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Evolution in the Federal Tort Claims Act

The United States Court of Military Appeals, 1975-1977:  
Judicializing the Military Justice System

O'Callahan Revisited: Severing  
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## THE CHANGING MEANINGS OF DISCRETION: EVOLUTION IN THE FEDERAL TORT CLAIMS ACT \*

Donald N. Zillman \*\*

After more than two decades of congressional activity and scholarly persuasion,<sup>1</sup> Congress passed the Federal Tort Claims Act<sup>2</sup> as a part of the Legislative Reorganization Act of 1946. The Act mixed high-minded concern over the failure to compensate victims of negligent or wrongful government acts and a more practical desire to rid the Congress of the several thousand private relief bills that proved a by-product of federal sovereign immunity.<sup>3</sup>

In broad terms the FTCA authorized suit against the United States

for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>4</sup>

In brief, the Act authorized federal courts to apply respondeat superior liability against the United States.

What the Government gave, however, it could also take away. The lengthy "exceptions" in the FTCA retained immu-

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\* The opinions and conclusions expressed 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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<sup>1</sup> See L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 59 (1974); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 *Geo. L.J.* 1 (1946). Professor Edwin Borcharad was the leading academic advocate of the FTCA.

<sup>2</sup> Act of Aug. 6, 1946, ch. 753, 60 Stat. 842 (codified in 28 U.S.C. §§ 2671-2680 (1970)). The jurisdictional grant of power to the federal courts appears at 28 U.S.C. § 1346(b) (1970). The Act will hereinafter be cited as the FTCA.

<sup>3</sup> L. JAYSON, *supra* note 1, at § 58.

<sup>4</sup> 28 U.S.C. § 2672 (1970).

nity over a variety of government activities.<sup>5</sup> The most notable exception was section 2680(a) which bars recovery on:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The initial portion of the section which concerns acts "in execution of statute or regulation" has rarely been the subject of litigation.<sup>6</sup> The discretionary function exception, however, has proven to be the liveliest provision of the Federal Tort Claims Act.

This article will assess the contemporary role of the discretionary function exception. The initial section will examine judicial interpretation of the exception through 1970 by focusing on *Dalehite v. United States*,<sup>7</sup> still the Supreme Court's leading case on the exception. The next section will examine trends in the judicial interpretation of the concept of discretionary authority in three related areas—mandamus, recovery of tort damages by individuals from states and municipalities, and recovery of damages from individual government employees. As Lester Jayson, the Act's most dedicated chronicler,<sup>8</sup> has observed, these areas were well established in 1946 and provided a basis for interpreting the new "discretionary function" language of the Tort Claims Act.<sup>9</sup> However, changes in each area since 1946 suggest the appropriateness of a changed interpretation of the FTCA discretionary function provision. The following section will consider four recent

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<sup>5</sup> The Government has retained immunity under the FTCA for torts occurring in a foreign country, 28 U.S.C. § 2680(k); certain intentional torts, *id.* § 2680(h); combatant activity claims, *id.* § 2680(j); claims arising from tax collection efforts, *id.* § 2680(c); and maritime claims, *id.* § 2680(d).

<sup>6</sup> L. JAYSON, *supra* note 1, at § 247. The requirement that the employee be "exercising due care" does not free negligent acts from review.

<sup>7</sup> 346 U.S. 15 (1953).

<sup>8</sup> Jayson is the former Chief of the Torts Section of the Justice Department. His two volume, *Handling Federal Tort Claims* is the best study of the Act and its judicial interpretation.

<sup>9</sup> Jayson, *Application of the Discretionary Function Exception*, 24 FED. BAR J. 153, 155-57 (1964).



court of appeals decisions which indicate a judicial willingness to rethink the exception's balance between protecting critical government activity and redressing injury to citizens.

## I. THE DISCRETIONARY FUNCTION EXCEPTION

Commentators have traced capably the limited legislative history of section 2680(a).<sup>10</sup> The most frequently cited piece of legislative history stated a desire to prevent suits for damages resulting from activities such as nonnegligent flood control or irrigation projects or from authorized regulatory activity of the Federal Trade Commission, Securities and Exchange Commission or the Treasury Department even if negligence was alleged. However, "the common law torts" of such agency employees could be compensable under the Act.<sup>11</sup> While Congress may have felt it was providing some guidance, it was evident that the federal courts would write the history of the discretionary function exception.<sup>12</sup>

When reviewing the activities of 1946 three decades later, one must recognize that the FTCA moved the federal government to a position of leadership in governmental tort compensation. Most states and lesser organs of government shielded their activities with the defense of absolute immunity or with unworkable distinctions between governmental and proprietary functions.<sup>13</sup> By removing these obstacles to recovery, Congress made tort recovery from the United States far more satisfactory than from the lesser governmental entities.

The initial discretionary function cases provided limited analysis of the provision.<sup>14</sup> Significant analysis and controversy

<sup>10</sup> L. JAYSON, *supra* note 1, at § 246; Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception*, 6 AM. U.L. REV. 22, 23 (1957); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 37 GEO. L.J. 81, 83-85 (1968).

<sup>11</sup> H.R. REP. NO. 2245, 77th Cong., 2d Sess. 10 (1974), cited in L. JAYSON, *supra* note 1, at § 246.

<sup>12</sup> The terms "discretionary function exception" and "section 2680(a)" will be used throughout this article to refer to the discretionary function clause of section 2680(a).

<sup>13</sup> Summaries of state and municipal tort liability are found in Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); James, *Tort Liability of Governmental Units and their Officers*, 22 U. CHI. L. REV. 610 (1955); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1368 (1954).

<sup>14</sup> Pre-*Dalehite* cases advanced several tests to determine the existence of a protected function. One class of cases followed the legislative history in denying re-

about section 2680(a) began with *Dalehite v. United States*.<sup>15</sup> *Dalehite* was the test case against the United States to determine the existence of government liability for the 1947 explosion that destroyed half of Texas City, Texas. The facts of the case have been well detailed elsewhere.<sup>16</sup> In brief, almost 8,500 plaintiffs brought claims totalling \$200 million after much of Texas City was destroyed when two ships loaded with fertilizer-grade ammonium nitrate (FGAN) exploded. The FGAN was produced as part of the European reconstruction program after the Second World War. The major allegations of government negligence involved improper manufacture, bagging, and shipment of the FGAN by the Army and improper storage, supervision and firefighting by the Coast Guard. The district court found for the plaintiffs. The court of appeals reversed.<sup>17</sup>

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covery in flood control or irrigation cases, e.g., *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950); *Lauterbach v. United States*, 95 F. Supp. 479 (W.D. Wash. 1951); *North v. United States*, 94 F. Supp. 824 (D. Utah 1950); *Thomas v. United States*, 81 F. Supp. 881 (W.D. Mo. 1949); and cases involving government regulatory powers, *Schmidt v. United States*, 198 F.2d 32 (7th Cir. 1952) (Securities and Exchange Commission); *Matveychuk v. United States*, 195 F.2d 613 (2d Cir. 1952) (Office of Price Administration). A second test looked to the statutory or regulatory grant of authority to the alleged tortfeasor. Compliance with a mandatory grant of authority or the grant of discretionary authority decided the case for the Government. *Schmidt v. United States*, 198 F.2d 32 (7th Cir. 1952); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950); *Penny v. United States*, 171 F.2d 365 (5th Cir. 1948); *Kline v. United States*, 113 F. Supp. 298 (S.D. Tex. 1953); *Kendrick v. United States*, 82 F. Supp. 430 (N.D. Ala. 1949). Non-compliance with a mandatory statute or regulation would remove a "discretionary function" defense. *Somerset Seafood v. United States*, 193 F.2d 631 (4th Cir. 1951); *Worley v. United States*, 119 F. Supp. 719 (D. Ore. 1952). A third test introduced the "planning stage-operational stage" dichotomy. Typically, a court would find the government decision to engage in an activity to have been discretionary. However, once the decision was reached, the Government could be liable for negligently implementing the decision. *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Somerset Seafood v. United States*, 193 F.2d 631, 635 (4th Cir. 1951); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Hernandez v. United States*, 112 F. Supp. 369 (D. Haw. 1953); *Hambleton v. United States*, 87 F. Supp. 994 (W.D. Wash. 1949).

<sup>15</sup> 346 U.S. 15 (1953).

<sup>16</sup> *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952); L. JAYSON, *supra* note 1, at § 249.02.

<sup>17</sup> *In re Texas City Disaster*, 197 F.2d 771 (5th Cir. 1952). The circuit court found those who "planned, launched and carried on the enterprise" were clearly protected by section 2680(a). Without admitting government negligence, the court found that the importance of the European Aid Program might have justified a

The Supreme Court affirmed the denial of government liability<sup>18</sup> without reviewing the district court's findings of negligence. It found the FTCA was passed to recompense for "the ordinary common-law torts" but not claims "however negligently caused, that affected the governmental functions."<sup>19</sup> Having found the government actions to have been discretionary functions for purposes of section 2680(a), the Court held it "unnecessary" to decide "precisely where discretion ends." Assuredly it

includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.<sup>20</sup>

Turning to the facts of the case the Court found protected discretion was clearly involved in "the cabinet-level decision to institute the fertilizer export program" or in the decision to require no further "experimentation with the FGAN."<sup>21</sup> Specific acts of negligence in manufacturing, bagging, labeling and shipping were protected because they were carried out by subordinates in accordance with official directives of superiors.<sup>22</sup> In the most memorable phrase of the case, all decisions involved were "responsibly made at a planning rather than operational level."<sup>23</sup> Finally any Coast Guard negligence was protected because of the generally discretionary nature of

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"calculated risk" protected by the exception. Any negligence in the manufacturing, packaging or distribution stage would be protected by compliance with government regulations. Negligence of Coast Guard employees in their custodial and firefighting duties was held to be either discretionary activity or activity with no analogy to the tortious acts of a private individual. In short, the court found that any act of government negligence would be immunized under some provision of the FTCA.

<sup>18</sup> *Dalehite v. United States*, 346 U.S. 15 (1953). Plaintiffs' brief to the Supreme Court limited its challenge to "the mistakes of judgment and the careless oversight of government employees . . . who failed to concern themselves as a reasonable man should for the safety of others." *Id.* at 35.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 35-36.

<sup>21</sup> *Id.* at 37.

<sup>22</sup> *Id.* at 39-40.

<sup>23</sup> *Id.* at 42.

public health and safety regulations and the nonexistence of analogous private liability.<sup>24</sup>

Justices Jackson, Black and Frankfurter dissented. They found ample negligence "by those in charge of detail" and no evidence that decision makers had in fact taken a calculated risk.<sup>25</sup> The dissenters rejected the "planning versus operational" distinction of the majority. Instead they distinguished between "policy decisions of a regulatory or governmental nature" and acts dealing "only with the housekeeping side of federal activities."<sup>26</sup> The former should be properly protected by the discretionary function exception. The latter, including many of the acts in *Dalehite*, should not be immunized.

Commentators have generally sided with the minority. Professor James opposed the protection of "non-political" judgments implied by the decision and suggested repeal of 2680(a).<sup>27</sup> Professor Peck deplored the lack of clear connection between the negligent acts and the government policy allegedly being protected.<sup>28</sup> Mr. Jayson found the planning-operational distinction unhelpful and favored limitation of the exception to situations where "the discretion involved should have a close affinity to the business of government *qua* government."<sup>29</sup> Professor Mathews also disliked the uncertainty of the exception and favored a limitation to discretion "authorized by the Constitution or organic statute of the agency involved."<sup>30</sup>

Despite the merits of the critical comment, *Dalehite* is not indefensible from the 1953 perspective. In retrospect three

<sup>24</sup> *Id.* at 42-44.

<sup>25</sup> *Id.* at 58.

<sup>26</sup> *Id.* at 60.

<sup>27</sup> James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Staggish Retreat of an Ancient Immunity*, 10 C. FLA. L. REV. 184 (1957).

<sup>28</sup> Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 217 (1956). Professor Peck proposed that the Government prove the acts or omissions in question "were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so, for the advancement of a governmental objective and pursuant to discretionary authority given him by the Constitution, a statute, or regulation. . . . *Id.* at 225-26. Professor Peck's views are further defined in Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391, 410-12, 415-18 (1973).

<sup>29</sup> Jayson, *supra* note 9, at 160.

<sup>30</sup> Mathews, *supra* note 10, at 37.

factors stand out. First, government negligence in the case is debatable. Although the district court found ample negligence on the part of the Government<sup>31</sup> the Supreme Court majority, while purporting to accept the findings below and decide the case on the discretionary function exception, seemed persuaded that government employees and officials had exercised the care of reasonable men. The need for further combustibility tests on the FGAN is an example. The Court observed that the manufacturers relied on the satisfactory experience of the Tennessee Valley Authority with FGAN: "Obviously, having manufactured and shipped the commodity FGAN for more than three years without even minor accidents, the need for further experimentation was a matter of discretion."<sup>32</sup> The Court might have added "and weighty evidence that government employees had not been negligent." In the following paragraph of the *Dalehite* opinion, the Court stressed the compliance with the plan drafted by the Field Director of Ammunition Plants relying on the TVA and private enterprise experience. Again, negligence and discretion language are both present. In conclusion, the Court summarized:

The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here. Even now, no one has suggested the the ignition of FGAN was anything but a complex result of the interacting factors of mass, heat, pressure and composition.<sup>33</sup>

The majority found "serious room for speculation" that negligence by the French Council, longshoremen and staff—not government employees—started the initial fire.<sup>34</sup> In brief, one leaves the majority opinion convinced that five members of the Court might have decided for the Government on negligence grounds if no discretionary function exception had been present.

The second factor justifying the *Dalehite* decision was the sheer magnitude of the disaster. Justice Jackson's scornful dissent remarked that the majority had revised "The King can do no wrong" to "The King can do only little wrongs."<sup>35</sup> While

<sup>31</sup> Portions of the district court opinion are appended at 346 U.S. 15, 45-47 (1953).

<sup>32</sup> *Id.* at 38.

<sup>33</sup> *Id.* at 42.

<sup>34</sup> *Id.* at 41.

<sup>35</sup> *Id.* at 60.

pungent, this observation is unfair. The Court should properly have asked what congressional intent was concerning United States liability for mass disaster. Certainly, provisions of the FTCA evidence legislative intent to confine liability for mass disaster. Combat activity claims, one source of massive liability, are barred.<sup>36</sup> The suggested exemption for government regulatory acts and civil works projects immunized two other potentially high liability activities.<sup>37</sup> Procedurally, the Act's limitation on attorneys' fees,<sup>38</sup> bar of punitive damages,<sup>39</sup> and prohibition of jury trials<sup>40</sup> evidenced caution for the taxpayer dollar.

The third factor supporting the *Dalehite* holding was the FGAN program's connection with the European recovery program. The majority noted that several of the challenged acts would have delayed the delivery or increased the cost of fertilizer had they been done as plaintiffs suggested. Illustrative of this position is the discussion of coating the fertilizer against water absorption. "At stake was no mere matter of taste: ammonium nitrate when wet, cakes and is difficult to spread on fields as a fertilizer. So the considerations that dictated the decisions were crucial ones, involving the feasibility of the program itself. . . ."<sup>41</sup> From the government's standpoint the timing was perfect. The time between 1947 (the date of the disaster) and 1953 (the date of the decision) was short enough for the crises of post-war reconstruction to be memorable. Yet in the elapsed interval, the success of the Marshall Plan and other elements of post-war reconstruction had become recorded history.

The government response to *Dalehite* was legislative relief which recognized the "compassionate" responsibility of the Government.<sup>42</sup> A special claims commission was created.<sup>43</sup> However, the authorization provided significant limits on ex-

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<sup>36</sup> 28 U.S.C. § 2680(j) (1970).

<sup>37</sup> See note 11 *supra*.

<sup>38</sup> 28 U.S.C. § 2678 (1970).

<sup>39</sup> 28 U.S.C. § 2674 (1970). The same provision bars pre-judgment interest awards against the Government.

<sup>40</sup> 28 U.S.C. § 2402 (1970).

<sup>41</sup> *Dalehite v. United States*, 346 U.S. 15, 40 (1953).

<sup>42</sup> Act of Aug. 12, 1955, ch. 864, 69 Stat. 707.

<sup>43</sup> *Id.*

cessive government expense.<sup>44</sup> The legislative reaction to the Supreme Court opinion in *Dalehite* can be read in two ways. From one perspective the special legislative relief was an indignant rebuff to the Supreme Court's refusal to provide compensation. However, there was no amendment or elimination of the discretionary function language in order to prevent further miscarriages of justice. On the other hand, the Congress might have found the Court's denial of responsibility to be proper on the facts of the case—an implicit judicial decision to let Congress handle a mass disaster arguably outside of the Act's purview. Here again no remedial legislative action was taken beyond the Texas City relief bill. One obvious approach could have been a recovery limit on a single claim or on all claims arising out of a common act of government misfeasance. Indeed, in the nearly quarter century since *Dalehite* Congress has not chosen to refine section 2680(a).

The Supreme Court has been no less reluctant to reconsider the discretionary function exception. No decision since 1953 has considered the meaning of section 2680(a) to the extent that *Dalehite* did. However, references to the section and interpretation of other provisions of the FTCA have generally been thought to temper the harshness of *Dalehite* for tort claimants.

In *Indian Towing v. United States*,<sup>45</sup> plaintiff's tugboat ran aground in the Mississippi allegedly due to the failure of a Coast Guard light. Using *Dalehite* language, the Court accepted the government's position that a discretionary function was not involved because the negligence was at the operational level.<sup>46</sup> The Court then rejected the government's contention that because no private person would operate a lighthouse, there could be no liability analogous to that of a "private individual under like circumstances."

Two years later in *Rayonier, Inc. v. United States*,<sup>47</sup> the Court again rejected a "uniquely governmental" test in the course of finding government liability. A major forest fire was started,

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<sup>44</sup> Claims had to have been filed in court prior to April 25, 1950 in order to be considered. A \$25,000 limit on a single claim was set. Claims were reduced by the amount of insurance (except life insurance) or other payments. Insurance subrogation claims were forbidden and a maximum attorneys' fee of 10% was set. *Id.*

<sup>45</sup> 350 U.S. 61 (1955).

<sup>46</sup> *Id.* at 64.

<sup>47</sup> 352 U.S. 315 (1957).

allegedly by sparks from a government train. Plaintiffs claimed government employee negligence in allowing the fire to start and in failing to control and stop it. The district court found government negligence but dismissed the action on the basis of language from *Dalehite* that the FTCA "did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."<sup>48</sup> The Supreme Court rejected the government's argument that United States liability should be equivalent to the liability of a State of Washington municipal corporation and rejected the venerable municipal tort distinction between "proprietary" and "governmental" actions. In language with import for the continuing validity of the *Dalehite* decision, the Court continued:

It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. The Government warns that if it is held responsible for the negligence of Forest Service firemen a heavy burden may be imposed on the public treasury . . . . But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act.<sup>49</sup>

A third, albeit brief, examination of the discretionary function exception came in *Hatahley v. United States*.<sup>50</sup> There plaintiffs sued for the destruction of their horses by federal agents. The Court allowed recovery under a trespass theory, summarily rejecting the government's discretionary function claim, evidently in view of the violation of both federal regulation and state statute by the government employees. In the Court's view, both provisions had removed any discretion from the employees' activity.

Passing mention was also given the discretionary function exception in *United States v. Muniz*.<sup>51</sup> The major effect of the decision was to grant federal prisoners a right of action under

<sup>48</sup> *Dalehite v. United States*, 346 U.S. 15, 43 (1953).

<sup>49</sup> *Rayonier, Inc. v. United States*, 352 U.S. 313, 319-20 (1957).

<sup>50</sup> 351 U.S. 173 (1956).

<sup>51</sup> 374 U.S. 150 (1963).



the Tort Claims Act. Answering suggestions that its ruling might hamper significant government policies, the Court reflected on the familiar tort elements involved in most prisoner cases and observed that the discretionary function exception would prevent encroachment on legitimate areas of corrections officer control.

The Court's most recent opportunity to refine the discretionary function exception came in *Laird v. Nelms*.<sup>52</sup> At issue was Air Force liability for sonic boom damage. The court of appeals had rejected the discretionary function defense, noting that Air Force regulations required "maximum protection for civilian communities."<sup>53</sup> The circuit court distinguished *Dalehite* as involving no likelihood of harm; in *Nelms*, "the inability to prevent a deliberately released destructive force from causing harm . . . provides an appropriate limit to the discretionary function exception."<sup>54</sup> The court also found that plaintiff could hold the Government liable absolutely for its conduct of an ultrahazardous activity.

The Supreme Court reversed on the absolute liability ground.<sup>55</sup> Having so decided the case, the Court stated that it was "unnecessary to treat" the discretionary function holding. Earlier in the opinion, the Court had reflected on the legislative relief eventually granted the Texas City claimants. The Court remarked, "Both by reason of *stare decisis* and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in *Dalehite* as controlling here."<sup>56</sup> While directed to the strict liability issue, the language of the 6-2 decision may be suggestive on the discretionary function issue as well.

Predicting the direction the Supreme Court might take in a further examination of the discretionary function exception is difficult. None of the present Court members was a party to the *Dalehite* decision. The Warren Court decisions generally expanded the coverage of the Tort Claims Act in line with its remedial objectives. *Indian Towing* and *Rayonier* rejected Jus-

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<sup>52</sup> 406 U.S. 797 (1972).

<sup>53</sup> *Nelms v. Laird*, 442 F.2d 1169 (4th Cir. 1971).

<sup>54</sup> *Id.* at 1167.

<sup>55</sup> 406 U.S. 797 (1972). The Court held that the statutory language requiring a "negligent or wrongful act" forbade absolute liability. The Court's holding has been criticized. Peck, *supra* note 28, at 403.

<sup>56</sup> *Laird v. Nelms*, 406 U.S. 797, 802 (1972).

tice Jackson's fear that the Act would be limited to routine and inexpensive torts. *Hatahley* and *Muniz* rejected automatic use of the exception where disruption of law enforcement duties might be involved. By contrast, three Burger Court decisions, *Nelms*, *United States v. Logue*,<sup>57</sup> and *United States v. Orleans*<sup>58</sup> have supported government arguments for a strict construction of the Act. Overall, however, the decisions have been too few and too factually unique to determine Supreme Court response to any particular discretionary function case.

Greater predictive certainty is provided by a substantial body of lower court discretionary function cases decided before and after *Dalehite*. While courts have regularly despaired of the imprecision of section 2680(a),<sup>59</sup> they have decided cases. In some areas they have supplied reasonably predictable standards. In others, they have at least provided guidelines for claimants. Activities similar to familiar private sector torts have consistently been held not immunized by the discretionary function exception. Governmental negligence in motor vehicle driving,<sup>60</sup> building or property maintenance<sup>61</sup> and medical practice<sup>62</sup> is not protected by the discretionary function exception. Another line of cases has sustained government liability for negligence in the piloting and ground control of aircraft.<sup>63</sup>

<sup>57</sup> 412 U.S. 521 (1973) (denying liability for negligence of county jailers acting pursuant to contract with federal government).

<sup>58</sup> 425 U.S. 807 (1976) (denying liability for negligence of participant in OEO program).

<sup>59</sup> E.g., *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975); *Hendry v. United States*, 418 F.2d 774 (2d Cir. 1969); *Dupree v. United States*, 247 F.2d 819 (3d Cir. 1957); *Brown v. United States*, 374 F. Supp. 723 (E.D. Ark. 1974).

<sup>60</sup> *Friday v. United States*, 239 F.2d 701 (9th Cir. 1957); *Crouse v. United States*, 137 F. Supp. 47 (D. Del. 1955); *Sullivan v. United States*, 129 F. Supp. 713 (N.D. Ill. 1955).

<sup>61</sup> *United States v. Washington*, 351 F.2d 913 (9th Cir. 1965) (unmarked power lines); *American Exch. Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (post office steps); *Stanley v. United States*, 347 F. Supp. 1088 (D.S.D. 1964) (mailbox); *McNamara v. United States*, 199 F. Supp. 870 (D.D.C. 1961) (Capitol Building floor); *McCormick v. United States*, 159 F. Supp. 920 (D. Minn. 1958) (high tension wire near building).

<sup>62</sup> *Supchak v. United States*, 365 F.2d 844 (3d Cir. 1966); *Santa v. United States*, 252 F. Supp. 615 (D.P.R. 1966); *Hunter v. United States*, 236 F. Supp. 411 (M.D. Tenn. 1964); *Rufino v. United States*, 126 F. Supp. 132 (S.D.N.Y. 1954).

<sup>63</sup> *Yates v. United States*, 497 F.2d 878 (10th Cir. 1974); *Ingham v. Eastern Airlines*, 373 F.2d 227 (2d Cir. 1967); *United Air Lines v. Wiener*, 353 F.2d 379 (9th

Several areas have been consistently protected by the exception. Most notable are government flood control, irrigation and public land projects,<sup>64</sup> and regulatory and licensing activity.<sup>65</sup> Uniquely military activities,<sup>66</sup> law enforcement activities<sup>67</sup> and matters of foreign relations<sup>68</sup> have also received section 2680(a) protection. Government contracting has been similarly protected.<sup>69</sup> Two often litigated areas in which the cases diverge involve sonic boom damage<sup>70</sup> and suits for fail-

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Cir. 1964); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956); *Eastern Air Lines v. Union Trust*, 221 F.2d 62 (D.C. Cir. 1955). Violation of a Federal Aviation Administration regulation has often been a factor in rejecting a section 2680(a) defense. *E.g.*, *Ingham v. Eastern Airlines*, 373 F.2d 227 (2d Cir. 1967); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964). Where the discretionary function exception has been applied, the claimant has sought to impose a duty beyond that stated in FAA regulations. *E.g.*, *Miller v. United States*, 278 F. Supp. 1147 (E.D. Ky. 1974); *Kullberg v. United States*, 271 F. Supp. 788 (W.D. Pa. 1964).

<sup>64</sup> *Spillway Marina v. United States*, 445 F.2d 876 (10th Cir. 1971) (water draw-down in Corps of Engineers dam project); *Boston Edison v. Great Lakes Dredge*, 425 F.2d 891 (1st Cir. 1970) (Corps dredging project); *Konecny v. United States*, 388 F.2d 59 (8th Cir. 1967) (flooding from Corps dam); *United States v. Gregory*, 300 F.2d 11 (10th Cir. 1962) (drainage from Bureau of Reclamation project); *United States v. Ure*, 225 F.2d 709 (9th Cir. 1955) (canal flooding). *Contra* *Seaboard Coast Line v. United States*, 473 F.2d 714 (5th Cir. 1973) (drainage ditch); *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962) (drainage ditch).

<sup>65</sup> *Peltzman v. Smith*, 404 F.2d 335 (2d Cir. 1968) (Coast Guard radio license); *United States v. Morell*, 331 F.2d 498 (10th Cir. 1964) (Taylor Grazing Act permit); *Davis v. FDIC*, 369 F. Supp. 277 (D. Colo. 1974) (bank regulation); *Boruski v. SEC*, 321 F. Supp. 1273 (S.D.N.Y. 1971); *Mullins v. First Nat'l Bank*, 275 F. Supp. 712 (W.D. Va. 1967) (Small Business Administration handling of loan security); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967) (Maritime Commission regulation).

<sup>66</sup> *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964) (riot control); *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973) (riot control); *Schubert v. United States*, 245 F. Supp. 170 (S.D. Tex. 1965) (jet engine testing); *Bartholomae Corp. v. United States*, 185 F. Supp. 651 (S.D. Cal. 1955) (atomic bomb testing); *Barroll v. United States*, 135 F. Supp. 441 (D. Md. 1955) (artillery firing).

<sup>67</sup> *Accardi v. United States*, 435 F.2d 1239 (3d Cir. 1970); *Brooks v. United States*, 152 F. Supp. 335 (S.D.N.Y. 1957). *But see* *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970).

<sup>68</sup> *4 Star Aviation v. United States*, 409 F.2d 292 (3th Cir. 1969).

<sup>69</sup> *Irzyk v. United States*, 412 F.2d 749 (10th Cir. 1969); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969); *Blaber v. United States*, 332 F.2d 629 (2d Cir. 1964); *Hamman v. United States*, 267 F. Supp. 411 (D. Mont. 1967).

<sup>70</sup> Discretionary function exception applied: *Abraham v. United States*, 465 F.2d 881 (5th Cir. 1972); *Maynard v. United States*, 430 F.2d 1264 (9th Cir. 1970); *McMurray v. United States*, 286 F. Supp. 701 (W.D. Mo. 1968). Discretionary

ure to care for government psychiatric patients.<sup>71</sup>

Since *Dalehite*, the use of "planning" versus "operational" language has been frequent in the lower court cases.<sup>72</sup> This "levels of discretion" argument states that the decision to undertake an activity is discretionary. However, the carrying out of details once the decision is reached is considered ministerial and unprotected. Rarely has this distinction been analytically helpful in guiding a court in a close case. Often the rationale allows a court to soothe the executive branch while awarding the plaintiff his damages. The courts recognize the difficult governmental judgments that precede a decision to set a flight record, build a building, try a new theory of inmate rehabilitation, or reactivate a military installation. These are clearly protected judgments. Quite probably, too, the court would find the Government owed no duty to the claimant or breached no standard of care in its broad decision. Responsible government planners do not plan tort damage to the public. Therefore, the court would conclude the harmful action was merely the result of careless mechanical implementation of the planners' decision, and as such should be compensated.

The presence of a statute or regulation guiding government action has been another factor strongly influencing the

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function exception rejected: *Ward v. United States*, 471 F.2d 867 (3d Cir. 1973) (Government would be liable for operational negligence); *Neher v. United States*, 265 F. Supp. 210 (D. Minn. 1967) (government waiver of defense); *Wildwood Mink Ranch v. United States*, 218 F. Supp. 67 (D. Minn. 1963). See also *Pigott v. United States*, 451 F.2d 374 (5th Cir. 1971) (firing of Saturn rocket).

<sup>71</sup> Discretionary function exception applied: *Blitz v. Boog*, 328 F.2d 596 (2d Cir. 1964); *Smart v. United States*, 207 F.2d 841 (10th Cir. 1953); *Dugan v. United States*, 147 F. Supp. 674 (D.D.C. 1956). Discretionary function exception rejected: *Underwood v. United States*, 336 F.2d 92 (5th Cir. 1966); *White v. United States*, 317 F.2d 13 (4th Cir. 1963); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Merchants Bank v. United States*, 272 F. Supp. 409 (D.N.D. 1967); *Cohen v. United States*, 252 F. Supp. 679 (N.D. Ga. 1966); *Baker v. United States*, 226 F. Supp. 129 (S.D. Iowa 1964).

<sup>72</sup> E.g., *Seaboard Coast Line v. United States*, 473 F.2d 714 (5th Cir. 1973); *Gibson v. United States*, 457 F.2d 1391 (3d Cir. 1972); *Ingham v. Eastern Airlines*, 373 F.2d 227 (2d Cir. 1967); *White v. United States*, 317 F.2d 13 (4th Cir. 1963); *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962); *American Exch. Bank v. United States*, 257 F.2d 938 (7th Cir. 1958); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956); *Eastern Airlines v. Union Trust*, 221 F.2d 62 (D.C. Cir. 1955).

lower courts. As in pre-*Dalehite* cases,<sup>73</sup> the Government has been most successful in asserting section 2680(a) when its attorneys can point to a statute granting discretionary power to a government agency.<sup>74</sup> By the words of the exception even an abuse of discretion will not make the government liable. Compliance with a mandatory statute or regulation has also been a factor in finding the activity discretionary.<sup>75</sup> The initial provision of section 2680(a) makes clear that courts are not to use the FTCA to review the wisdom of government regulations.<sup>76</sup> By contrast, plaintiffs have been most successful when they can show that government employees have violated a mandatory directive.<sup>77</sup> *Hatahley* reflects Supreme Court approval of this interpretation.<sup>78</sup>

A final factor is the presence of other government defenses. Even though the plaintiff may persuade the court that the government's act was nondiscretionary, recovery can be denied for a number of reasons. Plaintiffs have seen their cases fail for lack of government duty,<sup>79</sup> lack of breach (negligence),<sup>80</sup> lack of causation,<sup>81</sup> contributory negligence,<sup>82</sup> vio-

<sup>73</sup> See note 14 *supra*.

<sup>74</sup> *Davis v. FDIC*, 369 F. Supp. 277 (D. Colo. 1974); *Newberg v. Federal Sav. & Loan*, 317 F. Supp. 1104 (N.D. Ill. 1970).

<sup>75</sup> *Abraham v. United States*, 465 F.2d 881 (5th Cir. 1972); *Weinstein v. United States*, 244 F.2d 68 (3d Cir. 1957).

<sup>76</sup> See *Dupree v. United States*, 247 F.2d 819 (3d Cir. 1957).

<sup>77</sup> *Ingham v. Eastern Air Lines*, 373 F.2d 227 (2d Cir. 1967); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964); *Duncan v. United States*, 353 F. Supp. 1167 (D.D.C. 1973); *Tilley v. Delta Air Lines*, 249 F. Supp. 696 (D.S.C. 1966); *Fritz v. United States*, 216 F. Supp. 156 (D.N.D. 1963) (state statute violated). See also *Motors Ins. v. Aviation Specialties*, 304 F. Supp. 973 (W.D. Mich. 1969) (prior practice violated).

<sup>78</sup> *Hatahley v. United States*, 351 U.S. 173 (1956).

<sup>79</sup> *United States v. DeCamp*, 478 F.2d 1188 (9th Cir. 1973); *Blaber v. United States*, 352 F.2d 629 (2d Cir. 1964); *Mahler v. United States*, 306 F.2d 713 (3d Cir. 1962); *Weinstein v. United States*, 244 F.2d 68 (3d Cir. 1957); *Davis v. FDIC*, 369 F. Supp. 277 (D. Colo. 1974); *United States v. Delta Indus.*, 275 F. Supp. 934 (N.D. Ohio 1966); *Westchester Fire Ins. v. Farrell's Dock*, 152 F. Supp. 97 (D. Mass. 1957).

<sup>80</sup> *Hendry v. United States*, 418 F.2d 774 (2d Cir. 1969); *Gowdy v. United States*, 413 F.2d 525 (6th Cir. 1969); *United States v. Prager*, 251 F.2d 266 (5th Cir. 1958); *United States v. Ure*, 225 F.2d 709 (9th Cir. 1955); *Ashley v. United States*, 215 F. Supp. 39 (D. Neb. 1963).

<sup>81</sup> *Chanon v. United States*, 350 F. Supp. 1039 (S.D. Tex. 1972); *Wiltkamp v. United States*, 348 F. Supp. 1075 (E.D. Mich. 1972); *Kuhne v. United States*, 267 F. Supp. 649 (E.D. Tenn. 1967); *Gibbs v. United States*, 251 F. Supp. 391 (E.D. Tenn. 1965); *Bulloch v. United States*, 145 F. Supp. 824 (D. Utah 1955).

<sup>82</sup> *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969); *Miller v. United States*,

lation of the statute of limitations<sup>83</sup> and failure to avoid other section 2680 exceptions.<sup>84</sup> The presence of other defenses may color a court's approach to a discretionary function issue. Certainly it suggests that the exception is not as critical as government briefs would suggest.

## II. THE CHANGING MEANINGS OF DISCRETION

In view of the limited legislative history of the "discretionary function" exception and prior judicial interpretation of discretionary actions in other fields, it is a fair assumption that Congress intended the courts to draw on precedents from those fields in giving content to the Tort Claims Act. Jayson<sup>85</sup> and others<sup>86</sup> have recognized mandamus actions against public officials, tort suits against states and municipalities, and tort suits against individual government officers as three antecedents to the "discretionary function" language of 2680(a). To be sure, different policy objectives might govern a mandamus action, a damage action against a government entity, and a damage action against an individual. Nonetheless, these actions can provide substantial guidance, if not certainty, in the interpretation of the Tort Claims Act.

If the courts are to look to the meaning of "discretionary" in other contexts, it is necessary to recognize the changes that have occurred since 1946 in such actions. In general, the 30 years since enactment of the FTCA have witnessed a cutting away of immune official discretion.

378 F. Supp. 1147 (E.D. Ky. 1974); *Somlo v. United States*, 274 F. Supp. 827 (N.D. Ill. 1967); *Kullberg v. United States*, 271 F. Supp. 788 (W.D. Pa. 1964); *Hunter v. United States*, 236 F. Supp. 411 (M.D. Tenn. 1964).

<sup>83</sup> *Mims v. United States*, 349 F. Supp. 839 (W.D. Va. 1972); *Newberg v. Federal Sav. & Loan*, 317 F. Supp. 1104 (N.D. Ill. 1970); *Nichols v. United States*, 236 F. Supp. 241 (S.D. Cal. 1964).

<sup>84</sup> *Scanwell Labs v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975) (misrepresentation); *State Marine Lines v. Schulz*, 498 F.2d 1146 (4th Cir. 1974) (detention of goods by Customs Agent); *Baca v. United States*, 467 F.2d 1061 (10th Cir. 1972) (contract interference); *Accardi v. United States*, 435 F.2d 1239 (3d Cir. 1970) (malicious prosecution); *United States v. Foneca*, 332 F.2d 872 (5th Cir. 1964) (assault, battery and false imprisonment); *United States v. Gregory Park*, 378 F. Supp. 317 (D.N.J. 1974) (misrepresentation); *Duncan v. United States*, 355 F. Supp. 1167 (D.D.C. 1973) (contract interference); *Smith v. United States*, 330 F. Supp. 867 (E.D. Mich. 1971) (battery).

<sup>85</sup> See note 9 *supra*.

<sup>86</sup> *Gottlieb*, *supra* note 1, at 44-45; *Reynolds*, *supra* note 10, at 84-85.

## A. MANDAMUS ACTIONS

Traditionally, the mandamus action allowed a court to compel action by government officials in certain limited circumstances. The drafters of section 2680(a) would have been familiar with the Supreme Court's language in *Wilbur v. United States ex rel. Kadrie*:

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way. . . .<sup>87</sup>

A ministerial duty was one "so plainly prescribed as to be free from doubt and equivalent to a positive command." Where the duty depended on a statute "the construction of which is not free from doubt" mandamus was not considered appropriate.<sup>88</sup> Later cases followed the Supreme Court's interpretation by defining the prerequisites for mandamus as (1) a clear right in the plaintiff to the relief sought, (2) a clear duty on the part of the defendant to provide the relief, and (3) the absence of another adequate remedy.<sup>89</sup>

The federal courts possess jurisdiction to hear suits for relief "in the nature of mandamus" against federal officers and agencies.<sup>90</sup> Prior to the passage of that statute, the 1962 Mandamus and Venue Act,<sup>91</sup> the Justice Department attempted without success to require a showing of "a ministerial duty owed to the plaintiff under a law of the United States."<sup>92</sup> Nevertheless, it was probably assumed that the jurisdictional language of section 1361 would be interpreted according to traditional mandamus rules.

Commentators have been critical of the ministerial-discretionary distinction.<sup>93</sup> They correctly find the distinction

<sup>87</sup> 281 U.S. 206, 218 (1930).

<sup>88</sup> *Id.* at 218-19.

<sup>89</sup> See *Winningham v. HUD*, 512 F.2d 617 (3d Cir. 1975); *Carter v. Seamans*, 411 F.2d 767, 773 (3d Cir. 1969).

<sup>90</sup> 28 U.S.C. § 1361 (1970).

<sup>91</sup> Act of Oct. 3, 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744. See generally *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and Nonstatutory Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); *Comment*, 51 WASH. L. REV. 97 (1975).

<sup>92</sup> See *Byse & Fiocca, supra* note 91, at 313-16.

<sup>93</sup> *Id.* at 333 ("The fact that the officer has discretion is not conclusive, the de-

unhelpful. Moreover, they have regarded it as providing an undesirable limit on judicial review of the actions of federal officials.<sup>94</sup> As a possible result, federal courts in recent years have given an expansive meaning to both section 1361 and requests for mandamus relief on the merits.

*Burnett v. Tolson*<sup>95</sup> is illustrative of judicial willingness to review seemingly "discretionary" judgments under section 1361. At issue there was the legality of civilian anti-war leafleting at Fort Bragg, North Carolina. Evidently relying on broad language in an earlier Supreme Court decision,<sup>96</sup> the Fort Bragg Post Commander denied the individuals permission to distribute their material on post. The leafleteers then sued the post commander to enjoin his prohibition. They invoked the jurisdiction of the court under section 1361. As the action was proceeding, the Supreme Court in an unargued per curiam opinion, *United States v. Flower*,<sup>97</sup> reversed a criminal conviction involving similar leafleting activities on first amendment grounds. A majority of the Fourth Circuit found that *Flower* had resolved the constitutional issue and removed any discretion from the Post Commander to deny access to the public areas of Fort Bragg and found mandamus jurisdiction. Judge Widener in dissent found neither a clear right on the part of the leafleteers nor a clear duty on the part of the Post Commander. He noted that the Commander acted prior to the *Flower* decision and that significant factual differences between Fort Bragg and Fort Sam Houston, where *Flower* was arrested, left substantial room for command discretion.

terminative issue is the scope of the discretion."); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965). ("[T]he classification is illusory, it is apt to label the result rather than control it.")

