. Although the individual ceases to be a problem for the Armed Services, both he and his future conduct will be of concern to society in general. The gunman does not inquire of his victim whether he is civilian or military.

#### V. ACHIEVEMENT OF OBJECTIVES

In the administration of criminal justice, the consensual resolution of criminal charges plays an important part. In any given case, both the Government and the individual can achieve a mutuality of advantage which dictates the desirability for resolution of the issues through agreement rather than contest. This, of course, is the essence of the Administrative Model. The Supreme Court has recognized the legitimate interests served by this process:

For the defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional process can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.<sup>449</sup>

In an effort to provide guidance in determining when the court

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successful rose to 20%. In calendar year 1975 those who made a personal appearance received favorable action in 22.8% and those who did not make an appearance were successful in 21.1% of such cases. In 1976 the successful applicants have been considerably more numerous: January—28.0%, February—34.0%, March—32.3%, April—37.0%, and May—42%. Some of the more recent success may be due to increased opportunities to make personal appearances before the Board. In November 1975, regional panels were established, and in February 1976 traveling boards were set up. The above information was furnished to the author by the Military Assistant, Army Discharge Review Board, Deputy Assistant Secretary of the Army (DA Rev. Bds and Pers. Sec.).

<sup>448</sup> Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973).

<sup>449</sup> Brady v. United States, 397 U.S. 743, 752 (1970).

can grant concessions to those pleading guilty without violating the "concepts of impartiality and fairness which have traditionally guided the exercise of the judicial functions,"<sup>450</sup> the *American Bar Association Standards Relating to Pleas of Guilty* have indicated some of the circumstances where "the interest of the public in the effective administration of criminal justice . . . would be served"<sup>451</sup> by the compromising of criminal charges.<sup>452</sup> The extent to which these objectives are served by the discharge procedure will now be considered.

### A. BY THE GOVERNMENT

When compared with the *Standards*, the benefits which the Government expects to achieve by acceptance of the request for discharge are primarily those of expediency and necessity. That does not mean, however, that the values are inconsistent, although there is some divergence in the emphasis being placed on the values.

It can be said that the request for discharge aids in the prompt application of "punishment" to the accused. To the extent that the goal of eliminating the soldier who has no rehabilitative value is realized without the delay associated with the necessity for trial, the best interests of the service are achieved. The weakness of the case,<sup>453</sup> the difficult and time-consuming proof required in some offenses,<sup>454</sup> and the possibility that the court will not adjudge a punitive discharge<sup>455</sup> are illustrations of situations where the discharge procedure is compatible with guilty plea justifications for concessions to defendants.

<sup>450</sup> Comment, 66 YALE L.J. 204, 210 (1956).

<sup>451</sup> ABA STANDARDS, *supra* note 234 § 1.8(a).

<sup>452</sup> (i) that the defendant, by his plea, has aided in insuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has acknowledged his guilt and shows a willingness to assume responsibility for his conduct;

(iii) that the concession(s) will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from his form of conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

*Id.*

<sup>453</sup> SJA Resp. 7.

<sup>454</sup> SJA Resp. 35, 37 & 38. It assures elimination of the undesirable soldier "without bambling on the whims of counsel, the judge and/or juries." SJA Resp. 39.

<sup>455</sup> SJA Resp. 20.

On the other hand, it appears that the ready availability of the procedure does not necessarily aid in the accused's repentance and rehabilitation. Only three<sup>456</sup> commands affirmatively reported that the possibility of receiving an undesirable discharge has deterrent effect. Indeed, there appears to be evidence that the procedure is being used as an "easy out" for individuals who commit offenses solely with that end in mind.<sup>457</sup> In this respect, the discharge procedure is subject to the same criticism directed toward the rehabilitative effect of pleading guilty in civilian criminal justice:

Although a guilty plea may at times be motivated by repentance, more often it would seem to represent exploitation by the accused of the prosecutor's and court's reaction to such a plea. . . . But the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character. Faced with convincing evidence of guilt, an accused will probably take a guilty plea for reasons of expediency, not principle.<sup>458</sup>

The *American Bar Association Standards* and military practice vary in cases where acceptance of the request for discharge is motivated by administrative convenience. The *Standards* permit charge and sentence concessions only when the accused's plea has "increased the probability of prompt and certain application of correctional measures to *other* offenders."<sup>459</sup> All but one<sup>460</sup> of the commands believed that the substantial savings of time, effort and expense being achieved by the discharge procedure were the primary benefit to the Government. While this may have, as the *Standards* suggest, value in terms of permitting greater attention to other cases, this result only comes about because the accused's case is not being tried.<sup>461</sup>

<sup>456</sup> SJA Resp. 9, 17 & 36. See notes 411-413 & accompanying text *supra*.

<sup>457</sup> Twenty-one staff judge advocates responded that the procedure was used as an "easy-out" for the "anti-military" soldier. Four responded it was not, and nine noted some tendency in that direction. Five others indicated it was "more often the trouble maker who cannot or will not function in society." SJA Resp. 3. The difficulty in dealing with an accused in the correctional setting who has pleaded *nolo contendere* without an admission of guilt or without his guilt being determined may be a reason for rejection of the *nolo contendere* plea. See Commentary to FED. R. CRIM. P. 11(f).

<sup>458</sup> Comment, 66 YALE L.J. 204, 210-11 (1956).

<sup>459</sup> ABA STANDARDS, *supra* note 234 § 1.8(vi) (emphasis added). The commentary expressly rejects the idea that an accused should receive sentence consideration because *his* trial saves time and expense: "A defendant should not serve two years (or whatever the reduction may be) merely because he has saved the state \$500 (or whatever the cost of the trial may be). This kind of exchange cannot be justified under any of the accepted theories of punishment."