<sup>94</sup> Until late 1976 the action "in the nature of mandamus," sometimes provided the only jurisdictional provision under which a citizen aggrieved by a federal officer could sue. Such a case might arise where (1) no specific statutory provision authorized judicial review; (2) the complaining party could not meet the amount in controversy requirement of 28 U.S.C. § 1331; and (3) the judicial circuit in question had not recognized the Administrative Procedure Act as an independent grant of jurisdiction. The passage of Public Law 94-575 on October 21, 1976 corrects this difficulty. On February 23, 1977 the United States Supreme Court in *Califano v. Sanders*, 45 U.S.L.W. 4209, held that the Administrative Procedure Act does not provide a separate grant of subject matter jurisdiction.

<sup>95</sup> 474 F.2d 877 (4th Cir. 1973).

<sup>96</sup> *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

<sup>97</sup> 407 U.S. 197 (1972).



*Mattern v. Weinberger*<sup>98</sup> is even more explicit in rejecting traditional mandamus presumptions. Plaintiffs raised procedural due process arguments against Social Security practices for recouping benefit overpayments. Plaintiffs claimed the Supreme Court decision in *Goldberg v. Kelly*<sup>99</sup> clearly resolved the issue in their favor. The Third Circuit noted that *Goldberg* was at least arguably controlling and observed that the instant case presented "complex constitutional issues which have not yet been definitively settled."<sup>100</sup> Nonetheless the court found that a resolution of the constitutional issue favorable to plaintiff would create "a binding, nondiscretionary duty to provide a pre-recoupment oral hearing."<sup>101</sup> Mandamus jurisdiction was sustained and plaintiffs' contentions on the merits were upheld.<sup>102</sup> In *Holmes v. United States Board of Parole*<sup>103</sup> a federal prisoner challenged the failure to provide procedural due process before classifying him as a "special offender." The Seventh Circuit rejected the government's claim that mandamus was inappropriate to litigate "complex constitutional issues." The circuit court both sustained jurisdiction under section 1361 and upheld most of the district court's mandatory and declaratory relief. The court observed, "in cases charging a violation of constitutional rights, mandamus should be construed liberally."<sup>104</sup>

In *Haneke v. Secretary of HEW*<sup>105</sup> the Court of Appeals for the District of Columbia Circuit sustained a federal civil service plaintiff's challenge to a violation of an "equal pay for equal work" statute. In discussing the mandamus requirements the court rejected the theory that "the need for a court to construe the statutory provision which forms the basis of the action is a bar to the remedy of mandamus."<sup>106</sup> The court found the Civil

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<sup>98</sup> 519 F.2d 150 (3d Cir. 1975).

<sup>99</sup> 397 U.S. 254 (1970).

<sup>100</sup> *Mattern v. Weinberger*, 519 F.2d 150, 156 (3d Cir. 1975).

<sup>101</sup> *Id.* at 156.

<sup>102</sup> In a similar welfare benefit denial context, Judge Friendly candidly noted: "Granted that it may be doubtful whether Congress intended § 1361 to cover situations of this sort, . . . the language is sufficiently broad to do so." *Frost v. Weinberger*, 515 F.2d 57, 62 (2d Cir. 1975). See also *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975); *Michigan Head Start Director v. Butz*, 397 F. Supp. 1124 (W.D. Mich. 1975).

<sup>103</sup> 541 F.2d 1243 (7th Cir. 1976).

<sup>104</sup> *Id.* at 1249.

<sup>105</sup> 535 F.2d 1291 (D.C. Cir. 1976).

<sup>106</sup> *Id.* at 1297 n.16.

Service Commission's regulation did not comply with its statutory duty and ordered relief granted to the plaintiff.

A second recognition of broader scope for mandamus has come in the abuse of discretion area. A leading case is *United States ex rel. Schoenbrun v. Commanding Officer*.<sup>107</sup> There a military reservist sought cancellation of orders to active duty on the grounds of hardship. The relief was denied by the Army and the reservist petitioned the district court for a writ of habeas corpus. The Second Circuit held the petition could properly be treated as one requesting mandamus. Despite its finding that the applicable military regulations clearly left discretion in the decision maker and its admission that the legislative history of section 1361 showed the statute was not intended to direct discretion, the Second Circuit recognized that the official "conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted."<sup>108</sup> Relief was denied on the merits when no abuse of discretion was found. Later cases have adopted the abuse of discretion standard although they have typically denied relief.<sup>109</sup>

The willingness of courts to expand mandamus has substantially undercut the utility of the old "ministerial-discretionary" test. Further interpretation of mandamus is uncertain in light of the passage of Public Law 94-574 in October 1976. The act removes sovereign immunity as a bar to judicial review of federal administrative actions and eliminates the \$10,000 amount in controversy requirement<sup>110</sup> for certain suits against the government. The statutory purpose is to encourage and rationalize judicial review for the wrongs committed by federal agencies.<sup>111</sup> It may be expected that the act will stimulate judicial review of matters previously regarded as unreviewable.

Considerations in a mandamus case and an action under the Federal Tort Claims Act may differ. However, the greater intrusion on the workings of government will likely be in the

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<sup>107</sup> 403 F.2d 371 (2d Cir. 1968).

<sup>108</sup> *Id.* at 374.

<sup>109</sup> *Naporano Metal & Iron v. Secretary*, 529 F.2d 537 (3d Cir. 1976); *Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11, 27 n.31 (3d Cir. 1975); *Grant v. Hogan*, 505 F.2d 1220 (2d Cir. 1974); L. JAFFE, *supra* note 93, at 182.

<sup>110</sup> 18 U.S.C. § 1331 (1970).

<sup>111</sup> *See* [1976] U.S. CODE CONG. & ADMIN. NEWS 6121-49.

mandamus area. There the court decision compels a change in performance of duties. The post commander must admit leafleteers. The Social Security Administration must restructure its benefit recoupment program. The parole board must add additional procedural protections. By contrast, under the FTCA there is a one time, after the fact payment that does not touch the pocket of the responsible official and may scarcely be noted by the government agency.

### B. STATE AND MUNICIPAL TORTS

A second line of FTCA "discretionary function" precedent was drawn from tort actions against state governments and municipal entities. Although Jayson has noted that prior to 1946 actions for the design of public works and for improper performance of regulatory activity by state and local officials were treated as immune matters of discretion,<sup>112</sup> the distinction between discretionary and ministerial acts was of limited significance in deciding issues of government tort liability. States were generally immune from liability on sovereign immunity grounds.<sup>113</sup> This venerable doctrine provided an absolute defense which obviated the need to inquire into the ministerial or discretionary nature of the activity.

Greater possibility of recovery existed against lesser organs of government. However, municipal tort law turned on the distinction between "governmental" and "proprietary" activities.<sup>114</sup> Governmental activities encompassed a large variety of activities unique to government, done for the general welfare or not involving economic benefit. Tortious activity arising out of a governmental function could not give rise to liability. By contrast, proprietary activities were those analogous to private enterprise, particularly ones generating revenue. A proprietary activity could give rise to government liability.<sup>115</sup>

<sup>112</sup> Jayson, *supra* note 9, at 1957.

<sup>113</sup> 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.07 (1958). Writing before the frontal rejection of state and local immunity, Professor Davis found that recovery was often secured through private bills, limited purpose statutes, and eminent domain claims. *Id.* at §§ 25.01 to .06.

<sup>114</sup> *Id.* at § 25.07; F. HARPER & F. JAMES, THE LAW OF TORTS 1619-25 (1952) [hereinafter cited as HARPER & JAMES]; W. PROSSER, TORTS 979-80 (4th ed. 1971); James, *Tort Liability of Governmental Units and their Officers*, 22 U. CHI. L. REV. 610 (1955).

<sup>115</sup> The governmental-proprietary distinction was subject to exceptions. Trespass and nuisance actions, claims for taking of property, and claims for street and

Matters of discretion played a limited role in the governmental-proprietary area. Once an activity was deemed governmental, the fact that allegedly tortious activity may have stemmed from ministerial duties was irrelevant. The government unit was as immune for the negligent driving of the police officer, the careless maintenance of the school janitor, or the medical malpractice of the health service physician as it was for harm caused by policy decisions of the mayor or the city manager. Discretionary considerations were, however, considered in assessing liability for torts by proprietary activities. The municipality would be immune for a discretionary decision concerning a proprietary action.<sup>116</sup>

In summary, the state and municipal tort considerations of discretionary activity prior to 1946 did add to the interpretation of the new section 2680(a). However, with the enactment of the FTCA, the Congress rejected existing theories of state and municipal tort liability.<sup>117</sup>

In the decades since 1946 courts and legislatures have recognized the validity of commentators' criticisms of the governmental-proprietary distinction<sup>118</sup> and the unfairness of broad government immunities. Currently, the large majority of the states have by statute or judicial decision recognized a general right to sue government entities in tort.<sup>119</sup> One result has been to raise "discretionary function" issues in state cases in the same fashion as in FTCA cases. To say that police, fire, and educational personnel can subject the government to liability need not suggest that their every wrongful or negligent act authorizes a remedy.

Several state tort claims acts have borrowed language almost

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sidewalk defects could be raised against municipalities despite their "governmental" appearance. W. PROSSER, *supra* note 114, at 979.

<sup>116</sup> Professors Harper and James suggest that an injured plaintiff could not challenge a municipal power company's decision to place its power lines above ground rather than underground. HARPER & JAMES, *supra* note 114, at 1625.

<sup>117</sup> The Supreme Court in *Indian Towing v. United States*, 350 U.S. 61, 63-69 (1955), emphatically rejected the contention that Congress had intended to incorporate the governmental-proprietary distinction in the FTCA.

<sup>118</sup> 3 K. DAVIS, *supra* note 113, at § 25.07; HARPER & JAMES, *supra* note 114, at 1621; W. PROSSER, *supra* note 114, at 979.

<sup>119</sup> A helpful survey is in *Avala v. Board of Education*, 305 A.2d 877, 889 (Pa. 1973). See also 3 K. DAVIS, *supra* note 113, at § 25.00 (1970 Supp.); Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462 (1972); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

identical to that of section 2680(a).<sup>120</sup> Others have provided variants<sup>121</sup> or added specific exceptions for liability arising from discretionary activity. Provisions of state law recognize immunity for licensing activity,<sup>122</sup> property inspection,<sup>123</sup> prison escapes,<sup>124</sup> failure to provide police protection,<sup>125</sup> and failure to provide supervision of recreational areas.<sup>126</sup>

Those states which have not enacted a tort claims act face similar decisions in deciding when government conduct should subject the state to liability for damages. Not surprisingly, opinions in many state and local tort cases have relied on the older federal discretionary function precedents. Planning/operational distinctions,<sup>127</sup> the "subsequent negligence" test,<sup>128</sup> and violations of statute or regulation<sup>129</sup> have helped decide state cases.

A few courts, however, have been willing to take a more searching look at discretionary claims. Several attitudes have been shown. Initially there is a willingness to recognize the imprecision of the term "discretionary."<sup>130</sup> Next, courts have

<sup>120</sup> ALASKA STAT. § 09.50.259(1) (1975); HAW. REV. STAT. § 662.15(1) (1968); OR. REV. STAT. § 30.265(2)(d) (1974). The California Tort Claims Act has given rise to the most searching studies of discretion in state and local torts. See Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463 (1963); Note, 19 HASTINGS L.J. 561 (1968); Note, 39 S. CALIF. L. REV. 470 (1966).

<sup>121</sup> CAL. GOV'T CODE § 820.2 (1966); ILL. ANN. STAT. 85-2-201 (Smith-Hurd 1966); IND. CODE ANN. 34-4-16.5-3(6) (Burns 1974); N.J. STAT. ANN. § 59:2-3 (1976).

<sup>122</sup> CAL. GOV'T CODE § 821.2 (1966); ILL. ANN. STAT. 85-2-104 (Smith-Hurd 1966); IND. CODE ANN. 34-4-16.5-3(10) (Burns 1974); N.J. STAT. ANN. 59:2-5 (1976).

<sup>123</sup> CAL. GOV'T CODE § 821.4; ILL. ANN. STAT. 85-2-105 (Smith-Hurd 1966); IND. CODE ANN. 34-4-16.5-3(11) (Burns 1974); N.J. STAT. ANN. 59:2-6 (1976).

<sup>124</sup> CAL. GOV'T CODE § 845.8(b) (1970).

<sup>125</sup> CAL. GOV'T CODE § 845 (1966).

<sup>126</sup> N.J. STAT. ANN. 59:2-7 (1976).

<sup>127</sup> *Rogers v. State*, 459 P.2d 378 (Haw. 1969); *Amelchenko v. Freehold Borough*, 201 A.2d 726 (N.J. 1964).

<sup>128</sup> See note 72 and accompanying text *supra*; *State v. Stanley*, 506 P.2d 1284 (Alas. 1973); *Sava v. Fuller*, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).

<sup>129</sup> E.g. *Ranos v. Madera County*, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971); *Elton v. Orange County*, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); *Mason v. Bitton*, 534 P.2d 1360 (Wash. 1975); *Campbell v. Bellevue*, 530 P.2d 234 (Wash. 1975).

<sup>130</sup> *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Sava v. Fuller*, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (3d Dist. 1967). Justice Pierce's conclusion that discretion is always present rates as a minor classic: "He who says

demanding a showing that the discretion involved matters of basic governmental policy.<sup>131</sup> This test appears to reject treating every planning function as a matter of protected discretion.

A further judicial approach has been to require that the discretionary decisions asserted after the fact as defenses to a lawsuit were actually made before the action by the government officials.<sup>132</sup> In the words of the California Supreme Court:

Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.<sup>133</sup>

A final factor has been a suggestion that discretion might be abused so badly as to give rise to liability. Justice Peters for the California Supreme Court has reflected on the "wholesome" deterrent effect of liability for excesses of official power.<sup>134</sup> In the context of finding highway design a protected discretion-

discretion is not involved in driving a nail has either never driven one or has had a very sore thumb, a split board, or a bent nail as the price of attempting to do so." *Id.* at 291, 57 Cal. Rptr. at 318.

<sup>131</sup> *Evangelical United Brethren Church v. State*, 407 P.2d 440 (Wash., 1965); *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968); *Spencer v. General Hosp.*, 425 F.2d 479 (D.C. Cir. 1969) (Wright, J. concurring). *EUB v. State* set forth a four-part test for preliminary assessment of discretion: "(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?" 407 P.2d 440, 443 (Wash., 1965).

<sup>132</sup> *Wuehrich v. Delia*, 134 N.J. Supr. 400, 341 A.2d 365 (1975); *Johnson v. State*, 73 Cal. Rptr. 240 (1968). Professor Peck was an early proponent of this theory. Peck, *supra* note 28, at 217.

<sup>133</sup> *Johnson v. State*, 69 Cal. 2d 782, 794 n.8, 447 P.2d 352, 361 n.8, 73 Cal. Rptr. 240, 249, n.8 (1968).

<sup>134</sup> *Ramos v. Madera County*, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971). The case involved alleged abuse of field laborers by county welfare workers. The court rejected a discretionary function defense on the grounds that state statutes made mandatory the county officials' duties. The court responded to the

ary activity, Justice Denecke of the Oregon Supreme Court observed that a "road designed so that it ended at the edge of a cliff" could give rise to designer liability.<sup>135</sup>

Judicial and scholarly comment<sup>136</sup> concerning the liability of states and municipalities has stressed a more searching view of discretionary immunity which will generally broaden opportunities for recovery. State court cases may be expected to influence interpretation of the discretionary function exception to the FTCA. Certainly the liability of states and municipalities is more closely analogous to federal government liability than mandamus actions or actions against individual government officers. In both areas failures of the governmental process are corrected by after the fact payments out of governmental funds.

### C. PUBLIC OFFICIAL LIABILITY

The third antecedent of the federal discretionary function exception is the treatment of discretion in damage suits against public officials. In 1946 a rough tripartite system of responsibility obtained. Judges, legislators and certain high government officials were absolutely immune from tort liability for actions in the broad scope of their duties.<sup>137</sup> Their conduct was protected regardless of bad faith or corrupt motive. Other government officers and employees were immune for discretionary acts if done honestly and in good faith.<sup>138</sup> Ministerial acts of lower officials and employees were unprotected.<sup>139</sup>

As with the governmental-proprietary distinction the categories were never precise, nor could they properly be.<sup>140</sup>

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argument that an "abuse of discretion" would be protected by remarking that the phrase cannot protect "alleged harassment and excoriation of a 15 year old, mentally retarded child"

<sup>135</sup> *Smith v. Cooper*, 256 Ore. 485, 511, 475 P.2d 78, 90 (1970).

<sup>136</sup> Note, 56 IOWA L. REV. 980 (1971); Note, 52 MINN. L. REV. 1047 (1968); Note, 7 WILLAMETTE L.J. 355 (1971).

<sup>137</sup> *Spaulding v. Vilas*, 161 U.S. 483 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); W. PROSSER, *supra* note 114, at 987-88.

<sup>138</sup> 3 K. DAVIS, *supra* note 113, at 514; L. JAFFE, *supra* note 93, at 240-45 (1965); W. PROSSER, *supra* note 114, at 988.

<sup>139</sup> W. PROSSER, *supra* note 114, at 988-90.

<sup>140</sup> Prosser refers to the discretionary-ministerial distinction as "finespun and more or less unworkable." *Id.* at 988. See L. JAFFE, *supra* note 93, at 240. A further confusion comes in the treatment of acts in excess of jurisdiction. 3 K. DAVIS, *supra* note 113, at § 26.05; W. PROSSER, *supra* note 114, at 991.

Professors Harper and James noted the fundamental dilemma of any suit against the individual officer:

Whenever suit is brought against an individual officer . . . the court must consider the practical effects of liability and make a value judgment between the social and individual benefit from compensation to the victim, together with the wholesome deterrence of official excess, on one hand, and, on the other hand, the evils that would flow from inhibiting courageous and independent official acts and deterring responsible citizens from entering public life.<sup>141</sup>

The courts have recognized these problems in the last three decades as they have subjected defendants' claims of nonactionable employee discretion to greater scrutiny. Although the changes in the law have been great, trends have not been consistent or coordinated. Nevertheless several can be identified.

First, large portions of individual officer liability have been federalized under the Civil Rights Act.<sup>142</sup> Since the Supreme Court decided *Monroe v. Pape*<sup>143</sup> in 1961, traditional intentional tort actions against state and local officials have increasingly been denominated actions to redress deprivations of constitutional rights committed under color of state law. Suits brought under 42 U.S.C. § 1983 offer plaintiffs damages and injunctive relief in addition to access to federal courts. The emergence of this federal remedy has been the major development in public officer accountability over the last decade. *Bivens v. Six Narcotics Agents*<sup>144</sup> has created a similar potential for actions against federal officers.<sup>145</sup>

<sup>141</sup> HARPER & JAMES, *supra* note 114, at 1640-41.

<sup>142</sup> 42 U.S.C. § 1983 (1970) provides the basis for most constitutional suits against persons acting under color of state law. In 1975, 10,392 suits were filed in federal court for civil rights deprivations. In 1961, 296 civil rights suits were begun. [1975] ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 194. Such classic negligence actions against government officers as mishandling vehicles and not maintaining property remain state court matters decided by common law tort rules. However, many intentional torts (assault, battery, false imprisonment) against government officers can also be phrased as constitutional deprivations (denial of liberty without due process, cruel and unusual punishment, improper search and seizure) allowing a choice of state or federal action.

<sup>143</sup> 365 U.S. 167 (1961).

<sup>144</sup> 403 U.S. 388 (1971).

<sup>145</sup> Since *Bivens* Congress has allowed the United States to be sued for certain intentional torts of law enforcement personnel. 28 U.S.C. § 2680(h) (Supp. V 1975).



Second, the development of the right to sue governmental entities in tort has diminished the need to sue individual officers. Where a direct action against the government exists, claimants usually are not concerned with suing the individual employee-tortfeasor.<sup>146</sup> In some cases, suit against the individual officer or employee may be forbidden.<sup>147</sup> A second approach is to indemnify the government official out of public funds or through private insurance.<sup>148</sup> Thus, even though the official is a party to the litigation, he need not pay an eventual judgment. These trends appear most well developed in the negligent tort areas. Greater uncertainty exists when intentional torts and deprivations of constitutional rights are involved.<sup>149</sup> Nonetheless, the trend in recent decades has been to recognize and correct the deleterious effects of recovery against individual government officials.<sup>150</sup>

Post-1946 judicial decisions dealing with the exercise of discretion by public officials have followed several tracks. Several decisions have granted the official absolute immunity from damages in section 1983 actions. This immunity exists even though malice can be shown. *Pierson v. Ray*<sup>151</sup> incorporated an absolute judicial immunity into federal civil rights cases. *Ten-*

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<sup>146</sup> The Federal Tort Claims Act forbids a subsequent action against an individual government employee after a judgment has been secured against the United States. 28 U.S.C. § 2676 (1970). Several state laws provide similar protection. *E.g.* CAL. GOV'T CODE § 825 (West 1972). The Supreme Court has denied the United States a right of indemnity against a negligent employee. *Gilman v. United States*, 347 U.S. 507 (1954).

<sup>147</sup> See 28 U.S.C. § 2679 (1970) (immunizing government drivers) and Act of Oct. 8, 1976, Pub. L. No. 94-464, 90 Stat. 1985 (immunizing military medical personnel).

<sup>148</sup> 3 K. DAVIS, *supra* note 113, at 514; L. JAFFE, *supra* note 93, at 245. Valuable discussion of the subject of insurance for governmental torts is found in Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588; Smith, *Insurance and the Texas Tort Claims Act*, 49 TEX. L. REV. 445 (1971); Note, 26 U. FLA. L. REV. 89 (1973).

<sup>149</sup> For example, state statutes may refuse to compensate employees for intentional torts, for violations indicating malice, or for punitive damages. Such findings are quite possible in a civil rights context where the parties may have bitter differences over whose conduct conforms to the law. CAL. GOV'T CODE § 825 (West 1966).

<sup>150</sup> Prosser found no evidence that the failure to recognize absolute immunity deterred "good men from seeking office." W. PROSSER, *supra* note 114, at 989. The tremendous increase in Civil Rights litigation occurred after Prosser wrote.

<sup>151</sup> 386 U.S. 547 (1967).

*ney v. Brandhove*<sup>152</sup> immunized legislators and *Imbler v. Pachtman*<sup>153</sup> gave the same immunity to prosecutors performing their prosecutorial duties.

Other officials have been given a qualified immunity that protects them from liability for damages upon a showing of good faith and reasonableness. For some officials, the qualified immunity appears to provide greater protection than previous immunity for even nonnegligent errors.<sup>154</sup> For other officials, court decisions cut short assertions of absolute immunity based on their particular status and the undoubtedly discretionary nature of their decisions.<sup>155</sup>

Three cases give the recent flavor of official discretion decisions. The first is the Second Circuit's consideration of *Bivens v. Six Narcotics Agents*.<sup>156</sup> The earlier landmark Supreme Court opinion had authorized a constitutionally based action for damages for the federal agents' violations of fourth amendment rights.<sup>157</sup> On remand, the Second Circuit rejected the agents' claim of absolute immunity.<sup>158</sup> The court stated that normal police duties—arrests, searches, seizures—could not be deemed discretionary. While the court spoke of the nondiscretionary duty of enforcing the law, it recognized that the policeman's job is filled with the need to exercise judgment and considered the issue to be "whether or not federal officers performing police duties warrant the protection of the immunity defense."<sup>159</sup> Having held they did not, the Second Circuit then provided the federal agents with the "good faith and reasonable belief" defense adopted for 1983 police tort suits in *Pierson v. Ray*.<sup>160</sup>

Two years later the Supreme Court decided *Scheuer v. Rhodes*.<sup>161</sup> The suit sought recovery under section 1983 for the

<sup>152</sup> 341 U.S. 367 (1951).

<sup>153</sup> 424 U.S. 409 (1976).

<sup>154</sup> *E.g.* *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) (en banc holding that jailer can raise a good faith defense in a false imprisonment case).

<sup>155</sup> Defendants in both *Scheuer v. Rhodes*, 416 U.S. 252 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975), requested an absolute grant of immunity. See text accompanying notes 161-168 *infra*.

<sup>156</sup> 456 F.2d 1339 (2d Cir. 1972).

<sup>157</sup> *Bivens v. Six Narcotics Agents*, 403 U.S. 388 (1971).

<sup>158</sup> *Bivens v. Six Narcotics Agents*, 456 F.2d 1339, 1343-47 (2d Cir. 1972).

<sup>159</sup> *Id.* at 1346.

<sup>160</sup> 386 U.S. 547 (1967).

<sup>161</sup> 416 U.S. 252 (1974).

victims and survivors of the 1970 National Guard shootings at Kent State University. Joined as defendants were the enlisted guardsmen, their commanders, the Adjutant General, and the Governor of the state. The President of Kent State University was an additional defendant. The district court dismissed plaintiffs' complaint on eleventh amendment grounds. The court of appeals affirmed, adding the alternative ground of absolute immunity.<sup>162</sup> The Supreme Court found dismissal improper. In discussing absolute executive immunity, the Court found it appropriate to "take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983."<sup>163</sup> The Court noted the Governor, the university president and their chief subordinates had "options . . . far more subtle than those made by officials with less responsibility."<sup>164</sup> The Court found that a qualified immunity would be sufficient to protect these officials. Defendants' discretion would be analyzed according to "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief. . . ."<sup>165</sup>

A year later in *Wood v. Strickland*<sup>166</sup> the Court held that school board officials were not entitled to absolute immunity from damages in suits brought under section 1983. The Court recognized that the board members' action in question (student expulsion for misconduct) "necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy."<sup>167</sup> Nonetheless, as in *Scheuer*, the Court found an absolute immunity unnecessarily protective of official actions and detrimental to student constitutional rights. Accordingly, only a qualified immunity based on good faith and a reasonable belief in the legality of his action would protect the school board member. Most significantly the Court held that a board member would be required to know "the basic unquestioned constitutional rights of his charges."<sup>168</sup>

<sup>162</sup> *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972).

<sup>163</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

<sup>164</sup> *Id.* at 247.

<sup>165</sup> *Id.* at 247-48.

<sup>166</sup> 420 U.S. 308 (1975).

<sup>167</sup> *Id.* at 319.

<sup>168</sup> *Id.* at 322. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court held that the *Wood* standard would apply to mental hospital officials.

Lower court decisions have applied the *Scheuer-Wood* limitation on immunity to federal officials. In *Apton v. Wilson*<sup>169</sup> the Attorney General of the United States, his chief assistant and the District of Columbia police chief were all held to be protected by only qualified immunity.<sup>170</sup>

The restructuring of official liability for damages is probably not yet complete. But already it appears that fundamental differences exist between old ministerial-discretionary guidelines and the newer qualified immunity decisions. Under the latter, much of the business of decision makers has been opened to the possibility of tort damages. Actions that would have been immune three decades ago now subject government officials to at least the inconvenience of a defense on the merits. Quite probably, some of the change reflects changed attitudes toward government. A decade of minority struggles for civil rights, the Vietnam War and Watergate stimulated concern for the accountability of public officials. The recognition of public wrongdoing has focused concern on the need for citizen remedies and on the value of personal actions against government officers.

### III. TOWARD A NEWER INTERPRETATION OF THE "DISCRETIONARY FUNCTION" EXCEPTION

#### A. FOUR JUDICIAL STUDIES

Four recent decisions in the courts of appeals suggest a judicial willingness to reevaluate limits of the FTCA discretionary function exception. In each case a close reading of *Dalehite* and its progeny indicated the government's motion to dismiss under section 2680(a) would have been granted. In each case the defense was rejected. In two instances the court proceeded to uphold a substantial verdict for plaintiffs. The four decisions plus earlier courts of appeals' opinions<sup>171</sup> strongly indicate that the federal courts are less likely to accept uncritically a discretionary function defense than in previous

<sup>169</sup> 506 F.2d 83 (D.C. Cir. 1974).

<sup>170</sup> See also *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

<sup>171</sup> *Hendry v. United States*, 418 F.2d 774 (2d Cir. 1969); *Coastwire Packet v. United States*, 398 F.2d 77 (1st Cir. 1968); *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967).

decades. While *Dalehite* itself is paid necessary homage,<sup>172</sup> particular attention is given later Supreme Court opinions<sup>173</sup> modifying that discretionary function landmark.<sup>174</sup>

The first case chronologically is *Moyer v. Martin Marietta Corp.*<sup>175</sup> Plaintiff's decedent, a civilian test pilot, died when the jet ejection seat in his B-57A triggered on the ground. The manufacturer of the plane, the manufacturer of the seat and the United States were joined as defendants. Government negligence was alleged in furnishing an improperly designed airplane and in issuing the Technical Order directing modifications on the ejection seat. The district court granted the government's motion to dismiss on the discretionary function exception. It found the selection of the ejection seat and ejection mechanism to "reflect choices made on a planning level, which, in the most immediate sense, affect the political interests of the nation."<sup>176</sup> The Fifth Circuit began by considering the cumulative effects of *Indian Towing*, *Hatahley* and *Rayonier* on *Dalehite*.<sup>177</sup> It then quoted at length and reaffirmed language from its earlier decision in *Smith v. United States*<sup>178</sup> where it stated that the Supreme Court had rejected the "absolute interpretation" of *Dalehite* that "any federal official vested with decision-making power" would be protected by section 2680(a). The *Smith* opinion had further rejected the planning-operational distinction as "specious," instead finding that "the question at hand . . . is the nature and quality of discretion involved in the acts complained of."<sup>179</sup> The Fifth Circuit then reviewed the contentions of the parties. Plaintiff conceded discretion existed in the choice of aircraft and possibly in the general design of the seat. However, the alleged de-

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<sup>172</sup> *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975); *Downs v. United States*, 522 F.2d 990, 996-97 (6th Cir. 1975); *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974).

<sup>173</sup> See text accompanying notes 45-51 *supra*.

<sup>174</sup> *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975) (*Dalehite* "qualified by subsequent decisions of the Supreme Court"); *Downs v. United States*, 522 F.2d 990, 996 (6th Cir. 1975) ("Later opinions have suggested a more restrictive view of the exception"); *Moyer v. Martin Marietta*, 481 F.2d 585, 598 (5th Cir. 1973) ("without the gloss of later cases *Dalehite* would preclude recovery").

<sup>175</sup> 481 F.2d 585 (5th Cir. 1973).

<sup>176</sup> See *id.* at 591.

<sup>177</sup> *Id.* at 594-96.

<sup>178</sup> 375 F.2d 243 (5th Cir. 1967).

<sup>179</sup> *Id.* at 246.

iciencies in the design of the seat could not be deemed discretionary. The Government argued that any decision involving safety evaluation entailed "weighing the relative safety of the component, the degree of risk involved in its utilization, and the cost of securing a change in the component to make it 'more safe.'" <sup>180</sup> Such decisions involved the possibilities of greater cost, delay in producing the plane and harm to other functions of the plane. The government brief did not indicate that any of the factors cited applied in the instant case.

In a brief paragraph the court held for the plaintiff. It found the *Moyer* facts "very close to the line" between protected and nonprotected activities. While overall selection of the aircraft would be protected, acceptance "of a system of the aircraft, such as the pilot's ejection seat and its mechanism" would not.<sup>181</sup> The case was reversed and remanded for trial on the negligence issue.

*Griffin v. United States* <sup>182</sup> provided the Third Circuit an opportunity to reconsider the discretionary function exception. Plaintiff was rendered quadraplegic due to the ingestion of Sabin live-virus polio vaccine. An action against the vaccine manufacturer was settled out of court for a substantial amount. The plaintiff asserted that the United States was liable because the Division of Biologic Standards, an agency of the Health, Education and Welfare Department, had improperly tested and released the vaccine. Much of the discretionary function dispute turned on a Surgeon General's regulation which established the pre-release testing procedures for the vaccine.

The Third Circuit considered two separate facets of the discretionary function issue. The more familiar ground involved a determination that a mandatory regulation had been violated by DBS employees who relied on a scientific standard, "biological variation," which was not authorized by the regulation.<sup>183</sup> As a result, the discretionary function exemption could not relieve the Government of liability.

Of greater significance was the circuit court's preliminary discussion of the discretionary function issue. The government brief claimed that the comparative judgment of vaccine

<sup>180</sup> *Moyer v. Martin Marietta*, 481 F.2d 585, 597 (5th Cir. 1973).

<sup>181</sup> *Id.* at 598.

<sup>182</sup> 500 F.2d 1059 (3d Cir. 1974).

<sup>183</sup> 42 C.F.R. § 73.114(b)(1)(iii).

strains constituted an "exercise of judgment" in a regulatory activity and thus fit within the discretionary function exception. The court quickly rejected any *per se* test, citing *Dalehite* for the proposition that the discretion must involve "some consideration as to the feasibility or practicability of Government programs." Critical to a decision was "whether the nature of the judgment called for policy considerations."<sup>184</sup> Policy was clearly involved in the Surgeon General's approval of a live virus immunization program. Likewise, the establishment of "the standard against which all manufactured lots were to be measured" was a discretionary act. The implementation of the regulation, however, was a different matter. Significantly, the court agreed with the government's argument that a "judgmental determination" was required in determining whether a particular vaccine strain met the criteria for safety. However, this professional judgment "requires only performance of scientific evaluation and not the formulation of policy" or "the determination of the feasibility or practicability of a government program."<sup>185</sup> Finding the discretionary function exception unavailable for errors in the testing phase, the Third Circuit affirmed the district court's finding that the government's negligent release of the vaccine in question was the proximate cause of the plaintiff's injury.

The Sixth Circuit considered the discretion of law enforcement officers in *Downs v. United States*.<sup>186</sup> Plaintiffs were the survivors of an airplane pilot who was killed by a hijacker during a confrontation between the hijacker and FBI agents. The United States contended that the actions of the FBI agent on duty had been nonnegligent and in any case were protected by section 2680(a). The district court rejected the application of the exception but found the chief agent's conduct was not unreasonable under the emergency circumstances of the case.<sup>187</sup> The circuit court affirmed as to section 2680(a), but reversed the finding of no negligence. The Government contended the agent's actions were immunized by section 2680(a) because the agent had the "discretion to make an on-the-scene judgment. . . ." which involved "room for policy judgment." The court rejected the judgment *per se*

<sup>184</sup> *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1975).

<sup>185</sup> *Id.* at 1066.

<sup>186</sup> 522 F.2d 990 (6th Cir. 1975).

<sup>187</sup> *Downs v. United States*, 382 F. Supp. 713 (M.D. Tenn. 1974).

test, stressing the need to protect the functions of policy formulation. It continued by indicating doubts as to the value of the planning-operational standard and adopted the position that the discretionary function exception encompasses "those activities which entail the formulation of governmental policy, whatever the rank of those so engaged."<sup>188</sup> Crucial to the decision in the case at hand was the existence of FBI and Departments of Transportation and Justice hijacking guidelines. While not revealing the contents of the secret guidelines the circuit court indicated that they counseled government use of force only as a last resort to prevent an imminent loss of life. Accordingly, the FBI agent in charge "was not making policy in responding to this particular situation,"<sup>189</sup> and his actions were not protected by section 2680(a).

*Driscoll v. United States*<sup>190</sup> involved an apparently routine car-pedestrian accident at Luke Air Force Base, Arizona. Driscoll's claim against the Government was based in part on the lack of crosswalks and warning devices in the area of the accident. The Government moved for summary judgment on the discretionary function exception. The Base Civil Engineer stated that no regulations required him to install the safety equipment Driscoll sought. The Government further showed that no injuries like Driscoll's had previously occurred and that the Base Engineer had received no recommendation from anyone regarding the necessity of installing crosswalks and warning devices in the area.

The district court granted the government's motion. The Ninth Circuit reversed, finding that for purposes of a summary judgment motion, the record could support a conclusion that operational rather than planning negligence was involved in the decision not to install safety equipment. It noted

<sup>188</sup> *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975).

<sup>189</sup> *Id.* The Government argued the case was analogous to *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964). *Faneca* held the Government was not liable for the torts of federal law enforcement officers in enrolling the first black student at the University of Mississippi. There, the *Downs* court held, the government employees were making policy which would "inevitably serve to guide the actions of other government officials faced with similar situations." 522 F.2d at 997.

<sup>190</sup> 525 F.2d 136 (9th Cir. 1975).



our belief that the judicial process is demonstrably capable of evaluating the reasonableness of the failure of the Base Civil Engineer to take the steps that Driscoll alleges were necessary. In addition, we do not believe that this evaluation will impair the effective administration of the Air Force Base nor will it make the United States liable for large and numerous claims.<sup>191</sup>

The circuit court viewed the case as one where the Base Engineer "had undertaken to provide traffic control services."<sup>192</sup> The decision not to install devices at the place of the accident then became an "operational level" action to be judged by ordinary negligence law. Consequently, the case was remanded for further consideration.

### B. AN EVALUATION OF THE CASES

Critics of a rigid application of the discretionary function exception have urged various tests to ensure a more enlightened treatment of section 2680(a) issues.<sup>193</sup> The tests typically urge a balancing of factors in deciding whether the plaintiff's injury or the government's interests should control. The four court of appeals cases indicate judicial attentiveness to the merits of the balancing process.

#### 1. *The Harm to the Plaintiff*

All four cases fall squarely within the FTCA's coverage of actions "for injury or loss of property or personal injury or death."<sup>194</sup> *Moyer* and *Downs* are wrongful death actions. *Griffin* and *Driscoll* are personal injury cases. *Downs* also included a claim for property damage to the light plane involved in the hijacking. Plaintiffs therefore make the strongest case for application of the Act. More accurately, plaintiffs may be said to meet an essential jurisdictional requisite of the statute. The growing flexibility of the FTCA has encouraged a number of suits based on alleged government interference with economic expectation or contract advantage.<sup>195</sup> Rather than looking for

<sup>191</sup> *Id.* at 138.

<sup>192</sup> *Id.* at 139.

<sup>193</sup> L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 219 (1963); Note, 66 HARV. L. REV. 488 (1953). See also Note, 56 IOWA L. REV. 930 (1971).

<sup>194</sup> 28 U.S.C. §§ 1346(b), 2672 (1970).

<sup>195</sup> *Myers & Myers v. Postal Service*, 527 F.2d 1252 (2d Cir. 1975) (loss of mail delivery contract); *Scanwell Labs v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975) (monetary loss in bidding on government contract); *Rutter Rex v. United States*, 515 F.2d 97 (5th Cir. 1975) (NLRB delay causing back pay awards to increase).

a specific statutory exception or assessing the claims on the merits, courts should interpret "injury or loss of property" as requiring physical damage to property.

The success of the FTCA has been in handling such claims. Both the legislative history of the Act and the exceptions for regulatory activity, misrepresentation and interference with contract rights indicate the FTCA is not a satisfactory vehicle for contesting government decisions injuring a citizen's economic expectations. The line drawing may be inexact. But we may take as a premise that the Government should not cause physical harm. If it does, it is reasonable to make the Government pay or to require it to explain why pressing national concerns prevent payments. By contrast, there is no similar understanding that the Government should not financially harm a citizen. Legislative and administrative action is by nature a favoring or disfavoring of groups or individuals. To suggest any such financial hurt could be dealt with under the FTCA would badly strain the Act.

## 2. *The Existence of Alternate Remedies*

Nothing in the FTCA limits the government's liability to situations where no other relief is possible. Further, the Supreme Court has clearly recognized the propriety of subrogation claims against the Government.<sup>196</sup> Nevertheless, a plaintiff's claim for justice may be more or less appealing depending on the availability of other sources of recovery.

All of the four cases involve several possible culpable parties. As such they typify the increasing complexity of modern, multiple defendant tort law. In *Moyer* the aircraft manufacturer and the seat manufacturer had been joined as defendants. In *Griffin*, a settlement with the vaccine manufacturer had taken place prior to the Third Circuit's consideration of the case. In *Driscoll* some recovery from the negligent driver or his insurance company may have been possible. In *Downs*, while the hijacker's conduct was certainly culpable, his estate was probably incapable of satisfying any substantial judgment. In addition, both *Moyer* and *Driscoll* were probably eligible for worker's compensation benefits. The *Driscoll* court in fact noted that his claim might well be barred by the exclusivity

<sup>196</sup> *United States v. Aetna Cas. & Sur. Co.*, 358 U.S. 366 (1949). See also *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

provision of the federal civilian worker's compensation scheme.<sup>197</sup>

Despite the presence of alternate means of recovery, the four circuits gave little attention to them in deciding the discretionary function issues. Given the statutory command to adjudicate claims like private tort actions, this decision is a proper one.<sup>198</sup> Duty, proximate causation, and damage rules appear sufficient to prevent recovery against the United States where its wrongdoing is minimal or remote.<sup>199</sup>

### 3. *The Rank of the Decision Maker*

The four cases provide strong evidence that high rank alone is not enough to invoke 2680(a). *Griffin* examined the actions of the Chief Pathologist of the Division of Biologic Standards. The negligent actor in *Downs* was an FBI Special Agent with over 20 years of law enforcement experience. *Moyer* and *Driscoll* studied the actions of military officers. In no case did the rank of the officer appear to be a significant factor in the court's decision.