<sup>460</sup> There is no advantage to the Government "except to the taxpayer, i.e., triple the size of the JAG Corps." SJA Resp. 1.

<sup>461</sup> SJA Resp. 28: "It has, however, freed counsel for both sides to devote more time to cases that are tried. Defense counsel especially have expressed the feeling that they would not be able to do an adequate job if every accused went to trial." SJA Resp. 19.

The distinction which the *Standards* are trying to make is, by and large, semantic rather than practical.

Where the charges have been referred to a court-martial empowered to adjudge a punitive discharge the procedure affords a "swift disposition of cases which will probably result in punitive discharges but little post-trial confinement."<sup>462</sup> The authority to grant discharges in these circumstances is not unlimited. It may not be exercised "where the nature, gravity and circumstances surrounding an offense require a punitive discharge and confinement."<sup>463</sup> In practical operation, the major use of the authority seems to involve military offenses<sup>464</sup> such as absence without leave<sup>465</sup> rather than felony charges.<sup>466</sup> This particularized treatment is consistent with the *Standards'* view that plea concessions may properly be given in order to tailor corrective measures to be taken in order to better achieve the purposes of correctional treatment.<sup>467</sup> In these cases the discharge procedure is appropriately applied to those individuals whose records indicate they will not benefit from the rehabilitative effect of confinement and the offense does not require the stigma of a punitive discharge following the delay and the expense of a judicial proceeding.

There are a number of cases, however, where the charge has not been referred to trial<sup>468</sup> or has been referred to trial by a court which cannot adjudge a punitive discharge.<sup>469</sup> In these circumstances it has been claimed that the advantage to the Government is less relevant:

It would appear that a convening authority has decided either that discharge is not warranted either for the offense or for the offender, or from some combination of both, or that he does not believe a court-martial would in fact [discharge the accused].<sup>470</sup>

In this view, the commander faces a dilemma: He "either lets a rehabilitatable soldier 'out', or . . . rectifies a situation where

<sup>462</sup> SJA Resp. 26 & 34.

<sup>463</sup> AR 635-200, para. 10-4 (C42).

<sup>464</sup> SJA Resp. 3, 19, 27, 28 & 34.

<sup>465</sup> In fiscal year 1972, approximately 21,000 out of 25,465 discharges involved absence without leave. See note 5 *supra*.

<sup>466</sup> *E.g.*, SJA Resp. 10: "It is not used on this post as a compromise for people facing felony charges or as a method of summarily dismissing any soldier in trouble."

<sup>467</sup> See note 452 *supra*. This is consistent with the regulation's assertion that use of the Chapter 10 procedure "is appropriate and encouraged when the commander determines that the offense charged is sufficiently serious to warrant elimination from the service and the individual has no rehabilitative value." AR 635-200, para. 10-4 (C42).

<sup>468</sup> See notes 109-110 & accompanying text *supra*.

<sup>469</sup> See notes 111-112 & accompanying text *supra*.

<sup>470</sup> SJA Resp. 26.

discharge is appropriate but can't be achieved by other means."<sup>471</sup>

The dilemma, unlike the Gordian knot, is easily untied. Referral to a court-martial not authorized to adjudge a punitive discharge does not necessarily mean the soldier has rehabilitative value. Discharge may be appropriate but not expected either because the evidence relating to the accused's character and lack of value to the service is generally not admissible<sup>472</sup> or because of the attitude of the sentencing agency:

Given the present attitude of the general public and military judges toward punitive discharge for purely military offenses, such individuals do not get a punitive discharge until the 2d or 3d conviction. When it is obvious that a first conviction, even by regular SPCM, will have little or no rehabilitative effect, Chapter 10 is a desirable substitute for [AR 635-200, ch. 13] proceedings.<sup>473</sup>

Normally, in these cases the trial of the accused will be followed by an administrative board proceeding.<sup>474</sup> Whether the request for discharge is considered a substitute for other administrative elimination proceedings<sup>475</sup> is of no consequence. True, the accused receives far fewer rights consistent with the Judicial Model, but if he desires not to avail himself of these safeguards, he may do so. As long as the initiative is with the accused to elect a more expeditious discharge, he should be accommodated so long as the approving authority is satisfied that there is in fact no further rehabilitative value warranting further efforts on the part of the command.

Obviously, "the individual who hates the Army and is unwilling to accept routine military requirements"<sup>476</sup> has little rehabilitative value. The problem is, however, concerned with more than whether the soldier has a "potential for positive contribution"<sup>477</sup> and the removal of an "unhappy nonproductive soldier"<sup>478</sup> although both detract from the proficiency of

<sup>471</sup> *Id.*

<sup>472</sup> See MCM, 1969, paras. 75 & 138(f)(2).

<sup>473</sup> SJA Resp. 20.

<sup>474</sup> When a case has been considered by a court-martial authorized to adjudge a punitive discharge, but does not do so, administrative elimination under Chapter 13 of AR 635-200 is precluded unless an express exception is granted by the Department of the Army. See AR 635-200, para. 13b(3)(C42).

<sup>475</sup> Compare SJA Resp. 20: "When it is obvious that a first conviction, even by regular SPCM, will have little or no rehabilitative effect, Chapter 10 is a desirable substitute for [ch. 13, AR 635-200] procedure.", with SJA Resp. 6: "Although Chapter 10 is not a substitute for discharge UP [ch. 13, AR 635-200] frequently the individual has either been in trouble or can be expected to be in future trouble."

<sup>476</sup> SJA Resp. 20.

<sup>477</sup> SJA Resp. 14.

<sup>478</sup> SJA Resp. 12.

modern armies. The rapid elimination of those "trouble-makers"<sup>479</sup> who "[adversely affect] troop efficiency and discipline"<sup>480</sup> is required if "their contaminating influence"<sup>481</sup> is to be avoided.