### 4. *The Monetary Cost to the Government*

The increasing cost of litigation makes it likely that few cases which proceed to litigation will involve trivial damages. Although Congress placed no monetary limit on claims under the FTCA, a court may hesitate to award judgment to a plaintiff when faced with a single claim for massive damages or with a claim that would set precedent for numerous similar claims. The circuit courts in *Driscoll* and *Moyer* commented on the issue. The *Moyer* court noted that the case was an exceptional one because most test pilots, unlike *Moyer*, were government employees and thus limited to worker's compensation remedies.<sup>200</sup> The *Driscoll* court offered the conclusory statement that its decision would not open the United States to "large and numerous claims."<sup>201</sup>

*Griffin*, by contrast, reviewed a damage award of over \$2 million resulting from Mrs. Griffin's quadraplegia.<sup>202</sup> That

<sup>197</sup> 5 U.S.C. § 8116 (1970).

<sup>198</sup> 28 U.S.C. §§ 1346(b), 2672 (1970).

<sup>199</sup> See notes 79-82 *supra*.

<sup>200</sup> *Moyer v. Martin Marietta*, 481 F.2d 585, 598 (5th Cir. 1973).

<sup>201</sup> *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975).

<sup>202</sup> The damages were reduced under the terms of a joint tortfeasor agreement between the vaccine manufacturer and the Griffins. *Griffin v. United States*, 500 F.2d 1059, 1071-78 (3d Cir. 1974).

case becomes the leading precedent asserting federal liability for negligent drug certification, a not insignificant source of future liability. Similarly, *Downs* affirmed a judgment approaching \$400,000 and opened the door to future claims for improper handling of rescue operations by law enforcement officers.

### 5. *The Compliance with Statute or Regulation*

Earlier FTCA cases showed the significance of compliance or noncompliance with a statute or regulation governing the allegedly negligent conduct.<sup>203</sup> Noncompliance with a mandatory command has often been found to remove an act from the protection of section 2680(a). Compliance with a mandatory command or a grant of discretion in the statute or regulation has tended to predict an application of the discretionary function exception.

Regulatory language received considerable discussion in *Griffin* and *Downs*. In each, the circuit court found a violation of a mandatory command and indicated that the violation strongly influenced its decision of the discretionary function issue. Study of the regulatory schemes, however, indicated both mandatory and discretionary language. The *Griffin* majority read the pertinent regulation as forbidding the consideration of "biological variation," a standard not mentioned in the regulation. The dissent regarded the regulatory language as imprecise both because the Division of Biologic Standards "had to determine . . . how much weight to accord to each of the five factors enumerated in the regulation" and because the reference strain "was a constantly varying standard."<sup>204</sup> Thus, to require that "a comparative analysis of the test results demonstrate that the neural virulence of the test virus pool does not exceed that of the NIH reference attenuated polio virus" was not a matter of clear compliance with mandatory regulation. Of additional significance was the fact that the DBS officials charged with negligence were among the prime drafters of the regulation.<sup>205</sup>

In *Downs* the government hijacking regulations were not revealed. Nevertheless it is probable that the guidelines do leave

<sup>203</sup> See cases cited at notes 14, 75-77 *supra*.

<sup>204</sup> *Griffin v. United States*, 500 F.2d 1059, 1075-76 (3d Cir. 1974) (Van Dusen, J. dissenting).

<sup>205</sup> *Id.* at 1074 n.2.

room for some discretion. A general statement may suggest that a government approach of delay, compliance and nonviolence toward hijackers has kept loss of life and damage to property at a minimum. However, given the great variety of hijacking situations and the possible political implications of a particular hijacking, it is likely that the guidelines recognize that exceptions exist. The *Downs* decision was probably a decision by the court that the FBI agent's reasons for deviation from general policy were unpersuasive. Such an approach intermingles discretionary function and negligence issues.

*Griffin* and *Downs* both suggest that regulatory language still deserves assessment in a discretionary function case. In some instances, it may be decisive. In other situations, it is best treated as another factor in deciding the applicability of section 2680(a).

#### 6. *The Ability of Courts to Evaluate the Issues*

The growth of tort law in recent decades has doubtless encouraged the federal courts to reject the contention that section 2680(a) should apply because of a court's inability to deal with the issues. The growth of products liability and professional malpractice litigation is reflected in the decisions of each of the four cases. *Moyer* and *Griffin* are essentially defective product cases. *Griffin* looked to medical malpractice standards as well. *Driscoll* and *Moyer* could rely on a smaller body of engineer malpractice cases. *Downs* is less startling given the substantial growth in civil litigation against law enforcement officers.

The four cases suggest the lessened significance of an "agency expertise" contention. The federal courts handle a wide variety of cases involving both technological and administrative complexities outside of the Federal Tort Claims Act. Where difficulty or subtlety of judgment is at issue, it may be more proper to consider these matters in assessing negligence rather than in assessing the discretionary function exception. Where the real contention is not judicial lack of expertise but judicial encroachment on a coordinate branch of Government, the issue should be faced in those terms.

#### 7. *Judicial Interference with Coordinate Branch of Government*

All four cases show a concern for avoiding interference with governmental policy making. Scholars and courts have con-

sistently agreed that some government decisions should be exempt from review for negligence. Terms like "planning" and "discretionary" have tried, usually with limited success, to define such decisions. All four circuit decisions seem to demand an actual showing of interference with governmental as contrasted to professional decision making. In *Moyer*, the Government speculated on the delays, higher costs and detriment to the aircraft that might have been caused by a different seat design. No evidence was presented showing these factors were actually considered by the decision makers and the section 2680(a) claim failed.<sup>206</sup> In *Griffin* the Third Circuit assessed the judgment as

that of a professional measuring neurovirulence. It was not that of a policy-maker promulgating regulations by balancing competing policy considerations in determining the public interest. Neither was it a policy planning decision nor a determination of the feasibility or practicability of a government program.<sup>207</sup>

*Downs* similarly treated the hijacking situation as one without "policy overtones." <sup>208</sup> *Driscoll* implied the same. Yet the court suggested "a more complete development of the facts" might alter its opinion.<sup>209</sup>

#### IV. CONCLUSION

Unchallenged government discretion has been in deservedly bad repute in recent years. Abuses of authority during United States involvement in Vietnam, in the operation of intelligence activities by the CIA, and in the series of events commonly known as "Watergate" have shown that claims of secrecy, immunity, and privilege can protect the criminal, the stupid and the embarrassing as well as the legitimate workings of government. Accountability in government has become a watchword for citizens of all political faiths.

The long term results of a loss of faith in government are uncertain. Short-term consequences are more visible. The brief studies of mandamus, state and local tort liability, and individual officer liability suggest increased judicial willingness to reject claims of protected discretionary activity.<sup>210</sup> Congress-

<sup>206</sup> *Moyer v. Martin Marietta*, 481 F.2d 585, 597-98 (5th Cir. 1973).

<sup>207</sup> *Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974).

<sup>208</sup> *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975).

<sup>209</sup> *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1974).

<sup>210</sup> See Section III *supra*.

sional assumption of responsibility for the victims of such disparate government misjudgments as the Teton Dam collapse<sup>211</sup> and the Central Intelligence Agency LSD experiments<sup>212</sup> show legislative sensitivity to the problems of unchecked discretion. So too does the amendment of the FTCA to reflect the Supreme Court decision in *Bivens v. Six Narcotics Agents*.<sup>213</sup>

*Moyer, Griffin, Downs and Driscoll* all suggest an interpretation of the Federal Tort Claims Act which reflects an unwillingness to accept the mere assertion of immunity based on governmental discretion.<sup>214</sup> All cases rejected a single factor approach to the section 2680(a) exception. References to precedent which turned on the planning-operational distinction, the rank of the decision maker, connection with military operations, or the law enforcement or public health contexts of the cases could have justified a government motion to dismiss. Each circuit refused. Further, the courts' insistence that the Government be protecting matters of governmental policy rather than judgmental professional, mechanical or scientific matters is significant. Implicit in the distinction may be the recognition that absent war or similar emergency, true policy decisions do not involve conscious decisions to cause physical harm to persons or uncompensated damage to property. Officers of a democracy acting "for the people" should not be in the business of trading lives for some greater social good. Where such a loss occurs, this occurrence suggests negligence or wrongdoing on the part of persons implementing policy.

The four cases open the way to a more thorough consideration of the propriety of government action. Government counsel advancing a discretionary function exception should be prepared to assert why the decision in question deserved judi-

<sup>211</sup> Act of July 12, 1976. Pub. L. No. 94-355, 90 Stat. 892.

<sup>212</sup> N.Y. Times, May 19, 1976, at 44, col. 2 (Senate approves \$1,250,000 compensation for family of subject of CIA drug experiment).

<sup>213</sup> 28 U.S.C. § 2680(h) (Supp. V 1975). The background of the new "law enforcement officer intentional tort" section is studied in Borger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Tort Amendment: An Interpretative Analysis*, 54 N.C.L. Rev. 496 (1976).

<sup>214</sup> Additional recent cases involving section 2680(a) claims are *First Nat. Bank v. United States*, 552 F.2d 870 (10th Cir. 1977); *Martin v. United States*, 546 F.2d 1855 (9th Cir. 1976); *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976); *Clemente v. United States*, 422 F. Supp. 564 (D.P.R. 1976); *Hoffman v. United States*, 398 F. Supp. 380 (E.D. Mich. 1975).

cial protection. Judges must weigh the factors discussed earlier in reaching a decision. While litigation will continue to classify actions on one side or the other of the discretionary line,<sup>215</sup> uncertainties will remain. A reasoned case-by-case analysis of these matters should not overtax the federal courts.

The narrower reading of the discretionary function exception should not open the floodgates to suits against the United States. The statutory requirement of property loss or damage, personal injury or death should remove many suits that are really matters of contractual interference or challenges to administrative actions.<sup>216</sup> Other provisions of section 2680 provide additional protection for the Government. Once past jurisdictional bars to suit, a potential claimant still must satisfy a federal judge that tort recovery is appropriate against the Government. The courts have had no hesitancy to rule against claimants on the merits when the facts or law require.<sup>217</sup> Fairness to citizens should encourage evaluation on the merits rather than dismissal because of the alleged need to protect the often unarticulated discretion of some public servant.

In summary, a more restrained use of section 2680(a) can serve both the Government and the citizenry it represents. The exception will remain to protect policy making. At the same time, the opportunity for greater review of government action will aid individuals deserving compensation and subject government activities to a healthy judicial oversight.

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<sup>215</sup> See notes 60-69 *supra*.

<sup>216</sup> See notes 194-195 *supra*.

<sup>217</sup> See notes 79-82 *supra*.



# THE UNITED STATES COURT OF MILITARY APPEALS, 1975-1977: JUDICIALIZING THE MILITARY JUSTICE SYSTEM\*

Captain John S. Cooke\*\*

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\*The opinions and conclusions expressed 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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## I. INTRODUCTION

Since June 1975, the United States Court of Military Appeals<sup>1</sup> has significantly changed the military justice system. Most importantly, the court has substantially shifted the balance of power in the system by invalidating or restricting powers previously exercised by commanders and other line personnel, and by depositing greater ultimate authority in the hands of lawyers and judges. More subtly, the court has endeavored to adjust the attitudes with which all participants in the system exercise their particular authority.

The implications of such changes are obviously important to the military, which, given its specialized nature, has traditionally vested in the commander relatively sweeping powers over an almost unlimited range of activities. The full impact of the changes accomplished by the court to date is as yet unclear, and further changes appear imminent. In view of the effects such changes will inevitably engender, one must ask several questions. First, what have the changes been, and what additional developments are likely to follow in the near future? Second, what has motivated the court to follow the path it is on? Third, what does all of this mean for military justice, as well as the military society generally? Finally, what if anything should we in the military society, particularly lawyers and judges, be doing about these transformations? Hopefully, this article, which will examine the court's work during the last two years, will help answer these questions.

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<sup>1</sup> Hereinafter referred to as "CMA" or "the court" in text.

## II. BACKGROUND AND OVERVIEW

*The life of the law has not been logic; it has been experience.*

—Oliver Wendell Holmes<sup>2</sup>

The choice to examine the court's work since its June 1975 opinions is no accident, for it was at that time that Chief Judge Albert B. Fletcher, Jr. assumed active duties on the court.<sup>3</sup> While numerous forces, both external and internal, have converged to impel the court's recent activism, it is clear that Chief Judge Fletcher has been the catalyst in this chemistry. His presence has given the court's direction a force and character it would otherwise probably not have had. But while the impetus provided by the Chief Judge has been highly important, one cannot lose sight of other major factors underlying the present court's work.

Initially, a brief look at the historical development of military justice is in order. It should be recognized that the trend away from total command domination of the military justice system has existed for at least half a century.<sup>4</sup> Throughout this time military justice has moved, albeit at a somewhat irregular pace, toward a closer approximation of the procedures and an assimilation of the values of civilian criminal legal systems in this country. This movement has been marked by two interrelated trends. First, it has gradually been recognized that servicemembers are entitled to a panoply of rights similar, if not identical, to that enjoyed by civilians.<sup>5</sup> Concomitantly, the role

<sup>2</sup> O. W. HOLMES, *THE COMMON LAW* 1 (M. Howe ed. 1963).

<sup>3</sup> Chief Judge Fletcher was nominated by President Ford on March 13, 1975 and confirmed by the Senate on April 14, 1975 to serve the remainder of a fifteen year term expiring on May 1, 1986. He was named Chief Judge on April 14, 1975. The first decisions in which Chief Judge Fletcher participated were handed down on June 20, 1975. Prior to joining the court, Chief Judge Fletcher had served as a judge of the Eighth Judicial District for the State of Kansas from 1961 until 1975.

<sup>4</sup> See Brown, *The Crowder-Ansell Dispute*, 33 MIL. L. REV. 1 (1967); Cretella & Lynch, *The Military Judge: Military or Judge*, 9 CAL. W.L. REV. 57 (1972); Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. (1968); Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F.L. REV. 1 (Summer 1973).

<sup>5</sup> See O'Callahan v. Parker, 395 U.S. 258 (1969); Burns v. Wilson, 346 U.S. 137 (1953); United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1963); United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951). *But see* Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417

of lawyers and judicial officers<sup>6</sup> in the administration of the military justice system has been expanded in order to ensure that servicemembers are accorded the full measure of such rights and benefits.

The biggest single step in this process was the enactment, in 1950, of the Uniform Code of Military Justice.<sup>7</sup> Implementation of the UCMJ brought the military into closer harmony with the principles and values of American criminal law and procedure. Indeed in many respects the Code catapulted the military ahead of its civilian counterparts in the protection of individual rights, most notably in the areas of the right against self-incrimination,<sup>8</sup> right to free counsel,<sup>9</sup> pretrial discovery,<sup>10</sup>

U.S. 733 (1974). See also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 298 (1957), reprinted in MIL. L. REV. BICENT. ISSUE 141 (1975); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962); Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 266 (1958), reprinted in MIL. L. REV. BICENT. ISSUE 171 (1975); Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1952).

<sup>6</sup> See Douglass, *The Judicialization of Military Courts*, 22 HAST. L.J. 213 (1971); Stevenson, *supra* note 4, at 2-10. This development seems to have been given its initial impetus at the termination of World War I by the "Crowder-Ansell dispute." See Brown, *supra* note 4, at 36-45. See also Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919), reprinted in MIL. L. REV. BICENT. ISSUE 53 (1975).

<sup>7</sup> Act of May 5, 1950, Pub. L. No. 81-506, § 1, 64 Stat. 108. This act has subsequently been amended and codified as UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ or the Code in text and U.C.M.J. in footnotes].

<sup>8</sup> See U.C.M.J. art. 31. Article 31 established warning requirements for the admissibility of confessions and admissions fifteen years before the Supreme Court created similar standards in *Miranda v. Arizona*, 384 U.S. 436 (1966). Article 31 has also been deemed to protect a broader range of activity than the right against self-incrimination under the fifth amendment to the Constitution. Compare *United States v. White*, 17 C.M.A. 211, 38 C.M.R. 9 (1967) and *United States v. Minnifield*, 9 C.M.A. 373, 26 C.M.R. 153 (1958) with *United States v. Mara*, 410 U.S. 19 (1973) and *Gilbert v. California*, 388 U.S. 263 (1967) (Article 31's protections extend to the giving of handwriting exemplars, while fifth amendment privilege does not). Compare *United States v. Mewborn*, 17 C.M.A. 431, 38 C.M.R. 229 (1968) and *United States v. Rosato*, 3 C.M.A. 143, 11 C.M.R. 143 (1955) with *United States v. Dionisio*, 410 U.S. 1 (1973) (Article 31 covers the giving of voice exemplars, fifth amendment does not). Compare *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974) and *United States v. Musquire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958) with *Schmerber v. California*, 384 U.S. 757 (1966) (Article 31 may protect against extraction of bodily fluids such as blood or urine; fifth amendment does not).

<sup>9</sup> U.C.M.J. arts. 27, 38 & 70. Article 27 was expanded by the Military Justice Act of 1968, Pub. L. No. 90-632, § 2(10), 82 Stat. 1335, to widen the availability of

and appellate review.<sup>11</sup> On the other hand, the military system remained relatively far behind in some areas.<sup>12</sup> However, even after the UCMJ was amended in 1968 to increase the availability of lawyers and the powers of trial judges,<sup>13</sup> the commander still retained substantial powers over the process at the trial level.<sup>14</sup>

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legally qualified counsel in special courts-martial. Even before that amendment, the military justice system provided defendants with appointed counsel 18 years earlier than civilian jurisdictions were required to. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>10</sup> See U.C.M.J. art. 32(b) under which a hearing, similar in some respects to a grand jury hearing, must be held before any case can be referred to a general court-martial. Unlike a grand jury hearing, the accused and his counsel are present throughout and may cross-examine witnesses. Discovery has been recognized as one of the purposes for these proceedings. *United States v. Samuels*, 10 C.M.A. 206, 27 C.M.R. 280 (1959). More generally, by custom the military has recognized far broader discovery than exists in civilian jurisdictions. See *Saunders, Proposed Changes in Military Discovery*, 10 AM. CRIM. L. REV. 81 (1971).

<sup>11</sup> See U.C.M.J. arts. 66 & 67. Under Article 66, appellate review by a Court of Military Review is automatic in all cases in which a punitive discharge or confinement for one year or more has been approved at lower levels. (Review is also automatic in cases in which there is a sentence of death or which involve a general or flag officer). Courts of Military Review are empowered to make findings of fact and to reassess sentences downward. See ABA STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, CRIMINAL APPEALS § 1.1 [hereinafter cited as ABA STANDARDS] & commentary 15-19 (1970); ABA STANDARDS, APPELLATE REVIEW OF SENTENCES § 1.1 (1968).

<sup>12</sup> Most notably, the court-martial "jury system" was left largely in the control of the commander who retained responsibility for the selection of jurors. See U.C.M.J. arts. 25, 51 & 52. See also J. BISHOP, *JUSTICE UNDER FIRE* 27 (1974).

<sup>13</sup> See *Douglass*, *supra* note 6, at 213-37.

<sup>14</sup> See *Sherman, Military Justice Without Military Control*, 82 YALE L.J. 1598, 1599 n.7 (1975):

The commander can (1) bring court-martial charges against one of his men, arts. 22-24 UCMJ; (2) appoint an investigating officer and reject any recommendation by him that the court-martial not be brought, art. 32 UCMJ, MCM 1969, *supra* note 6, para. 34, at 7-9; (3) select the court members from his subordinates and the prosecutor and defense counsel from the legal officers in his Staff Judge Advocate's office, arts. 25, 27 UCMJ; and (4) reverse the conviction or reduce the sentence, art. 64, UCMJ. In addition, the commander can (1) bargain with the accused in return for a guilty plea, see *United States v. Villa*, 19 U.S.C.M.A. 564, 42 C.M.R. 166 (1970); (2) grant immunity to accomplices and witnesses in return for testimony favorable to the prosecution, MCM 1969, para. 150b, at 27-58; and (3) exercise general administrative control over the trial, such as excusing court members before, and, in certain situations, even after the trial has begun, see *United States v. Allen*, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955). A commander, as convening authority, is prohibited from censoring, reprimanding, or admonishing any court member, judge, or counsel concerning the findings or sentence or from

The UCMJ created a two-level appellate court system which was composed of military boards (now courts) of review and a civilian Court of Military Appeals which stood at the apex of the military justice system. The existence of these courts, and particularly the Court of Military Appeals, served as one restraint upon the authority commanders formerly held over the system.<sup>15</sup> Nevertheless, despite the existence of these courts and the extension of procedural safeguards to service personnel, the single factor which most distinguishes the military justice system from its civilian counterparts is, as it has always been, the degree to which it is subject to the authority of the commander.<sup>16</sup> Although this authority has been diluted in

attempting, by unlawful means, to influence the action of a court-martial or member, Art. 37, UCMJ. But there has never been a prosecution under Article 37 despite a number of cases claiming command influence.

See also Hansen, *supra* note 4, at 19-50; Schiesser & Benson, *A Proposal To Make Courts-Martial Courts: The Removal of Commanders From Military Justice*, 7 TEX. TECH. L. REV. 559, 561-66 (1976).

<sup>15</sup> See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972) for an excellent discussion of the creation and early years of the court.

<sup>16</sup> In addition to the powers which the commander exercises over the trial proceedings, see Sherman, *supra* note 14, at 1399, the commander has also controlled, or had considerable influence over numerous other aspects of the criminal process. His authority extends along three axes. First, because of the military's unique structure and purpose, a narrower range of behavior is socially tolerable; a broader range of activities is subject to criminal sanctions. See, e.g., U.C.M.J. arts. 85, 86, 90, 91, 92, 133 & 134. See also Fratcher, *Presidential Power to Regulate Military Justice, A Critical Study of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861, 868-69 (1959). While some of these offenses, such as absence without leave, are statutorily defined, some, like violation of an order or regulation, U.C.M.J. art. 92, or "disorders and neglects to the prejudice of good order and discipline," U.C.M.J. art. 134, leave the commander the latitude to fill in the blanks.

Along the second axis, the command structure generally permits and in some cases requires, authorities to intrude upon the privacy and liberty interests of servicemembers with greater ease than the Government may do in the civilian community. Such intrusions occur for a variety of reasons, but their impact on the justice system cannot be gainsaid. Thus, a commander may detain one of his men without any showing of probable cause, see *United States v. Davis*, 54 C.M.R. Adv. Sh. 188, 198 (A.C.M.R. 1976) (Jones, J. concurring), and similarly may compel him to stand in a lineup without probable cause, *United States v. Kittell*, 49 C.M.R. 225 (A.F.C.M.R. 1974). Traditionally, a commander has also been able to inspect his men and their belongings, *United States v. Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959).

Finally, as indicated above, *supra* note 14, the commander has exercised extensive control over the procedures for disposing of incidents of misconduct.

many respects,<sup>17</sup> it still permeates the entire system.<sup>18</sup> CMA is now cutting away that power, and is depositing authority over the judicial system in judicial hands. A variety of factors appear to underlie the court's efforts to continue, and perhaps hasten, the trends of the last half century.

Of obvious importance are the several changes in the court's membership within a relatively short period of time. In addition to Chief Judge Fletcher's ascension to the court, there were three other changes on the three-member court between February 1974 and February 1976.<sup>19</sup> These were bound to

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<sup>17</sup> The commander's power has been diluted in several ways. Articles 37 and 98 of the Code prohibit command influence and other improper tampering with the system. There has apparently never been a court-martial conviction for a violation of one of these articles, however. Sherman, *supra* note 14, at 1399 n.7; Thorne, *Article 98 and Speedy Trials—A Nexus Revised?*, THE ARMY LAWYER, July 1976, at 8. His power has also been diluted to the extent that many of his rulings on interlocutory matters are subject to relitigation before the military judge. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), paras. 666 & 115a [hereinafter cited as MCM, 1969].

<sup>18</sup> See Schiesser & Benson, *supra* note 14; Sherman, *supra* note 14. The commander's impact on the system is intangible as well as tangible. Even where the commander's decisions are subject to review, the fact that he considers an issue first often enables him to frame the question in such a way as to minimize the possibility of reversal; moreover, in a system operated entirely by military men (except at CMA), including lawyers as well as nonlawyers, deference is naturally paid to the rank and position of the commander. Courts frequently endeavor to serve society's interest, by balancing the needs of the government against those of the individual. In the military, the command is the society; therefore, there is a tendency to identify the government's interest with society's because the commander is deemed to speak for both.

It must be recognized, however, that the commander's powers do not always, or necessarily, inure to the detriment of accused individuals. In the first place, most commanders are genuinely interested in the welfare of those they command, and honestly seek to be fair and just in fulfilling their obligations. Moreover, some of the commander's powers are ameliorative, insofar as they enable him to alleviate the burden of a sentence by disapproving or suspending all or part of it, see U.C.M.J. arts. 64 & 71; or permit him to dispose of offenses by lower levels of courts-martial, see U.C.M.J. arts. 19, 20, 23 & 24; or by other means, see, e.g., U.C.M.J. art. 15.

<sup>19</sup> Senior Judge Ferguson, who served on the court from May 1, 1956 to May 1, 1971 when he became Senior Judge, was recalled to active service on the court on February 17, 1974, and continued to perform full duties until May 21, 1976. Senior Judge Ferguson's recall was especially significant because he was a frequent dissenter in his prior service on the court. During the period of his recall Senior Judge Ferguson saw many of his earlier positions become law.

Judge William H. Cook assumed his position on the bench on August 21, 1974 and was subsequently reappointed to a full term expiring on May 1, 1991. Judge

cause some changes in outlook, regardless of who the new judges were.

Other forces were also at work. In the later 1960's and early 1970's, CMA had become, in the opinion of some observers, somewhat conservative in the exercise of its powers and had failed to meet expectations which it had itself raised earlier.<sup>20</sup> This conservatism may have resulted from an unwillingness to rock the boat during American involvement in the Vietnam conflict. Regardless of its origins, this conservatism persisted in the face of increased criticism of the system.<sup>21</sup> Some observers called for the abolition or drastic revision of the military justice system;<sup>22</sup> at the same time civilian courts were subject-

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Cook served for a number of years as counsel to the House Armed Services Committee.

Judge Matthew J. Perry took his oath of office on February 18, 1976 to serve the remainder of the term expiring on May 1, 1981; when Judge Perry assumed full duties in May 1976, Senior Judge Ferguson again retired. Judge Perry has an extensive background as a trial attorney. Recent news reports state that Judge Perry will leave CMA soon to take a federal district judgeship. His departure, just at a time when the court's personnel situation seemed to be stabilizing somewhat, will once again create some uncertainty in the system. Judge Perry's rumored departure necessitates a caveat that the trends to be described in this article are subject to change depending upon his departure and who replaces him.

All of these changes and the attendant disruption they have caused in the orderly process of military justice have led at least one commentator to suggest that the membership of the court should be expanded. See Miller, *Three Is Not Enough*, THE ARMY LAWYER, Sept. 1976, at 11. See also Willis, *The Constitution, The United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27, 85 (1972).

<sup>20</sup> See Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals*, 10 HARV. C.R.-C.L. L. REV. 33 (1975), reprinted in MIL. L. REV. BICENT. ISSUE 609 (1976); Willis, *supra* note 15.

<sup>21</sup> Such increases in criticism of military justice are not unusual in times of war. See Sherman, *supra* note 14, at 1398; Tenhet & Clarke, *Attitudes of U.S. Army War College Students Toward the Administration of Military Justice*, 59 MIL. L. REV. 27, 31 (1973).

<sup>22</sup> J. BISHOP, *supra* note 12; Bavh, *The Military Justice Act of 1971: The Need For Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Schiesser & Benson, *supra* note 14; Sherman, *supra* note 14. See also Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), reprinted in MIL. L. REV. BICENT. ISSUE 579 (1976).

In a survey of Congressional proposals to change the military justice system in 1971, Professor Sherman discussed proposals ranging from the abolition of court-martial jurisdiction over all but purely military offenses to less drastic changes. All proposals would have had the effect of reducing command control of the system. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971). Senator Bavh commented on the commander's powers, stating "It is inconceivable that any man, especially one untrained in the law, can



ing military justice to greater scrutiny.<sup>23</sup>

As the Vietnam conflict drew to a close, however, civilian courts, led by the Supreme Court, acknowledged the specialized and different nature of the military society.<sup>24</sup> Then in *Schlesinger v. Councilman*<sup>25</sup> the Supreme Court placed its faith in the military court system, and imposed upon the military the primary responsibility for protecting those subject to its authority.<sup>26</sup> In a sense this decision gave CMA a mandate to respond to the problems and criticisms of the military justice system; at least the present court seems to have treated *Councilman* this way.<sup>27</sup>

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be both concerned commander and judicial neutral." Bayh, *supra*, at 9. He also stated, "The court-martial should have no place among the commander's arsenal of disciplinary powers." *Id.* at 10.

<sup>23</sup> See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969); *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975); *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969).

<sup>24</sup> See *Parker v. Levy*, 417 U.S. 733, 743 (1975). See also *Middendorf v. Henry*, 425 U.S. 25 (1976); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parisi v. Davidson*, 405 U.S. 34 (1972); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Wallis v. O'Kier*, 491 F.2d 1323 (10th Cir. 1974).

<sup>25</sup> 420 U.S. 978 (1975).

<sup>26</sup> Speaking for the majority, Mr. Justice Powell wrote. "[I]t must be assumed that the military court system will vindicate servicemen's constitutional rights." *Id.* at 758.

It is interesting to note that as the Supreme Court tends to construe constitutional protections in the criminal process more narrowly, see, e.g., *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *Michigan v. Mosley*, 423 U.S. 96 (1975); *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *Harris v. New York*, 401 U.S. 222 (1971); see George, *Future Trends in the Administration of Criminal Justice*, 69 MIL. L. REV. 1 (1975), CMA is attempting to avoid constitutional grounds for its decisions. This is similar to the trend being followed by a growing number of state courts, which are using their state constitutions to maintain or extend federal constitutional protections established during the 1960's. See *United States v. Miller*, 425 U.S. 435, 454 n.4 (1976) (Brennan, J. dissenting); *Baxter v. Palmigiano*, 425 U.S. 308, 339 n.10 (1976) (Brennan, J. dissenting). See also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Comment, *Expanding Criminal Procedural Rights Under State Constitutions*, 23 WASH. & LEE L. REV. 909 (1976). Although the military justice system has no Constitution of its own, the UCMJ, as the basic source of military criminal law, has been used by CMA to fill much the same role in many respects.

<sup>27</sup> Thus, Chief Judge Fletcher wrote in *United States v. Thomas*, "The efficacy of the Court of Appeals' decision in *Committee for GI Rights v. Callaway*, is dubious, at best, in light of the guidelines announced by the Supreme Court in *Schlesinger v. Councilman*. . . ." 24 C.M.A. 228, 233 n.2, 51 C.M.R. 607, 612 n.2 (1975) (citations omitted). *GI Rights* involved a suit for an injunction against intrusive inspec-

While these factors may be seen as having combined to impel some form of change, they do not by themselves fully explain the precise direction of the court. For that, one must look at the personalities and philosophies of the members of the court, collectively and individually. The respective philosophies of the individual judges will be examined with reference to specific issues below. While it is risky to generalize about the philosophy of the court as an institution, it seems safe to identify two basic precepts as the motivating factors in much of the court's work.

First, the court is reevaluating the balance between "justice" and "discipline" in the military justice system.<sup>28</sup> These concepts are interrelated and coexist in varying degrees in any criminal legal system, but the military has traditionally placed greater emphasis on the latter. The present court is probing the underlying tension between justice and discipline, and is readjusting the mechanisms by which they are balanced. The court feels that considerations of justice must be given greater emphasis, and it has concluded that the requirements of justice are too sophisticated, and the machinery of justice too complex to be left to the commander to operate, because he frequently has a natural interest in putting a hidden thumb on the disciplinary side of the scale.

This precept has generally been reflected in the tendency of the court to distinguish and separate functions exercised by the commander and other line personnel. The commander is permitted to retain his disciplinary functions, but his functions in administering justice (*i.e.* judicial functions) have been taken from him. This dichotomization has been effectuated in other ways as well, as the court has attempted to guard against what it perceives as undue infringement of the integrity of the

tions and other command activities invading individual interests, but did not include or seek injunctions against any court-martial proceedings. *Schlenger v. Councilman* prohibits federal courts from intervening, by injunction or otherwise, in ongoing court-martial proceedings, in most situations. Because *GI Rights* did not involve such activity, it appears not to have contravened the *Councilman* rule. That Chief Judge Fletcher reads the *Councilman* guidelines broadly enough to say that *GI Rights* violates them indicates that he feels that in *Councilman* the Supreme Court recognized the primary authority of military courts over not only the court-martial process itself, but over at least some activities ancillary to that process.

<sup>28</sup> Compare former Judge Brosman's discussion of this issue in Brosman, *Freer Than Most*, 6 VAND. L. REV. 166, 167 (1953).

administration of justice by disciplinary activities and attitudes. This tendency deserves close scrutiny, for it must be recognized that justice and discipline are properly but two sides of the same coin; to the extent that the court separates them unnecessarily, it risks devaluing the whole system.

The second precept is the court's view of its own role in the military justice system. Related to its view that the legal profession must run the military justice system is the perception that CMA itself must play a dynamic leadership role in the system. CMA sees itself as the only institution capable of bringing to the system the type of constant leadership it believes necessary. Congressional change is only an occasional measure, and Congress cannot give its steady attention to the system. Indeed CMA was created to fill such a role for Congress.<sup>29</sup> CMA views the Judge Advocates General as playing only a limited role in the supervision of military justice. Only CMA is in a position to interpret the Constitution and the UCMJ for the entire military justice system and to supervise it on a constant basis. In CMA's view, such supervision is, at bottom, properly a judicial function. Thus, fortified with what it takes as its mandate from *Schlesinger v. Councilman*, the court will exercise extensive authority over the entire system.

These philosophies are reflected in the three basic trends to be examined in this article. These trends are: first, CMA believes that the trial judiciary must take an active role in the criminal process; second, CMA has itself assumed responsibility for supervising the entire military justice system and will carefully scrutinize the entire process; and third, the court will interpret broadly the rights of individuals accused of crime.

### III. THE EXPANDING ROLE OF THE MILITARY JUDGE

*In the long run there is no guarantee of justice except the personality of the judge.*

—Benjamin N. Cardozo<sup>30</sup>

In one of his first opinions for the court, Chief Judge Fletcher wrote:

<sup>29</sup> See *McPhail v. United States*, 24 C.M.A. 304, 308-09, 52 C.M.R. 15, 19-20 (1976).

<sup>30</sup> Benjamin N. Cardozo, *quoted in ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE* 4 (1972).

What we do reject is the notion that the legality of a criminal trial may be measured by the same rules applicable to a game of chance. The trial judge is more than a mere referee, and as such, he is required to assure that the accused receives a fair trial.<sup>31</sup>

This statement epitomizes the court's view of the role of the trial judge,<sup>32</sup> and should be read much more broadly than in the context of the issue<sup>33</sup> to which it applied. CMA sees an active trial judge as the appropriate administrator of the trial process, and as an essential counterweight to the power which the Government wields in relation to a military accused. Thus the court has increased both the authority and the responsibility of the military judge.

<sup>31</sup> *United States v. Graves*, 23 C.M.A. 434, 437, 50 C.M.R. 393, 396 (1976).

<sup>32</sup> Compare the language of Judge Latimer in *United States v. Wilson*, 7 C.M.A. 713, 23 C.M.R. 177 (1957).

We have said on numerous occasions that it is the law officer who is in charge of the trial proceedings and responsible for its orderly conduct. One of his most important functions is to give adequate instructions on the issues of the case. The trial of a criminal case is not a game to be regulated by the whims of counsel. If we are to build a real system of military justice, we must ensure that the law officer is shouldered with the responsibility of seeing to it that the court-martial members are given proper guideposts to reach a fair and just verdict, counsel for the parties notwithstanding.

*Id.* at 716, 23 C.M.R. at 180. See also ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE, introduction at 3, 4:

Given the mandate of neutrality, the role of the judge is not that of a mere functionary to preserve order and lend ceremonial dignity to the proceedings. As the central figure at the trial mantled with neutrality, it is the judge's responsibility to direct and guide the course of the trial in such manner as to give the jury fair opportunity in the opposing actions of the adversary parties to reach an impartial result on the issue of guilt. The teaching of the history of common law nations is that the trial judge, adhering to his neutral role, should possess, nevertheless, power to curb both adversaries in order that independent courts be maintained for the rational enforcement of the rights of free men. Provided that he acts judicially and with due regard for the rights of the defendant, the trial judge should be empowered to clarify obscurity in issues or evidence, prevent unnecessary delay, and promote the expeditious, fair and dignified course of the trial. Unless the judge possesses and, when necessary, exerts power to curb excessive and prejudicial zealotry on the part of prosecutors, the rights of defendants would be exposed to serious abuse. And, manifestly, unless the power of control exists, the interest of society in preserving the criminal courtroom atmosphere as a place where trials can proceed with dignity would be frustrated by unchecked misconduct on the part of the accused, counsel or others.

<sup>33</sup> The issue involved in *Graves* was the waiver of the omission of an instruction.

*A. THE MILITARY JUDGE MUST ENSURE THAT THE ACCUSED RECEIVES A FAIR TRIAL*

*1. Revision of the waiver doctrine*

CMA has obliged the military judge to take greater control of proceedings during the court-martial; he must be, in effect, the "governor" of these proceedings. It is apparent that defense counsel does not bear sole responsibility to ensure that the accused's rights are protected; the military judge shares this responsibility, and, in many situations, bears the ultimate burden of protecting the accused's rights. One of the means by which the court has reemphasized the judge's obligations in this regard is through a narrow interpretation of defense waiver doctrines.

In *United States v. Graves*<sup>34</sup> CMA dealt with the failure of the military judge to instruct the court members on the voluntariness of a confession, despite the presence of evidence raising that issue. Under the older case of *United States v. Howard*<sup>35</sup> a military judge had a duty to instruct on this issue sua sponte, but *Howard's* strength had been sapped somewhat by *United States v. Meade*<sup>36</sup> which held that such an instruction could be waived. In *Graves* the Government argued, therefore, that the defense had impliedly waived the instruction by neither requesting it nor objecting to the instructions given by the trial judge.

CMA rejected the government's argument. Clearly it could have done so by simply relying on existing case law; the passive waiver doctrine urged by the Government had never been applied to this issue.<sup>37</sup> But, as the present court has often done, Chief Judge Fletcher used the erosion of earlier cases by later ones as a reason to erect an even higher barrier to protect the accused's rights. The court not only found no waiver here; it made broad pronouncements concerning the role of the trial judge and waiver rules. In addition to the statement quoted at the beginning of this section, the Chief Judge also wrote:

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<sup>34</sup> 23 C.M.A. 434, 50 C.M.R. 393 (1976).

<sup>35</sup> 18 C.M.A. 252, 39 C.M.R. 252 (1969).

<sup>36</sup> 20 C.M.A. 510, 43 C.M.R. 350 (1971).

<sup>37</sup> *United States v. Meade*, 20 C.M.A. 510, 43 C.M.R. 350 (1971); *United States v. Howard*, 18 C.M.A. 252, 39 C.M.R. 252 (1969).

Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.<sup>38</sup>

Several cases subsequent to *Graves* have established that the judge may never simply accede to counsel's desires on an instructional issue.<sup>39</sup> CMA has also indicated that the military judge's instructions will be subject to strict scrutiny on review.<sup>40</sup> Recently, in *United States v. Grunden*,<sup>41</sup> CMA held that

<sup>38</sup> *United States v. Graves*, 23 C.M.A. 434, 437, 50 C.M.R. 395, 396 (1975).

<sup>39</sup> In *United States v. Hanna*, 25 C.M.A. Adv. Sh. 135, 54 C.M.R. Adv. Sh. 153 (1976), CMA reversed the defendant's conviction because the military judge failed to instruct on the voluntariness of a confession although the defense counsel stated after the judge had made his preliminary ruling of admissibility that he did not intend to relitigate the issue on the merits. There was, however, some evidence introduced on the merits which touched upon the voluntariness issue, albeit not as much as was introduced during litigation on the suppression motion. CMA held that the military judge should have instructed the court members on the voluntariness question. The defense's waiver was obviously ineffective here because it occurred *before* the judge had heard the evidence. If the judge is ever to grant a defense wish that an issue not be instructed upon, he may only do so upon evaluating all the evidence and other factors in the case: this was not done here.

In *United States v. Johnson*, 23 C.M.A. 514, 50 C.M.R. 653 (1975), the defense objected to any instruction on manslaughter in a prosecution for murder. Nevertheless, the military judge instructed on involuntary, but not voluntary, manslaughter, although both offenses were raised by the evidence. CMA rejected the Army Court of Military Review's finding that by his objection to manslaughter instructions, defense counsel (individual civilian counsel) waived any objection to the lack of a voluntary manslaughter instruction. Although CMA implied that the doctrine of waiver might apply if it were clear that the military judge was granting a fully explored defense desire that an instruction be omitted, *Johnson* again reflects the notion that it is the judge's responsibility to decide upon instructions, and that it is his decision which will be reviewed. See Cooper, *More Than a Mere Referee*, THE ARMY LAWYER, Aug. 1976, at 1; Hilliard, *The Waiver Doctrine: Is It Still Viable?*, 18 A.F.L. REV. 45 (Spring 1976); Sandell, *United States v. Graves: No More Affirmative Waiver?*, THE ARMY LAWYER, May 1976, at 7.