As has been indicated, the request for discharge procedure has been utilized in a significant percentage of disciplinary cases in some commands.<sup>482</sup> Some indication of the scope of the procedure can be grasped by comparing the number of cases tried with those disposed of by Chapter 10. From 1971 through 1975, 9,025 general courts-martial and 77,029 special courts-martial were tried which resulted in conviction.<sup>483</sup> During the same period, 90,948 soldiers were discharged under Chapter 10.<sup>484</sup>

It has been estimated<sup>485</sup> that the cost of a general court-martial is \$1,000.00 more than the cost of accepting a request for discharge. While the study was undertaken at a time when court members were required in all cases, the addition of counsel and military judges at the special court-martial, as well as the personnel requirements for subsequent administrative boards, more than make up for any costs deducted for those cases in which counsel did not participate. Assuming only one-half of the 90,948 Chapter 10 applicants were eliminated through a combination of punitive discharge courts and administrative boards rather than the prompt acceptance of a request for discharge, the additional cost for the period would have been approximately \$45,474,000.00!

<sup>479</sup> SJA Resp. 17.

<sup>480</sup> SJA Resp. 11.

<sup>481</sup> SJA Resp. 13.

<sup>482</sup> Illustrative of the scope of the problem, and the part played by the request for discharge, are the following responses: SJA Resp. 1—"4 Chapter 10's to 1 court-martial!"; SJA Resp. 2—"From Jan-Sept 72, 414 cases were tried and 210 Chpt. 10's were approved"; SJA Resp. 10—"Jan-Aug 72, 291 cts. mt. and 750 Chapter 10's". Within commands having Personnel Control Facilities the importance of the procedure as an alternative to trial by court-martial was even more pronounced:

SJA Resp. 16:

	Chpt 10	[Ch. 13] Board	Courts-martial
CY 1971	3,735	1,730	3,196
CY 1972 (2 Qtrs)	4,506	314	446

In *United States v. Pinkney*, 22 U.S.C.M.A. 595, 596, 48 C.M.R. 219, 220 (1974) the Court of Military Appeals incorrectly assessed the importance of the procedure by expressing the view that the "discharge in lieu of court-martial plays an important, though minor, role in the disposition of criminal offenses in the military services." (emphasis added).

<sup>483</sup> See note 68 *supra*.

<sup>484</sup> See notes 5 & 6 *supra*.

<sup>485</sup> JAGA 1965 3903, 21 Apr. 1965.

It appears that the request for discharge has produced its most important benefit in reducing what would have otherwise been an unmanageable case load. Although these Administrative Model considerations may not meet the theoretical objections of the *American Bar Association Standards*, they do have the constitutional approval of the Supreme Court.<sup>486</sup> They should not be lightly abandoned.

### B. BY THE ACCUSED<sup>487</sup>

The notion that charge reduction is proper in order to achieve an opportunity to individualize the consequences of the conviction; to avoid high mandatory minimum sentences and the lack of opportunity for probation; and in order to avoid a label of "felon" is accepted by the *Standards* for application in appropriate cases. All but three<sup>488</sup> responses noted that the primary benefit to the accused is the avoidance of the consequences of trial and conviction. The most important of these consequences are the lack of a federal conviction on his record,<sup>489</sup> and the avoidance of confinement normally adjudged in those cases sufficiently serious to warrant discharge.<sup>490</sup>

A frequently mentioned<sup>491</sup> benefit sought by the accused is the avoidance of a punitive discharge. Here the benefit may be illusory depending on the status of the case. As has been seen, a number of commands accept requests for discharge even though the case has not been referred to trial or not referred to trial by a court authorized to impose a punitive discharge. Under these circumstances, the accused is receiving no benefit other than the avoidance of further service in which additional convictions leading to a punitive discharge or an adverse administrative discharge might result.<sup>492</sup>

"It is without question a fact that some soldiers purposefully amass sufficient infractions, all usually minor, but which in concert authorize the issuance of a punitive discharge by court-martial, specifically to make themselves eligible to be discharged

<sup>486</sup> See note 482 & accompanying text *supra*.

<sup>487</sup> It should be noted that these are the views of the staff judge advocate rather than those who have elected this option.

<sup>488</sup> SJA Resp. 11, 23 & 25.

<sup>489</sup> Thirty-three responses indicated the avoidance of a federal conviction was a primary benefit to the accused.

<sup>490</sup> Twenty-one responses indicated the avoidance of confinement was a primary benefit to the accused. An additional ten responses indicated avoidance of confinement as a secondary objective.

<sup>491</sup> Eighteen responses indicated the avoidance of a punitive discharge was an objective of the accused.

<sup>492</sup> SJA Resp. 20 & 28.

pursuant to Chapter X."<sup>493</sup> The desire to gratify "his most driving desire—his prompt separation from the Army"<sup>494</sup> is a composite of many factors. Use of drugs by servicemen, the unpopularity of certain service such as that required during the Vietnam War, the obnoxiousness of military life to soldiers not motivated to adjust to it,<sup>495</sup> racial tensions, and the hatred many young people feel for the Army as one of the most powerful bulwarks of the "establishment," all contribute to a sociological climate in which the accused desires to "return to a society he believes is more beneficial to him."<sup>496</sup> The decision to request discharge for the good of the service may be the result of a number of considerations:

He does not have a federal conviction; is removed from pretrial confinement; gets out of the Army; is saved from the trauma and embarrassment of a trial; avoids post-trial confinement, and enables him to resume civilian life without a social blemish from association with convicts for an extended period.<sup>497</sup>

In some commands, however, not all of these goals are achieved, and the fact that the majority of such discharges are "undesirable" does not deter such individuals and in fact may be a positive sign for acceptance within their peer group.

Whatever the motivation, it appears that a substantial number of young service personnel are satisfied to waive the protections offered by the Judicial Model and rely upon the adjudicative process of the Administrative Model to achieve their goals.

## VI. EVALUATION

### A. MODULAR CONSIDERATIONS

The request for discharge procedure has a number of "obstacles" of a nature one would expect to find in the Judicial Model. The requirement for jurisdiction over the person and the offense, the necessity for charges, and the requirements for a free, knowing and voluntary election by the accused following consultation with counsel are all factors normally

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<sup>493</sup> SJA Resp. 26. This comment reflects the ability to utilize the provisions of section B of the Table of Maximum Punishments to permit a Chapter 10 discharge for lesser offenses in combination with previous offenses. This option is no longer available. See note 102 & accompanying text *supra*.

<sup>494</sup> SJA Resp. 11.

<sup>495</sup> "We have had very few requests submitted in connection with politically motivated offenses. The typical accused is simply a person with little respect for authority, who for non-political reasons, will not serve." SJA Resp. 19.

<sup>496</sup> SJA Resp. 6.

<sup>497</sup> SJA Resp. 39.



found in the court-martial process. Indeed, the action of the approving authority in determining whether the request should be approved is not unlike that required when he takes post-trial action on the findings and sentence of a court-martial:

[He must] consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. . . . And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining [the legality of the proceeding].<sup>498</sup>

However, it must be recalled, there are no findings and sentence of a duly constituted court or jury as are normally associated with judicial processes involving punishment, nor are the discretionary decisions being made subject to appeal in the military justice system.<sup>499</sup> Both the regulation and the practices of those who administer the system reflect an informal administrative adjudication leading to a "sentence" having significant consequences.

A major touchstone of the Judicial Model is the adversary process, and the part played by the defense counsel:

I do not mean to suggest that questions about the right to counsel disappear if one adopts a model of the process that conforms more or less closely to the [Administrative Model], but only that such questions become absolutely central if one's model moves very far down the spectrum of possibilities toward the [Judicial Model]. The reason for this centrality is to be found in the assumption underlying both models that the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned, the state and the accused.<sup>500</sup>

The defense counsel initially plays a nonadversary role in advising the accused of the availability of the option and the advisability of attempting to exercise it. Once the decision to submit the request has been made, counsel's adversary role is usually limited to those rare instances where the nature of the case is such that it is necessary and appropriate for him to actively assist the accused by contending he should be discharged and occasionally seeking to upgrade the character of the discharge. Normally, however, the case is processed to a conclusion as a matter of agreement between the Government and the accused. Neither the defense counsel nor the adversary process is conspicuous in either the regulatory scheme or the daily practice of those involved in its processing.

<sup>498</sup> *Runkle v. United States*, 122 U.S. 543, 557 (1887).

<sup>499</sup> The rationale is that an administrative discharge request is not a "case" within the scope of appellate review. See *United States v. Hudson*, 48 C.M.R. 270 (ACMR 1974).

<sup>500</sup> PACKER at 172.

The volume of cases being disposed of under this authority dictates recourse to the Administrative Model:

This model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited.<sup>501</sup>

In this context, the "limited resources" the responding staff judge advocates were concerned with was an inadequate number of judge advocate counsel to properly try all of the cases before courts-martial. Any significant curtailment of this authority will have to be accompanied by a proportional increase in the size of the Judge Advocate General's Corps if major backlogs of untried cases and bulging stockades are to be avoided. The total inability or unwillingness of Congress to provide adequate incentives to attract and retain a sufficient number of young attorneys will dictate retention of the Administrative Model and retard any significant progress toward a Judicial Model.

#### B. DISCRETIONARY CONSIDERATIONS

Although the regulation provides some guidance concerning when a request for discharge can be accepted, the central issue is whether the accused has "rehabilitative" value. Even fewer guidelines are provided for determining the character of the discharge to be awarded. The problems faced by the approving authority in these areas are no different than those of determining whether the accused is sufficiently "dangerous" to warrant pretrial detention, and how to utilize the seemingly unlimited punishment powers judges possess.

Many of the criticisms directed toward the unstructured discretion in the civil criminal process are largely inapplicable to this procedure. The reason is that the accused has voluntarily applied for this option knowing the processes involved and the likely outcome. Under these circumstances, it should come as no surprise to the accused that if the approving authority finds that his conduct warrants discharge, he will probably receive an undesirable discharge as his "sentence."

#### C. "SENTENCING" CONSIDERATIONS

It is clear that discharge for the good of the service, particularly where an undesirable discharge is awarded, is the equivalent of a "sentence." It is the culmination of an administrative

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<sup>501</sup> *Id.* at 159.

fact-finding process in which the accused, with his consent and at his urging, has been found to be undesirable for further service. It is unique in that while a specific act of misconduct forms the basis for the request, the entire record of the accused, sometimes including factors that are not criminal in nature and would not normally be admissible in a court-martial, forms the basis for the discharge as well as the characterization of his service. Although it could be contended that this procedure does not result in criminal punishment,<sup>502</sup> the impact upon the individual, depending upon the moral condemnation society wishes to place upon the recipient of an undesirable discharge, is almost as great as that of a bad conduct discharge imposed by court-martial.<sup>503</sup>

It has been asserted that there are only two theories of punishment:

In my view, there are two and only two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evildoers, and the prevention of crime. It is possible to distinguish a host of more specific purposes, but in the end all of these are simply intermediate modes of one or the other of the two ultimate purposes.<sup>504</sup>

Awarding an undesirable discharge does not operate to prevent crime in the service, either by rehabilitation of the accused or through deterrence. The accused is discharged only when the determination has been made that there is no spark of rehabilitative value which can be reached. With regard to the deterrence, if service separation is a goal to be achieved at all costs, the discharge procedure is an attractive way of reaching that goal. Thus the procedures may actually encourage rather than deter misconduct. Any prevention of crime which is realized, at least within the military service, results from the offender's discharge. This does not mean that the accused will be deterred from the commission of further offenses. It only means that the processing and punishment for such misconduct will no longer be the responsibility of the military.