<sup>40</sup> *United States v. McGee*, 23 C.M.A. 591, 50 C.M.R. 856 (1975) (failure to instruct on involuntary manslaughter through culpable negligence was reversible error even though accused was convicted of a "greater" lesser included offense; lesser included offenses cannot be ordered serially in a simplistic fashion). Chief Judge Fletcher wrote:

Even though the trial judge implicitly determined that involuntary manslaughter through culpable negligence was not raised by the evidence,

failure to instruct on evidence of uncharged misconduct,<sup>42</sup> even where the defense expressly requested that no such instruction be given, was error. Arguably not all issues potentially subject to instruction are so important<sup>43</sup> as to preclude application of an affirmative waiver concept, but as a practical matter, if not as a legal rule, a trial judge runs a great risk of reversal if he experiments in order to discover what such matters might be.

Counsel determine issues in a case to the extent that their strategies dictate what evidence will be presented. It appears that waiver type concepts may apply as to evidentiary matters which are or are not raised.<sup>44</sup> Once the evidence has been admitted, however, the responsibility for instructing upon it falls solely on the shoulders of the military judge; he may not use the desires of counsel, expressed or implied, as a shield to obscure his own mistakes.

The military judge has similar responsibilities with respect to evidentiary questions. In *United States v. Heflin*,<sup>45</sup> CMA found that trial defense counsel's failure to object to a record

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this Court, as well as other appellate tribunals, has an independent responsibility to evaluate the evidence and determine whether the appellant was deprived of his right to have the court-martial consider all reasonable alternatives of guilt.

*Id.* at 592, 50 C.M.R. at 857.

<sup>42</sup> 23 C.M.A. Adv. Sh. 327, 34 C.M.R. Adv. Sh. 1033 (1977).

<sup>43</sup> See *United States v. Janis*, 24 C.M.A. 225, 31 C.M.R. (1976), for a discussion of the admissibility for limited purposes of evidence of uncharged misconduct.

<sup>44</sup> Admission of evidence of uncharged misconduct has generally required a *sua sponte* instruction. See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, MILITARY JUDGE'S GUIDE, para. 9-31 (1969). This requirement has not been consistently applied. Compare *United States v. Haimson*, 5 C.M.A. 208, 17 C.M.R. 208 (1954) with *United States v. Bryant*, 12 C.M.A. 111, 30 C.M.R. 111 (1961). Whether defense counsel's wishes on other, less significant, instructional issues may be considered is questionable in light of *Grunden*.

<sup>45</sup> Thus, Chief Judge Fletcher wrote in *Graves*, "The passive waiver concept properly has been restricted to actions of trial defense counsel which leave appellate tribunals with *insufficient factual development* of an issue necessary to resolve a question of law raised on appeal." *United States v. Graves*, 23 C.M.A. 434, 437, 50 C.M.R. 393, 396 (1975) (emphasis added). Chief Judge Fletcher was obviously referring to matters other than instructions on voluntariness here, because the passive waiver concept had never been applied to the confession voluntariness issue presented in *Graves*. See *United States v. Meade*, 20 C.M.A. 510, 43 C.M.R. 350 (1971); *United States v. Howard*, 18 C.M.A. 252, 39 C.M.R. 252 (1969). See note 48 *infra*.

<sup>46</sup> 23 C.M.A. 505, 50 C.M.R. 644 (1975).

of previous convictions that was inadmissible on its face<sup>46</sup> was not a waiver. In language similar to that in *Graves*, the court said "An affirmative waiver issue arises where a matter intentionally is left in dispute at the trial level in order to gain a tactical advantage either at trial or subsequently on appeal."<sup>47</sup> The court added that a "necessary prerequisite" to a finding of waiver would be a showing that the issue was unresolved by the failure to object.<sup>48</sup> *Heflin* makes it clear that any kind of waiver of an obvious issue must be found by the judge to be

<sup>46</sup> The record, a DA Form 20B, lacked a signature which by regulation was necessary to establish finality of the conviction. The result reached by CMA in *Heflin* was seemingly mandated by an earlier case, *United States v. Engle*, 3 C.M.A. 41, 11 C.M.R. 41 (1953), in which CMA held that introduction of a record of prior conviction with a defect similar to that in *Heflin* necessitated reversal despite the failure of the defense to object to its introduction at trial. The doctrinal basis of the *Engle* rule was that such evidence was not competent, rather than that the error could not be presumed to be waived. The Army Court of Military Review did not follow *Engle* in *Heflin* because in the interim the ACMR had adopted a waiver approach to such cases which permitted it to avoid *Engle*. See *United States v. Warren*, 49 C.M.R. 396 (A.C.M.R. 1974) (en banc), *pet. denied*, 49 C.M.R. 889 (1973). See note 49 *infra*. This avoidance of an apparently binding CMA precedent drew condemnation from Chief Judge Fletcher, *United States v. Heflin*, 23 C.M.A. 505, 506 n.6, 50 C.M.R. 644, 645 n.6 (1973). See notes 251 and 252 and accompanying text *infra* for further discussion of this issue.

As it did in *Graves*, CMA used the intervening erosion of a prior CMA rule not only to revitalize that rule, but to extend protections of individual interests even further.

<sup>47</sup> *United States v. Heflin*, 23 C.M.A. 505, 507, 50 C.M.R. 644, 646 (1973).

<sup>48</sup> In the course of this discussion, Chief Judge Fletcher cited *United States v. Mundy*, 2 C.M.A. 500, 9 C.M.R. 130 (1953), "for its affirmative waiver concept rather than its holding that waiver was appropriate under the facts enunciated therein." *United States v. Heflin*, 23 C.M.A. 505, 507 n.8, 50 C.M.R. 644, 646 n.8 (1973). *Mundy* dealt with the duty to instruct on lesser included offenses; the court there held that an objection to instructions could be waived by affirmative action of the accused's counsel, 2 C.M.A. at 503, 9 C.M.R. at 133. The court also indicated that waiver would apply only to "instances involving an affirmative, calculated, and designed course of action by a defense counsel" on the instructional issue. *Id.* at 503, 9 C.M.R. at 133.

In *Mundy*, the court found waiver where the defense counsel expressly left the issue of instruction on a lesser included offense up to the judge, and then did not object to the instructions as given. Chief Judge Fletcher has indicated his disagreement with such an application of the waiver rules in the above quotes. The Chief Judge's citation of *Mundy* implies that defense waiver may apply to some instructional issues. How much weight this brief reference carries in light of the more recent decision in *Grunden*, see notes 41-44 and accompanying text *supra*, is questionable. It must be noted that the *Mundy* reference was made in a case dealing with waiver as to an evidentiary issue.



not only affirmative, but also a reasonably competent choice.<sup>49</sup> Again this places an additional burden on the trial judge to both identify issues and clarify counsel's strategy and its foundation.

CMA has also dealt with waiver issues and the trial judge's responsibility in several cases dealing with prejudicial argument by the trial counsel. In *United States v. Miller*<sup>50</sup> the court refused to apply the waiver doctrine to the defense counsel's failure to object to trial counsel's "general deterrence"<sup>51</sup> argument where that argument was, in CMA's view, given emphasis by the judge's instruction to "consider all matters in aggravation 'heard today.'"<sup>52</sup> The significance attached by the court to such relatively innocuous language of the military judge is additional evidence of the importance with which his role is viewed and of the standards to which he will be held.<sup>53</sup>

In *United States v. Shamberger*<sup>54</sup> CMA was extremely critical

<sup>49</sup> In *Heflin*, Chief Judge Fletcher criticized the ACMR's earlier decision in *United States v. Warren*, 49 C.M.R. 396 (A.C.M.R. 1974), on which the ACMR relied for its affirmation of *Heflin*. In *Warren* the ACMR said:

If trial defense counsel was insufficiently concerned about admissibility of the Form 20B to research the matter, in other words, if his failure to object was bottomed on his heedlessness, given his primary interest in the case the relationship between the rule we are applying and harmless error rule is close and obvious.

*Id.* at 397, quoted in *United States v. Heflin*, 23 C.M.A. at 506, 50 C.M.R. at 645. Chief Judge Fletcher considered the *Warren* approach and concluded, "We view the waiver question somewhat differently. The approach adopted in *Warren* unduly tends to relieve the trial bench of its primary judicial responsibility to assure that a court-martial is conducted in accordance with sound legal principles." 23 C.M.A. at 507, 50 C.M.R. at 646. The message is clear: even though counsel is heedless, the judge has no license to be; indeed, such heedlessness triggers his responsibility to act. Implicit in this approach is a somewhat different view of the abilities and attitudes of defense counsel than was perceived by the ACMR in *Warren*. See notes 196-207 and accompanying text *infra*. See also *United States v. Morales*, 23 C.M.A. 508, 50 C.M.R. 647 (1975).

<sup>50</sup> 24 C.M.A. 181, 51 C.M.R. 400 (1976).

<sup>51</sup> See notes 303-314 and accompanying text *infra*.

<sup>52</sup> *United States v. Miller*, 24 C.M.A. 181, 51 C.M.R. 401 (1976). *Miller* left open the possibility that defense failure to object to a general deterrence argument could, standing alone, be a waiver. The very minimal nature of the impetus added to the argument by the relatively minor remark by the military judge in *Miller* indicates, however, that such instances will be rare.

<sup>53</sup> Compare *id.* with *United States v. Johnson*, 24 C.M.A. 23, 51 C.M.R. 73 (1975).

<sup>54</sup> 24 C.M.A. 203, 51 C.M.R. 448 (1976). *Shamberger* also involved the trial judge's duty to instruct on the voluntariness of a confession, the same issue as was raised in *Graves*. Here CMA found that there was insufficient evidence to raise the issue on the merits.

of the military judge's own application of waiver to the defense counsel's failure to object to a concededly improper argument on the sentence<sup>55</sup> until after the judge had instructed the court. CMA implied, citing *Graves*, that even had there been no objection at all, the trial judge had a duty to cure this error. In any event, the defense counsel's objection, albeit tardy, obliged the judge to take appropriate steps to cure the error,<sup>56</sup> and precluded invocation of the waiver doctrine.

It should be recognized that although the court found waiver inapplicable in *Miller* and *Shamberger* because of specific circumstances in each case, the court's position on improper argument generally is not significantly different from what it has been in years past.<sup>57</sup> In *United States v. Nelson*<sup>58</sup> the court held that improper argument by trial counsel does not necessarily require sua sponte instructions, nor will it, in the absence of such instructions necessitate reversal.<sup>59</sup> In this regard defense counsel's failure to object to such argument is a factor to be weighed in determining whether the argument was so prejudicial as to necessitate reversal. This is the same ap-

<sup>55</sup> The trial counsel suggested to the court members that they put themselves in the position of the rape victim's husband watching his wife being raped repeatedly. The military judge recognized this argument as improper, but deemed the defense's untimely objection a waiver.

<sup>56</sup> CMA apparently felt that mistrial was the only appropriate remedy for this egregious argument. Chief Judge Fletcher stated, "What is troubling, however, is that here a judicial officer acknowledged on the record that error was present in the proceedings. Yet he elected to do nothing rather than to declare a mistrial." *United States v. Shamberger*, 24 C.M.A. 205, 205 n.1, 51 C.M.R. 448, 450 n.1 (1976). See note 62 *infra*.

Interestingly, Judge Cook dissented. Judge Cook's position on waiver is difficult to decipher. In *Shamberger* he said, "It has long been settled that objection to impermissible comment by counsel in the course of argument must be made at the time of the comment." *Id.*, at 206, 51 C.M.R. 451. Yet in *United States v. Miller*, see note 50 and accompanying text *supra*, Judge Cook joined in a per curiam opinion which held that even in the absence of any objection by the defense, trial counsel's general deterrence argument was grounds for reversal. It must be concluded that Judge Cook places great weight on the military judge's role in trial proceedings; otherwise his positions in *Miller* and *Shamberger* are irreconcilable.

<sup>57</sup> *But see* *United States v. Mosely*, *United States v. Sweisford*, 24 C.M.A. 173, 51 C.M.R. 392 (1976) (decided jointly).

<sup>58</sup> 24 C.M.A. 49, 51 C.M.R. 143 (1975).

<sup>59</sup> The court reversed, however, on the basis of another portion of the trial counsel's argument. Defense counsel had objected to this portion of the argument, but his objection was overruled by the military judge.

proach the court has used for years.<sup>60</sup> As *Nelson* indicates in dicta, however, CMA would like the military judge to be more aggressive in cutting off improper argument and curing the error at the trial level.<sup>61</sup> *Shamberger* reflects that the court may be less likely to view curative instructions as sufficient to remove prejudice than it has in the past,<sup>62</sup> although such instructions are by no means always inadequate.<sup>63</sup>

## 2. Ensuring Providency of Guilty Pleas

CMA's dual concerns that the accused not suffer from his counsel's errors and that the military judge aggressively control the conduct of the trial have led the court to extend the military judge's responsibility to ensure that a guilty plea is provident.<sup>64</sup> In *United States v. Harden*,<sup>65</sup> CMA iterated the trial

<sup>60</sup> See, e.g., *United States v. Saint John*, 23 C.M.A. 20, 48 C.M.R. 312 (1974); *United States v. Wood*, 18 C.M.A. 291, 40 C.M.R. 3 (1969); *United States v. Ryan*, 21 C.M.A. 9, 44 C.M.R. 63 (1971); cf. *United States v. Doctor*, 7 C.M.A. 126, 21 C.M.R. 25 (1956).

<sup>61</sup> *United States v. Nelson*, 24 C.M.A. 49, 52 n.5, 51 C.M.R. 143, 146 n.5 (1975), quoting ABA STANDARDS, THE PROSECUTION FUNCTION § 5.9. See also *United States v. Knickerbocker*, 25 C.M.A. Adv. Sh. 346, 54 C.M.R. Adv. Sh. 1072 (1977), reversing appellant's conviction because of prejudicial argument by trial counsel. The majority said: "At the very least, the judge should have interrupted the trial counsel before he ran the full course of his impermissible argument. Corrective instructions at an early point might have dispelled the taint of the initial remarks. *Id.* at 348, 54 C.M.R. Adv. Sh. at 1074. In a separate opinion concurring in the result, Chief Judge Fletcher argued that concrete guidance on such issues is necessary, and indicated that he would use the American Bar Association Standards as a yardstick in this regard.

<sup>62</sup> See *United States v. Long*, 17 C.M.A. 323, 38 C.M.R. 121 (1967); *United States v. O'Neal*, 16 C.M.A. 33, 36 C.M.R. 189 (1966). It is worth noting that then Judge Ferguson dissented in *Long* and expressed his lack of faith in the power of instructions to cure prejudicial argument. Cf. *United States v. Wood*, 18 C.M.A. 291, 297-302, 40 C.M.R. 3, 9-14 (1969) (Ferguson, J. dissenting).

A sua sponte declaration of a mistrial in response to the government's misconduct at the conclusion of the taking of evidence may raise the hazards of a former jeopardy bar to retrial. See *United States v. Jorn*, 400 U.S. 470 (1971). But see *United States v. Keenan*, 18 C.M.A. 108, 39 C.M.R. 108 (1969); MCM, 1969, para. 36e. An appropriate response to improper argument on the merits may be difficult to formulate. This difficulty serves to emphasize the need for the military judge to be alert to improper argument and to nip it in the bud wherever possible.

<sup>63</sup> See *United States v. Johnson*, 24 C.M.A. 23, 51 C.M.R. 73 (1975).

<sup>64</sup> *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). See U.C.M.J. art. 45; MCM, 1969, para. 70b, as amended 40 Fed. Reg. 4247, 4249-50 (1975).

<sup>65</sup> 24 C.M.A. 76, 51 C.M.R. 249 (1976).

judge's obligation to assure the accused properly understands the consequences of his plea.

At trial the parties deemed the charges of possession and attempted sale of heroin to be separately punishable; the Army Court of Military Review determined that the offenses were multiplicitous but affirmed because the extent of the misunderstanding was not so substantial as to render the plea improvident, and the accused had waived any objection to other possible harm due to the error.<sup>66</sup> Judge Cook wrote the opinion for CMA, in which the court held that waiver did not apply to these circumstances<sup>67</sup> and that the effect of the misunderstanding was sufficiently substantial to render the plea improvident.<sup>68</sup> Judge Cook emphasized, citing *Graves*, that "[p]rimary responsibility for determining legal limits of punishment rests upon the trial judge. . . ." <sup>69</sup> Thus, although the accused's counsel made a mistake as to the maximum sentence, so did the judge and the trial counsel; under such circumstances the accused did not have to bear the costs of this mistake.<sup>70</sup>

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<sup>66</sup> *United States v. Harden*, 50 C.M.R. 354 (A.C.M.R. 1975). Note that the ACMR did not use a waiver concept in its treatment of the providency of the plea itself: that court held that the misunderstanding was insubstantial. The waiver concept was applied to the fact that the sentence was imposed under a misunderstanding as to the maximum permissible punishment.

<sup>67</sup> While CMA's determination that the plea was improvident would seem to moot the waiver issue as to maximum sentence, Judge Cook indicated that multiplicity and sentence limitations generally are the trial judge's responsibility and the waiver doctrine is not applicable in such cases.

<sup>68</sup> Chief Judge Fletcher, concurring, added his views on what constitutes a substantial error, indicating that a "miscalculation of the period of impossible confinement which approaches 100 percent [is] 'substantial.'" *United States v. Harden*, 24 C.M.A. 76, 78, 51 C.M.R. 249, 251 (1976). Lesser periods may also be "substantial" in his view. This statement was, no doubt, an effort by the Chief Judge to provide some concrete guidance on this question for inferior courts. Such efforts are typical of Chief Judge Fletcher; he frequently attempts to establish rules of general applicability for the benefit of lower courts. Cf. *United States v. Knickerbocker*, 25 C.M.A. Adv. Sh. 846, 849, 54 C.M.R. Adv. Sh. 1072, 1075 (1977) (Fletcher, C.J., concurring in the result). See note 61 *supra*.

<sup>69</sup> Judge Cook did state that there could be situations where the "judge is misled by defense counsel." He then indicated that he might treat such situations differently. *United States v. Harden*, 24 C.M.A. 76, 77, 51 C.M.R. 249, 250 (1976).

<sup>70</sup> See also *United States v. Frangoulas*, 24 C.M.A. 317, 52 C.M.R. 28 (1976); *United States v. Smith*, 24 C.M.R. 79 n.1, 51 C.M.R. 252 n.1 (1976) (guilty plea provident despite erroneous determination of maximum punishment where accused acknowledged awareness of possible different interpretations of multiplicitous charges).

The court further expanded the trial judge's duties as to pleas in *United States v. Jemmings*.<sup>71</sup> In that case, CMA held that the military judge erred in accepting the accused's plea of guilty to housebreaking where his statements during the providency inquiry established a possible defense of duress.<sup>72</sup> To minimize the possibility of overlooking a possible defense during the plea acceptance discussion, Chief Judge Fletcher wrote:

Where the accused's responses during the providency inquiry suggest a possible defense to the offenses charged, the trial judge is well advised to clearly and concisely explain the elements of the defense in addition to securing a factual basis to assure that the defense is not available.<sup>73</sup>

The military judge should, therefore, go beyond merely eliciting a narrative from the accused so that he, the judge, can decide whether a defense exists; he should lay the defense out before the accused so that the issue, and the accused's (and his counsel's) understanding of it, are manifest in the record.<sup>74</sup>

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ity issue and manifested on the record an intent to plead guilty regardless of the judge's interpretation): *United States v. Brown*, 24 C.M.A. 314, 52 C.M.R. 25 (1976) (plea provident despite failure of military judge to inform accused it rendered him liable to a fine, which was subsequently adjudged); *United States v. Bowers*, 24 C.M.A. 5, 51 C.M.R. 5 (1975) (plea negotiated under misunderstanding of maximum punishment improper).

<sup>71</sup> 24 C.M.A. 256, 51 C.M.R. 650 (1976). See also *United States v. Craney*, 23 C.M.A. 519, 50 C.M.R. 658 (1975).

<sup>72</sup> The accused asserted during the providency inquiry that he was motivated to commit the offense by threats of harm to his family.

<sup>73</sup> 24 C.M.A. at 259, 51 C.M.R. at 653. CMA reversed because it could not ascertain whether the military judge himself understood that duress was a possible defense on these facts. Obliging the trial judge to describe the elements of a defense in the record not only helps to ensure the accused fully understands his plea. It also gives appellate courts a firmer appreciation of the trial judge's own understanding of the law and the case. This, and other rules like it, stem in part from CMA's concerns about the abilities of the judiciary and CMA's desire to keep a watchful eye on it.

<sup>74</sup> The court phrased this rule as the judge "should," not the judge "must." It probably stopped short of making advice on the elements of a defense a mandatory requirement because it has never actually made advice on the elements of the offense an absolutely mandatory requirement. See *United States v. Kilgore*, 21 C.M.A. 35, 44 C.M.R. 89 (1971). The present court reaffirmed the *Kilgore* rule in its memorandum opinion in *United States v. Grecco*, Docket No. 31,013 (C.M.A. April 8, 1977). Chief Judge Fletcher indicated in *Jemmings* that such an omission is a risky business, however.

The military judge must also be more penetrating with his inquiry in negotiated plea cases. In *United States v. Elmore*<sup>75</sup> Chief Judge Fletcher wrote a separate opinion in which he expressed his concern over the uncertainties and hidden dangers raised by pretrial agreements. He wrote:

[H]enceforth, as part of the *Care* inquiry the trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by any existing pretrial agreement. Where the plea bargain encompasses conditions which the trial judge believes violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness, he should, on his own motion, strike such provisions from the agreement with the consent of the parties.<sup>76</sup>

Chief Judge Fletcher's *Elmore* guidelines were subsequently adopted by the court in *United States v. Green*.<sup>77</sup> The trial judge must inject himself between the accused and the convening authority to ensure that unfair advantage is not taken of the accused in the pretrial agreement. The reference to the "trial judge's own notions of fundamental fairness" is intriguing. It must be viewed as a sign of Chief Judge Fletcher's strong desire that the military judge aggressively exercise his knowl-

<sup>75</sup> 24 C.M.A. 51, 54 C.M.R. 254 (1976). The majority (Senior Judge Ferguson dissented) held in *Elmore* that a provision in a pretrial agreement requiring the accused "to enter a plea of guilty prior to presentation of evidence on the merits" was permissible where the record established that the defense did not consider itself restricted by the provision from making motions. See notes 177-183 and accompanying text *infra* for further discussion of CMA's attitude toward pretrial agreements.

<sup>76</sup> *Id.* at 53, 51 C.M.R. at 256 (footnote omitted; emphasis in original).

<sup>77</sup> 24 C.M.A. 299, 52 C.M.R. 10 (1976). In addition to formally requiring the inquiry advanced by Chief Judge Fletcher in *Elmore*, *Green* requires the military judge to determine whether any plea bargain exists. *Green* also discussed the propriety of the military judge's examination of the quantum portion of the agreement which contains the convening authority's *quid pro quo* for the plea. The court held that such an examination was not error in this case. See *United States v. Villa*, 19 C.M.A. 564, 42 C.M.R. 166 (1970), but in the interests of "perceived fairness" CMA decided that this practice should be discontinued. The trial judge should not examine the quantum portion of the agreement until after he announces the sentence. This position seems somewhat inconsistent with CMA's desire for an active trial judiciary; it is probably explained by CMA's concern about the quality of the military judiciary. See notes 229-233 and accompanying text *infra*.

edge, experience and prestige in all aspects of the trial process. The trial judge must be the central figure in the courtroom. While he need not, and indeed should not,<sup>78</sup> try the case for the parties, he must ensure that the case is properly tried. This responsibility includes supervising not only counsel but others, such as the convening authority, who are connected with the trial.

### 3. *Protecting the Accused's Right to Counsel*

CMA has tightened the requirements that the military judge must follow to ensure that the accused understands his right to counsel. The accused's rights and choices as to counsel must be thoroughly explained to him.<sup>79</sup> The court has tolerated no deviation from the counsel inquiry standards required under *United States v. Donohew*.<sup>80</sup> In *United States v. Copes*<sup>81</sup> the court held that advising the accused of his right to counsel of his choice "from the SJA office" was an improper limitation on the accused's right under Article 38(b) of the Code.<sup>82</sup> In *United States v. Jorge*<sup>83</sup> CMA refused to assume that the accused was aware of his right to a civilian attorney merely because he had exercised his right to be represented by individual military counsel. In addition, the court found that the accused's selection of individual military counsel did not preclude him from also securing civilian counsel.<sup>84</sup>

CMA has also demanded that the military judge (as well as

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<sup>78</sup> See *United States v. Shackelford*, 23 C.M.A. Adv. Sh. 13, 54 C.M.R. Adv. Sh. 13 (1976), discussed at notes 252-253 *infra*.

<sup>79</sup> CMA has also indicated that denials by commanders of requests for individual military counsel must be carefully reviewed by trial and appellate courts. *United States v. Quinones*, 23 C.M.A. 462, 50 C.M.R. 481 (1973).

<sup>80</sup> 18 C.M.A. 149, 39 C.M.R. 194 (1969).

<sup>81</sup> 23 C.M.A. 578, 50 C.M.R. 843 (1975).

<sup>82</sup> Senior Judge Ferguson distinguished earlier cases in which defective *Donohew* advice was held nonprejudicial because in those cases the record as a whole had demonstrated that the accused understood his rights to counsel. See *United States v. Whitmire*, 21 C.M.A. 268, 45 C.M.R. 42 (1972); *United States v. Turner*, 20 C.M.A. 167, 43 C.M.R. 7 (1970).

<sup>83</sup> 23 C.M.A. 580, 50 C.M.R. 845 (1975).

<sup>84</sup> As Senior Judge Ferguson pointed out, *United States v. Jorge*, 23 C.M.A. 580, 581 n.1, 50 C.M.R. 845, 846 n.1 (1975), the rule in *United States v. Jordan*, 22 C.M.A. 164, 46 C.M.R. 164 (1973), that an accused has a right under Article 38(b) of the Code to individual military counsel or civilian counsel, but not both, is not applicable where the accused forms an attorney-client relationship with his individual military counsel before retaining civilian counsel.

others in the system) be more careful to ensure that the accused's right to counsel is not diluted in cases where one attorney represents multiple clients as to a single transaction. The court took a dim view of detailing one counsel to represent multiple defendants in *United States v. Evans*<sup>85</sup> and *United States v. Blakey*.<sup>86</sup> Although in the latter case it refused to ban the practice altogether, CMA said:

Several personnel at the trial level share substantially in carrying the burden of ascertaining the absence of any possibility of conflict in multiple representation. . . . Nobody involved in the trial process may escape this responsibility—neither the convening authority nor the defense counsel, nor the trial judge.<sup>87</sup>

Because the military judge is ultimately responsible for the process at the trial level, he must take the leading role here. To the extent that detailing counsel to represent multiple clients continues in the wake of *Evans* and *Blakey*, the military judge should engage in a detailed inquiry with counsel and each accused to ensure potential conflicts of interest are discovered before trial.<sup>88</sup>

#### 4. Preparation and Witness Production

One other area intimately related to the fairness of proceedings in the courtroom is witness production and defense access to evidence. CMA has demonstrated its concern with the military judge's responsibilities here, and is likely to increase its scrutiny of this issue in the months ahead. Article 46 of the UCMJ provides that the prosecution and defense shall have "equal opportunity to obtain witnesses and other evidence." The Manual states that the trial counsel will secure his own witnesses when he determines them to be "material and necessary" and that he will ensure the attendance of defense witnesses unless he disagrees that they are "necessary." In the latter event the disagreement is taken to the convening authority for resolution, and may ultimately be relitigated before the mili-

<sup>85</sup> 24 C.M.A. 14, 51 C.M.R. 64 (1975).

<sup>86</sup> 24 C.M.A. 63, 51 C.M.R. 192 (1976).

<sup>87</sup> *Id.* at 64, 51 C.M.R. at 193.

<sup>88</sup> See *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *Campbell v. United States*, 352 F.2d 859 (D.C. Cir. 1965). See also *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972).



tary judge at trial.<sup>89</sup> CMA is concerned that the Manual procedures do not ensure that the defense actually has equal access to witnesses, and it is also apparently convinced that the standard previously applied to such issues was improper.<sup>90</sup>

In *United States v. Carpenter*<sup>91</sup> the court dealt with the military judge's denial of a defense request for production of a character witness.<sup>92</sup> The military judge had opined<sup>93</sup> that although the witness was subject to military orders, "military necessity" could justify a command determination of nonavailability; because the command had declared the witness unavailable, the trial judge refused to compel his production. CMA unanimously held that this was error. Judge Cook, writing for the court, examined the judge's reliance on the "military necessity" rule. He wrote, "Although 'military necessity' or various personal circumstances . . . may be proper criteria to determine when [a witness'] testimony can be presented, the sole factor in determining whether he will testify at all is the materiality of his testimony."<sup>94</sup> Insofar as the court rejected the notion that military necessity justifies the absolute nonproduction of a witness, it was saying nothing new.<sup>95</sup>

<sup>89</sup> MCM, 1969, para. 115a.

<sup>90</sup> See *O'Callahan v. Parker*, 395 U.S. 258, 264 n.4 (1969).

<sup>91</sup> 24 C.M.A. 210, 51 C.M.R. 507 (1976).

<sup>92</sup> The requested witness was the officer who had been the accused's commander at the time the alleged offenses occurred. The requested witness was attending school at Fort Gordon, Georgia, at the time of trial, which took place at Fort Wadsworth, New York. He was to serve as a character witness. See *United States v. Sears*, 20 C.M.A. 380, 43 C.M.R. 220 (1971); *United States v. Sweeney*, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

<sup>93</sup> The military judge's remarks, quoted at some length in the opinion, were rather injudicious, and must have affected CMA's perception of his decision not to order the witness' production. The witness was not that far away, nor do his duties appear to have been especially essential. The defense offered to participate in a weekend session to minimize the witness' absence from school. With the facts in this posture, it was not surprising that CMA took a dim view of the judge's attitude and action.

<sup>94</sup> *United States v. Carpenter*, 24 C.M.A. 210, 212, 51 C.M.R. 507, 509 (1976).

<sup>95</sup> Actually, the term "military necessity" appears in U.C.M.J. art. 49(d)(2) which discusses when depositions may be introduced at a court-martial. "Military necessity" is one of several circumstances which justify using a deposition instead of live testimony. The purpose of such a provision was described in the legislative history, quoted in *United States v. Davis*, 19 C.M.A. 217, 223, 41 C.M.R. 217, 223 (1970):

MR. BROOKS: . . . May I ask . . . [w]hat is meant by "military necessity"?

MR. LARKIN: I take it that covers the situation where there is a witness

In *Carpenter* the court went on, however, to discuss the accused's right to production of witnesses. As noted in the quotation in the preceding paragraph, the court indicated that the "sole factor in determining whether a witness will testify at all is the materiality of his testimony." Significantly, the "and necessary" requirement included in the Manual equation has been dropped from the court's test. This omission does not seem to be inadvertent.<sup>86</sup> By deliberately ignoring the "neces-

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subject to the code, or military personnel who are on such an important military mission, or by virtue of military operations, that it is impossible in performing their duty to also be at the place of the trial. In that case it is permitted that their deposition be read at the trial.

MR. BROOKS: Of course, that could be badly abused if they wanted to.

MR. LARKIN: I suppose it is a question of the good faith in operating or administering it. [*Hearings on H.R. 2498 Before the House Armed Services Committee*, 81st Cong., 1st Sess., at 1970.]

If the doctrine could be abused in admitting depositions, its use to permit non-production of a witness altogether multiplies the dangers. Clearly the military judge misapprehended the applicability of the rule in *Carpenter*. As CMA had previously pointed out, failure to produce an essential witness who was not amenable to process would necessitate an abatement of the proceedings. *United States v. Daniels*, 23 C.M.A. 94, 48 C.M.R. 655 (1973)

<sup>86</sup> Judge Cook made the statement twice, see text accompanying note 94 *supra*. Earlier in the opinion he stated:

The right of an accused to compel the attendance of witnesses in his behalf is well established in military law. This right is not absolute in that it involves consideration of relevancy and materiality of the expected testimony. However, once materiality has been shown the Government must either produce the witness or abate the proceedings.

24 C.M.A. at 212, 51 C.M.R. at 509 (citations and footnote omitted). The use of the terms "relevancy" and "materiality" is redundant in military parlance. MCM, 1969, para. 137. See also *United States v. Iturralde-Aponte*, 24 C.M.A. 1, 51 C.M.R. 1 (1973), which held that the accused was entitled to the production of a psychiatrist who had interviewed the homicide victim when the victim was eleven years old, and a probation officer who knew the victim when he was eighteen. (The victim was apparently twenty-one or twenty-two when he was killed.) Both witnesses would have testified as to the violent nature of the victim's character. The accused was alleging self-defense. The military judge denied the request for the witnesses on grounds of temporal remoteness. CMA reversed, holding that the witnesses should have been produced. CMA stated of the defense right to witnesses: "[w]ho these witnesses shall be [assuming they are material to the issues in the case] is a matter for the accused and his counsel." The quoted language is from *United States v. Sweeney*, 14 C.M.A. 599, 602, 34 C.M.R. 379, 382 (1964); the bracketed material was added by CMA in *United States v. Iturralde-Aponte*, 23 C.M.A. 1, 2, 51 C.M.R. 1, 2 (1973). Judge Cook recently indicated that he did not mean to change the test for witness production. See *United States v. Willis*, 5 M.J. 94, 96 (C.M.A. 1977) (Cook, J. dissenting). Nonetheless, the majority in *Willis* obviously read *Carpenter* more broadly.

sary" requirement of the Manual, the court is making it easier for the defense to exercise its own choice as to what witnesses it will call. Although CMA has not always been very precise in its use of the terms "material and necessary," the "necessary" requirement appears to have been used to deny production of defense witnesses, even though their testimony would be material, where their testimony would be cumulative with that of other more immediately available witnesses,<sup>97</sup> or where it would go to relatively peripheral issues.<sup>98</sup> By making the standard one of materiality alone, CMA has restricted the government's power to affect which witnesses the defense may elect to have present.<sup>99</sup>

In addition to somewhat subtly changing the test for witness production,<sup>100</sup> CMA also indicated in *Carpenter* that the military judge should and must bear greater direct responsibility for the production of witnesses. In a footnote, Judge Cook commented on the present procedures under Manual paragraph 115a whereby the defense is required to submit its request for witnesses first to the trial counsel, and then, in the event of disagreement, to the convening authority:

To the extent that this paragraph requires the defense to submit its request to a partisan advocate for a determination, the requirement appears to be inconsistent with Article 46 . . . . Since the defense in the present case notified the trial counsel of his desire for a witness, we have found it unnecessary to discuss in the text of the

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<sup>97</sup> See, e.g., *United States v. Boone*, 48 C.M.R. 709 (A.C.M.R. 1975).

<sup>98</sup> See, e.g., *United States v. Sweeney*, 14 C.M.R. 599, 34 C.M.R. 379 (1964); *United States v. Harvey*, 8 C.M.A. 538, 25 C.M.R. 42 (1957) (dictum); cf. *United States v. Thornton*, 8 C.M.A. 446, 24 C.M.R. 256 (1957).

<sup>99</sup> Two recent cases have applied this more liberal standard. See *United States v. Willis*, 3 M.J. 94 (C.M.A. 1977), and *United States v. Jouan*, 3 M.J. 136 (C.M.A. 1977). In *Willis* the majority said, "We believe that materiality is not susceptible to gradation. The testimony of a witness either is or is not material to the proceeding at hand." 3 M.J. at 95. *Jouan* seems to reflect a recognition that a military judge must be able to limit witness requests, at least insofar as the testimony may be cumulative, for there the court said, "Under the rule in *Carpenter*, we do not seek to open the floodgate to limitless requests for witnesses, each side seeking to augment its case by numerical superiority. . . ." 3 M.J. at 137.

<sup>100</sup> CMA overruled no cases in either *Carpenter* or *Iturralde-Aponte*. Yet compare *Carpenter* with *United States v. Sweeney*, 14 C.M.A. 599, 34 C.M.R. 379 (1964); *United States v. Thornton*, 8 C.M.A. 446, 24 C.M.R. 756 (1957); *United States v. DeAngelis*, 3 C.M.A. 298, 12 C.M.R. 54 (1953). Compare *Iturralde-Aponte* with *United States v. Harvey*, 8 C.M.A. 536, 25 C.M.R. 42 (1957).

opinion the failure to comply with the procedure prescribed by paragraph 115a. However, this case illustrates that various problems can arise because the military judge has not been specifically empowered by the Uniform Code of Military Justice to order the appearance of a witness at all stages of the proceedings.<sup>101</sup>

This statement reflects where CMA would like to go; in this instance, legislation seems necessary to achieve the result.

Nevertheless, *Carpenter* demonstrates that the trial judge must be more vigilant in protecting the accused's rights in this area. The Manual already directs that renewal of a request for witnesses at trial be treated *de novo*.<sup>102</sup> *Carpenter* casts doubt upon any denial of witnesses based upon a failure to follow the procedural requirements of paragraph 115a.<sup>103</sup> At bottom, *Carpenter* also reflects the view that military judges are too solicitous of the command's desires and the command's purse strings in deciding witness production questions. The case reemphasizes that the issue is one of materiality of the witness and the decision is the judge's to make. Expense and inconvenience to the command cannot be permitted to undermine the accused's basic right under Article 46. As to enforcement mechanisms, *Carpenter* indicates that if the Government fails to comply with the judge's production order, it must "abate the proceedings."<sup>104</sup> Failure to do so would presumably oblige the judge to dismiss charges.<sup>105</sup>

<sup>101</sup> *United States v. Carpenter*, 24 C.M.A. 210, 212 n.8, 51 C.M.R. 507, 509 n.8 (1976).

<sup>102</sup> MCM, 1969, para. 115a.

<sup>103</sup> There is already authority for this. *See United States v. Jones*, 21 C.M.A. 215, 44 C.M.R. 269 (1972). Query how CMA would treat accountability for speedy trial purposes if defense counsel waited until trial to make his request for witnesses? Surely the defense has some burden to raise the issue as early as practicable (perhaps by requesting an Article 59(a) session as soon as charges are referred.)

<sup>104</sup> *United States v. Carpenter*, 24 C.M.A. 210, 212, 51 C.M.R. 507, 509 (1976). *See note 96 supra*.

<sup>105</sup> *See also United States v. Daniels*, 23 C.M.A. 94, 48 C.M.R. 655 (1974). A question may arise as to precisely what is meant by "abate." *Black's Law Dictionary* (4th ed. 1968) defines the term: "As used in reference to actions at law, word abate means that action is utterly dead and cannot be revived except by commencing a new action." *Id.* at 16. Thus, an abatement would seem tantamount to a withdrawal or dismissal. If the Government did not abate the proceedings, the military judge would then, presumably, have to dismiss charges. *But cf. United States v. McElhinney*, 21 C.M.A. 456, 45 C.M.R. 210 (1972) (convening authority refused to produce witness held essential by military judge. Trial was held without

The significance of the statement in *Carpenter* that the military judge should be responsible for the production of witnesses at "all stages of the proceedings"<sup>106</sup> was made apparent in *United States v. Ledbetter*.<sup>107</sup> There the majority held that the availability of a witness to testify at an Article 32(b) hearing is an issue "ultimately to be resolved, as is true with other questions, by the trial judge. Neither the witness' inclination to attend nor his commander's desire to order his attendance at a pretrial investigation is conclusively determinative."<sup>108</sup> Again, this statement does not really change the law,<sup>109</sup> but it serves to reemphasize the military judge's responsibilities in the area, and to admonish him not to give undue deference to the commander's desires.

the witness. Weighing the materiality of the witness' testimony on review, CMA held that his nonproduction, while error, was not prejudicial).

<sup>106</sup> *United States v. Carpenter*, 24 C.M.A. 210, 212 n.8, 51 C.M.R. 507, 509 n.8 (1976). See note 101 and accompanying text *supra*.

<sup>107</sup> 23 C.M.A. Adv. Sh. 51, 54 C.M.R. Adv. Sh. 51 (1976). Interestingly, although Judge Cook made the statement about the desirability of the military judge's exercising power over the production of witnesses "at all stages of the proceedings" in *Carpenter* he dissented from the majority's determination in *Ledbetter* that the military judge has such power. In *Ledbetter* he seemed content to let the Article 32(b) investigating officer, or the witness' commander make determinations of availability.