It follows that the "punishment" must be justified upon a retributive basis. First of all, it suitably characterizes the nature and quality of the accused's service, and distinguishes that

<sup>502</sup> Criminal punishment means simply any particular disposition or the range of permissible dispositions that the law authorizes (or appears to authorize) in cases of persons who have been judged through the dispositive processes of the criminal law to be guilty of crimes. Not all punishment is criminal punishment but all criminal punishment is punishment. Punitive damages imposed in a civil suit constitute punishment but not criminal punishment. Punishment is a concept; criminal punishment is a legal fact.

*Id.* at 35.

<sup>503</sup> See Jones, *supra* note 461.

<sup>504</sup> PACKER at 36.

service from that of those who have served honorably and well. Second, it operates to deprive the individual of any financial or other benefits to which he might otherwise be entitled. Perhaps more importantly, it represents the moral condemnation of the military community that the accused's service has rendered him undesirable for further participation in the Profession of Arms. Philosophical considerations are adequately served by characterizing the accused as the scoundrel he is:

I have heard it suggested that a man should be required to serve out his enlistment, either in the unit or confinement, before being discharged, and that any other policy invites wholesale misconduct on the part of soldiers seeking an early out. I do not subscribe to this theory. Ours is not a slave army; we do not command the loyalty of an American soldier through fear or sullen acceptance, but rather through the satisfaction that comes from serving his country and his unit well and honorably. To the great majority of our soldiers an Honorable Discharge Certificate is an important goal. If a man prefers and deserves an Undesirable Discharge, the Army is better off without him.<sup>205</sup>

#### D. EXPECTATIONS

As has been seen, the Chapter 10 procedure mixes elements from both the Administrative and Judicial Models. Purists who insist upon full compliance with either model will be disappointed with the system in both its regulatory structure and its practical operation. Their cries for change will be both loud and insistent, but, as is true of many reformers, those who would overturn the cart should first ascertain its cargo. Recognition of the value choices which were made in the regulation, and the implementation of the procedure in day-to-day operations will go a long way toward reducing the disappointment and anger which emanate from unrealized expectations as to how the system is to operate. That is the necessary first step toward meaningful dialogue in determining the most desirable mix of values.

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<sup>205</sup> Letter from Major General Shoemaker, Commanding General, U.S. Army Air Defense Center and Fort Bliss, reprinted in *THE ARMY LAWYER*, Apr. 1972, at 17.

## APPENDIX

This is the questionnaire which was sent to 39 general court-martial jurisdictions in September 1972. The responses to this questionnaire determine the manner in which the Chapter 10 Discharge Program was utilized during that time period. See note 9 *supra*.

## 1. EVIDENCE SUFFICIENCY

a. Do you consider the submission of a Chapter 10 the equivalent of a plea of guilty?

b. Do you examine the sufficiency of the evidence to support the charge? If so, do you take action to bolster the evidence when it appears weak?

c. By what standard of proof do you test the sufficiency of the evidence?

d. Do you accept a Chapter 10 when the accused denies guilt thru an exculpatory statement in the file, a statement submitted with the Chapter 10, or thru the defense counsel?

## 2. CONSENT

a. Is the Chapter 10 option well known among the troops? Do you publicize it?

b. Does the unit commander or the defense counsel initially advise the accused of the availability of Chapter 10?

c. Have you had any difficulty in "educating" the commanding general on the advantages of the Chapter 10?

d. Have you had any complaints from individuals that they have been improperly advised on the impact of a Chapter 10?

e. What ground rules do you have on permitting the accused to withdraw his Chapter 10?

f. In what cases have you permitted an accused to withdraw his Chapter 10?

## 3. FAIRNESS AND PROPRIETY OF PROCEDURES

a. What are the advantages of the Chapter 10 to the United States?

b. What are the advantages of the Chapter 10 to the accused?

c. If the individual is in pretrial confinement at the time the resignation is approved, is he immediately released? If not, how long does he normally remain in pretrial confinement until he is discharged?

d. Once the discharge is approved, do you take action to dismiss the charges?

e. Under what circumstances would you defer action on the resignation until after the trial?

f. Is the accused counseled in any way concerning his duty to continue to soldier pending completion of the action on his Chapter 10 and the possible consequences of subsequent misconduct?

g. What criticism of the Chapter 10 do you receive from company, battalion, and brigade commanders?

h. What criticism of the Chapter 10 do you receive from local attorneys or bar associations?

i. Do you follow the exact procedures contained in Chapter 10, or have you developed local procedures, and if so, what are they?

j. Does the defense counsel accompany you to plead his case before the commanding general?

#### 4. EFFECTIVENESS AND EFFICIENCY OF THE PRACTICE

a. How long does it take for you to process a Chapter 10 from initiation by the accused until departure from your command?

b. Do you have any data available on the number of Chapter 10s approved in comparison with the number of cases tried?

c. Does the Chapter 10 have any deterrent effect on misconduct?

d. Do you believe the Chapter 10 is being used as an "easy out" for anti-military individuals?

e. Has the Chapter 10 proved to be a significant tool in lowering the stockade population or reducing the backlog of untried cases?

f. Do you have any local ground rules on the prompt submission of the Chapter 10 in order to prevent delay of trials?