This apparent inconsistency provides a substantial clue as to Judge Cook's philosophy. In *Carpenter* Judge Cook said the military judge *should* have power to determine witness production issues at all stages of the proceedings. In *Ledbetter* (while primarily disagreeing with the majority's determination of the standard of availability) Judge Cook was unwilling to recognize that the military judge possesses this power in the absence of more direct codal authority and in the face of Manual provisions placing it elsewhere. Thus, while Judge Cook may share some of the long range goals for the system espoused by his brethren, he is less prone to use the judicial process as a means to attain them. Chief Judge Fletcher has said in describing some of the court's goals, "I would move now to an area where the concepts expressed are unanimous, but the implementation is subject to debate by the individual judges. This is not to say that we differ in direction but only in how to get there." Fletcher, *The Continuing Jurisdiction Trial Court*, THE ARMY LAWYER, Jan. 1976, at 5, 6. Judge Cook's extensive background as a legislative assistant in Congress no doubt contributes to his philosophy that major change ought to be carried out by legislative, rather than judicial action. A good example of Judge Cook's judicial philosophy is seen in his dissent in *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975).

<sup>108</sup> *United States v. Ledbetter*, 23 C.M.A. Adv. Sh. 51, 61 n.15, 54 C.M.R. Adv. Sh. 51, 61 n.15 (1976).

<sup>109</sup> See MCM, 1969, para. 69c.

As in *Carpenter*, the court in *Ledbetter* accompanied this reminder to the military judge with a more liberal standard for determining the availability of defense witnesses. Previously there was no explicit test for determining the availability of witnesses at an Article 32 investigation, but in practice it seems that distance alone was sufficient for a finding of unavailability.<sup>110</sup> In *Ledbetter*, CMA held, however, that availability must be determined by balancing "[t]he significance of the witness' testimony . . . against the relative difficulty and expense of obtaining the witness' presence at the investigation."<sup>111</sup> In *Ledbetter* CMA held that the key government witness, who was in Florida at the time of the Article 32(b) hearing, should have been produced although the situs of the hearing was in Thailand. Of pivotal importance in the court's decision was the witness' "untimely transfer from Thailand less than two weeks prior to the commencement of the Article 32 investigation."<sup>112</sup> Thus, the government's own acts may be thrown onto the scale against it in this balancing test, when those acts have the effect, either intentionally or inadvertently, of increasing the expense and inconvenience in producing the witness.<sup>113</sup>

A case in a related area, one dealing with pretrial preparation and discovery, further amplifies the court's view of the military judge's responsibility and authority. In *Halfacre v.*

<sup>110</sup> See, e.g., *United States v. Cox*, 48 C.M.R. 723 (A.F.C.M.R. 1974).

<sup>111</sup> *United States v. Ledbetter*, 25 C.M.A. Adv. Sh. 51, 61, 54 C.M.R. Adv. Sh. 51, 61 (1976).

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

<sup>113</sup> To the statement that the witness' desire to be present to testify at the Article 32(b) hearing is immaterial, see text accompanying note 108 *supra*, Chief Judge Fletcher added, "But cf. *United States v. Farrison*, 10 C.M.A. 220, 27 C.M.R. 294 (1959)." *Farrison* recognized that:

The Manual also observes that there is "no provision for compelling the attendance [at an Article 32(b) hearing] of witnesses not subject to military jurisdiction." Paragraph 34d, page 47; cf. paragraph 115. It would appear, therefore, that the decision as to availability might rest with the witness himself.

10 C.M.A. at 221, 27 C.M.R. at 295. While Chief Judge Fletcher's reference to *Farrison* is rather cryptic, it seems to mark a recognition that an accused has no right to the attendance at an Article 32(b) hearing of an unwilling witness not subject to military orders. However, just because the witness is not subject to military orders will not justify his or her nonattendance; the witness must also be unwilling to attend. *United States v. Chestnut*, 25 C.M.A. Adv. Sh. 182, 54 C.M.R. Adv. Sh. 290 (1976). Thus, within the limits imposed by *Ledbetter's* balancing test, the Government must also endeavor to secure the voluntary attendance of witnesses not subject to military orders.

*Chambers*<sup>114</sup> the court, acting on a petition for extraordinary relief, ordered:

That respondents be given a period of 60 days from the date of this order within which to comply with the meaning and effect of the military judge's order by providing the necessary transportation for petitioner and his detailed defense counsel to travel to and from Karachi, Pakistan. . . .<sup>115</sup>

The situs of the trial was Japan. It appears that Halfacre, who was charged with possession of opium, was contending that his possession was unknowing and that he needed to return to Karachi to gather evidence regarding his receipt of the box in which the opium was discovered. He originally sought relief from the trial judge, who granted a continuance so that he might be given administrative leave in order to go if he paid his (and his counsel's) travel expenses; the judge refused to order him sent at government expense, and the convening authority refused to so send him. Halfacre then sought, and obtained, the above relief from CMA.

Several things are significant about the *Halfacre* order. Most obvious is its brevity. The above quoted language is virtually the entire order; no opinion or citation of authority accompanies it. Yet the court ordered a commander to send an accused and counsel halfway around the world. In this sense, *Halfacre* stands as an example of the present court's willingness to use its extraordinary writ powers,<sup>116</sup> with dramatic suddenness, when the need arises, as a means of demonstrating its interest and concern about an area of law. In so doing the court has been prone to leave doctrinal issues for later resolution.<sup>117</sup>

*Halfacre* should not be read, however, as indicating that CMA will get into the business of ordering accused, counsel, and witnesses all over the world. The critical language in *Halfacre* is that which indicates that CMA's order is designed to compel compliance with "the meaning and effect of the military judge's order." It will be recalled that the trial judge had

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<sup>114</sup> Misc. Docket No. 76-29 (13 July 1976).

<sup>115</sup> *Id.* slip. op. at 1-2.

<sup>116</sup> See notes 258-284 and accompanying text *infra*.

<sup>117</sup> See, e.g., *Phillippy v. McLucas*, 23 C.M.A. 709, 50 C.M.R. 915 (1975); *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975); *Harms v. United States Military Academy*, Misc. Docket No. 76-38 (10 Sept. 1976).

continued the case so that the convening authority might give the accused administrative leave. By so doing, the military judge had effectively dropped the case back in the convening authority's lap.<sup>118</sup> CMA's order indicates that the trial judge's decision to continue the case demonstrated that he considered it necessary for Halfacre and his counsel to return to Karachi; otherwise, there was no need for the continuance at all. This being necessary, CMA gave "meaning and effect" to the military judge's order by ordering Halfacre and his counsel sent. *Halfacre*, therefore, stands as a message to this military judge and all others that the trial judge, not the convening authority, makes determinations such as these and the trial judge has the authority to enforce his decisions.

Read in conjunction, *Carpenter*, *Ledbetter*, and *Halfacre* establish that the military judge is responsible for seeing to it that the accused has access to and can have presented all available evidence material to the case, at all stages of the proceedings. Further, the cases indicate that in determining what evidence is available, the military judge may not give overly solicitous regard to the expense or inconvenience the Government will suffer. The distances and expenses involved in both *Ledbetter* and *Halfacre* are ample testimony to that. While the court has spoken little about the sanctions underlying the trial judge's authority in these areas, the abatement language in *Carpenter* indicates that the trial judge's ultimate weapon is dismissal of the charges.

### B. THE MILITARY JUDGE IS RESPONSIBLE FOR THE CRIMINAL PROCESS OUTSIDE THE COURTROOM

As *Ledbetter* and *Halfacre* indicate, CMA believes that many of the decisions in the pretrial process must be made by the military judge. To the extent that nonjudicial personnel, such as convening authorities, may make decisions in these areas, the judge must review them.

<sup>118</sup> Why the military judge took this halfway measure is unclear. One can only speculate that he either felt that he lacked authority to actually order the transportation of the accused and his counsel to Karachi, or that he felt the motion was really groundless, but was attempting to force defense counsel's hand on the issue. Apparently, defense counsel had difficulty obtaining entry visas into Pakistan after CMA had ordered that he and Halfacre be sent. CMA recently vacated the order, apparently without accused and counsel having returned to Karachi.



### 1. *Pretrial Confinement*

Among the court's most significant decisions of the last two years have been those dealing with pretrial confinement. In a series of cases arising on petitions for extraordinary relief, the court effectively removed from the commander the authority to determine whether a member of his command could be confined before trial. At the same time CMA increased the power of the military judge in certain respects and hinted that military judges might possess far broader authority in other areas. Additionally, the court has recently revised the standards for imposition of pretrial confinement.

#### a. *Limiting the Commander's Power over Pretrial Confinement*

Prior to 1975 CMA had disclaimed responsibility over pretrial confinement issues, leaving the matter within the commander's control<sup>119</sup> as the Code and Manual apparently dictated.<sup>120</sup> It was generally a requirement that the accused exhaust his other remedies, including filing an Article 138 complaint,<sup>121</sup> before he could even secure any sort of judicial review,<sup>122</sup> and such review was limited. Individual members of CMA had hinted that the military judge might have some authority to act on pretrial confinement issues,<sup>123</sup> but hints were

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<sup>119</sup> *E.g.*, *Horner v. Resor*, 19 C.M.A. 285, 41 C.M.R. 285 (1970):

The type of restraint, if any, to be imposed upon an accused prior to trial presents a question for resolution by the commanding officer, in the exercise of his sound discretion. His decision will not be reversed in the absence of a showing of an abuse of discretion.

*See also* *Wood v. McLucas*, 22 C.M.A. 475, 47 C.M.R. 643 (1973); *Catlow v. Cooksey*, 21 C.M.A. 196, 44 C.M.R. 160 (1971); *Dexter v. Chafee*, 19 C.M.A. 289, 41 C.M.R. 289 (1970).

<sup>120</sup> *See* U.C.M.J. art. 9; MCM, 1969, paras. 20, 21, & 22. Paragraph 21c states that a "court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his custody in its presence."

<sup>121</sup> U.C.M.J. art. 138. An Article 138 complaint is an official complaint against a commanding officer demanding redress for a wrong done by that officer. The complaint must be investigated by the general court-martial convening authority and a report thereof must be filed with the appropriate service secretary.

<sup>122</sup> *United States v. Tuttle*, 21 C.M.A. 229, 45 C.M.R. 3 (1972); *Catlow v. Cooksey*, 21 C.M.A. 196, 44 C.M.R. 160 (1971); *Font v. Seaman*, 20 C.M.A. 387, 43 C.M.R. 227 (1971). This process effectively precluded any other remedies because of its time-consuming nature and because under *Font* and *Catlow* the command decision was reviewable only for abuse of discretion.

<sup>123</sup> *See DeChamplain v. Lovelace*, 23 C.M.A. 35, 37, 48 C.M.R. 506, 508 (1974) (*Duncan, C.J.* concurring in the result): "I do not agree with the military judge's

as far as they went. The military judge's powers were vague and at best very limited.<sup>124</sup> The only remedy for illegal pretrial confinement that was explicitly recognized before September 1975 was sentence relief.<sup>125</sup>

Then in three brief orders, *Porter v. Richardson*,<sup>126</sup> *Milanes-Canamero v. Richardson*<sup>127</sup> and *Phillippy v. McLucas*,<sup>128</sup> issued on September 9, 1975, the court began a process which would effectively shift the responsibility for the pretrial confinement decision from the commander to a judicial or quasi-judicial officer. In so doing the court also implied that a military judge has more powers than previously recognized. Yet, despite the suddenness and the impact with which these decisions initially struck, the court was remarkably vague in some of its language. As a result of the court's approach one must conclude that in its pretrial confinement decisions of late 1975 and early 1976, the court was reluctant to impose a specific solution for

ruling below (according to petitioner) that he, in a proper case, lacks authority to hear and rule upon the accused's motion for release from pretrial confinement." See also *Newsome v. McKenzie*, 22 C.M.A. 92, 46 C.M.R. 92, 98 (1973) (statement of Quinn, J.); *Callow v. Cooksey*, 21 C.M.A. 106, 44 C.M.R. 160 (1971); *Font v. Seaman*, 20 C.M.A. 387, 43 C.M.R. 227 (1971); *Callow* and *Font* both indicated that if Article 138 relief was denied, the issue should be presented to the military judge who was to review only for an abuse of discretion, following the processing of an Article 138 complaint. *DeChamplain* and *Newsome* did not refer to an Article 138 complaint as a prerequisite to relief.

<sup>124</sup> Thus, in *Hallinan v. Lamont*, 18 C.M.A. 652 (1968), CMA indicated, while denying a petition for extraordinary relief, that pretrial confinement amounting to harassment or oppression "... resulting in denial of the right to a speedy trial, the improper procurement of a confession, the impeding of proper preparation for trial, or otherwise denying due process of law may be remedied by appropriate motions submitted at the trial level." *Id.* at 653; cf. *Horner v. Resor*, 19 C.M.A. 285, 41 C.M.R. 285 (1970).

It should be noted that Judge Quinn cited *Hallinan* and *Horner* in making his statement in *Newsome v. McKenzie*, 22 C.M.A. 92, 46 C.M.R. 92 (1973), that pretrial confinement issues might, in some circumstances, be presented to the military judge. Judge Quinn's reliance on these cases seems to indicate that the powers he ascribed to the military judge were quite limited, and did not extend to powers to order a prisoner's release or dismiss charges where confinement was illegal but without any further showing of prejudice. See also *United States v. Gagnon*, 42 C.M.R. 1035 (A.F.C.M.R. 1970).

<sup>125</sup> See *United States v. Jennings*, 19 C.M.A. 88, 41 C.M.R. 85 (1969); *United States v. Nelson*, 18 C.M.A. 177, 39 C.M.R. 177 (1969). See also *Walker v. United States*, 19 C.M.A. 247, 251, 41 C.M.R. 247, 251 (1970).

<sup>126</sup> 23 C.M.A. 704, 50 C.M.R. 910 (1975).

<sup>127</sup> 23 C.M.A. 710, 50 C.M.R. 916 (1975).

<sup>128</sup> 23 C.M.A. 709, 50 C.M.R. 915 (1975).

the problem it perceived. This reluctance appears to have dissipated recently, and the court has begun to remodel the pretrial confinement process on its own.

In *Porter*, *Milanes-Canamero*, and *Phillippy* the court, acting on petitions for extraordinary relief, ordered the trial judge in each case to "convene an Article 39(a) . . . session to inquire into the legality of petitioner's pretrial confinement [and to] issue orders, if any are necessary to effectuate his findings."<sup>129</sup> It is at once apparent that this ruling did not ineluctably flow from the well spring of judicial precedent. What was more perplexing was that the majority's<sup>130</sup> orders included only a terse citation of four cases<sup>131</sup> without any discussion of the issues involved. Of the four cases the court relied upon, *Gerstein v. Pugh*<sup>132</sup> was the critical one.<sup>133</sup> In *Gerstein* the Supreme Court held that a probable cause determination by a

<sup>129</sup> *Phillippy v. McLucas*, 23 C.M.A. 709, 710, 50 C.M.R. 915, 916 (1975); *Milanes-Canamero v. Richardson*, 23 C.M.A. 710, 50 C.M.R. 915 (1975); *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975). In *Phillippy*, because charges had not been referred to trial when Airman Phillippy filed his petition with CMA, CMA also ordered "[t]hat the convening authority, if the petitioner is in confinement on the date of this order and if the convening authority intends to refer this case to trial, forthwith refer this case to an appropriate court-martial. . . ." 23 C.M.A. at 709, 50 C.M.R. at 915.

<sup>130</sup> Judge Cook dissented in all three cases.

<sup>131</sup> The majority cited: *Gerstein v. Pugh*, 420 U.S. 103 (1975); *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975); *DeChamplain v. Lovelace*, 23 C.M.A. 35, 37, 48 C.M.R. 506, 508 (1974) (Duncan, C.J. concurring); *Newsome v. McKenzie*, 22 C.M.A. 92, 93, 48 C.M.R. 92, 93 (1973) (Quinn, J. concurring).

<sup>132</sup> 420 U.S. 103 (1975).

<sup>133</sup> As noted above, see note 124 *supra*, a careful examination of Judge Quinn's position in *Newsome v. McKenzie*, 22 C.M.A. 92, 93, 48 C.M.R. 92, 93 (1973), which was relied upon by the majority in *Phillippy*, *Porter*, and *Milanes-Canamero*, reveals that he did not appear to envision the sort of action taken in those cases. Chief Judge Duncan's position in *DeChamplain v. Lovelace*, 23 C.M.A. 35, 37, 48 C.M.R. 506, 508 (1974), see note 123 *supra*, might imply that he felt that the military judge has authority to order an accused's release from pretrial confinement. In that opinion, however, Judge Duncan cited his concurring opinion in *Newsome v. McKenzie* where he indicated that the military judge's power to rule on pretrial confinement issues was at that time undetermined. Thus, Chief Judge Duncan's *DeChamplain* statement seems simply to be a caveat to the military judge not to assume he lacks power because that issue was uncertain.

The Eighth Circuit Court of Appeals' decision in *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975), indicated that an accused in the military has a right to a hearing on his pretrial confinement by someone other than the commander who preferred charges. That court specifically disavowed disqualifying the convening authority from so ruling.

neutral and detached magistrate is a necessary prerequisite to any significant period of pretrial detention. In *Porter* and *Milanes-Canamero*, CMA indicated that the accused had been incarcerated for a period of time "without the legality of his confinement being considered by a neutral and detached magistrate, although petitioner's case was referred to trial. . . ." <sup>134</sup> This statement, coupled with the subsequent citation of *Gerstein* appeared to indicate that the convening authority (who presumably passed on the probable cause issue when he referred the charges) did not qualify as a neutral and detached magistrate. <sup>135</sup>

Subsequently, in *Courtney v. Williams* <sup>136</sup> CMA discussed this problem in more depth. Chief Judge Fletcher, writing for the majority, equated "the person ordering the confinement" (who is usually the accused's commander) with the arresting policeman in *Gerstein*. <sup>137</sup> He then pointed out that the UCMJ

<sup>134</sup> *Milanes-Canamero v. Richardson*, 23 C.M.A. 710, 50 C.M.R. 916 (1975); *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975).

<sup>135</sup> The Supreme Court has held that a magistrate need not be a lawyer. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). He must, however, be neutral and detached. *Id.*; cf. *United States v. United States District Court*, 407 U.S. 297 (1972); *Coullidge v. New Hampshire*, 408 U.S. 443 (1971). *Gerstein*, of course, was silent as to whether the commander is a neutral and detached magistrate.

<sup>136</sup> 24 C.M.A. 87, 51 C.M.R. 260 (1976). Shortly after its decisions in *Porter*, *Milanes-Canamero*, and *Phillippy*, CMA decided *Kelly v. United States*, 23 C.M.A. 567, 50 C.M.R. 786 (1975) and *Thomas v. United States*, 23 C.M.A. 570, 50 C.M.R. 709 (1975). In each of these cases CMA determined that petitioners were confined in contravention of applicable regulations and Article 13 of the Code. In *Thomas* CMA ordered release of the petitioner; in *Kelly*, CMA returned the case to the Army Court of Military Review for it "to exercise its extraordinary writ authority." 23 C.M.A. at 568, 50 C.M.R. at 787. Thus CMA decided that the Courts of Military Review have all writs authority. See note 244 *infra*. While *Kelly* and *Thomas* were not entirely clear, they hinged primarily on the failure of the Army to adhere to its own regulations concerning the incarceration of prisoners at the Disciplinary Barracks at Fort Leavenworth. (Both *Kelly* and *Thomas* were pending rehearings at the time of their petitions and therefore were technically in pretrial confinement.) These decisions, on the heels of *Porter*, *Milanes-Canamero*, and *Phillippy*, served to reemphasize the rapidity with which CMA wanted to move in this area.

<sup>137</sup> *Courtney v. Williams*, 24 C.M.A. 87, 89, 51 C.M.R. 260, 262 (1976). It should be recognized that Chief Judge Fletcher has elsewhere obscured the distinction between Articles 7 and 9 of the U.C.M.J. See *United States v. Kinane*, 24 C.M.A. 120, 123 n.7, 51 C.M.R. 310, 313 n.7 (1976). See also notes 441-445 and accompanying text *infra*. Thus, the distinction between the person ordering apprehension and the person ordering arrest, see *United States v. Ross*, 13 C.M.A. 432, 32 C.M.R. 432 (1963), is rendered meaningless.

"provides no procedure for reviewing the probable cause determination that is made by the person ordering arrest or confinement,"<sup>138</sup> as would be the case in the civilian situation. The Chief Judge next stated a principle which has obviously guided the present court in much of its recent work: "[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."<sup>139</sup> The majority found no such conditions here.

While *Courtney* obviously removed the reviewing function from the person who orders confinement, the opinion was somewhat ambiguous as to who may exercise that function. It was apparent that the majority preferred that such a role be filled by a legally trained judicial officer;<sup>140</sup> yet the court stopped short of expressly imposing such a requirement. It merely stated that pretrial confinement must be reviewed by a neutral and detached magistrate without defining that term. The apparent disqualification of the convening authority in *Porter* and *Milanes-Canamero* casts doubt on exercise of such authority by any commander, however.<sup>141</sup>

<sup>138</sup> *Courtney v. Williams*, 24 C.M.A. 87, 89, 51 C.M.R. 260, 262 (1976). The court effectively held the UCMJ provisions unconstitutional there, because Article 9 authorizes an appropriate commander to order confinement. CMA avoided striking down a codal provision by saying that the Code is constitutionally incomplete. The court felt compelled to fill in the gaps it found in the pretrial confinement provisions of Articles 9 through 15. See notes 147-151 and 296-301 *infra*.

<sup>139</sup> *Id.*; cf. *United States v. Grunden*, 25 C.M.A. Adv. Sh. 327, 54 C.M.R. Ad. Sh. 1053 (1977).

This Court recognizes that the Supreme Court in *Parker v. Levy*, 417 U.S. 733, 743 (1974), acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions. See *Middendorf v. Henry*, 425 U.S. 25 (1976); *Greer v. Spock*, 424 U.S. 828 (1976); *Schlesinger v. Councilman*, 420 U.S. 738 (1975). Yet, this Court once again must state that analysis and rationale will be determinative of the propriety of given situations, and that the mere uniqueness of the military society or military necessity cannot be urged as the basis for sustaining that which reason and analysis indicate is untenable. See *United States v. Robel*, 389 U.S. 258 (1967).

*Id.* at 332 n.9, 54 C.M.R. Adv. Sh. at 1058 n.9.

<sup>140</sup> Chief Judge Fletcher commended the Army's military magistrates program which had already transferred some of the pretrial confinement review considerations to independent judicial officers. *Courtney v. Williams*, 24 C.M.A. 87, 90 n.14, 51 C.M.R. 260, 263 n.14 (1976). See also *Bouler v. Wood*, 23 C.M.A. 589, 50 C.M.R. 854 (1975), commending the military judge for "recognizing that the judicial process must be involved in the pretrial confinement process." *Id.* at 590, 50 C.M.R. at 855.

<sup>141</sup> The Air Force has construed *Courtney* to permit the commander having special

CMA was less ambiguous in *Courtney* in describing the criteria to be used in reviewing the pretrial confinement decision.<sup>142</sup> The magistrate must not only find probable cause to believe the individual has committed an offense, as required by *Gerstein*. Under *Courtney* he must also make a "bail type" decision whether the individual should be confined. In *Courtney* this decision rested upon whether the accused was likely to remain present for trial.<sup>143</sup>

These issues have been brought into sharper focus in two recent decisions, but the illumination necessary to highlight the court's thinking has brought other troubling questions into view. In *Fletcher v. Commanding Officer*<sup>144</sup> CMA ordered the release from pretrial confinement of eight Marines whose confinement had been reviewed by a military magistrate at Camp Pendleton. This magistrate was not a lawyer. The majority ordered release because "[t]he Government has not shown a need for pretrial confinement. Indeed, there is nothing in the records to indicate a disposition on the part of any of the petitioners to resort to flight to avoid prosecution."<sup>145</sup> The

court-martial jurisdiction over those at the confinement facility to be the magistrate. See *United States v. Williams*, \_\_\_ C.M.R. \_\_\_, ACM S 24413 (A.F.C.M.R., 20 Aug. 1976). *Courtney* does not expressly foreclose such a system; indeed its acceptance of the rationale of *DeChamplain v. Lovelace*, 510 F.2d 419 (8th Cir. 1975), which upheld the convening authority's power to rule on pretrial confinement lends some support to this view.

One is still reminded, however, that despite the fact that the convening authority had referred charges in *Porter* and *Milanes-Canamero*, CMA said these individuals had not had the legality of their confinement reviewed by a neutral and detached magistrate. Presumably, a convening authority had passed on both the probable cause question (by referring charges) and, because both individuals had been confined for more than 30 days, the question whether they should have been confined. (DoD Dir. 1323.4, para. 111.A.2.b. requires such a determination). Chief Judge Fletcher has now made it clear that he thought *Porter*, *Milanes-Canamero* and *Phillippy* required a decision by a judicial officer. See text accompanying notes 158-160 *infra*.

<sup>142</sup> Bail is not available in the military. See *Levy v. Resor*, 17 C.M.A. 133, 37 C.M.R. 999 (1967). See also 18 U.S.C. § 1356(2) (Supp. V 1975). On the surface it could be argued that the absence of this determination was the critical shortcoming in the procedures in *Porter* and *Milanes-Canamero*. But see note 141 *supra*.

<sup>143</sup> *Courtney v. Williams*, 24 C.M.A. 87, 90 n.12, 51 C.M.R. 260, 263 n.12 (1976). But see *United States v. Peters*, 24 C.M.A. 287, 288 n.4, 51 C.M.R. 803, 804 n.4 (1976), wherein Judge Perry hinted that risk of flight might not be the only permissible basis for pretrial confinement.

<sup>144</sup> Misc. Doc. No. 76-103 (C.M.A. Feb. 18, 1977).

<sup>145</sup> *Id.*, slip op. at 4. In what may have been a hint of broader grounds for pretrial restraint, the court did say in concluding its order:

majority did not comment upon the magistrate's lack of legal qualifications.

Chief Judge Fletcher dissented in *Fletcher*, and said that he would return the case for "a hearing before a legally trained judicial officer on situs."<sup>146</sup> The Chief Judge indicated that in his view, *Porter*, *Milanes-Canamero*, and *Phillippy* require a true judicial officer to review pretrial confinement decisions. The fact that the majority did not adopt this approach may reflect that they are willing to let nonindependent nonlawyers make such decisions, or it may simply be that the majority decided not to reach the question on the facts of the case.

In *United States v. Heard*<sup>147</sup> the court again dealt with the legality of pretrial confinement.<sup>148</sup> The majority in *Heard* shifted gears in holding that in addition to risk of flight, detention for the purpose of preventing further serious crimes or obstruction of justice may also be a permissible basis for pretrial confinement.<sup>149</sup> The court held, however, that pretrial

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The authorities may, if they deem it appropriate within the purview and limitations of the Uniform Code of Military Justice, impose restraints, other than confinement, which may be designed to assure the presence of the parties in court as required and which may serve to prevent recurrences of the alleged incidents.

*Id.*, slip op. at 5 (emphasis added).

<sup>146</sup>*Id.*, slip op. at 6 (Fletcher, C.J. dissenting).

<sup>147</sup>3 M.J. 14 (C.M.A. 1977).

<sup>148</sup>Airman Heard alleged that he had been confined illegally for twenty-two days. His commander frankly admitted at trial that he "put [Heard] in [confinement] because he was such a pain in the neck around the squadron and required so much additional attention by the [training instructors] and the first sergeant. I never had fear he would go AWOL." *United States v. Heard*, 3 M.J. 14, 22 (C.M.A. 1977). While agreeing that Airman Heard's confinement was illegal, CMA granted no relief, because the period of confinement adjudged had already been reduced by the convening authority and again by the AFMCR. The latter reduction was for the time served in pretrial confinement. Any prejudice the accused suffered by this reduction in lieu of administrative credit mandated by *United States v. Larner*, 24 C.M.A. 197, 51 C.M.R. 442 (1976), was minimal and required no further action because by the time CMA decided *Heard* the accused had already served his sentence to confinement. This determination rendered the rest of CMA's opinion dicta, but it is dicta which cannot be ignored.

<sup>149</sup>Judge Perry rejected the assertion, most recently advanced in *Courtney v. Williams*, see note 143 and accompanying text *supra*, and seemingly embraced in *Fletcher v. Commanding Officer*, that risk of flight is the only permissible basis for pretrial confinement. Judge Perry analyzed the development of that approach and concluded that the court had misapprehended its own precedents. See *De-Champlain v. Lovelace*, 23 C.M.A. 35, 48 C.M.R. 507 (1974); *United States v. Jennings*, 19 C.M.A. 88, 41 C.M.R. 88 (1969); *United States v. Nelson*, 18 C.M.A.

confinement, regardless of the ground upon which it is based, may only be imposed "when lesser forms of restriction or conditions of release have been tried and been found wanting."<sup>150</sup> The court pointed to provisions of the ABA Standards Relating to Pretrial Release as a model for implementing this "stepped" process.<sup>151</sup>

177, 39 C.M.R. 177 (1969); *United States v. Bayhand*, 6 C.M.A. 762, 21 C.M.R. 84 (1956). In essence, Judge Perry found that the court had misconstrued U.C.M.J. art. 13 ("... nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence. . .") as establishing a *precondition* to pretrial confinement when actually it is meant to be no more than a limitation upon the *conditions* of pretrial confinement. Articles 9 and 10 establish the prerequisites for confinement. Article 9 requires probable cause for arrest or confinement, that is, reasonable grounds to believe that an offense was committed and that the accused was the perpetrator. See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976). Article 10 is very general in its language (confinement may be ordered "as circumstances may require. . ."). CMA gave this language a judicial gloss approaching a complete simonize in *Heard*, however. See text below.

<sup>150</sup> *United States v. Heard*, 3 M.J. 14, 21-22 (C.M.A. 1977). The complete text of this critical paragraph is as follows:

We are convinced, therefore, that Article 10 of the UCMJ, which authorizes confinement only "as circumstances may require," must be interpreted quite literally, and we believe that the only time that circumstances require the ultimate device of pretrial incarceration is when lesser forms of restriction or conditions on release have been tried and have been found wanting. To this end, this Court embraces the ABA Standards, Pretrial Release §§ 3.1, 3.2, 3.5, 3.6, 3.7 and 3.8 (1968) insofar as the peculiarities of the military system do not make it impossible for them to apply. In other words, only when this "stepped" process of appropriate lesser forms of restriction or conditions on release is first tried and proves inadequate, is pretrial confinement "require[d]" within the meaning of Article 10, UCMJ. We believe, as do the authors of these standards, that adherence to these procedural and conceptual measures will meet both the possible constitutional infirmities and the practical troubles enwrapping preventive detention, and, consistently, it will apply the same force of logic to the risk of flight consideration.

*Id.* (footnotes omitted).

<sup>151</sup> The pretrial release standards the court specifically referred to, see note 150 *supra*, establish a presumption in favor of release on order to appear for all accused persons. While the standards are not entirely clear, they strongly imply that, except in capital cases, outright detention should not be imposed in the first instance in any case. Whether the authors of the ABA Standards intended to make this a *per se* rule may be debated, particularly insofar as such a requirement may apply to accuseds considered high risks to absent themselves for trial. See ABA STANDARDS, PRETRIAL RELEASE § 3.1(a), at 54 & introduction at 6. It is anticipated that the "stepped" approach created by the court in *Heard* will be greeted with less than universal approbation in the field.

The most serious problem raised by this approach is likely to be meeting the manpower requirements for administering and supervising the release of indi-



A number of questions are raised in *Heard*. Most significantly, the majority opinion, authored by Judge Perry, did not indicate who is (or is not) a proper person to make the determination as to the propriety of pretrial restraint. Query whether the accused's commander may impose conditions upon release, or whether these must be determined or reviewed by a magistrate. May the "magistrate" be a nonlawyer? Judge Perry has yet to comment upon this issue, although the issue was presented in both *Fletcher v. Commanding Officer* and *Heard*.<sup>152</sup> Chief Judge Fletcher clearly believes that he must be

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viduals. The risk of fleeing defendants or ones who pose a threat to the community should be minimized by the supervision and release conditions which may include, when appropriate, release during duty hours and custody during other times. See ABA STANDARDS, PRETRIAL RELEASE § 5.2(b)(iv). The supervision requirements as well as the additional judicial administration which the program appears to demand will require the diversion of personnel resources from other tasks, however.

Still, it must be recognized that the ABA Standards, and, apparently, CMA contemplate that even such supervisory measures should be the relatively rare exception and not the rule. It may be argued that a military organization inherently demands different standards from the civilian model. CMA has indicated that such arguments must overcome substantial burdens. See note 139 and accompanying text *supra*. Pretrial confinement is easily subject to official abuse. In light of the facts in *Heard* itself, it is not surprising that CMA felt that stricter standards were needed.

Aside from practical criticisms, there are, of course, questions which can be raised about the doctrinal bases for the *Heard* decision. CMA obviously exercised its supervisory powers in *Heard* and "set policy" for the system. See Section IV.C. *infra*. Judge Perry overruled MCM, 1969, para 20c, and, with it, in all probability, the other provisions of the Manual dealing with pretrial confinement, because they do not prescribe rules of "procedure, including modes of proof in cases before courts-martial. . . ." U.C.M.J. art. 36. See notes 296-297 *infra*. The majority cited no authority which mandates its approach: instead it made general reference to due process, the eighth amendment, numerous studies and treatises on pretrial restraint, and, of course, the ABA Standards. Ultimately the majority made a legislative decision that this was the most appropriate way to deal with pretrial restraint. The decision seems to draw its sustenance from the due process clause of the fifth amendment, although if the standards espoused by CMA are constitutionally required then many civilian jurisdictions are running afoul of the law. See ABA STANDARDS, PRETRIAL RELEASE § 5.1(a) commentary at 55.

<sup>152</sup> In *Fletcher* the magistrate was a nonlawyer whose connection to the local command was unclear. In *Heard* the confinement in question was ordered by Airman Heard's squadron commander. It should be noted that this confinement occurred in 1974, well before the present line of cases which has disqualified the commander from making such determinations. This may be the reason Judge Perry chose not to address this point, although his failure to do so is troublesome because of the uncertainty it leaves in its wake.

a "legally trained judicial officer."<sup>153</sup> Judge Cook holds that the commander may exercise these functions. Despite this ambiguity in the court's position it would seem prudent to repose such authority in one who truly is a judicial officer.<sup>154</sup>

*b. The Military Judge's Role in the Pretrial Confinement Decision*

As CMA has raised the standards for the imposition of pretrial confinement and has restricted the commander's power to impose confinement, it has hinted at substantially broader authority for the military judge in this area. As indicated above, the court has yet to hold that the military judge must be the one to rule upon pretrial confinement. It has held, however, that he has the power to make rulings in this area and to order release if necessary.<sup>155</sup> The major question still outstanding is when that power commences.

<sup>153</sup> Fletcher v. Commanding Officer, 25 C.M.A. Adv. Sh. 379, 54 C.M.R. Adv. Sh. 1105 (1977), slip op. at 6 (Fletcher, C.J. dissenting). Chief Judge Fletcher also expressed his view on the proper nature of the proceedings required to make the determination described in the majority opinion in *Heard*. In Chief Judge Fletcher's view: "The safeguards necessary to implement the procedure expressed in Judge Perry's opinion would of necessity have to be the same as those for a full scale trial, without a jury." United States v. Heard, 3 M.J. 14, 25 (C.M.A. 1977) (Fletcher, C.J. concurring). This contemplates a full adversary hearing by a judicial officer. *Contra*, Gerstein v. Pugh, 420 U.S. 123 (1975). It is not clear whether the Chief Judge is calling for such a requirement only in cases of preventive detention or in all cases of pretrial confinement, but in view of Judge Perry's assertion that each basis logically requires the same procedures it would seem to indicate that he is. The Chief Judge does not indicate what procedures he would apply for lesser forms of restraint or for the imposition of other conditions of release.

<sup>154</sup> Despite the lack of a definitive statement from Judge Perry on who may impose restraint, it seems unlikely that he would sanction exclusive command administration of the elaborate procedures he constructs in *Heard*. He seems to allude to this when he refers favorably to *Courtney v. Williams* and says the decision to confine must be "judiciously reached." United States v. Heard, 3 M.J. 14, 22 n.19 (C.M.A. 1977); and when he twice describes the release decision as being made by a "judicial officer," *id.* at 21; *cf.* United States v. Roberts, 25 C.M.A. Adv. Sh. 39, 41 n.6, 54 C.M.R. Adv. Sh. 39, 41 n.6 (1976).

<sup>155</sup> Thus, in *Porter*, *Milanes-Canamero*, and *Phillippy*, CMA ordered the military judge to conduct a hearing under U.C.M.J. art. 39(a) to "inquire into the legality" of the confinement, and to "issue appropriate orders to effectuate his findings." *Milanes-Canamero v. Richardson*, 23 C.M.A. 710, 50 C.M.R. 916 (1975); *Phillippy v. McLucas*, 23 C.M.A. 709, 710, 50 C.M.R. 915, 916 (1976); *Porter v. Richardson*, 23 C.M.A. 704, 50 C.M.R. 910 (1975). This obviously means that the military judge has authority under Article 39(a) to order the release of an illegally confined individual before trial. Moreover, as *United States v. Dunks*, 24

In *Phillippy*, the majority ordered the convening authority to refer charges to a court-martial so that the judge could conduct a hearing. The fact that CMA felt referral was a necessary prerequisite to the judge's action would seem to indicate that the military judge has no power to act in advance of referral. Subsequent cases leave this issue unclear. In *Courtney*, Senior Judge Ferguson emphatically argued in his concurring opinion that the military judge, as the equivalent of a federal judge, has the power to act in advance of referral. Yet Senior Judge Ferguson's assertion of such power is more noteworthy because it stands alone. In what was obviously a major case in which the court was attempting to clarify for the services the requirements in this area,<sup>156</sup> Chief Judge Fletcher's choice not to express similar beliefs in his majority opinion seems to indicate that he had misgivings about such an interpretation.<sup>157</sup> While it is evident that Chief Judge Fletcher favors the principle of a trial judiciary empowered to act in this area, his *Courtney* opinion avoids the conclusion that the military judge can or must rule on such questions.

Other statements from Chief Judge Fletcher leave this issue unresolved. In a speech given before *Courtney* was decided, the Chief Judge said:

First, let me make it clear that I do not believe today that any trial judge in the military has any statutory authority to act until a court-martial is convened. I would advise you not to look at the majority opinion in the writ cases where we ordered the trial judge to hold a hearing on pretrial restraint as authority to exceed the Code. We merely called on the trial judge to meet the standard of a neutral and detached magistrate.<sup>158</sup>

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C.M.A. 71, 51 C.M.R. 200 (1976), indicates, the judiciary must review the decisions of others in the criminal process to ensure that individual rights are protected. See text accompanying notes 163-166 *infra*. See also *Bouler v. Wood*, 23 C.M.A. 389, 390, 50 C.M.R. 854, 855 (1975).

<sup>156</sup> The Government and Defense Appellate Divisions of all of the services were invited to and did file amicus curiae briefs in *Courtney*. The court was obviously aware of the importance of its decision.

<sup>157</sup> The similar relationship of Chief Judge Fletcher's concurring opinion and Judge Perry's majority opinion in *Heard* may suggest similar reservations by Judge Perry. *But see* note 154 *supra*.

<sup>158</sup> Fletcher, *supra* note 107, at 6. This statement is technically inaccurate insofar as it implies that CMA has ordered a military judge to hold a hearing prior to referral. CMA has never done so, and in one case, *Phillippy*, it ordered the referral

In his dissent in *Fletcher v. Commanding Officer*, however, Chief Judge Fletcher stated he would "order a hearing before a legally trained judicial officer on situs" and that he "would not differentiate between referred and nonreferred cases."<sup>159</sup> It is difficult to reconcile these two statements. It is possible that in the course of slightly more than a year Chief Judge Fletcher has changed his mind about a military judge's authority to act in advance of referral. Such a shift might be explained by the Chief Judge's impatience with the system and its reluctance to move to fully accept the spirit of the *Courtney* decision. Otherwise, the possible explanations for these apparently contradictory statements are tenuous at best.<sup>160</sup>

One other case, *Bouler v. Wood*,<sup>161</sup> decided before *Courtney*, raises interesting questions in this area. In *Bouler* the military judge, on his own initiative, held an Article 39(a) session in advance of referral of charges. The military judge determined the accused's confinement to be illegal at that hearing, but did not grant any relief because he felt he had no authority to compel it. The accused then petitioned CMA for a writ of mandamus. CMA denied the petition because the issue was then moot.<sup>162</sup> Nevertheless, Chief Judge Fletcher warmly praised the actions of the judge:

We cannot dispose of this matter, however, without commending the trial judge, Judge Wood, for exercising his authority as a judge in a heretofore unexplored area of military law. His concern and foresight, recognizing the necessity for the judicial process while at the same

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of charges to avoid this problem. However, in *Bouler v. Wood*, 23 C.M.A. 589, 50 C.M.R. 854 (1975), the court did praise, without actually sanctioning, a military judge who so acted on his own. See text accompanying notes 161-163 *infra*.

<sup>159</sup> *Fletcher v. Commanding Officer*, 25 C.M.A. Adv. Sh. 379, —, 54 C.M.R. Adv. Sh. 1105, — (1977) (Fletcher, C.J. dissenting).