#### 5. DISCRETION

a. Who participates in the decision making process on whether to accept the Chapter 10 and the character of the discharge to be awarded?

b. Does the defense counsel discuss the case with the chain of command to feel them out before submitting the Chapter 10?

c. Does the defense counsel discuss the case with you to ascertain what your recommendation will be before submitting the Chapter 10?

d. Do you engage in any "plea bargaining" with the defense counsel either as to the charges to be submitted to the commanding general, or the character of discharge to be awarded?

e. What percentage of the time do you agree with the recommendations of the chain of command?

f. What percentage of the time does the commanding general accept your recommendations?

g. What percentage of the time does the commanding general accept your recommendations when contrary to those of the chain of command?

h. Does the defense counsel submit Chapter 10s knowing that your recommendations will be contrary to his requests?

j. In addition to the guidance contained in para 10-3b, do you have any specific rules as to when a resignation should be accepted and the character of the discharge to be awarded? What are they?

k. Are these specific rules known in same manner by the defense counsel?

l. Would you accept a Chapter 10 where you doubt the accused would receive a discharge if referred to an appropriate court-martial?

m. Would you accept a Chapter 10 where no decision has been made as to the level of referral?

n. Would you accept a Chapter 10 where referred to a summary or regular special court-martial?

o. Would you accept a Chapter 10 where the accused was initially offered non-judicial punishment which he refused in order to submit a Chapter 10 following preferral of charges?

p. What is the purpose in awarding an undesirable discharge?





## RECENT PUBLICATIONS

### BOOKS RECEIVED AND BRIEFLY NOTED\*

The IBP Research and Editorial Staff. *1976 Federal Tax Desk Book*: Englewood Cliffs, New Jersey: Institute for Business Planning, Inc. Pp. 543, appendix and index. \$29.95.

Lawyers are more and more turning to specialization as a method of coping with the increasing complexities of practicing law in today's society. Even in the military this drive towards specialization has taken root.<sup>1</sup> While many of the emerging specialty areas are the product of new, highly structured federal regulatory systems, one narrow field of expertise has been with us for a considerable length of time—the practice of law emanating from the Internal Revenue Code. This field has as its recognized savants those who have obtained advanced degrees in the specialty area and those who participate in the increasing number of tax institutes. Despite these two certifying credentials, those who actively engage in tax practice must either accumulate or have access to a substantial library of materials devoted to the substantive and procedural aspects of the federal tax law. Most of the services are multi-volumed, frequently supplemented, highly technical, and of concern to all of us, expensive.<sup>2</sup> This last concern takes on an increasing importance to military attorneys who deal with seemingly limitless areas of responsibility and who have limited budgets for library acquisition and maintenance. In light of these facts, it may be particularly difficult for military attorneys to justify the creation (and maintenance) of a library devoted to a subject which they have neither the occasion nor the expertise to practice regularly. Nonetheless, if only for purposes of recognizing potential problems, judge advocates must have a nodding acquaintance with the substantive and procedural sections of the Internal Revenue Code.

It was for this reason that the announcement of the publication of the Institute for Business Planning's *1976 Federal Tax Desk Book* should be of interest to military attorneys. The IBP publishes what is, ounce for ounce, one of the best estate

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

<sup>1</sup> See, e.g. *Award of Judge Advocate Specialty Designations*, THE ARMY LAWYER, Apr. 1976, at 21-24.

<sup>2</sup> Even with a "government discount" a publication which only includes the Internal Revenue Code and Regulations costs \$69.00 per year.

planning guides available.<sup>3</sup> That modestly sized volume outlines the various options available to those planning estates and includes appendices which are invaluable. If the Tax Guide could provide as complete and concise an overview of federal income taxation as its companion does for estate planning, it would be a highly recommended addition to each judge advocate's personal or office library.

The *Federal Tax Desk Book* is divided into two major parts and subdivided into 11 sections. Unfortunately, the first part which comprises 360 of the book's 500 pages of text is entitled "Business Tax Planning Strategy" and is of only marginal importance to judge advocates. Another 20 pages devoted to tax sheltered investments (including citrus and almond groves, and vineyards) will in all probability be infrequently used by military attorneys.

However, two of the sections are of major utility to judge advocates and may by themselves justify the purchase of this or a succeeding edition of this book. The first of these sections, entitled Planning for Income Tax Savings, succinctly outlines the methods to best utilize the deductions available under the current tax law. Although current congressional initiatives have as their purpose the substantial alteration of the always popular home office and child care deductions,<sup>4</sup> the desk book covers these, the moving expense deduction, sick pay exclusion, the provision for tax deferral of profits from the sale of personal residence, and more in language which is readily comprehensible by the nonspecialist. The treatment is essentially prospective—in other words read this at the beginning of the tax year rather than at the end; and use it to advise clients of the tax possibilities of their situations, not to fill out their 1040's.

Nonetheless, in my view, the best section is saved for last. Section XI, "How To Stay in IRS's Good Graces," is a concise but important contribution to the generalist's library. In only 34 pages it gives a practical outline of what happens once the tax return is filed—from initial review of a return to judicial resolution of disputes with the IRS.

One example of the value of this book for the nonspecialist will suffice. Outlining the course of a typical audit from the motivational perspective of the agent, the book notes that "production" is one of his stronger drives.<sup>5</sup> Consequently, to maximize his return, he will want to settle small cases with relative

<sup>3</sup> CASIN, *ESTATE PLANNING DESK BOOK* (3d ed. 1972).