<sup>160</sup> Three possible explanations may be advanced. First, it may be that a military judge "called upon" or "ordered" by CMA to review the legality of pretrial confinement is acting under CMA's supervisory authority, and not relying solely on his own powers. Alternatively, it may be that although a military judge has no statutory authority to act, as a judge, where constitutional rights are at stake, he has limited inherent powers to protect them. These theories, undeveloped as they are, seem unlikely. It is also possible that Chief Judge Fletcher would have ordered charges referred in *Fletcher*, as was done in *Phillippy*, to avoid the question of the military judge's powers before referral. If so, the Chief Judge's choice of words in his *Fletcher* opinion is misleading.

<sup>161</sup> 23 C.M.A. 589, 50 C.M.R. 854 (1975).

<sup>162</sup> By the time CMA issued its decision *Bouler* had been tried and convicted.

time the possible limits to the exercise of his powers, can only serve as a model for other judges.<sup>163</sup>

This extraordinary statement belongs alongside the statement from *Graves* quoted at the beginning of this section. It makes plain Chief Judge Fletcher's desire for an active judiciary. It is all the more noteworthy in view of the apparent reservations Chief Judge Fletcher then had about the legal basis for Judge Wood's actions in *Bouler*. This language indicates that when it comes to protecting individual rights, Chief Judge Fletcher would prefer that a military judge err on the side of aggressiveness.

The pretrial confinement cases establish that once a case has been referred to a court-martial, a military judge may rule upon pretrial confinement issues. This is consistent with the view that the military judge is responsible for all that goes on at the trial level. Before referral, any statement outlining the military judge's power must be punctuated with a question mark. In addition, *Heard* raises new questions about the determinations to be made prior to pretrial confinement and the procedures for making them. In any event, a commander has far less power today in this area than he had in 1975.

## 2. *Review of the Commander's Decisions by the Military Judge*

Another case which has the effect of increasing the power of the military judge over all proceedings at the trial level is *United States v. Dunks*.<sup>164</sup> At issue there was the refusal by the military judge to grant a continuance in order to permit command review of Dunks' application for dismissal of the charges under a local speedy trial regulation. The commander of the United States Army in Europe (USAREUR) had promulgated a regulation<sup>165</sup> under which summary and special court-martial cases were to be brought to trial within 45 days of imposition of pretrial restraint. If the case was not brought to trial within that time, the appropriate general court-martial convening authority would, upon application by the accused, dismiss the charges unless certain unusual conditions existed. His denial of the accused's application could be appealed to

<sup>163</sup> 23 C.M.A. at 590, 50 C.M.R. at 855 (footnote omitted).

<sup>164</sup> 24 C.M.A. 71, 51 C.M.R. 200 (1976).

<sup>165</sup> USAREUR supp. 1 to Army Reg. No. 27-10, Legal Services—Military Justice (16 Sept. 1971).

the commander, USAREUR. As implemented, the program was administered and operated entirely by the command, without judicial involvement.

CMA held the military judge's failure to grant the continuance to be error. The court said that the continuance should have been given not merely to permit the command to complete its review of the petition before trial, but to allow the judge to review the command's decision. The judiciary has

... the right as well as the duty to assure Government compliance with the terms of the 45-day rule. The trial judge's denial of the request for a continuance deprived the appellant of his right to judicial review of the administrative decision by forcing him to trial before his administrative remedy was ripe for judicial scrutiny.<sup>166</sup>

*Dunks* makes it plain that the military judge is responsible for anything which affects the judicial process, and that he has authority to fulfill that responsibility. A commander cannot operate a program affecting the military justice system without judicial involvement. What is more, the judge has the last word on such issues.

### C. THE CONVENING AUTHORITY'S POWERS OVER TRIAL PROCEEDINGS WILL BE RESTRICTED

CMA has taken steps to reduce the extent to which the military judge's decisions may be reviewed by the commander and to further insulate courtroom proceedings from command control, either direct or indirect. In the court's view, the convening authority ought to be able to inject his presence into the courtroom only as a litigant, not as a judicial partner.

#### 1. Reversing the Convening Authority's Power to Reverse

A major step in reducing the commander's role as a judicial officer was taken in *United States v. Ware*<sup>167</sup> when CMA

<sup>166</sup> 24 C.M.A. 71, 72, 51 C.M.R. 200, 201 (1976). See also *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975). *Dunks* would seem to be authority for judicial review of a wide range of command activities affecting the military justice system. Thus, service or local regulations which affect the initiation, processing, and disposition of cases could be the subject of litigation. Query whether *Dunks* provides a basis for judicial review of a commander's treatment of a request for discharge in lieu of court-martial under Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 10 (C42, 14 Dec. 1975)?

<sup>167</sup> 24 C.M.A. 102, 51 C.M.R. 275 (1976).

unanimously held that a convening authority may not reverse any ruling by the military judge. CMA held that paragraph 67f of the Manual is inconsistent with the provision of the Code upon which it was based; the court invalidated a portion of that paragraph and overruled several earlier cases upholding the validity of that provision.<sup>168</sup> The language which was challenged posited that the convening authority could, under Article 62(a),<sup>169</sup> reverse certain rulings on matters of law by the military judge.<sup>170</sup> Because the distinction between questions of law and questions of fact had been loosely construed in earlier decisions,<sup>171</sup> this provision gave the convening authority considerable leverage over the military judge. Although the military judge had authority over interlocutory matters,<sup>172</sup> his ultimate sanction for enforcement was (and is, generally) dismissal of charges; under paragraph 67f, a convening authority could, potentially, stymie this sanction and at least stalemate the issue.<sup>173</sup> In the wake of *Ware*, this is no longer possible; the convening authority can do no more than return an issue

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<sup>168</sup> *United States v. Bielecki*, 21 C.M.A. 450, 45 C.M.R. 224 (1972); *United States v. Frazier*, 21 C.M.A. 444, 45 C.M.R. 218 (1972); *Priest v. Koch*, 19 C.M.A. 298, 41 C.M.R. (1970); *Lowe v. Laird*, 18 C.M.A. 131, 39 C.M.R. 131 (1969); *United States v. Boehm*, 17 C.M.A. 530, 38 C.M.R. 328 (1968).

<sup>169</sup> "If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action." U.C.M.J. art. 62(a).

<sup>170</sup> CMA held that paragraph 67f conflicts with the plain meaning of Article 62(a). The court therefore did not reach the question of whether paragraph 67f is within the President's powers under Article 36. *United States v. Ware*, 24 C.M.A. 102, 104 n.10, 51 C.M.R. 275, 277 n.10 (1976). See notes 285-302 and accompanying text *infra*.

<sup>171</sup> See *United States v. Frazier*, 21 C.M.A. 444, 45 C.M.R. 218 (1972). There CMA held that the convening authority could review the military judge's findings of fact to determine whether they were "reasonably supported by the evidence." *Id.* at 446, 45 C.M.R. at 200. Later in that same opinion the court dropped the word "reasonably" from the equation. "Findings that are not supported by the evidence do not bind a reviewing authority. Neither is the reviewing authority bound, as a matter of law, to accept the conclusion of the trial judge, if that conclusion is not supported by factual findings." *Id.* at 447, 45 C.M.R. at 221 (citations omitted). See also *United States v. Bielecki*, 21 C.M.A. 450, 45 C.M.R. 224 (1972); *United States v. Boehm*, 17 C.M.A. 530, 38 C.M.R. 328 (1968).

<sup>172</sup> MCM, 1969, para. 67f; see, e.g., *United States v. McElhinney*, 21 C.M.A. 436, 45 C.M.R. 210 (1972); *United States v. Knudson*, 4 C.M.A. 587, 16 C.M.R. 161 (1954).

<sup>173</sup> The statutory contempt powers of a court-martial (and therefore a military judge) do not extend to this sort of activity. U.C.M.J. art. 48; MCM, 1969, para.

to the military judge for another look: he cannot reverse him.<sup>174</sup> *Ware* therefore reflected CMA's view that legal issues are to be decided by legal experts.<sup>175</sup> In addition, it removed a potential stumbling block to judicial control of trial proceedings.<sup>176</sup>

118a. See McHardy, *Military Contempt Law and Procedure*, 55 MIL. L. REV. 131, 150-51 (1972). It seems unlikely that courts-martial have inherent contempt powers. But see *Ex parte Robinson*, 86 U.S. 505 (1873), where the Supreme Court said: "The power to punish for contempts is inherent in all courts." *Id.* at 509. The Supreme Court was obviously referring only to federal courts created under Article III of the Constitution, however, and surely, in that day, did not intend to imply that courts-martial had such power. Compare 18 U.S.C. § 401 (1948) with 18 U.S.C. § 3651 (1958). See also *United States v. Occhi*, 25 C.M.A. Adv. Sh. 93, 54 C.M.R. Adv. Sh. 93 (1976). The hybrid nature of a court-martial as a judicial institution and a creature of the commander renders the court-martial contempt power dubious, especially where the convening authority is the person who would be subject to contempt. See MCM, 1969, para. 118b. But, query the efficacy of Article 92 as a vehicle for enforcing the military judge's orders.

Thus the previous construction of Article 62(a) contained far greater potential for impasse than does the present rule, although the court previously asserted that the former construction was designed to avoid such an impasse. *Priest v. Koch*, 19 C.M.A. 293, 298, 41 C.M.R. 293, 298 (1970). Under that procedure, if a convening authority refused to accord some form of appropriate relief ordered by the military judge, the military judge's only remedy was dismissal of charges, a ruling on which he could be reversed by the convening authority, at least in theory. It seems likely that any conviction so obtained would be reversed on appeal. But cf. *United States v. McElhinney*, 21 C.M.A. 436, 45 C.M.R. 210 (1972). However, by the time of reversal, the accused would have undergone substantial hardship and, in most cases, a considerable period of confinement.

<sup>174</sup> This construction leaves the Government without redress against an erroneous ruling by the military judge. Chief Judge Fletcher pointed out this undesirable circumstance in a separate opinion in *United States v. Rowel*, 24 C.M.A. 137, 138, 51 C.M.R. 327, 328 (1976). The problem with any appeal by the Government in the military would be the disposition of the accused during the pendency of the appeal, as well as the likelihood of the dispersion of witnesses. On the other hand the existence of a limited form of governmental appeal might well inure to the benefit of accused servicemembers. At present, the fact that a ruling adverse to the Government is final while a ruling favorable to it is not may, in some cases where the issue is very close, motivate the military judge to rule for the Government in order to leave ultimate resolution of the issue to appellate tribunals.

<sup>175</sup> The court said in *Ware*:

It appears to us to be inherently inconsistent with the action of Congress in creating an independent judicial structure in the military, to strain the clear meaning of Article 62(a) to the point of permitting the *lay* convening authority to reverse a ruling of *law* by the trial judge.

*United States v. Ware*, 24 C.M.A. 102, 106, 51 C.M.R. 275, 279 (1976) (emphasis in original.)

<sup>176</sup> *Ware* is one of several cases in which one of Senior Judge Ferguson's earlier dissenting positions has become law. In *Ware* the court actually went further than



## 2. Restricting the Convening Authority's Power to Manipulate Proceedings Through Pretrial Agreements

Another less direct avenue of command control of court-martial proceedings has been pretrial agreements. CMA has been concerned with these agreements for some time,<sup>177</sup> but the present court is particularly concerned about possible misuse of such "deals." As indicated above,<sup>178</sup> in the *Elmore* and *Green* decisions CMA required that the military judge examine carefully to discover both the existence of an agreement and the provisions of the bargain during plea providence inquiries. In *United States v. Holland*,<sup>179</sup> the court condemned the "undisclosed halter on the freedom of action of the military judge"<sup>180</sup> created by a provision requiring the plea be entered "prior to presentation of any evidence on the merits and/or presentation of motions going to matters other than jurisdiction."<sup>181</sup> The court's insistence that a pretrial agreement may

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any earlier opinion of Senior Judge Ferguson, despite his contention that he had "oftimes expressed the judgment that Article 62(a) authorizes" the construction adopted in *Ware* and no more. *United States v. Ware*, 24 C.M.A. 102, 104, 51 C.M.R. 275, 277 (1976). In the cases Senior Judge Ferguson cites as manifesting his previous position, *Lowe v. Laird*, 18 C.M.A. 131, 133, 39 C.M.R. 131, 133 (1969) and *United States v. Boehm*, 17 C.M.A. 330, 338, 38 C.M.R. 328, 336 (1968), his quarrel with the majority does not appear to have been over the convening authority's power, under Article 62(a), to reverse a ruling of the presiding officer. (In both *Lowe* and *Boehm*, the ruling was made by the president at a special court-martial.) Instead, then— Judge Ferguson disagreed with the majority's characterization of the issues involved as questions of law which would permit such reversal. This position is also reflected in Judge Ferguson's opinion, concurring in the result, in *Priest v. Koch*, 19 C.M.A. 293, 298, 41 C.M.R. 293, 298 (1970), where he joined in denying extraordinary relief on the ground that the issue on which the convening authority had directed reconsideration was entirely a matter of law. The majority in *Priest* treated the directive to the military judge to reconsider his ruling as a reversal, and Judge Ferguson does not seem to have disagreed with this. See *Priest v. Koch*, *id.* at 299 n.1, 41 C.M.R. at 299 n.1 (1970). Thus, Senior Judge Ferguson had never actually espoused the rule adopted in *Ware*. One judge who had was Judge Duncan. *United States v. Frazier*, 21 C.M.A. 444, 447, 45 C.M.R. 218, 221 (1972).

<sup>177</sup> See, e.g., *United States v. Troglin*, 21 C.M.A. 189, 44 C.M.R. 237 (1972); *United States v. Villa*, 19 C.M.A. 364, 42 C.M.R. 166 (1970); *United States v. Cummings*, 17 C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Allen*, 8 C.M.A. 504, 25 C.M.R. 8 (1957).

<sup>178</sup> See notes 73-77 and accompanying text *supra*.

<sup>179</sup> 23 C.M.A. 442, 50 C.M.R. 461 (1975).

<sup>180</sup> *Id.* at 444, 50 C.M.R. at 463.

<sup>181</sup> *Id.* at 442, 50 C.M.R. at 461. The provision requiring entry of a guilty plea prior to presentation of any evidence on the merits will not, standing alone, in-

demand no more of the accused at his trial than that he enter a plea of guilty reflects not only the court's disapproval of manipulation of the proceedings, but its belief that the defense is at a distinct disadvantage in experience and leverage in bargaining with the command.<sup>182</sup> Although the court may permit an otherwise improper provision in an agreement where it clearly originated with the defense,<sup>183</sup> it is most uncomfortable with this process. It will tolerate it only under circumstances which permit the judge to ensure, without hidden restraints, that the accused has not been unfairly disadvantaged.

This section cannot be concluded without recognizing that there are limits to the court's expansion of the role of the trial judge. In *United States v. Occhi*<sup>184</sup> the court refused to find that the military judge has the power to suspend sentences.<sup>185</sup> This conclusion does not seem to have been reached without

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validate the agreement if it is clear that the defense counsel does or did not construe it to limit his right to make motions or to litigate issues other than guilt. Compare *United States v. Elmore*, 21 C.M.A. 51, 51 C.M.R. 254 (1975) with *United States v. Kapp*, 23 C.M.A. 442, 50 C.M.R. 461 (1975) and *United States v. Schmeltz*, 24 C.M.A. 93, 51 C.M.R. 266 (1976). For an exposition of the facts in *Kapp* see *United States v. Kapp*, 49 C.M.R. 200 (A.C.M.R. 1974).

<sup>182</sup> See *McMenamin, Plea Bargaining in the Military*, 10 AM. CRIM. L. REV. 93 (1971). The court's concern about such problems is further discussed at notes 196-209 *infra*. In *United States v. Lanzer*, 3 M.J. 60 (C.M.A. 1977), the court expressly noted its suspicion in describing the rationale for its careful attention in this area: "Recognizing the strong bargaining position the convening authority occupies, the court has consistently held that pretrial agreements will be strictly enforced. . . ." *Id.* at 62.

<sup>183</sup> *United States v. Schmeltz*, 23 C.M.A. 377, 50 C.M.R. 83 (1975), *rev'd on other grounds on reh.*, 23 C.M.A. 93, 51 C.M.R. 266 (1976); *cf.* *United States v. Elmore*, 24 C.M.A. 51, 51 C.M.R. 254 (1976).

<sup>184</sup> 25 C.M.A. Adv. Sh. 93, 54 C.M.R. Adv. Sh. 93 (1976).

<sup>185</sup> The contention was that 18 U.S.C. § 3651 (1970), which authorizes "any court having jurisdiction to try offenses against the United States" to suspend sentences, applies to the military judge. While the language of the statute appears broad enough to include courts-martial, whether Congress intended that the military judge have such powers is debatable. The UCMJ, of course, provides only for command or nonjudicial personnel to suspend sentences. U.C.M.J. arts 71 & 74.

CMA had earlier hinted that the Courts of Military Review have power to suspend sentences. *United States v. Keller*, 23 C.M.A. 545, 50 C.M.R. 716 (1975). The Navy Court of Military Review has held that it has the power, not inherently but under U.C.M.J. art. 66, to effectively suspend sentences by approving no more of a sentence, or a portion thereof, as provides for suspension. *United States v. Silvernail*, NCM 760314 (N.C.M.R. 13 May 1976).

reluctance; indeed, although *Occhi* appears to settle the issue for now,<sup>186</sup> it seems probable that Chief Judge Fletcher and Judge Perry would both favor enactment of legislation which would extend such power to the military judge.<sup>187</sup>

Despite *Occhi*, the court has decisively shifted power and responsibility in the trial stage of the court-martial process away from commanders and toward the judiciary.<sup>188</sup> While *Occhi*

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<sup>186</sup> *United States v. Williams*, 25 C.M.A. Adv. Sh. 144, 54 C.M.R. Adv. Sh. 162 (1976).

<sup>187</sup> In his separate opinion in *Occhi* Judge Perry agreed with Judge Cook that the military judge is not statutorily empowered to suspend sentences, but he disagreed with Judge Cook that the structure of the military and the process under the UCMJ are incompatible with placing suspension power in the military judge. Chief Judge Fletcher, concurring in the result in *Occhi*, found that the suspension issue was not properly before the court because the military judge in *Occhi*'s case gave no indication that he would have suspended the sentence himself even had he believed he had the power to do so. (The military judge had recommended that the convening authority suspend part of the sentence.) Chief Judge Fletcher did indicate that he considered the suspension power issue undecided and effectively invited trial judges to raise the suspension question again, either by actually adjudging a suspended sentence, or by indicating that if the power existed, the judge would have suspended the sentence. In light of *United States v. Williams*, 25 C.M.A. Adv. Sh. 144, 54 C.M.R. Adv. Sh. 162 (1976), a trial judge who accepts this invitation will find himself alone on the dance floor with no music playing. Congressional action is now necessary to give the military judge the power to suspend sentences.

*Occhi* is an example of a circumstance which is likely to recur. As CMA approaches the limits of the UCMJ's elasticity, the judges are more likely to divide on their analyses of the correct legal approach to the problem, even though there may be a consensus as to the most desirable solution to it. Such divisions, particularly when accompanied by the frequent changes in the court's personnel of recent years which may continue if Judge Perry departs, make following the law difficult. CMA has undermined the value of *stare decisis* with its many shifts in legal analysis. See *United States v. Harrison*, 9 C.M.A. 731, 733, 26 C.M.R. 511, 513 (1958) (Ferguson, J. dissenting). This problem is even more acute when military practitioners must pick and choose between the positions of the various judges on CMA to arrive at a viable rule to be followed. While for some issues on which the court is divided see, e.g., *United States v. Seay*, 24 C.M.A. 7, 51 C.M.R. 57 (1976), the controlling law may be derived from the narrowest opinion by a majority judge, cf. *Marks v. United States*, 43 U.S.L.W. 4233, 4234 (U.S. Mar. 1, 1977), this is exceedingly difficult to do with a three-member court, especially where none of the opinions fits "inside" another. See, e.g., *United States v. Roberts*, 25 C.M.A. Adv. Sh. 39, 54 C.M.R. Adv. Sh. 39 (1976).

<sup>188</sup> CMA has also acted in the post trial area to ensure that the military judge in fact authenticates the record of trial as required by Article 54(a) of the Code, except in unusual cases. In *United States v. Cruz-Rijos*, 24 C.M.A. 271, 51 C.M.R. 723 (1976), CMA construed narrowly the "death, disability, or absence" provision

indicates that there are statutory constraints on this process which the court will respect, the court is likely to continue its process of reducing the commander's judicial authority. The court is also likely to increase its suggestions for legislation as the limits of the present UCMJ are pressed. In CMA's view the entire trial process is an integrated one<sup>189</sup> which must be administered and supervised by a judicial officer. The commander does not fill that role.

#### IV. CMA WILL SUPERVISE THE ENTIRE MILITARY JUSTICE SYSTEM

*Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, and not the person who first spoke or wrote them.*

—Bishop Hoadly's Sermon  
preached before the King,  
March 31, 1717<sup>190</sup>

##### A. CMA WILL SUPERVISE ALL PERSONNEL WITHIN THE MILITARY JUSTICE SYSTEM

###### 1. Lawyers

A major reason for CMA's imposition of specific rules and of Article 54(a) which permits the trial counsel to authenticate the record of trial when one of these conditions renders the judge unable to perform that duty. Mere physical absence of the judge is by itself an insufficient reason to permit the trial counsel to authenticate. Actual unavailability for an extended period appears to be what is contemplated. Failure of the military judge to authenticate, where he is not demonstrably unavailable, appears to be reversible error per se. Although CMA's determination that the previous standard permitted frequent circumvention of authentication by the military judge was undoubtedly correct, the apparent elimination of the possibility of such being harmless error has been aptly criticized. *United States v. Stewart*, 54 C.M.R. Adv. Sh. 629 (A.C.M.R. 1976). Compare *Cruz-Rijos* with *United States v. Hill*, 22 C.M.A. 419, 47 C.M.R. 397 (1973). Yet CMA probably fashioned the absolute remedy it did in order to avoid creating a loophole which it feared would be expanded by lower courts into a noose for the rights it was trying to protect.

<sup>189</sup> Two cases, *United States v. McOmber*, 24 C.M.A. 207, 31 C.M.R. 432 (1976); and *United States v. Jordan*, 24 C.M.A. 156, 31 C.M.R. 375 (1976), modifying *United States v. Jordan*, 23 C.M.A. 325, 30 C.M.R. 664 (1975), serve to highlight this view. See notes 422-429 and 431-440 and accompanying text *infra*. If an individual is treated unfairly or improperly in the pretrial stages, such treatment will skew the results throughout the remainder of the process unless the judiciary acts to correct such wrongs.

<sup>190</sup> Quoted in W. LOCKHART, Y. KAMISAR & J. CHOPER, *THE AMERICAN CONSTITUTION* 1 (1964).

requirements on the military justice system is the court's concern about the independence, expertise, and professionalism of lawyers and judicial officers who are integral parts of the system. Many of the responsibilities which have been placed upon the military judge (which were examined in the last section) both enable appellate courts to make a more informed evaluation of the military judge's handling of a case and serve to ensure that the trial judge protects the rights of the accused. To a considerable degree CMA has required judges to protect the rights of accused servicemembers because it is unsure of the abilities of military defense counsel to singlehandedly protect their clients' interests.

Initially it must be recognized that, in the military, court personnel are subject to governmental control to a degree unparalleled in the civilian community. For example, the Government decides, at one level or another, who will be assigned as judges and counsel, and when those assignments will terminate.<sup>191</sup> The Government, in the form of the convening authority, also decides who will be counsel in a given case.<sup>192</sup> The defense counsel's relationship to the Government is a particular source of concern to CMA.

Protecting the independence of military defense counsel has long been recognized as a special problem,<sup>193</sup> and efforts have been made to insulate him from impermissible influences.<sup>194</sup>

<sup>191</sup> U.C.M.J. arts. 26 & 27. At the local level, except where a separate defense structure exists, as in the Air Force, the staff judge advocate decides which of the lawyers assigned to his office will be defense counsel, which will be trial counsel, and which will perform other duties. The Army has recently adopted a split certification procedure under Article 27 whereby JAGC officers just entering active duty will be certified as trial counsel only. Only after such an officer has demonstrated the capability to try cases will he be certified as a defense counsel. This will preclude the local staff judge advocate from assigning wholly inexperienced trial lawyers as defense counsel.

<sup>192</sup> U.C.M.J. art. 27. This power may be limited as to defense counsel by Article 38(b) which gives the accused the right to be represented by any "reasonably available" military counsel of his own selection or by civilian counsel provided by the accused. The determination of "reasonable availability" of military counsel is made, however, by that counsel's commander. CMA moved to limit the commander's discretion on such requests in *United States v. Quinones*, 23 C.M.A. 457, 30 C.M.R. 476 (1975). There the court indicated that the commander's determination will be subject to greater judicial scrutiny than before, and that the nature of requested counsel's duties, rather than their quantity, is the critical factor in support of a denial.

<sup>193</sup> See, e.g., *United States v. Kitchens*, 12 C.M.A. 389, 31 C.M.R. 175 (1961).

<sup>194</sup> See U.C.M.J. art. 37.

Nevertheless, as long as the defense counsel wears the uniform, he is always potentially subject to pressures from the command structure and his own desire for professional advancement. Such pressures may now be exacerbated by higher JAGC retention rates and greater competition for JAGC career positions.<sup>195</sup> Related to the independence problem is the fact that, generally speaking, defense counsel have been relatively junior and inexperienced (although the higher retention rates may have a beneficial effect here). Such inexperience is not manifested solely in knowledge and technique in the courtroom (where trial counsel often suffers from similar handicaps, albeit somewhat reduced by the government resources to which he has greater access) but, perhaps more importantly, in defense counsel's dealings with experienced, higher-ranking officials such as the staff judge advocate and convening authority.<sup>196</sup>

CMA is acting to alleviate some of the inequities it believes are created by the unique position of the defense counsel in the military. We have already seen several examples of this, most directly in the multiple client cases.<sup>197</sup> The higher standards for defense waiver, and the necessity for judges to ensure that the accused understands his fundamental trial rights also result from the court's perception of this problem. An even more direct expression of the court's deep interest in this area is seen in the recent case of *United States v. Palenius*.<sup>198</sup>

Specialist Four Palenius was convicted, after a contested

<sup>195</sup> See *Personnel Policy Changes*, THE ARMY LAWYER, May 1976, at 1 (A letter from The Judge Advocate General).

<sup>196</sup> See *McMenamin*, *supra* note 182. See also *United States v. Brooks*, 25 C.M.A. Adv. Sh. 277, 54 C.M.R. Adv. Sh. 793 (1977). In *Brooks*, one of the accused's trial defense counsel sought the advice of the chief of military justice regarding Sergeant Brooks' case, and in the process of doing so revealed the substance of several of the accused's privileged communications. (There was some unresolved dispute as to how much information was revealed.) The chief of military justice later acted as assistant trial counsel; however, his role was de minimis and there was no evidence that the apparent breach of privilege inured in any way to the detriment of the accused. CMA affirmed the conviction. Nevertheless, the court was obviously disturbed with the state of affairs. The facts in the case reflect an additional problem: that is, the atmosphere of informality which is often present in JAGC offices and which can contribute to the sort of problem that occurred in *Brooks*.

<sup>197</sup> *United States v. Blakey*, 24 C.M.A. 63, 51 C.M.R. 192 (1976); *United States v. Evans*, 24 C.M.A. 14, 51 C.M.R. 64 (1975).

<sup>198</sup> 25 C.M.A. Adv. Sh. 222, 54 C.M.R. Adv. Sh. 549 (1977).

trial, and sentenced *inter alia* to a bad conduct discharge and confinement at hard labor for two years. On his counsel's advice, Palenius waived his right to be represented by appellate defense counsel<sup>199</sup> during the automatic review by the Court of Military Review. Except for this misadvice, CMA determined that the trial defense counsel rendered no assistance to Palenius at any time after the trial. CMA held that the misadvice and inaction together deprived the accused of the effective assistance of counsel and that he was therefore entitled to a new review, with benefit of appellate defense counsel, in the Court of Military Review.<sup>200</sup> To this point, there was precedent for the court's action.<sup>201</sup>

The majority went on, however, to discuss the recurring nature of this problem. Judge Perry, speaking for the majority, pointed out the high stakes involved for most defendants in courts-martial and the disadvantages with which they are confronted in such proceedings. He then went to the heart of the problem:

While [military accused] have the right to be defended by counsel of their choosing, including skillful and experienced lawyers from the civilian community, the vast majority of them are represented by the young lawyers appointed by The Judge Advocates General. Time and again we have been impressed with the able and skillful manner in which these young lawyers have represented their clients. But the difficult problems they encounter because of inexperience and the vicissitudes of military practice sometimes produce the curious dilemma with which the appellant here was confronted.<sup>202</sup>

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<sup>199</sup> U.C.M.J. art. 70; MCM, 1969, para 102. It appears that Specialist Four Palenius' trial defense counsel advised him that appellate counsel would only delay the proceedings and, therefore, any relief to which Palenius may have been entitled. Counsel averred that this advice was based upon information given him by the senior defense counsel.

<sup>200</sup> CMA so held even though it said: "We do not suggest that there were errors which might have been presented or argued had the appellant been represented by counsel in his appeal and do not reach the question here." *United States v. Palenius*, 25 C.M.A. Adv. Sh. 222, 224 n.2, 54 C.M.R. Adv. Sh. 349, 351 n.2 (1977).

<sup>201</sup> See *United States v. Darring*, 9 C.M.A. 651, 26 C.M.R. 431 (1958). Compare *id.* with *United States v. Harrison*, 9 C.M.A. 731, 26 C.M.R. 311 (1958). The majority also cited a number of decisions by the Supreme Court and lower federal courts which deal with the sixth amendment right to counsel, so that the ultimate basis for the decision appears to rest on both constitutional and statutory grounds.

The court then enumerated, in some detail, the post-trial duties of trial defense counsel,<sup>203</sup> and, in an apparent exercise of its supervisory authority,<sup>204</sup> moved to ensure that these duties would be carried out:

The trial defense attorney can with honor and should maintain the attorney-client relationship with his client subsequent to the finding of guilty while performing the duties we set forth today until substitute trial counsel or appellate counsel have been properly designated and have commenced the performance of their duties, thus rendering further representation by the original trial defense attorney or those properly substituted in his place unnecessary. At such time, an application should be made to the judge or court then having jurisdiction of the cause to be relieved of the duty of further representation of the convicted accused.<sup>205</sup>

This requirement<sup>206</sup> has far-reaching implications. Of ini-

<sup>202</sup> *United States v. Palenius*, 25 C.M.A. Adv. Sh. 222, 230, 54 C.M.R. Adv. Sh. 549, 557 (1977).

<sup>203</sup> Among these are the duties:

1. To advise the client, in language he can understand, of the review and appellate process, and of the powers of the various agencies within the process and the accused's rights with regard to them;

2. To review the staff judge advocate's post-trial review and to present any appropriate matters to the convening authority before he takes action on the case;

3. To familiarize himself with and to prepare the grounds for appeal for discussion with his client and for forwarding to appellate defense counsel;

4. To attend to other legal needs of the accused, for instance, by preparing a request for deferral of confinement. *Id.* at 230-31, 54 C.M.R. Adv. Sh. at 557-58.

<sup>204</sup> See *United States v. Care*, 18 C.M.A. 353, 40 C.M.R. 247 (1969); *United States v. Rinehart*, 8 C.M.A. 402, 24 C.M.R. 212 (1957).

<sup>205</sup> *United States v. Palenius*, 25 C.M.A. Adv. Sh. 222, 231, 54 C.M.R. Adv. Sh. 549, 558 (1977).

<sup>206</sup> One may ask whether the release provision is a requirement. In this portion of its opinion, the court was discussing the "criteria by which claims of inadequacy of representation of the accused's interests subsequent to trial shall hereafter be determined." *United States v. Palenius*, *id.* at 230, 54 C.M.R. Adv. Sh. at 557. In addition, Judge Perry used the word "should" twice, rather than "must" in discussing the duty to secure recusal. This implies that this is not a mandatory provision, but is only a factor to be considered, along with the exercise of other duties, in determining adequacy of counsel. It is hard to see, however, what the "requirement" adds. In other words, if counsel is demonstrably zealous in representing his client's interests after trial, failure to secure release would not necessarily give rise to any sanction. On the other hand if his representation was not



tial significance, of course, is the administrative problem of securing release. Normally, the accused does not receive appellate defense counsel until well after the convening authority has taken action and the case has been forwarded to the Court of Military Review. That court would therefore ordinarily be the court "then having jurisdiction of the cause."<sup>207</sup> It is unlikely that the Courts of Military Review will be able to make a reasonable assessment of the release request, and as a result, this procedure may well become no more than a pro forma exercise. The release provision seems little more than a cosmetic gesture which may only increase paperwork and litigation. Nevertheless, it is highly significant as a manifestation of the majority's concern about the job counsel are doing, and its desire to inject more judicial oversight into this area.

*Palenius* also subtly hints at the continuing jurisdiction trial court, a concept previously espoused by Chief Judge Fletcher.<sup>208</sup> Judge Cook overstates the issue in his separate opinion when he says that "the majority apparently contemplate recusal of a trial defense counsel by the trial judge of the court-martial that convicted the accused. . . ."<sup>209</sup> This statement implies that the trial judge normally will rule on recusal of counsel, but this should not be the case. Nevertheless, there will be instances where trial defense attorneys will need to seek release well before the case is to go to the Court of Military Review. *Palenius* does contemplate that a court or judge must be available in such instance. The most logical candidate would be the judge who tried the case; but what authority would he have to act then? If he has the authority to act on this question, may he rule on other post-trial issues? *Palenius* does not provide an answer, for it only skirts the question.

Defense counsel is not the only object of CMA's interest.

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otherwise adequate, surely fulfillment of this provision would not save the case on review. The real impact of this rule is to reemphasize the defense counsel's obligations and the desirability of judicial oversight of his role throughout the process.

<sup>207</sup> Query the effect of the fact that many, if not very nearly all military counsel practicing before courts-martial are not admitted to practice before a court of military review.

<sup>208</sup> See Fletcher, *supra* note 107.

<sup>209</sup> *United States v. Palenius*, 25 C.M.A. Adv. Sh. 222, 232, 54 C.M.R. Adv. Sh. 349, 359 (1977) (Cook, J. concurring in the result).

The court has not neglected the trial counsel or other representatives of the Government in its discussion of what it expects of those involved in a court-martial. The court has reminded these individuals that their goal is always to seek justice, and it has criticized charging decisions,<sup>210</sup> concealment of facts,<sup>211</sup> dilatory tactics,<sup>212</sup> and arguments<sup>213</sup> which undermine achievement of that goal.

CMA is especially attentive to the potential for abuse by representatives of the Government in their dealings with the defense counsel and in the informal relationships which exist in many SJA offices. In *United States v. Schilf*,<sup>214</sup> CMA condemned deception by the chief of military justice and strongly disapproved the behind the scenes "horse trading" which went on in that case.<sup>215</sup> The staff judge advocate and the convening authority have also received the court's attention. In *United States v. Johnson*<sup>216</sup> CMA made clear that they are governed by the same ethical standards as counsel.<sup>217</sup>

In these cases CMA has used its reversal sanction in the normal review of cases not only to protect the rights of individual appellants, but to exert pressure on the system as a whole to ensure that its participants fulfill their legal and ethical duties. The reversal sanction is only an indirect means to achieve that goal, however. CMA has demonstrated that it desires to exercise more direct authority over the participants in the court-martial process.

The Judge Advocates General currently possess the greatest authority to discipline counsel and judges and to remove them

<sup>210</sup> *United States v. Williams*, 23 C.M.A. Adv. Sh. 176, 178 n.3, 54 C.M.R. Adv. Sh. 284, 286 n.3 (1976); *United States v. Hughes*, 24 C.M.A. 169, 170-71 n.3, 51 C.M.R. 388, 389-90 n.3 (1976).

<sup>211</sup> *United States v. Schilf*, 24 C.M.A. 67, 51 C.M.R. 196 (1976).

<sup>212</sup> *Kidd v. United States*, 24 C.M.A. 25, 51 C.M.R. 75 (1975).

<sup>213</sup> *United States v. Shamberger*, 24 C.M.A. 203, 51 C.M.R. 448 (1976); *United States v. Nelson*, 24 C.M.A. 49, 51 C.M.R. 143 (1975).

<sup>214</sup> 24 C.M.A. 67, 51 C.M.R. 196 (1976).

<sup>215</sup> Defense counsel informally agreed to request a delay in return for the release of his client from pretrial confinement. That such informality is often beneficial to the defense is not persuasive to the court. As *Palenius* indicates, the "vicissitudes" of military practice leave too many advantages to the Government to permit two way traffic on this avenue.

<sup>216</sup> 23 C.M.A. 416, 50 C.M.R. 320 (1975). Chief Judge Fletcher did not participate in this decision.

<sup>217</sup> *Id.* at 417-18 n.2, 50 C.M.R. at 321-22, n.2. See also *United States v. Beach*, 23 C.M.A. 489 n.2, 50 C.M.R. 360 n.2 (1975).

from the courtroom.<sup>218</sup> There are indications from CMA that it may move to assume some of this authority. In rules of court proposed by members of the court's staff in May 1976,<sup>219</sup> proposed rule 11 would have required that practitioners before courts-martial and the Courts of Military Review be admitted to CMA in order to try cases in those courts. Proposed rule 12 would have provided disciplinary procedures and sanctions to be utilized by CMA in supervision of "its bar."<sup>220</sup> CMA recently adopted new rules without including these controversial provisions.<sup>221</sup> Nevertheless, the mere fact that such rules were proposed indicates that there is substantial sentiment within the court for an integrated bar structure within the military. It is not unlikely that the court will seek legislative authority for such a system. Such a system would give CMA unprecedented power over the personnel who work in the military justice system.<sup>222</sup>

There is other evidence of a similar nature. In *United States v. Ledbetter*<sup>223</sup> CMA raised on its own, and granted a petition on the following issue:

Whether the military judge was subjected to unwar-

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<sup>218</sup> U.C.M.J. arts. 26(a) & 27; MCM, 1969, para. 48.

<sup>219</sup> United States Court of Military Appeals, Proposed Rules of Practice and Procedure, Staff Recommendations, presented at the Homer Ferguson Conference on Appellate Advocacy, May 20-21, 1976 [hereinafter cited as Proposed Rules of Court]. The rules had not been examined by the judges at the time they were presented. They have since been circulated to the services for comment and are now under consideration by the court.

<sup>220</sup> *Id.* rule 12. This rule also contemplates some supervision of military judges and judges on the Courts of Military Review. Rule 12 includes the creation of an "ethics committee," to act under the auspices of CMA to make recommendations on allegations of misconduct. Who would serve on such a committee is unclear.

<sup>221</sup> M.J. Court Rules, 3 M.J. No. 4 (June 28, 1977).

<sup>222</sup> CMA also declined to adopt the wording in Proposed Rule 4 which said that the court "may take action to grant extraordinary relief in aid of its jurisdiction or in the exercise of its supervisory powers over the administration of military justice." (emphasis added). Rule 4 now states that the court "may take action to grant extraordinary relief in aid of its jurisdiction including the exercise of its supervisory powers over the administration of the Uniform Code of Military Justice." (emphasis added). Thus the language in the proposed rule which seemed to ignore the jurisdictional limitations of Article 67 and the All Writs Act, 28 U.S.C. § 1651 (1970), was rejected in favor of less sweeping (but by no means unambiguous) language. The court's decision in *McPhail v. United States*, 24 C.M.A. 304, 52 C.M.R. 15 (1976), see notes 259-272 and accompanying text *infra*, may have mooted any real controversy over this provision in any event.

<sup>223</sup> 25 C.M.A. Adv. Sh. 51, 34 C.M.R. Adv. Sh. 51 (1976).

ranted command control allegedly based on his lenient sentences, in violation of Article 37 . . . and, if so, should not the remedy therefor take the prophylactic form of dismissal of the Charges and Specifications as well as individualized action by this Court against any member of its bar who may prove to be involved.<sup>224</sup>

This case was ultimately resolved on other grounds,<sup>225</sup> but the court was highly critical of those who discussed certain of the military judge's cases with him. The granted issue is significant, of course, because it contemplates taking disciplinary action against a member of CMA's bar for acts allegedly undermining the integrity of a case at the trial level.<sup>226</sup>

Proposed rules 11 and 12, and the granted issue in *Ledbetter* demonstrate CMA's desire to exercise more direct control over military trial practitioners, and reflect that an integrated bar concept is being considered as a means to accomplish this.<sup>227</sup> The court's authority to create such a structure is not at all clear.<sup>228</sup> The Judge Advocates General will no doubt protest any infringement of their powers under Articles 26 and 27. There may be valid reasons for such a structure, particularly in terms of enhancing the independence of defense counsel

<sup>224</sup> United States Court of Military Appeals, Daily Journal No. 76-38, Feb. 26, 1976, at 2.

<sup>225</sup> See notes 236-243 and accompanying text *infra*.

<sup>226</sup> The issue is especially important because one of the individuals involved was The Judge Advocate General of the Air Force.

<sup>227</sup> CMA has also hinted that Article 98 ought to be used as a means to encourage greater compliance with the standards of the military justice system. Article 98 makes punishable knowing and intentional failure to comply with the UCMJ, and also responsibility for unnecessary delays in the disposition of a case. CMA has referred to the Article several times. See *United States v. Burns*, 25 C.M.A. Adv. Sh. 170, 172, 54 C.M.R. Adv. Sh. 278, 280 (1976) (Perry, J. concurring); *United States v. Powell*, 24 C.M.A. 267, 269, 51 C.M.R. 719, 721 (1976); *United States v. Johnson*, 23 C.M.A. 416, 418 n.2, 50 C.M.R. 320, 322 n.2 (1975). See also Thorne, *Article 98 and Speedy Trials—A Nexus Revived?*, THE ARMY LAWYER, July 1976, at 8. Chief Judge Fletcher made clear that he feels that Article 98 is a proper remedy for speedy trial violations in *United States v. Perry*, 23 C.M.A. Adv. Sh. 297, 54 C.M.R. Adv. Sh. 813 (1977), in a separate opinion: "The way to protect military society from the 'guilty' accused who has not been provided a speedy trial is to enforce by prosecution those who chose to ignore the obligation to their society mandated by the Uniform Code of Military Justice." *Id.* at 808, 54 C.M.R. Adv. Sh. at 819.

<sup>228</sup> Article 27(b)(2) provides that counsel detailed for a general court-martial "must be certified as competent to perform such duties by The Judge Advocate General of the Armed Force of which he is a member." This seems to give TJAG

and the judiciary. On the other hand, the ability of The Judge Advocates General to effect the best possible allocation of personnel to handle all of the military's legal problems may be adversely affected should their authority be restricted in this area. These are issues deserving of careful attention and discussion. CMA appears willing to leave the creation of such a structure to Congress.

## 2. Trial Judges

CMA is also concerned about the independence and professionalism of judges. Signs of this concern appear in statements by the court which reflect its exasperation over some of the

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sole authority to determine who shall practice before courts-martial. See also U.C.M.J. art. 6(a) & MCM, 1969, para. 43. The question may be asked, however, whether Article 27(b)(2) establishes only a necessary rather than a sufficient condition for such practice by counsel.

Arguably, under CMA's supervisory power, see *McPhail v. United States*, 24 C.M.A. 304, 52 C.M.R. 15 (1976) and notes 259-272 and accompanying text *infra*, CMA has authority to provide for the qualifications of those counsel who try courts-martial (or at least those who try general and BCD special courts-martial, cases which might reach CMA in the ordinary process of review). The case of *United States v. Kraskouskas*, 9 C.M.A. 608, 26 C.M.R. 387 (1958), lends some support to this theory. In *Kraskouskas* the court held that an accused cannot, even by his own choice, be represented by a nonlawyer before a general court-martial. The court construed U.C.M.J. art. 38(b), which was ambiguous on the issue, to mean that "military counsel" meant only a qualified attorney. Although there is some language referring to the congressional intent behind Article 38 in the majority opinion in *Kraskouskas*, the decision ultimately turned on the court's supervisory power. Judge Ferguson wrote: "We conclude, therefore, that in order to promote the best interests of military justice, it is imperative that only qualified lawyers be permitted to practice before a general court-martial." *Id.* at 610, 26 C.M.R. at 390. Thus, in *Kraskouskas* the court appears to have asserted some authority to decide who may practice before general courts-martial.

In *In re Taylor*, 12 C.M.A. 427, 31 C.M.R. 13 (1961), the court indicated that certification by The Judge Advocate General, and admission to practice before CMA, or indeed the capacity to act as individual counsel at a court-martial, are unrelated. Lieutenant Colonel Taylor sought an injunction from CMA against his decertification by The Judge Advocate General of the Air Force. CMA denied relief, saying that TJAG's decision to certify or decertify a counsel is "no different from his determination that an officer is specially suited for assignment to the procurement, patent, or other special section in his office." *Id.* at 429, 31 C.M.R. 15. The court also said that certification is "[u]nlike admission to the legal profession," *id.*, and denied relief on grounds that the certification procedure is an administrative determination of TJAG. As a qualified attorney, Taylor could still have served as counsel in a court-martial at the request of an accused under Article 38(b). Decertification is, in effect, a personnel decision

errors made at the trial level. Thus, in *United States v. Shamberger*<sup>229</sup> Chief Judge Fletcher commented on a trial judge's rejection, on grounds of untimeliness, of a defense objection to prejudicial presentencing argument by trial counsel: "What is troubling, however, is that here a judicial officer acknowledged on the record that error was present in the proceedings. Yet he elected to do nothing rather than declare a mistrial."<sup>230</sup> And Senior Judge Ferguson, decrying a military judge's failure to permit litigation of the issue of whether a witness' testimony was the product of an illegal search, wrote in *United States v. Hale*:

While we are unable to conclude why a trial judge would preclude the litigation of a suppression motion . . . possibly, this judge erroneously believed that live testimony is not a proper subject of such a motion. As a result of his ruling, however, the record is critically deficient in the

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which by itself cuts off only one mode of access to the courtroom, either at the trial level or at CMA.

Thus, as interpreted by CMA, the certification process is only one factor in determining who tries courts-martial. Article 27 does not, by itself, provide The Judge Advocates General with authority to control all means of access to the military trial bar. *But see* MCM, 1969, para. 43; Army Reg. No. 27-10, Military Justice, ch. 4 (C14, 31 OCT. 1974). CMA's supervisory role arguably gives it some role in this regard, especially in view of the apparent statutory gaps in TJAG's authority.

It is possible to make a "worst case" type argument that CMA must have power in this respect. Otherwise CMA could conceivably have to review a case in which counsel for one side in the trial had been previously disbarred or suspended by CMA. While such an occurrence is improbable, it being unlikely CMA would take such severe action while The Judge Advocate General took none, it is not impossible. Indeed, in *Ledbetter*, CMA obviously took a very dim view of the actions of The Judge Advocate General of the Air Force. *Ledbetter* brings the entire issue into clearer focus, and again serves to make the point that CMA views itself as the appropriate supervisory body for the entire military justice system.

At bottom, while there is little affirmative authority for the proposition that CMA has the power to effect, at least in part, an integrated bar structure in this way, there is also not much that says it cannot. On a more practical level, in CMA's eyes, much more supervision is necessary in this area, as decisions like *Palentius* indicate. If CMA is to assert that it has greater power in this area, the effect on military lawyers and JAGC personnel policies could be momentous. Creation of such a structure ought to come about only after full exploration and with the cooperation of the services.

<sup>229</sup> 24 C.M.A. 205, 51 C.M.R. 448 (1976).

<sup>230</sup> *Id.* at 205 n.1, 51 C.M.R. at 450 n.1.

development of both the search's alleged illegality and of the question of taint.<sup>231</sup>

Senior Judge Ferguson was merely restating the obvious when he said that "possibly this judge erroneously believed" that no action by him was warranted. The fact that the court feels compelled to make such statements and the tone of perplexity with which it makes them reflect the court's distress over such errors.

CMA was even more disturbed by the military judge's actions in *United States v. Shackelford*,<sup>232</sup> where, after rejecting the accused's tendered guilty plea following the providency inquiry, the military judge refused to recuse himself<sup>233</sup> and presided over the ensuing jury trial. During the defense case in chief the accused testified in his own behalf; following examination by both the defense and trial counsel, the military judge interrogated the accused at length. Some of the questions put by the judge were apparently based on information elicited from the accused during the earlier providency inquiry.<sup>234</sup> Although the majority was especially critical of the judge's use of the information gained during the providency

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<sup>231</sup> 24 C.M.A. 134, 136 n.11, 51 C.M.R. 324, 326 n.11 (1976).

<sup>232</sup> 25 C.M.A. Adv. Sh. 13, 54 C.M.R. Adv. Sh. 13 (1976).

<sup>233</sup> The majority was critical of the judge's refusal to recuse himself here, and cited *United States v. Cockerell*, 49 C.M.R. 567, 570-73 (A.C.M.R. 1974), as an apparently correct approach to the recusal issue. In *Cockerell* the Army Court of Military Review held that the military judge should have recused himself after withdrawal of the accused's guilty plea (on grounds that insanity had been raised by evidence presented on other charges in the case). Failure to recuse was not deemed reversible error in that case. CMA seems, therefore, to espouse a fairly liberal recusal policy, although it did not reverse on that ground alone in *Shackelford*. Cf. *United States v. Engle*, 24 C.M.A. 213, 51 C.M.R. 310 (1976). This approach appears not to be consistent with the policies expressed in Trial Judge Memorandum Number 99, United States Army Judiciary, SUBJECT: Recusal or Disqualification of Military Judge, 1 Sept. 1976. See also *United States v. Wolzok*, 23 C.M.A. 92, 50 C.M.R. 572 (1975), in which CMA cautioned "trial judges to avoid situations . . . in which a trial ruling requires that a judge pass upon the effect of his own previous rulings." *Id.* at 494, 50 C.M.R. at 574. Recent cases indicate that the majority may not be willing to adopt quite so liberal a recusal policy as that espoused by Chief Judge Fletcher in *Shackelford*, however. See *United States v. Head*, 25 C.M.A. Adv. Sh. 332, 54 C.M.R. Adv. Sh. 1078 (1977); *United States v. Goodman*, 3 M.J. 1 (C.M.A. 1977).

<sup>234</sup> Judge Cook, concurring in the result, rested his vote to reverse the conviction solely on this ground.

inquiry, it found such extensive questioning prejudicial regardless of its foundation, and concluded that the military judge had abandoned his impartial role.<sup>235</sup>

*Shackelford* indicates that although CMA wants an active trial judiciary, it does not want the judge to try the case for the parties. His job is to identify the issues and to place them in perspective; it is counsel's role to develop the evidence so that this may be done. Moreover, implicit in the majority opinion is the suspicion that military judges may be more inclined to assist the Government than the defense. This concern relates to JAGC career patterns and to the independence of the judiciary, two issues about which the court is very concerned. To the extent that such a problem may exist, however, it is as much a question of attitudes as it is of structural imperfections in the system.

CMA's concern with the operation of the military judiciary was made even clearer in *United States v. Ledbetter*.<sup>236</sup> There the military judge alleged that after Ledbetter's trial he had been subjected to unlawful command influence with respect to the lenient sentences he had imposed in that and other cases. Among those alleged to have brought pressure to bear upon the military judge was The Judge Advocate General of the Air Force.<sup>237</sup> The Judge Advocate General asserted that he had contacted the judge in the ordinary course of his duty to supervise military judges,<sup>238</sup> in order to check on routine matters in the judicial circuit and to gather information about one case (not Ledbetter's) in which some command interest was anticipated.

CMA took an exceedingly dim view of this transaction. Although it found no prejudice because the contact occurred after the accused's trial, CMA criticized TJAG's action:

<sup>235</sup> See *United States v. Clower*, 28 C.M.A. 15, 48 C.M.R. 397 (1974). See also *United States v. Holmes*, 28 C.M.A. 497, 50 C.M.R. 577 (1975).

<sup>236</sup> 25 C.M.A. Adv. Sh. 51, 54 C.M.R. Adv. Sh. 51 (1976). See text accompanying notes 223-226 *supra*.

<sup>237</sup> In addition to The Judge Advocate General, others alleged by the military judge to have pressured him included the staff judge advocate of Ledbetter's command; the Chief of the Trial Judiciary, Office of The Judge Advocate General, United States Air Force; and an assistant in that office. While there are discrepancies as to what was actually said to the judge, it is clear that he was asked by several people about the lenient sentence he imposed in at least one case.

<sup>238</sup> U.C.M.J. art. 26.



The trial judge, as an integral part of the court-martial, falls within the mandate of Article 37. If anything is clear in the Uniform Code of Military Justice, it is the congressional resolve that both actual and perceived unlawful command influence be eliminated from the military justice system. Article 26(c)'s provision for an independent trial judiciary responsible only to the Judge Advocate General certainly was not designed merely to structure a more complicated conduit for command influence. That is to say, the Judge Advocate General and his representatives should not function as a commander's alter ego but instead are obliged to assure that *all* judicial officers remain insulated from command influence before, during and after trial. In the absence of congressional action to alleviate recurrence of events as were alleged to have occurred here,<sup>239</sup> we deem it appropriate to bar official inquiries outside the adversary process which question or seek justification for a judge's decision unless such inquiries are made by an independent judicial commission established in strict accordance with the guidelines contained in section 9.1(a) of the ABA Standards, The Function of the Trial Judge. . . .<sup>240</sup>

All of this is particularly noteworthy, because in view of its disposition of the case, the majority<sup>241</sup> did not have to discuss the issue at all.<sup>242</sup> CMA used the case as a launching pad for a discussion of its views and desires on the nature of the military judiciary. The assertion of the desirability of a tenured judiciary comes as no surprise. Beyond that, *Ledbetter* reflects the court's belief that it should itself be the primary agency for supervising the military judiciary. The structure described by section 9.1(a) of the *ABA Standards* cited by Chief Judge

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<sup>239</sup> Here the court noted that "[t]he appearance of judicial tampering could be eliminated by congressional action to provide some form of tenure for *all* judges in the military justice system." *United States v. Ledbetter*, 25 C.M.A. Adv. Sh. 51, 59 n.12, 54 C.M.R. Adv. Sh. 51, 59 n.12 (1976) (emphasis in original).

<sup>240</sup> *Id.*, at 58-59, 54 C.M.R. Adv. Sh. 58-59 (emphasis in original).

<sup>241</sup> Judge Cook, while agreeing with the sentiments expressed about the independence of the judiciary, disagreed that The Judge Advocate General had exceeded the bounds of his authority under the UCMJ.

<sup>242</sup> Of special interest is the fact that CMA published, as an appendix to the opinion, affidavits from the parties involved in the allegations of misconduct. Publication of these items was unnecessary in view of CMA's disposition of the case; certainly it created some embarrassment for those concerned. The court's deci-

Fletcher contemplates that the judicial commission will "make findings and recommendations to the highest court in the jurisdiction. Such court should be empowered to remove any judge found by it and the commission to be guilty of gross misconduct or incompetence in the performance of his duties."<sup>243</sup>

*Ledbetter* exposes the court's apprehensions about the independence of the military judiciary and its potential exposure to command control. Of critical importance, in addition to the court's aspirations to supervise the system itself, is the attitude toward The Judge Advocate General. In CMA's view, The Judge Advocate General is not the appropriate repository for supervisory authority over the judiciary. The Judge Advocates General have too many conflicting responsibilities to fulfill this obligation with the requisite detachment. This attitude will not be shared by The Judge Advocates General; obviously there are seeds for a conflict of large proportions here. Along with the integrated bar concept, the notions advanced here by CMA raise important questions about the structure of the JAG Corps, their personnel organization and management policies, and their organic relationship in the military structure. These questions deserve careful study by all who are interested in the military justice system.

### 3. Appellate Courts

CMA has not ignored the Courts of Military Review in its examination of the system. The structure under the judicial council alluded to in *Ledbetter* would include the Courts of Military Review, and the integrated bar structure contemplated in the proposed rules would have included these courts. CMA has also prodded these courts to be more active and has chastised them when it has felt that they were not fulfilling their responsibilities. In *Kelly v. United States*,<sup>244</sup> CMA remanded a petition for extraordinary relief to the Army Court of Military Review "in order for that Court to exercise its extraordinary

sion to lay the entire affair out in the open reflects its deep dissatisfaction with what had occurred here and its desire to discourage similar activities.

<sup>243</sup> ABA STANDARDS, THE FUNCTION OF THE TRIAL JUDGE § 9.1(a) (emphasis added).

<sup>244</sup> 23 C.M.A. 567, 50 C.M.R. 786 (1975).

writ authority."<sup>245</sup> At a single stroke (and without citing any authority) CMA thereby resolved the controversy over whether the Courts of Military Review have extraordinary writ powers<sup>246</sup> and at the same time forced them to actually use that power.<sup>247</sup>

CMA's adoption of relatively strict standards of review, such as the waiver rules or its construction of harmless error rules,<sup>248</sup> has forced the CMR's to be somewhat more exacting in their own review of cases. CMA has also stressed that it will require the courts of review to adhere closely to their statutory obligations. In *United States v. Boland*<sup>249</sup> CMA reversed a defendant's conviction of taking indecent liberties with a child under sixteen because no evidence of the child's age was introduced on the merits. Despite the presence of such evidence elsewhere in the record, and although the court members

<sup>245</sup> *Id.* at 568, 50 C.M.R. at 787 (1975).

<sup>246</sup> Compare *Gagnon v. United States*, 42 C.M.R. 1035 (A.F.C.M.R. 1970) and *United States v. Draughon*, 42 C.M.R. 447 (A.C.M.R. 1970) with *Combest v. Bender*, 43 C.M.R. 899 (C.G.C.M.R. 1971). See also *Henderson v. Wondolewski*, 21 C.M.A. 63, 44 C.M.R. 117 (1971).

<sup>247</sup> See also *United States v. Cruz-Rijos*, 24 C.M.A. 271, 274 n.3, 51 C.M.R. 723, 726 n.3 (1976), asserting that all courts, including the courts of military review, have inherent authority to order publication of their decisions; and *United States v. Keller*, 23 C.M.A. 545, 50 C.M.R. 716 (1975), which could be read as implying Courts of Military Review have power to suspend sentences. See note 185 *supra*.

<sup>248</sup> *United States v. Moore*, 24 C.M.A. 217, 51 C.M.R. 515 (1976); *United States v. Starr*, 23 C.M.A. 384, 50 C.M.R. 849 (1975); *United States v. Ward*, 23 C.M.A. 572, 50 C.M.R. 837 (1975). See also *United States v. Hall*, 23 C.M.A. 549, 50 C.M.R. 720 (1975). Note that in *Ward*, CMA left itself free to apply stricter harmless error standards to violations of the UCMJ than are applied to constitutional errors:

An instance, as the present case, wherein the evidence complained of was obtained solely in contravention of protections afforded by the United States Constitution, is to be distinguished from one in which the subject evidence also was the result of a violation of statutory provisions where the legal consequence afforded a military accused is more beneficial than that offered by the Constitution. In the latter instance, the test to be applied and the remedy tendered may be more beneficial to the accused than otherwise available under standards enunciated by the United States Supreme Court. *United States v. Kaiser*, 19 USCMA 104, 41 CMR 104 (1969).

*United States v. Ward*, *supra* at 575 n.3, 50 C.M.R. at 840 n.3.

<sup>249</sup> 24 C.M.A. 55, 54 C.M.R. 184 (1975).

could be presumed to have inferred the witness' minority by her appearance, CMA would not permit the Court of Military Review to circumvent its independent responsibility to determine guilt based on evidence on the record.<sup>250</sup>

CMA has not hesitated to be more direct in its criticisms when it is dissatisfied with the Courts of Military Review. In *United States v. Heflin*<sup>251</sup> Chief Judge Fletcher sternly admonished those courts to faithfully adhere to CMA's rulings.<sup>252</sup> In *United States v. McCarthy*<sup>253</sup> the Chief Judge found "alarming" the superficial attention being given jurisdictional issues by the Courts of Military Review, as well as by trial courts.<sup>254</sup> CMA has also put the courts of review on notice that it will scrutinize their sentence reassessments to ensure that meaningful sentence relief is given for prejudicial errors.<sup>255</sup>

CMA is attempting to nudge the Courts of Military Review closer to its own philosophy. Certainly it has required those courts to be more critical and demanding of the proceedings below.<sup>256</sup> The court would also like those courts to expand from their historical roots<sup>257</sup> and to bring their experience

<sup>250</sup> See U.C.M.J. art. 66(c). CMA rejected the Army Court of Military Review's opinion, *United States v. Boland*, 49 C.M.R. 791 (A.C.M.R. 1975), that compared its own reviewing function and that of the convening authority to that of civilian appellate courts. The ACMR felt itself properly able to rely on the inference of age apparently drawn from the witness' appearance by the court. CMA held this was improper. *Boland* demonstrates that while CMA is moving to assimilate more of the values and protections of civilian criminal law systems, where the military system already contains a more effective protection, CMA will apply the stricter rule. See also *United States v. Martinez*, 24 C.M.A. 100, 51 C.M.R. 273 (1976).

In *Boland*, CMA was adhering to the principles it had recently laid down in *United States v. Starr*, 23 C.M.A. 584, 50 C.M.R. 849 (1973) (evidence not admitted on the merits at trial may under no circumstances be considered to uphold the conviction on review). This rule had been applied in earlier cases. See *United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 229 (1973); *United States v. DeLeon*, 5 C.M.A. 747, 19 C.M.R. 43 (1955). *But cf.* *United States v. Johnson*, 23 C.M.A. 416, 50 C.M.R. 320 (1975) (leaving open the question of the propriety of examining allied papers to determine whether guilty plea was properly accepted).

<sup>251</sup> 23 C.M.A. 505, 50 C.M.R. 644 (1975).

<sup>252</sup> *Id.* at 506 n.6, 50 C.M.R. at 645 n.6.

<sup>253</sup> 25 C.M.A. Adv. Sh. 30, 54 C.M.R. Adv. Sh. 30 (1976).

<sup>254</sup> *Id.* at 33 n.1, 54 C.M.R. Adv. Sh. at 33 n.1.

<sup>255</sup> *United States v. Reed*, 23 C.M.A. 558, 559 n.4, 50 C.M.R. 777, 778 n.4 (1975).

<sup>256</sup> In this regard the results appear to be mixed. There are several notable areas where the courts of military review have been slow to adopt an approach espoused by CMA. See notes 342-345, 381, and 397 and accompanying text *infra*.

<sup>257</sup> See Currier & Kent, *The Boards of Review of the Armed Services*, 6 VAND. L. REV. 241 (1953).

and expertise to bear on the broader issues of military justice. CMA would like both trial judges and the CMR's to be more independent and more aggressive in their examination of problems in the system.

### *B. CMA WILL EXERCISE ITS AUTHORITY THROUGHOUT THE MILITARY JUSTICE SYSTEM*

CMA views itself as responsible for the administration and operation of the entire system of military justice. No element of the military structure which affects the justice system will escape the court's scrutiny, and CMA will jealously guard its own powers and prerogatives.

The court has made clear that its power to supervise military justice is not limited to its appellate authority under Article 67 of the Code.<sup>258</sup> In *McPhail v. United States*<sup>259</sup> the court proclaimed its ability to grant extraordinary relief in a case that could never come before it in the ordinary course of review under Article 67. At Sergeant McPhail's special court-martial the military judge granted a motion to dismiss for lack of jurisdiction but that ruling was reviewed<sup>260</sup> and reversed by the convening authority.<sup>261</sup> McPhail was then tried and convicted, but a punitive discharge was not adjudged; therefore,

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<sup>258</sup> Article 67 grants jurisdiction to CMA to review, in the course of the ordinary appellate process, those cases which a court of military review has reviewed. Because under Article 66, courts of military review may examine only certain cases, CMA's appellate jurisdiction is limited. Summary and special courts-martial in which no punitive discharge is adjudged will never reach CMA in the ordinary appellate process. This jurisdictional restriction generated the question whether CMA could exercise any sort of jurisdiction over such cases.

<sup>259</sup> 24 C.M.A. 304, 52 C.M.R. 15 (1976).

<sup>260</sup> See U.C.M.J. art. 62(a). But see notes 167-176 *supra*. While the convening authority was reviewing the ruling, the accused petitioned CMA for extraordinary relief, which CMA denied. As Judge Cook explained in *McPhail*, the petition was then premature because even under the interpretation of Article 62(a) subsequently announced in *Ware*, the convening authority was permitted to review the military judge's ruling and to ask him to reconsider it; therefore the accused had suffered no legal wrong at that time. Although *coram nobis* was raised in the later petition in *McPhail*, it was deemed inappropriate and not dispositive of the issue.

<sup>261</sup> CMA assumed the military judge considered himself bound by the convening authority's return of the record. See *Mangsen v. Snyder*, 24 C.M.A. 197, 51 C.M.R. 280 (1976).

the case could never have reached CMA in the ordinary appellate process. McPhail petitioned The Judge Advocate General of the Air Force under Article 69 of the Code, challenging the legality of his conviction. In spite of the pendency of *United States v. Ware* at that time, TJAG denied relief. The accused then petitioned CMA for extraordinary relief.

CMA granted relief, and in so doing it declared its authority to cure basic injustices throughout the military justice system. Judge Cook wrote for a unanimous court:

Still, this Court is the supreme court of the military judicial system. To deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the "integrated" nature of the military court system and to defeat the high purpose Congress intended this Court to serve. Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67.<sup>262</sup>

Judge Cook went on to say, "[A]s to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, [CMA has] jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority."<sup>263</sup>

*McPhail* thus gave fruit to the promise of some of CMA's early extraordinary writ cases<sup>264</sup> that seemed to have been nipped in the bud in *United States v. Snyder*.<sup>265</sup> But while *McPhail* established once and for all CMA's position of primacy over the whole military justice system, its magnitude and suddenness brought inevitable questions with it. The doctrinal

<sup>262</sup> *McPhail v. United States*, 24 C.M.A. 304, 309-10, 52 C.M.R. 13, 20-21 (1976).

<sup>263</sup> *Id.* at 310, 52 C.M.R. at 21.

<sup>264</sup> See *United States v. Bevilacqua*, 18 C.M.A. 10, 39 C.M.R. 10 (1968); *Gale v. United States*, 17 C.M.A. 40, 37 C.M.R. 304 (1967). In *Bevilacqua* the court said it was "not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial," 18 C.M.A. at 11-12, 39 C.M.R. at 11-12.

<sup>265</sup> 18 C.M.A. 480, 40 C.M.R. 192 (1969). In *Snyder* CMA held that it had no power to grant extraordinary relief in a case which could never come before it in

roots of the decision are open to criticism. The opinion rests largely upon congressional intent gleaned from a number of general statements in the legislative history about the court's role, none of which goes to the precise issue at hand; and upon the assertion that CMA possesses supervisory powers similar to the Supreme Court, a dubious proposition.<sup>266</sup> The court is on firmer ground when it alludes to Supreme Court opinions respecting the integrity of the military judicial system,<sup>267</sup> but even these do not treat the specific question raised in *McPhail*. At bottom, it seems that the court was not so much pushed into the position it adopted in *McPhail* by affirmative doctrinal forces, but rather was pulled into it by the vacuum of authority which the court perceived. Without such power CMA's exercise of its direct authority would be rendered less effective.<sup>268</sup>

Beyond the question of the basis for CMA's assumption of supervisory authority in excess of the literal limits of Article 67 is the issue of the scope of that authority. One must first ask what sorts of matters the court will deem appropriate for extraordinary relief. *McPhail* itself dealt with jurisdiction, a fundamental matter traditionally open to the widest forms of collateral attack.<sup>269</sup> The statement that CMA has "jurisdiction to require compliance with applicable laws from all courts and persons purporting to act"<sup>270</sup> under the UCMJ appears to imply authority to treat matters beyond jurisdiction, but establishes no limits to the authority. It seems safe to say that CMA will not get into the business of reviewing summary and spe-

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the ordinary appellate process. This retreat from *Bevilacqua* was apparently motivated by a somewhat cryptic note in the Supreme Court's majority opinion in *Novd v. Bond*, 395 U.S. 683, 693 n.7 (1969). The Supreme Court later seemed willing to grant CMA greater powers of self-determination. See *Parisi v. Davidson*, 405 U.S. 34, 44 (1972). For an excellent analysis of the theory and development of CMA's powers under the All Writs Act, see Wacker, *supra* note 20.

<sup>266</sup> See Wacker, *supra* note 20, at 629 n.113.

<sup>267</sup> See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>268</sup> See Wacker, *supra* note 20, at 643-59.

<sup>269</sup> See, e.g., *Ex parte Reed*, 100 U.S. 15 (1879); cf. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>270</sup> *McPhail v. United States*, 24 C.M.A. 304, 310, 52 C.M.R. 15, 21 (1976).

cial courts-martial on a routine basis.<sup>271</sup> But beyond that, just how the court will determine when to act and when to refrain from acting is uncertain.<sup>272</sup>

There is an even more fundamental and far-reaching question about the limits of the court's power to supervise the entire military justice system: what is the military justice system? In a society as tightly knit as the military, the court-martial process is interwoven with many other activities. What, then, can CMA do about military activities which affect the administration of justice by the courts? CMA is cognizant of the relationship of administrative proceedings (such as elimination actions) to the court-martial process.<sup>273</sup> In his separate opinion in *United States v. Thomas*<sup>274</sup> Chief Judge Fletcher indicated that he would prohibit the use of fruits of health and welfare inspections "as evidence in a criminal or quasi-criminal pro-

<sup>271</sup> One might argue that *McPhail* was a special case because, as a BCD special court-martial it was a case which, for a time at least, could potentially reach CMA. (Indeed, in this instance, it did reach CMA, albeit briefly.) Thus, as Judge Cook pointed out, "Had the accused petitioned this Court before he was sentenced, he would not now be burdened with a conviction for offenses which concededly were not triable by court-martial." *McPhail v. United States*, 24 C.M.A. 304, 307, 52 C.M.R. 15, 18 (1976). This implies that CMA's jurisdiction is limited to cases which were, at some point, potentially capable of coming before it. However, language that appears later in the opinion, *see, e.g.*, text accompanying note 263 *supra*, discloses no such limitations. Absent additional guidance, *McPhail* must be read as saying CMA has power to grant appropriate and necessary relief in any court-martial proceeding.

<sup>272</sup> Judge Cook made an intriguing statement in *McPhail* when he said, "Undeniably, this Court is fallible, and its errors, unless self-perceived and acknowledged, can be corrected only in the Federal civilian courts." *McPhail v. United States*, 24 C.M.A. 304, 309, 52 C.M.R. 15, 20 (1976). While it is true that an accused seeking redress from an "error" by military courts has long been able to collaterally attack his conviction in federal courts, *see Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Government has never had the benefit of a similar option. Yet clearly if *McPhail* is an "error" it is the Government, not the accused, which would want to determine CMA's fallibility in the federal courts. Was Judge Cook inviting the Government to test the federal courts on their willingness to review such a decision?

<sup>273</sup> Interest in this area has been expressed elsewhere. *See* H.R. 91, 95th Cong., 1st Sess. (1977). Judge Duncan perceived the relationship between the criminal process and administrative proceedings in *United States v. Unrue*, 27 C.M.A. 466, 472-73, 47 C.M.R. 356, 362-63 (1972). *See also* *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974).

<sup>274</sup> 24 C.M.A. 228, 233, 51 C.M.R. 607, 612 (1976) (Fletcher, C.J. concurring in the result).



ceeding."<sup>275</sup> The Chief Judge did not elaborate on what he meant by "quasi-criminal proceedings"; he could be referring to summary courts-martial,<sup>276</sup> to nonjudicial punishment,<sup>277</sup> or to administrative board actions,<sup>278</sup> or to a combination of these. While the language is tantalizingly vague, its potential scope cannot be ignored.

In *Harms v. United States Military Academy*<sup>279</sup> CMA flirted with a more direct expansion of its authority. A number of West Point cadets challenged the proceedings being conducted against them for alleged violations of the cadet honor code, and requested extraordinary relief from CMA.<sup>280</sup> These proceedings consisted of boards of officers, and were considered administrative in nature. The cadets based their assertion that CMA had jurisdiction on the grounds that punitive sanctions were being imposed upon them without benefit of the protections of the UCMJ. In other words, they claimed that the Army was disguising court-martial penalties with administrative procedures to circumvent formal protections under the Code. Although CMA ultimately dismissed the petitions,<sup>281</sup> it did so only after ordering oral arguments and briefs, and taking a careful look at the situation.<sup>282</sup>

<sup>275</sup> *Id.* at 235, 51 C.M.R. at 614.

<sup>276</sup> See *Middendorf v. Henry*, 425 U.S. 25 (1976), which held a summary court-martial not to be a true criminal proceeding.

<sup>277</sup> U.C.M.J. art. 15. See *Cooke, United States v. Thomas and The Future of Unit Inspections*, *THE ARMY LAWYER*, July 1976, at 1, 6-7 n.18.

<sup>278</sup> See, e.g., Army Reg. No. 635-200, Personnel Separations, ch. 13 (C42, 14 Dec. 1973).

<sup>279</sup> Misc. Docket No. 76-58 (C.M.A. Sept. 10, 1976).

<sup>280</sup> Examination of the petitioners' briefs made it unclear precisely what relief petitioners were seeking. At a minimum they seem to have wanted the board proceedings against them declared invalid.

<sup>281</sup> CMA denied the petitions "without prejudice to reassert any errors after the petitioners have exhausted their administrative remedies and provided the sanction of dismissal or its equivalent is imposed." *Harms v. United States Military Academy*, Misc. Docket No. 76-58, slip. op. at 3 (C.M.A. Sept. 10, 1976).

<sup>282</sup> CMA specified the following issues when it ordered a hearing on the initial petitions:

- I. Whether, except by sentence of court-martial, a U.S. Military Academy Cadet is subject to dismissal from the Academy for violation of the Cadet Honor Code.
- II. Whether dismissal of a cadet from the U.S. Military Academy is a criminal sanction. See Articles 4 and 66(b), Uniform Code of Military Justice. Compare 10 U.S.C. 4352(b) with 10 U.S.C. 4351(a).

The chimerical images created by *Harms* and Chief Judge Fletcher's *Thomas* opinion must not be permitted to obscure the substance of the court's thinking in this area. CMA is most unlikely to get into the business of reviewing administrative personnel actions on any large scale basis, absent legislation empowering it to do so.<sup>283</sup> As *Harms* demonstrates, however, CMA will ensure that the integrity of the UCMJ and the structure it creates are protected. The Government may not defeat the purposes of the Code by setting up a parallel program to accomplish similar ends. CMA will look past form to determine the substance of a given governmental action; if that substance affects the military justice system, CMA believes it has authority to act.<sup>284</sup>

### C. CMA WILL MAKE RULES AND ESTABLISH POLICY FOR THE MILITARY JUSTICE SYSTEM

CMA believes that making rules of evidence and prescribing procedural rules is, in the absence of legislative preemption, more properly a judicial than an executive function. Of course, Article 36 of the Code gives the President the authority to fill this role to a great extent; but within the limits of Article 36, CMA is attempting to actively assert itself. What is more, CMA is using its power to interpret the Code, including Article 36, in a way which will justify its activism.

CMA has demonstrated that it will not defer to the constructions adopted by the draftsmen of the Manual for Courts-Martial when it interprets the UCMJ. Instead, it will reach its own conclusions as to the Code's meaning, and then test the Manual provisions for adequacy against such standards. Naturally, this renders many Manual provisions less likely to be sustained. One example of this has already been seen in *United*

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III. Assuming dismissal is a criminal sanction, whether the Government is barred from imposing dismissal upon a cadet of the U.S. Military Academy, absent enabling legislation, in other than formal judicial proceedings under the Uniform Code of Military Justice.

IV. Assuming dismissal administratively from the U.S. Military Academy is precluded, whether this court has jurisdiction to halt proceedings which do not satisfy Uniform Code of Military Justice standards for court-martial.

*Harms v. United States Military Academy*, Misc. Docket No. 76-58, order of July 30, 1976.

<sup>283</sup> See note 273 *supra*.

<sup>284</sup> Cf. *United States v. Dunks*, 24 C.M.A. 71, 51 C.M.R. 200 (1976).

*States v. Ware*.<sup>285</sup> An even better example of this process is found in *United States v. Douglas*,<sup>286</sup> in which CMA held that paragraph 145*b* of the Manual, which permits substantially verbatim testimony from the Article 32 hearing to be introduced at trial, is contrary to Article 54 of the Code and therefore ineffective.<sup>287</sup> Article 54 is rather general in its language,<sup>288</sup> but it had previously been construed to require verbatim trial transcripts in general courts-martial.<sup>289</sup> In *Douglas* the court asserted that the requirement that the record of a general court-martial be verbatim "[n]ecessarily included [a] requirement that the testimony of the principal government witness be verbatim, whether it be live testimony or prior testimony."<sup>290</sup>

Actually, the court was playing with mirrors here. The cases cited by the court in *Douglas* to support the proposition it espoused dealt only with the failure of the record to include all that transpired at trial.<sup>291</sup> But the *Douglas* record was already complete in that sense; the reviewing authorities had everything before them that the trial court had, so their review was in no way impeded.<sup>292</sup> The gravamen of CMA's complaint in *Douglas* was surely not the disadvantage at which reviewing authorities were placed, but rather the difficulties suffered by the fact finders in weighing such evidence at trial, and the

<sup>285</sup> 24 C.M.A. 102, 51 C.M.R. 275 (1976); see notes 167-176 and accompanying text *supra*. See also *United States v. Washington*, 24 C.M.A. 324, 326 n.6, 52 C.M.R. 35, 37 n.6 (1976); *United States v. Carpenter*, 24 C.M.A. 210, 212 n.8, 51 C.M.R. 507, 509 n.8 (1976); *United States v. Kinane*, 24 C.M.A. 120, 124, 51 C.M.R. 310, 314 (1976).

<sup>286</sup> 24 C.M.A. 178, 51 C.M.R. 397 (1976).

<sup>287</sup> Actually the court's description of the transcript as a "summarization of a summarization," *id.* at 179, 51 C.M.R. at 398, renders it highly debatable whether the statement met the existing standards of paragraph 145*b*.

<sup>288</sup> Article 54 states in pertinent part: "Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge."

<sup>289</sup> MCM, 1951, para. 82*b*. See also *United States v. Nelson*, 3 C.M.A. 482, 13 C.M.R. 38 (1953).

<sup>290</sup> 24 C.M.A. at 179, 51 C.M.R. at 398.

<sup>291</sup> *United States v. Randall*, 22 C.M.A. 591, 48 C.M.R. 215 (1974); *United States v. Weber*, 20 C.M.A. 82, 42 C.M.R. 274 (1974).

<sup>292</sup> See *United States v. Cruz-Rijos*, 24 C.M.A. 271, 273, 51 C.M.R. 723, 725 (1976).

concomitant dilution of the accused's right to confront the witnesses against him.<sup>293</sup>

If the court's reflecting act in *Douglas* is less than dazzling, it still illuminates CMA's willingness to use the Code to reshape the system to comport more fully with its own image of proper procedures. In addition to striking down Manual provisions which conflict with CMA's interpretation of the UCMJ, CMA has indicated that it will construe Article 36 narrowly. Article 36 authorizes the President to prescribe rules for procedures "in cases before courts-martial."<sup>294</sup> The court has hinted in several cases that it does not believe that that provision is valid authority for many of the Manual's prescriptions.<sup>295</sup> Most recently, in *United States v. Heard*<sup>296</sup> the majority struck down paragraph 20c of the Manual, which deals with pretrial confinement procedures, on grounds it exceeded the authority granted under Article 36.<sup>297</sup>

This narrow construction of Article 36 jeopardizes substantial portions of the Manual.<sup>298</sup> If the court begins excising Manual provisions in this fashion, it will have to fill in the re-

<sup>293</sup> One major reason for the court's strained effort to ground the decision in a statutory, rather than a constitutional, foundation was the court's desire to avoid constitutional bases as that terrain is shifting. See note 26 *supra*. It is submitted that Articles 46 and 49 would have provided a better basis for the decision.

<sup>294</sup> Article 36(a) states in full:

The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

<sup>295</sup> See, e.g., *United States v. Washington*, 24 C.M.A. 324, 52 C.M.R. 85 (1976), wherein Judge Perry wrote:

This language [of MCM, 1969, para. 160 which holds that a substantive offense is separately punishable from conspiracy to commit it] merely reflects the state of the prevailing law, rather than prescribes or defines it, for the President has no authority to do the latter as it does not address "procedure, including modes of proof, in cases before courts-martial."

*Id.* at 326-27 n.6, 52 C.M.R. at 37-38 n.6 (1976). See also *United States v. Ware*, 24 C.M.A. 102, 104 n.10, 51 C.M.R. 275, 277 n.10 (1976).

<sup>296</sup> 3 M.J. 14 (C.M.A. 1977); see notes 147-151 *supra*.

<sup>297</sup> 3 M.J. 14, 20 (C.M.A. 1977). See also *United States v. Larnear*, 3 M.J. 76 (C.M.A. 1977).

<sup>298</sup> See, e.g., MCM, 1969, para. 152 which applies the fourth amendment exclusionary rule to courts-martial. As a rule of evidence, paragraph 152 is within the

sulting gaps with rules of its own. CMA has already established policies on matters for which it has found no clear, preexisting statutory standards. In *United States v. Hughes*<sup>299</sup> CMA held that simultaneous possession of several types of contraband drugs is punishable only as a single offense. Chief Judge Fletcher, writing for the majority, found no adequate guidance on the multiplicity issue in the UCMJ or in appropriate federal law; therefore, he concluded that "we must once again formulate a policy to fill the legislative void."<sup>300</sup>

The attitude expressed in *Hughes*, coupled with a willingness to negate provisions of the Manual under Article 36, will permit CMA to become a major force in promulgating rules of evidence and procedure in the military justice system. *United States v. Heard*, a case in which the court drastically altered the criteria, and, by implication, the procedures under which pre-trial confinement is imposed, is an example of this. Yet, while it is not inappropriate for a court to exercise substantial, if not final, authority in such a rule-making capacity,<sup>301</sup> such a path is fraught with risks. Implementation of a wholesale revision of rules of evidence and procedure on a case-by-case basis is like constantly repatching an inner tube: such measures ought really to be stopgaps. Full scale revision calls for the type of study and comprehensive treatment only a legislature can give. Again, *Heard*, with the many questions it leaves unanswered,<sup>302</sup> demonstrates the difficulties involved in efforts to institute extensive changes in a given case.