<sup>4</sup> Congress has recently altered both these provisions. Tax Reform Act of 1976, Pub L. No. 94-445, §§ 504, 607. — Stat. —

<sup>5</sup> It has been asserted that IRS "[e]mployees who fail to meet management's

rapidity. The easiest way to do this is to have the taxpayer agree with him. He may do this by explaining his theory of the facts and law to a taxpayer who is typically frightened at the thought of being audited; who typically wants to pay his just debts; and who will acknowledge his "error," and agree to waive his procedural rights by simply signing a form 870 (Forms 1902-E, 4549 and 4906, not mentioned here and typically not mentioned even in more specialized texts, may also be used for this purpose).

Unfortunately, once one of these forms is signed, the substantial opportunities for negotiation and compromise (all briefly outlined) are lost to the taxpayer. At this point, if the taxpayer finds the agent's theory to be misstated or plain wrong, he must pay the tax and sue for refund in a federal district court or the Court of Claims rather than utilize the administrative system where he can negotiate, litigate and then pay.

This chapter can help military attorneys better advise clients, or at any rate prevent them from making disastrous mistakes early in the tax collection process. With the wide range of problems facing military attorneys today such issue identification is vital: your client is subject to audit.<sup>6</sup>

Captain Brian R. Price

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expectations [*i.e.*, dollar production] are either denied promotions or . . . faced with disciplinary proceedings." *Hearings Before the Subcomm. on the Department of the Treasury, U.S. Postal Service, and General Government Appropriations of the Senate Comm. on Appropriations*, 93d Cong., 2d Sess. 9-10 (1974) (testimony of Mr. Vincent Connery, president of the National Treasury Employees Union). Commissioner Donald Alexander has stated that "there are no case or dollar goals for enforcement personnel," *id.* at 24, but this view has been disputed. *Id.* at 23.

\* *Kalinski v. Commissioner*, 528 F.2d 969 (1st Cir. 1976) (employees of Air Force Child Guidance Center in Europe claimed salaries exempt from taxation under 26 U.S.C. § 911(a)(2) (1970)); *Brummitt v. United States*, 329 F.2d 966 (Ct. Cl. 1964) (same claim made by wife of Army officer for income earned for services at Officers' Open Mess, Taipei).

Johnson, David T., and Schneider, Barry R., eds. *Current Issues in U.S. Defense Policy*. New York: Praeger Publishers, 1976. Pp. 254, notes and index. \$18.50.

If you can't tell an ASROC from a SUBROC or a SNW from a TNW (and want to) this is the book for you. The editors have collected a series of issue papers prepared by staff members of the Center for Defense Information, an "independent and nonpartisan research and educational agency" which aims to stimulate a greater public awareness of contemporary defense issues. As one is led to expect from the preface and perusal of the biographical data on the editors and contributors, the views expressed are not necessarily those of the government "experts." The individual papers do present alternative views and are valuable for that reason alone.

The first six chapters deal with the U.S. Forces stationed abroad. Beginning with an evaluation of post-Vietnam policy, Part I focuses on specific geographic areas, to wit: Europe, Korea, Japan, the Indian Ocean and the Persian Gulf. Part II looks at the U.S. weapons program beginning with an overview of the military budget and continuing through a discourse on the militarization of outer space.

The book has the merit of being reasonably comprehensive and succinct. Although it employs the jargon of the strategic studies community, it makes a conscientious effort to explain the jargon and the acronyms. It is not incomprehensibly scientific in the discussion of weapons systems and, therefore, is useful to the reader who lacks a technical background.

This is precisely the sort of book which one would expect to find among the required readings in a Strategic Studies course in a graduate school of foreign affairs. It is a good single source document for the military attorney who wants to get to know his clients' vocabulary and become conversationally literate about current defense issues at the strategic level. One never knows when he might be drawn into a conversation about the latest "broken arrow" or FROGs in Bessarabia.

Major Fred K. Green

Leibowitz, Arnold H., *Colonial Emancipation in the Pacific and the Caribbean: A Legal and Political Analysis*. New York: Praeger Publishers, 1976. Pp. 221, Notes, maps and index. \$18.50.

This is a lawyers' book, which is to say it focuses on the legal relationships which have developed and continue to evolve between a number of Pacific and Caribbean islands. Having shed their former colonial status, they have not in all cases attained (nor necessarily desired to attain) full and unencumbered sovereignty.

Through a series of case studies the author, a Washington, D.C. attorney with practical experience in insular affairs, presents a very informative comparative study of U.S. and British Commonwealth practices concerning decolonization. It is, however, primarily an historical and topically organized survey of the relationships without the promised legal analysis. In this regard the title overclaims. The author does observe that "The United States tends to follow a legalistic, conservative, and fairly rigid course in its territorial relations." Perhaps this is all the analysis which is possible. That there should be even this common thread discernible in the U.S. colonial experience is surprising, considering the diverse interests involved and the lack of uniformity in the administrative mechanisms established for the government of the territories.

The chapters concerning the Trust Territories of the Pacific Islands (TTPI) and Guam should be of particular interest to the military attorney in view of the recent reorganization of American forces in the western Pacific which relies heavily on the continued presence of U.S. facilities in the TTPI. The requirement for this continued presence clearly influences, if it does not determine, the shape of the political and legal relationships.

Praeger Publishers rush their Special Studies publications into print to make them available on a timely basis. One error, presumably an editor's oversight, should be attributed to this rush. In the preface the author notes a void in the literature concerning the phenomenon of the "associated state" and posits that "This book is an attempt to fulfill [*sic*] this void." In fact the author has made an admirable effort to *fill* the void.

Major Fred K. Green

Rolling, Bert, V.A., and Sukovic, Olga, *The Law of War and Dubious Weapons*. Stockholm: Stockholm International Peace Research Institute, 1975. English, pp. 78, List of References. Paperback price Swi kr. 47.50. Distributed by Almquist & Wiksell International, P.O. Box 62, S-101, 20 Stockholm 1, Sweden.

This little book is very readable and a useful orientation to the continuing discourse on the development of humanitarian law applicable in armed conflict. Chapter One provides an analytical review of the traditional general principles of international law applicable in hostilities and suggests the development of some new principles encompassing the notions of survival of the race and the preservation of the environment. The authors give extended attention to the problems that the various strategies of nuclear deterrence raise for traditional concepts of humanitarian law, and necessarily so, as it is in this *milieu* that the rational thinker often suffers a total mental disconnect.

Chapter Two is devoted to review, lacking in depth, of certain weapons and weapons systems which the authors label "dubious." Among those considered are nuclear, chemical, biological, geophysical, incendiary, small-calibre high-velocity, fragmentation, flechette, and delayed action weapons (mines and booby traps) and all weapons which are indiscriminate in their effects. Accepting this catalog, we find very little in the way of modern armament which is not of questionable legality.

The authors are not, however, merely naive humanitarians. They attempt to present a balanced view of the various positions, both pragmatic and legal, which have been advanced concerning the legitimacy of modern weaponry. There should, however, be no doubt as to where the authors come from nor about the institutional bias of the Stockholm International Peace Research Institute (SIPRI), which they represent. SIPRI has been an outspoken leader in arms control and disarmament efforts since its founding in 1966 by the Swedish Parliament.

The book suffers from generalizations and assertions which are not supported by citation to facts or authority and makes some statements of the law which are simply inaccurate.<sup>1</sup> The authors' conclusions too often mix the *is* and the *ought*. In this regard the book is of dubious value to judge advocates who

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<sup>1</sup> *E.g.*, page 7, relative to tear gases: "The use of tear gases and other incapacitating chemical weapons, as such might not be contrary to the laws of humanity. But they have been forbidden in the category of 'all chemical weapons' for the reason that some use of gas might lead to general gas warfare." The United States does not view tear gas as prohibited by international law although its use in war has been restricted by Executive Order.

must concern themselves with what *is* rather than what ought to be. Consequently, this book must be used with great care as it is an expression of the hoped for, rather than an accurate statement of existing law. It tells us (inaccurately in some respects) where we are and where we ought to go, but, like most books of its *genre*, fails to show us a practical and enforceable way to get there.

Major Fred K. Green

Whitson, William W., ed. *Foreign Policy and U.S. National Security*. New York: Praeger Publishers, 1976. Pp. 373, bibliography and index. \$22.50 hardback; \$6.95 paperback.

In his preface to this collection of essays on foreign policy and national security, the editor notes how America's perception of its role in world affairs has changed since the end of the Second World War. At the war's termination, the United States emerged with the power and unassailable prestige of a clear victor. Shortly thereafter, however, this position was challenged by the assertion of Soviet power and the goal of American economic, military and foreign policy became the "containment" of communist influence.

Apparently some individuals at BDM Corporation, a suburban Washington "full-service consulting and professional services company" concluded in 1975 that "containment" no longer aptly defined the focus of American policies. While not suggesting easy answers as to what term either should or does define this nation's current role in foreign and security affairs, the authors "attempt to articulate the challenge" to the congressional and executive leaders who will hold office after the 1976 elections.

The authors, typically holders of advanced degrees from eastern universities who have worked or are working with the Government, consider a wide range of issues under the topic headings of "Major Global Issues," "Major Regional Issues," and "Policy Instruments: The Question of Means." The first of these sections considers the broad problems of global starvation, multinational corporations and technology transfer, and terrorist organizations. Although these sections provide interesting reading, the second section which deals with regional issues will be of primary interest to judge advocates who desire to be better acquainted with the overall policy overseas American military presence supports. Of particular interest is Army Colonel William Kennedy's analysis of American policy with respect to Korea, Japan and Okinawa, particularly in light of the current *rapprochement* with mainland China. His observation that the goals desired by Congress and the executive are not in accord reflects the difficulties inherent in the development and execution of a coherent foreign policy.

After the discussion of various area issues, the authors consider the practical methods of embarking on a foreign policy which reflects the requirements of today's world. In a concluding section the editor waxes Wilsonian with a description of a "new American vision" which encompasses "manifest environ-



mental concern, creative internationalism, and strength to share."

In summary, this book highlights specific, current issues in foreign policy in a palatable 15-20 page format. The issues are only highlighted, and there is no attempt in any of the vignettes to definitively analyze what course should be followed. Accepting the book at face value, military readers will obtain a deeper understanding of the goals their deployment overseas supports, and a more thorough understanding of the problems facing American strategic and foreign policy in the last quarter of the twentieth century.

Captain Brian R. Price



## BOOKS AND TAPES RECEIVED\*

### BOOKS

1. Johnson, David T. & Schneider, Barry R., eds. *Current Issues in U.S. Defense Policy*. New York: Praeger Publishers, 1976. Pp. 254. \$18.50.\*\*

2. Nesbitt, Murray B. *Labor Relations in the Federal Government Service*. Washington, D.C.: BNA, 1976. Pp. 545. \$17.50.

3. Whelan, John William, ed. *Yearbook of Procurement Articles* (Vol. 12). Washington, D.C.: Federal Publications Inc., 1975. Pp. 1,055. \$80.00.

### TAPES

1. President's Privileged Papers, Richard M. Nixon v. United States (1974). California: Seven Arts Press, Inc. 1 hr. \$10.00

2. Right to Fair Trial, Dr. Sam Sheppard v. Maxwell (1966). California: Seven Arts Press, Inc. 1 hr. \$10.00

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\* Mention of a work in this section does not preclude later review in the *Military Law Review*.

\*\* See page 190 *supra*.



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By Order of the Secretary of the Army:

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**DISTRIBUTION:**

*Active Army:* To be distributed in accordance with DA Form 12-4 requirements.

**ARNG & USAR:** None.