The court will also endeavor to establish policy in a more general sense. In *United States v. Mosely*<sup>303</sup> it held trial coun-

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President's authority under Article 36. Yet paragraph 152 also discusses various types of searches and seizures and purports to state which are reasonable and which are not. It is questionable whether paragraph 152 can affirmatively establish substantive rules of search and seizure: rather, it would seem that it can do no more than attempt to reflect prevailing standards as enunciated by the courts and Congress.

<sup>299</sup> 24 C.M.A. 169, 51 C.M.R. 388 (1976).

<sup>300</sup> *Id.* at 170, 51 C.M.R. at 389. CMA seems to have overruled *United States v. Meyer*, 21 C.M.A. 310, 45 C.M.R. 84 (1972), *sub silentio*.

<sup>301</sup> See, e.g., The Federal Rules of Evidence for United States Courts and Magistrates, effective July 1, 1975, which were originally drafted under the authority of the Supreme Court, and ultimately enacted, with some revisions, by Congress.

<sup>302</sup> See note 151 *supra*.

<sup>303</sup> 24 C.M.A. 173, 51 C.M.R. 392 (1976).

sel's argument for a more severe sentence on the grounds of general deterrence improper. This holding was not without ambiguity. There is language in *Mosely* which seems to indicate that general deterrence is, per se, an improper consideration in adjudging a sentence. Judge Cook, *Mosely's* author, wrote: "Once the accused has committed the crime, the general deterrence aspect of the prescribed punishment is not relevant to him as he has not been deterred."<sup>304</sup> On the other hand there is reason to believe that the court was concerned that overemphasis on general deterrence renders the sentencing decision insufficiently individualized. Judge Cook said that general deterrence is

*a factor included within the maximum punishment prescribed by law, but not as a separate aggravating circumstance that justifies an increase in punishment beyond what would be a just sentence for the individual accused determined on the basis of evidence before the court. This approach retains the concept of general deterrence as a function of punishment, but it does not utilize it in a way that allows the accused to be punished more severely than he otherwise deserves.*<sup>305</sup>

There is other evidence that the court did not intend to completely abolish consideration of general deterrence in *Mosely*. In *United States v. Miller*<sup>306</sup> the court, in a per curiam opinion, said that *Mosely* condemned argument for "imposition of a more severe sentence upon the accused than might otherwise be adjudged."<sup>307</sup> In *United States v. Davie*<sup>308</sup> the Air Force Court of Military Review held that trial counsel's argument that the court members should consider general deterrence among other factors to arrive at a just sentence in the particular case was proper. The Air Force Court held that *Mosely* prohibited arguing that general deterrence demands a more severe sentence than would otherwise be adjudged. *Davie*

<sup>304</sup> *Id.* at 174, 51 C.M.R. at 393. Judge Cook also stated that the impact on the public of the punishment imposed upon the accused "is not deterrence from the same crime: that deterrence is still provided by the maximum punishment allowed by law." *Id.* This assertion seems specious. Whatever the maximum punishment, if the public is aware that the maximum punishment is never or only seldom imposed, it would seem that its deterrent effect would be substantially diluted.

<sup>305</sup> *Id.* (emphasis in original).

<sup>306</sup> 24 C.M.A. 181, 51 C.M.R. 400 (1976).

<sup>307</sup> *Id.*

<sup>308</sup> ACM S-24334 (A.F.C.M.R. 18 May 1976) (unpublished).

is the more noteworthy because CMA denied the accused's petition for review.<sup>309</sup> Although CMA has asserted that its denials of petitions have no precedential value,<sup>310</sup> the fact remains that *Davic* is good law in the Air Force.<sup>311</sup>

*Mosely* is clearly an exercise in policy making of the broadest sort, because no basis for condemnation of the general deterrence principal appears in the Code or prior case law.<sup>312</sup> Indeed, general deterrence remains an accepted part of penal

<sup>309</sup> *United States v. Davic*, Docket No. 32,673, C.M.A. Daily Journal No. 76-152 (Aug. 6, 1976).

<sup>310</sup> *United States v. Mahan*, 24 C.M.A. 109, 113 n.9, 51 C.M.R. 299, 303 n.9 (1976).

<sup>311</sup> The Army Court of Military Review has construed *Mosely* more broadly, although not without lodging its criticism of the *Mosely* rule. See *United States v. Lucas*, — M.J. —, CM 434131 (A.C.M.R. 19 Apr. 1976). CMA may be rethinking its *Mosely* approach. As of this writing it has before it the issue of the propriety of a military judge's decision to sentence which rested, in part, upon grounds of general deterrence. *United States v. Varacalle*, Docket No. 31,888, *pet. granted*, April 13, 1976.

<sup>312</sup> In *Mosely* the court cited *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176 (1959) and *United States v. Hill*, 21 C.M.A. 203, 44 C.M.R. 257 (1972). In *Mamaluy* the court found improper (but ultimately harmless) an instruction on sentencing that included advice to the court members that they consider penalties adjudged in similar cases, special local conditions warranting severe sentence, and the potential harm to the military's reputation in the civilian community if offending servicemembers were given lenient sentences. The court condemned such instructions as vague generalities with no real basis to which the court members could relate, and as "theories unsupported by testimony and which operate as a one way street against the accused." 10 C.M.A. at 197, 27 C.M.R. at 181.

In *Hill* the court was concerned with a statement made by the military judge after announcing sentence. The judge said, "Now you take that message back to those pushers. . . ." 21 C.M.A. at 206, 44 C.M.R. at 260. While some language in CMA's *Hill* opinion tends toward disapproval of the general deterrence concept, on the whole it appears the court was concerned that one accused was singled out and punished for the sins of others. The court in *Hill* did not seem to have intended to do away with the general deterrence purpose in punishment, for it said:

Also we have no hesitancy as to the legal correctness of the trial judge's remark that the "problem of heroin . . . must be dealt with . . . [among others] by the courts who [must] endeavor to deter others from engaging in conduct similar to" that which the accused had pleaded guilty.

*Id.* at 206, 44 C.M.R. 260 (bracketed words supplied by CMA).

The court's concern in *Mamaluy* and *Hill* was that punishment be individualized, and that the traditional sentencing considerations be part of that purpose. In *Mosely* CMA seems to have misconstrued this notion, and therefore the opinion can be read as saying that the only proper sentencing purpose is rehabilitation of the accused.

philosophy in this country.<sup>313</sup> The court's real concern in *Mosely* stems from its basic view that the emphasis in the military justice system must be shifted away from discipline and toward justice. The court suspects that the sentencing determination in the military is substantially affected by perceptions of the effect a given sentence will have on other soldiers in the organization.<sup>314</sup> It is the additional increment of punishment for discipline's sake that the court seems to be attacking in *Mosely*: the language about a "more severe" sentence than is otherwise appropriate seems to confirm this. Yet obviously there is no such discrete incremental element; rather, to the extent such special considerations do influence the sentence, they permeate it entirely. Moreover, such considerations exist whether or not trial counsel reminds the court-martial of them. Consequently, the court's efforts in *Mosely* to excise only the cancerous part of this consideration were awkward and imprecise. It is submitted that an instruction by the military judge emphasizing the limited role that general deterrence should play in the sentencing decision would be a more appropriate instrument to accomplish the court's purposes. In any event, *Mosely* stands as a prime example of CMA's efforts not just to build more procedural safeguards into the system, but to alter the attitudes of those within it.

#### V. CMA WILL INTERPRET BROADLY THE RIGHTS OF ACCUSED INDIVIDUALS

*Justice is not to be taken by storm. She is to be wooed by slow advances.*

—Benjamin N. Cardozo<sup>315</sup>

Historically, the rights of servicemembers have been narrower than those of civilians in three different respects: in the military, a greater range of behavior has been subject to criminal sanctions; the Government has greater latitude to intrude upon the privacy and liberty interests of serv-

<sup>313</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976).

<sup>314</sup> See, e.g., Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 1, 5 (1970): "First and foremost, the military justice system should deter conduct which is prejudicial to good order and discipline." General Westmoreland also stated: "Military law in contrast to civilian law, therefore, must have a motivating as well as a preventive function." *Id.* at 6.

<sup>315</sup> B. CARDOZO, *THE GROWTH OF THE LAW* 133 (1924).



icemembers; and the procedures for dealing with misconduct have been subject to greater government control. Preceding portions of this article have detailed many of the changes in these areas. Most of these changes have occurred in the third area, as CMA has transferred power over the adjudicatory process to the judiciary. It is probably fair to say that in the court's view this has been the most important area of change because by placing more authority in the hands of judges, the court has corrected some of the system's greatest imbalances and has made the system more amenable to other changes. Nevertheless, the court has been active in all three areas.

In this section a variety of issues will be discussed.<sup>316</sup> Yet all of the areas to be treated in this section have one thing in common: they represent efforts by CMA to restrict the power of the Government (usually as represented by the commander) to affect the servicemember's interests indicated in the preceding paragraph. These efforts by the court are sometimes awkward or strained because the commander's authority is so deeply rooted in tradition, the Code, or both. CMA is trying to reduce not only the commander's active role in the process, but also the spectre of his presence. At the same time the court is grappling with means to accommodate the special need for discipline which exists in the military society. It is important to recognize that the special nature of the military often, in the court's view, demands greater, not fewer, protections than might exist in civilian systems.

## A. JURISDICTION

### 1. *Jurisdiction Over the Person*

In the area of in personam jurisdiction, the court's most significant case has been *United States v. Russo*.<sup>317</sup> In *Russo* the court held that no court-martial jurisdiction existed to try a servicemember who, with the assistance of a recruiter, had enlisted fraudulently. Private Russo suffered from dyslexia and

<sup>316</sup> Of course, a number of the developments discussed in preceding sections have resulted in the expansion of individual rights. Most notable are the areas of pre-trial confinement, see notes 119-163 and accompanying text *supra*; and witness production, see notes 89-118 and accompanying text *supra*. Generally, the requirement that trial and appellate courts more carefully examine all aspects of the process has been designed to protect individual rights.

<sup>317</sup> 23 C.M.A. 511, 50 C.M.R. 650 (1975).

could not read; the recruiter's assistance enabled him to pass the Armed Forces Qualifications Test.<sup>318</sup>

CMA held first that Russo had standing to object to jurisdiction despite his own misconduct because the regulations he had violated were designed, at least in part, to protect him from himself. The court then held that the enlistment itself was void; in so doing it rejected the applicability of the seminal Supreme Court case, *United States v. Grimley*.<sup>319</sup> Essentially CMA concluded that because the Government had participated in the misconduct, the change in the individual's status found in *Grimley* never occurred. CMA relied on two of its own precedents in its analysis, although in both of them the pivotal issue was the involuntary nature of the accused's enlistment and subsequent service,<sup>320</sup> elements totally absent in

<sup>318</sup> The only evidence introduced on the matter at trial was Private Russo's own testimony about the circumstances of his enlistment. This testimony, unrebutted as it was, sufficed to deprive the military of jurisdiction. See *United States v. Barrett*, 23 C.M.A. 474, 50 C.M.R. 493 (1975).

<sup>319</sup> 157 U.S. 147 (1890). In *Grimley* the Supreme Court upheld court-martial jurisdiction despite Grimley's fraudulent enlistment (Grimley was overage and had lied about his age in order to enlist).

<sup>320</sup> In *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 761 (1974), the accused enlisted because a civilian judge gave him a choice of either going to jail or joining the Army. Not surprisingly, Catlow chose the latter. He was enlisted by a recruiter who was aware of the circumstances behind this decision, and in spite of Army regulations which should have barred Catlow's enlistment. Once Catlow was in the Army some efforts to secure his release from active duty were made on his behalf. Under these circumstances, CMA found that there was never a voluntary enlistment and therefore no court-martial jurisdiction existed.

In *United States v. Brown*, 23 C.M.A. 162, 48 C.M.R. 778 (1974), the accused chose to enlist, but being only 16 did so fraudulently by using a forged birth certificate. The recruiter failed to secure the parental consent forms necessary for Brown to enlist as the 17-year-old he purported to be. Once on active duty, and before his seventeenth birthday, Brown notified several people, including his commander, of his true status. CMA found there was no court-martial jurisdiction (Brown had since turned seventeen) because the Government failed to take adequate steps, both in the recruitment stage and later, to ensure that Brown was properly enlisted.

In both of these cases, two factors combined to deprive the military of jurisdiction. One was the recruiter misconduct, also present in *Russo*. The other seemingly necessary condition was the involuntary nature of the enlistment. In Catlow's case the involuntariness resulted from the coercion of having to choose between incarceration or enlistment. In Brown's case, his age precluded him from effecting a legally voluntary enlistment. See *United States v. Bianton*, 7 C.M.A. 664, 23 C.M.R. 128 (1957).

*Russo*. Under *Russo* the constructive enlistment doctrine<sup>321</sup> is conspicuously ignored: it is unclear when, if ever, the taint of recruiter misconduct might dissipate to allow jurisdiction to attach in a situation similar to that in *Russo*.<sup>322</sup>

The real basis for the *Russo* result is deterrence of governmental misconduct. Writing for a unanimous court, Chief Judge Fletcher stated "the result we reach will have the salutary effect of encouraging recruiters to observe applicable recruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices."<sup>323</sup> This statement is the heart of the *Russo* decision; and, indeed, it exemplifies one facet of the court's approach toward protecting individual rights. In CMA's view, the government's hands must be clean before it will be permitted to punish someone for his own misconduct. Also implicit here is Chief Judge Fletcher's view of the Government as a monolithic entity; when he speaks of deterrence he obviously is not referring to the impact *Russo* will have on recruiters. The recruiter who fraudulently enlists people hardly cares whether they are subsequently subject to court-martial jurisdiction.<sup>324</sup> The *Russo* decision will only be effective as a deterrent if institutional steps are taken to make its sanctions meaningful to recruiters. The court's approach here is similar to Chief Judge Fletcher's view of the fourth amendment exclusionary rule, to be examined below.

<sup>321</sup> See *United States v. Grimley*, 137 U.S. 147 (1890); *United States v. Overton*, 9 C.M.A. 684, 26 C.M.R. 464 (1958); cf. *United States v. Rodriguez*, 2 C.M.A. 101, 6 C.M.R. 101 (1952).

<sup>322</sup> There are two different situations in this area. The first is where, as in *Collon*, the individual is under a disqualifying disability at the time he enlists which can later be removed. In this situation, theoretically, a constructive enlistment could arise after the removal of the disability. The second is the *Russo* type situation, where the disability is permanent. Query whether a constructive enlistment could ever arise under these circumstances. CMA, by emphasizing examination of the government's conduct, and deterrence of misconduct, seems to gloss over this distinction, and to cast doubt about the applicability of constructive enlistment to these situations. *But cf.* *United States v. Fialkowski*, SPCM 11504 (A.G.M.R. 29 Apr. 1976).

<sup>323</sup> *United States v. Russo*, 28 C.M.A. 511, 512, 50 C.M.R. 650, 651 (1975).

<sup>324</sup> See also *United States v. Little*, 24 C.M.A. 328, 52 C.M.R. 39 (1976). There CMA held that a less egregious example of recruiter misconduct could still deprive the Government of jurisdiction in a fraudulent entry case. In *Little* the recruiter impaired the integrity of the Armed Forces Qualifications Text by explaining some portions of it to Little, although the recruiter was on notice that Little had difficulty reading.

## 2. Subject Matter Jurisdiction

The court has been even more active in the area of subject matter jurisdiction, that is, in determining what offenses are triable by courts-martial in light of *O'Callahan v. Parker*.<sup>325</sup> The present court has been quite strict in its definition of service connection under *O'Callahan*; in this the court is moving to limit the sorts of behavior over which the military can exert its control.<sup>326</sup>

In interpreting the *O'Callahan* requirements CMA has relied heavily on factors announced and the analysis utilized by the Supreme Court in *Relford v. Commandant*.<sup>327</sup> It has eschewed the cubby-hole kind of approach which characterized earlier cases,<sup>328</sup> in favor of a fact-specific, case-by-case analysis. In so doing, CMA has chided trial courts and the Courts of Military Review for taking a nonchalant attitude toward jurisdiction questions, saying that "jurisdiction is a matter to be proven, not presumed."<sup>329</sup> The two most important cases in this re-

<sup>325</sup> 395 U.S. 258 (1969).

<sup>326</sup> In addition to carefully evaluating the service connection issue, recent cases reflect that CMA will also closely scrutinize "exceptions" to the service connection requirements, most notably the "overseas exception." *United States v. Keaton*, 19 C.M.A. 64, 41 C.M.R. 64 (1969); *United States v. Weinstein*, 19 C.M.A. 29, 41 C.M.R. 29 (1969). In *United States v. Black*, 24 C.M.A. 162, 51 C.M.R. 381 (1976), the court held the overseas exception inapplicable because, although the conspiracy to transfer heroin was formed in Vietnam, the accused was, on the facts of the case, amenable to trial in federal court in the United States. *Cf. United States v. Luzzaro*, 25 C.M.A. Adv. Sh. 164, 54 C.M.R. Adv. Sh. 272 (1976), holding no overseas exception where larceny of currency from officers' club was punishable in a civilian court in the United States; but, service connection was found to justify military jurisdiction.

<sup>327</sup> 401 U.S. 355 (1971).

<sup>328</sup> *See, e.g.*, *United States v. Morisseau*, 19 C.M.A. 17, 41 C.M.R. 17 (1969) (holding reliance of victim on accused's status as servicemember confers military jurisdiction); *United States v. Camacho*, 19 C.M.A. 11, 41 C.M.R. 11 (1969) (holding that where victim of offense is servicemember, service connection exists); *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969) (holding, in effect, that most drug offenses by servicemembers are per se service connected).

<sup>329</sup> *United States v. Tucker*, 24 C.M.A. 311, 312, 52 C.M.R. 22, 23 (1976). *See also* *United States v. McCarthy*, 25 C.M.A. Adv. Sh. 30, 33, 34 nn.1 & 2, 54 C.M.R. Adv. Sh. 30, 33, 34 nn.1 & 2 (1976). In note 1 Chief Judge Fletcher admonished trial and appellate judges to take more care in determining jurisdictional issues. In note 2 he stated that "jurisdiction is a matter to be established affirmatively by the Government at trial." *Compare* MCM, 1969, para. 44f(3). This statement raises an interesting question as to who at trial is to make the jurisdiction determination. As the issue involves questions of law, it would seem that the military

gard have been *United States v. Hedlund*<sup>330</sup> and *United States v. McCarthy*.<sup>331</sup>

In *Hedlund* CMA abandoned, after ample warning,<sup>332</sup> the principle that the victim's status as a servicemember was sufficient by itself to establish service connection.<sup>333</sup> In *Hedlund* the accused, while on base, conspired with two other marines to go off base and rob someone. They fashioned some weapons on post, then left the installation. While off post they abducted and robbed two individuals, one of whom, unbeknownst to the conspirators, was an AWOL marine. CMA held that on these facts there was no jurisdiction over the robbery and kidnapping. The only one of the twelve *Relford* factors present was the military status of the victim, and this was, by itself, insufficient to establish service connection. In a case handed down the same day as *Hedlund*, CMA held that even where the accused and the victim were aware of each other's military status, that, without more, did not provide sufficient service connection.<sup>334</sup> Obviously, only when rare and special circumstances exist, perhaps where servicemembers assault their commander off post, or where the off-post offense is committed in the course of the accused's and victim's military duties, will jurisdiction be found in military victim cases.

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judge would be the appropriate one to make the choice; yet in some cases the question is almost entirely factual. *e.g.*, did the offense occur on post or off? Should the court members then decide? Trial counsel should also note that the absence of a motion to dismiss for lack of jurisdiction does not absolve them of the duty to prove jurisdiction.

<sup>330</sup> 25 C.M.A. Adv. Sh. 1, 54 C.M.R. Adv. Sh. 1 (1976).

<sup>331</sup> 25 C.M.A. Adv. Sh. 30, 54 C.M.R. Adv. Sh. 30 (1976).

<sup>332</sup> In *United States v. Moore*, 24 C.M.A. 290, 52 C.M.R. 1 (1976), the court said that *Relford* "suggests that there may be instances in which a crime committed off post against a fellow servicemember or the service itself is not triable by court-martial. . . ." *Id.* at 295, 52 C.M.R. at 6 (emphasis in original). CMA found court-martial jurisdiction to try Moore for his efforts to steal Servicemen's Group Life Insurance proceeds by fraud. In *United States v. Tucker*, 24 C.M.A. 311, 52 C.M.R. 22 (1976), CMA said *Relford* "made clear that in resolving questions of military jurisdiction, the situs of the offense is far more significant than the status of the accused or the victim." *Id.* at 312, 52 C.M.R. at 23. In *Tucker* CMA held that there was no jurisdiction over the offense of receiving stolen property, off post, where there was no evidence the accused knew the victim of the larceny was a servicemember. Judge Cook dissented in this case, as he did in *Hedlund* and *McCarthy*.

<sup>333</sup> See, *e.g.*, *United States v. Camacho*, 19 C.M.A. 11, 41 C.M.R. 11 (1969).

<sup>334</sup> *United States v. Wilson*, 25 C.M.A. Adv. Sh. 26, 54 C.M.R. Adv. Sh. 26 (1976).

Despite its restriction of jurisdiction over military victim offenses, *Hedlund* does reflect a commitment not to limit jurisdiction over on-post offenses. The court held, in *Hedlund*, that there was jurisdiction over the conspiracy offense because it occurred on post.<sup>335</sup> It will be recalled that the gravamen of the conspiracy was to go off post to rob someone. Therefore it would be reasonable to argue that the security of the post was not violated. While *Relford* indicates that geography is a critical factor in determining service connection, it implies that some on-post offenses may not be subject to court-martial jurisdiction.<sup>336</sup> Yet CMA upheld jurisdiction over the conspiracy in *Hedlund* with nary a pause, indicating the court is not likely to cut back on jurisdiction here.

In the other case, *United States v. McCarthy*, CMA rejected the "automatic" service connection rule for off-post drug offenses.<sup>337</sup> In *McCarthy* CMA upheld jurisdiction over an off-post transfer of drugs where a sizeable quantity of drugs was transferred to another servicemember under circumstances making it apparent that the latter would return to the installation to distribute these wares to other soldiers. Additionally, arrangements for the transfer occurred on post and were made in the course of the parties' duties. Although finding jurisdiction on these facts, Chief Judge Fletcher rejected the template type approach previously used by the court in drug cases.

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<sup>335</sup> Both the agreement and the overt act necessary to effectuate the offense occurred on post.

<sup>336</sup> The key language in *Relford* was

This leads us to hold, and we do so hold, that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. Expressing it another way: a serviceman's crime against the person of an individual upon the base or against the property on the base is "service connected" within the meaning of *O'Callahan*.

*Relford v. Commandant*, 401 U.S. 355, 369 (1971). This language demonstrates that for an on-post offense to be service connected, it must additionally be "violative of the security of a person or property there." While this language can probably be read loosely enough to cover most misconduct (including victimless crimes such as drug offenses), it obviously restricts on-post jurisdiction somewhat.

<sup>337</sup> See *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969). See also *United States v. Boyd*, 18 C.M.A. 581, 40 C.M.R. 293 (1969); *United States v. DeRonde*, 18 C.M.A. 575, 40 C.M.R. 287 (1969). In ruling as it did in *McCarthy*,

In a subsequent case, the court reversed a conviction for off-post possession of hashish.<sup>338</sup> The Chief Judge made clear in this opinion that, in his view, the commander has at his disposal sufficient means to deal with a servicemember who renders himself unfit for duty by using drugs<sup>339</sup> without having to extend the reach of the justice system this far into the servicemember's "private" life.

*McCarthy* bears scrutiny, for several of its statements reflect the court's approach to the jurisdiction issue generally. In addition to his emphasis on the *Relford* ad hoc analysis, and on the judiciary's duties in this regard, Chief Judge Fletcher indicated that courts must not only search for the presence of *Relford* factors, but should also assay their weight. He wrote:

The [service connection] issue requires careful balancing of the *Relford* factors to determine "whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and whether the distinct military interest can be vindicated adequately in civilian courts."<sup>340</sup>

Elsewhere, Chief Judge Fletcher indicated that service connection will not be found for offenses committed while the servicemember is "blended into the civilian populace."<sup>341</sup> This calls for a sophisticated analysis; the court will examine not only to see whether a military interest exists, but also to ensure that the military's need outweighs the interest of the civilian community.

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CMA was following a path taken by several federal courts which had addressed the issue. See *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Redmond v. Warner*, 355 F. Supp. 812 (D. Haw. 1973); *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969). It should be noted, however, that the Supreme Court, in vacating the determination by the Tenth Circuit Court of Appeals in *Schlesinger v. Councilman*, that no service connection over an off post drug offense existed, seemed to imply that it agreed with the *Becker* rule. 420 U.S. 738, 760-61 n.34 (1975).

<sup>338</sup> *United States v. Williams*, 25 C.M.A. Adv. Sh. 176, 54 C.M.R. Adv. Sh. 284 (1976).

<sup>339</sup> Such means would include prosecutions for offenses under U.C.M.J. arts. 86, 92, and 112, among others; as well as administrative measures, including transferring an individual out of a sensitive job or even separating him from the service when he is known to be involved with drugs. Cf. *Gardner v. Broderick*, 392 U.S. 275 (1968).

<sup>340</sup> *United States v. McCarthy*, 25 C.M.A. Adv. Sh. 30, 33, 54 C.M.R. Adv. Sh. 30, 33 (1976), citing *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975).

<sup>341</sup> *Id.* at 35, 54 C.M.R. Adv. Sh. at 35.

A number of recent decisions from the courts of military review appear to ignore the analysis CMA used in *McCarthy*. A few of these decisions fly in the face of *McCarthy* and several acknowledge this deviation, albeit in somewhat disingenuous terms.<sup>342</sup> Several of these opinions continue to rely on *United States v. Becker*<sup>343</sup> or its progeny,<sup>344</sup> although *Becker* was effectively overruled in *McCarthy*. These cases rest on the assumption that drugs necessarily have an adverse effect upon the performance of those who use or possess them.<sup>345</sup> Regardless of the merits of that view, it must be recognized that CMA has rejected it. CMA's position is that to the extent that an individual's duty performance falls short of the level required, a commander has at his disposal numerous administrative processes or criminal sanctions to deal with the problem directly, without having to regulate individual conduct in the civilian sphere. A more direct impact on the *security of the post*, the central concern in *McCarthy*, must be demonstrated before the military may exercise jurisdiction.

<sup>342</sup> For example, "We are fully cognizant that our conclusion appears contrary to the opinion expressed by a majority of the Court of Military Appeals in *McCarthy* and in *United States v. Hedlund*." *United States v. Artis*, ACM 22028 (A.F.C.M.R. 22 Oct. 1976), slip op. at 2-3 (footnotes omitted). The AFCMR went on to state: "In our opinion, drug abuse offenses, whether committed on or off-base, are of such singular military significance as to inherently satisfy the *Relford* criteria for determining service connected crimes." *Id.* at 3. See also *United States v. Smith*, ACM 21858 (A.F.C.M.R. 22 Oct. 1976); *United States v. Baker*, 54 C.M.R. Adv. Sh. 1018 (A.F.C.M.R. 1977); *United States v. Zorn*, 54 C.M.R. Adv. Sh. 198 (A.C.M.R. 1976); *United States v. Johnson* 54 C.M.R. Adv. Sh. 864 (A.C.M.R. 1976).

<sup>343</sup> 18 C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>344</sup> See, e.g., *United States v. Sexton*, 23 C.M.A. 101, 48 C.M.R. 662 (1975); *United States v. Rose*, 19 C.M.A. 3, 41 C.M.R. 3 (1969); *United States v. Castro*, 18 C.M.A. 598, 40 C.M.R. 310 (1969); *United States v. De Ronde*, 18 C.M.A. 575, 40 C.M.R. 287 (1969).

<sup>345</sup> Typical of these cases is *United States v. Coker*, ACM 22019 (A.F.C.M.R. 1976), in which the Air Force Court of Military Review upheld jurisdiction over off-post use, possession and sale of various drugs. Service connection was found as to the use (of marijuana) offense because the accused was a member of a missile maintenance team. The court found that the military has an interest in deterring drug use among its missile men, and that the accused represented a hazard to this critical mission. This position ignores the entire thrust of *McCarthy*. As to the deterrence prong, CMA's position here has philosophical ties to the same factors that motivated its *Mosely* decision. Deterrence of others is only one of several purposes served by the justice system. It is too thin a reed to alone support jurisdiction. As to the hazard represented by the accused, the Air Force



Assuredly, legitimate arguments can be mustered in favor of finding court-martial jurisdiction over off-post drug offenses; such arguments have proven persuasive in the past.<sup>346</sup> On the other hand, CMA is not the first court to decide that *O'Callahan* precludes jurisdiction over such offenses.<sup>347</sup> Regardless of the merits of CMA's position, however, the failure to rigorously apply *McCarthy* in jurisdiction cases will not only lead to reversals by CMA in many of such cases. More importantly, it is likely to reinforce CMA's distrust of military courts and may well lead the court to impose more rigid rules in this and other areas to reduce the maneuvering space available to lower courts.<sup>348</sup>

The discussion of *McCarthy* would be incomplete without mention of a statement made by Chief Judge Fletcher in a footnote. Responding to an assertion in Judge Cook's dissent to the effect that court members in a court-martial "are, arguably, the functional equivalents of the jurors in a civilian criminal trial,"<sup>349</sup> the Chief Judge commented on the jury system in the military:

Suffice it to say that court members, handpicked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction

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opinion rests on the very assumption rejected in *McCarthy* and, more directly, in *Williams*: that is, that the use of drugs necessarily renders one less fit for duty. The majority will not make this assumption: the Government must prove that an accused's duty performance is or will be affected. If the concern centers on the accused's sensitive duties as here, *McCarthy* certainly does not prevent Coker's commander from relieving him of those duties.

As to the sale offenses, the Air Force Court in *Coker* found jurisdiction, stating simply that "the sale offense, as the others, has singular military significance as to inherently satisfy the *Relford* service connection criteria." *Coker, supra*, slip op. at 6. The court cited *Becker* and two similar cases. Again this ignores *McCarthy* where jurisdiction over the sale was upheld in large measure because it was apparent that the buyer would return to the post to redistribute the drugs to other servicemembers. *McCarthy* ultimately rests on the finding that the security of the post was itself threatened by lawless acts thereon, not simply that other soldiers would necessarily be debilitated by the ingestion of drugs.

<sup>346</sup> See the cases cited in note 344 *supra*. See also *Schlesinger v. Councilman*, 420 U.S. 798, 760-61 n.34 (1975), apparently approving the *Becker* rule.

<sup>347</sup> See the federal cases cited in note 337 *supra*.

<sup>348</sup> See *United States v. Ledbetter*, 25 C.M.A. Adv. Sh. 51, 54 n.5, 54 C.M.R. Adv. Sh. 51, 54 n.5 (1976).

<sup>349</sup> *United States v. McCarthy*, 25 C.M.A. Adv. Sh. 30, 37, 54 C.M.R. Adv. Sh. 30, 37 (1976) (Cook, J. dissenting).

to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems. Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process.<sup>350</sup>

One can add little, except to say that such a statement reflects the Chief Judge's commitment to restructuring the military justice system along lines closer to its civilian counterparts, and his desire to remove the commander as an active participant in the trial process.

### B. SUBSTANTIVE CRIMES

One of the major distinctions between the military and civilian criminal legal systems is the range of behavior covered by criminal sanctions. Because military crimes are statutorily defined,<sup>351</sup> CMA is restricted in what it can do in this area. Nevertheless, as with subject matter jurisdiction, CMA will examine closely efforts by the military to extend the range of conduct which it can regulate. Two cases can be mentioned in this area.<sup>352</sup> In *United States v. Young*<sup>353</sup> CMA upheld Army regulations prescribing standards of appearance, specifically those dealing with hair length. The court had little basis to rule otherwise in light of the Supreme Court's decision upholding similar regulations for police personnel only a few months earlier.<sup>354</sup> Nevertheless, the mere fact that CMA was willing to examine this question reflects the court's willingness

<sup>350</sup> *United States v. McCarthy*, 23 C.M.A. Adv. Sh. 30, 35-36 n.3, 34 C.M.R. Adv. Sh. 30, 35-36 n.3 (1976) (footnotes omitted). See generally J. BISHOP, JUSTICE UNDER FIRE 27 (1974).

<sup>351</sup> See U.C.M.J. arts. 78-134. But see *id.* arts. 92, 133 & 134 which allow commanders substantial flexibility in determining what sorts of conduct may be subject to criminal sanctions.

<sup>352</sup> In this area, two other issues on which CMA has granted petitions for review are pending before the court as of this writing. In *United States v. Kick*, Docket No. 31,706 (pet. granted Mar. 12, 1976); *United States v. Williams*, Docket No. 32,291 (pet. granted June 16, 1976) and *United States v. Ballew*, Docket No. 33,169 (pet. granted Dec. 6, 1976). CMA will examine whether negligent homicide is an offense under U.C.M.J. art. 134. In *United States v. Harris*, Docket No. 31,481 (pet. granted Jan. 14, 1976); *United States v. Isaac*, Docket No. 31,378 (pet. granted Feb. 23, 1976), and *United States v. Weddleton*, Docket No. 32,319 (pet. granted June 22, 1976), CMA will examine whether Article 125 (sodomy) is constitutional.

<sup>353</sup> 24 C.M.A. 275, 31 C.M.R. 291 (1976).

<sup>354</sup> *Kelley v. Johnson*, 425 U.S. 238 (1976).

to face such issues. In *United States v. Smith*<sup>355</sup> CMA struck down a Navy regulation prohibiting any type of loan for profit by a member of the Navy to any other serviceperson.<sup>356</sup> The court held, with little discussion, that this restriction of personal freedom serves no valid military purpose.<sup>357</sup>

As in the jurisdiction area, the Government must demonstrate an interest in prohibiting a given course of conduct before it can punish it. This could be important in prosecuting offenses under Articles 92 and 134. Service connection under *O'Callahan* and conduct prejudicial to good order and discipline are not wholly unrelated concepts.<sup>358</sup> Thus, *Young* and *Smith* may haringer more stringent requirements in this regard; the practice of assuming prejudice or discredit in Article 134 cases appears especially vulnerable.

### C. SPEEDY TRIAL AND REVIEW

CMA is dedicated to maximizing the military's ability to ensure that the court-martial process at the trial level is operated as efficiently and as expeditiously as possible. The military system, unplagued for the most part by crowded dockets and severe personnel shortages, has the capability for truly speedy justice, which is itself of tremendous advantage to all connected with the process.<sup>359</sup> While there have been expressions of dissatisfaction<sup>360</sup> with the rigid speedy trial<sup>361</sup> and post-

<sup>355</sup> 23 C.M.A. 342, 50 C.M.R. 713 (1975).

<sup>356</sup> Usurious loans may be prohibited where the usurious rate of interest is specified. *United States v. Giordano*, 15 C.M.A. 163, 35 C.M.R. 135 (1964).

<sup>357</sup> There was ample precedent for the result in this instance. See, e.g., *United States v. Wilson*, 12 C.M.A. 165, 30 C.M.R. 165 (1961); *United States v. Nation*, 9 C.M.A. 724, 26 C.M.R. 504 (1958); *United States v. Wysong*, 9 C.M.A. 249, 26 C.M.R. 29 (1958). What is significant about *Smith* is the conspicuous absence of any analysis of any possible military need for such a regulation. The certitude with which the court draws its conclusion is indicative of the gap that exists between CMA's view of appropriate levels of controlling behavior, and the command view. A more detailed analysis by the court of its thinking in such cases might be helpful in bridging the gap.

<sup>358</sup> See *O'Callahan v. Parker*, 395 U.S. 258, 274 n.19 (1969); *United States v. Becker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969). See also *United States v. Williams*, 8 C.M.A. 325, 24 C.M.R. 135 (1957).

<sup>359</sup> See Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 7 (1971).

<sup>360</sup> See note 381 *infra*.

<sup>361</sup> *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), established a requirement that an accused in pretrial confinement must be brought to trial

trial<sup>362</sup> ninety-day rules, the court is determined to enforce them strictly as long as it perceives reluctance within the system to faithfully adhere to the principles underlying them. Moreover, there are increasing signs of concern from within the court over delays in circumstances where the ninety-day rules are not triggered.

CMA made very clear early in Chief Judge Fletcher's tenure that it would follow a hard line in interpreting the *Burton* 90-day rule when, in *United States v. Beach*,<sup>363</sup> it found, in a terse two paragraph opinion, a *Burton* violation and ordered charges dismissed. The majority's abruptness was contrasted by Judge Cook's lengthy dissent in which he concluded that various portions of the pretrial period were not properly charged to the Government; thus, where the majority found 143 days for which the Government was accountable, Judge Cook found only 80. Of particular significance was the fact that an Article 39(a) session was held on the 80th day of pretrial confinement. At that time the defense made several motions which resulted in further delays for, among other things, an inquiry into the accused's sanity and the production of defense witnesses. Judge Cook would not have held the Government liable for these delays.<sup>364</sup> The majority's decision to do so made clear the court's unwillingness to engage in

within three months or a presumption of a denial of speedy trial under U.C.M.J. art. 10 arises, and the Government must bear a heavy burden to show truly extraordinary circumstances justifying delay; dismissal of charges is the remedy for violation. In *United States v. Driver*, 23 C.M.A. 243, 49 C.M.R. 376 (1974), the three-month requirement was transformed into a uniform 90-day rule. In *United States v. Marshall*, 22 C.M.A. 431, 47 C.M.R. 409 (1973), several factors which might justify delays beyond 90 days were discussed.

<sup>362</sup> In *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974), the court held that where "the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of such restraint after completion of the trial" a presumption of a denial of speedy disposition of the case arises; again dismissal of charges is the remedy. While the basis for the *Dunlap* rule is unclear, it seems to be based upon CMA's supervisory power. See *United States v. Ledbetter*, 23 C.M.A. Adv. Sh. 51, 54 n.5, 54 C.M.R. Adv. Sh. 51, 54 n.5 (1976).

<sup>363</sup> 23 C.M.A. 480, 50 C.M.R. 560 (1975).

<sup>364</sup> Of critical importance was the timing of proceedings before the sanity board. The Government indicated at the time of the Article 32(b) hearing that it would refer the case to a sanity board. The Government subsequently failed to do so, but its change of position was not made known to the defense until shortly before the trial was scheduled to begin. The defense, which itself desired a sanity inquiry, was forced to move for one at the Article 39(a) session held on the

hairsplitting analyses of speedy trial issues, and stood as a stark reminder to the Government that exceptions to the *Burton* rule would be rare indeed. In fact, although some unusual circumstances in *Beach* render the proposition debatable,<sup>365</sup> it may be argued that *Beach* means that nothing short of findings may toll the *Burton* clock.<sup>366</sup>

If there were any doubts as to the court's inflexibility on the 90-day rules after *Beach*, they were dispelled in *United States v. Henderson*.<sup>367</sup> Henderson had been incarcerated before trial for 132 days, 113 of which were concededly charged to the Government. He was convicted of murder and conspiracy to commit murder; the offenses and trial took place in Okinawa. Investigation and processing before trial involved jurisdictional negotiations with the Japanese,<sup>368</sup> as well as interviewing and coordinating the production of witnesses who were foreign nationals, dependents, and soldiers. The majority<sup>369</sup> rejected the Government's contention that the seriousness and complexity of the case, as well as its foreign situs, justified the length of time it took to bring the case to trial. CMA recognized that the complexity of a case,<sup>370</sup> or unusual problems generated by a foreign situs *could* be factors which overcome the *Burton* presumption but it found these issues inadequately documented here. In *Henderson* the trial counsel introduced a

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eightieth day of pretrial confinement. In Judge Cook's view, however, delays occurring after the eightieth day could all be tied to other defense motions, so that the timing of the sanity board hearing was not dispositive. The brevity of the majority opinion makes its views on this matter uncertain.

<sup>365</sup> See note 364 *supra*.

<sup>366</sup> See *United States v. Marell*, 23 C.M.A. 240, 49 C.M.R. 373 (1974). See also *United States v. Smith*, 23 C.M.A. 556, 50 C.M.R. 774 (1975), upholding substitution of a military judge after the Article 39(a) session and before assembly without having to show good cause. "The function of the Article 39(a) session is to separate the trial itself from other preliminary and collateral matters which do not go directly to the issues of guilt or innocence of an accused." *Id.* at 556, 50 C.M.R. at 775.

<sup>367</sup> 24 C.M.A. 259, 51 C.M.R. 711 (1976).

<sup>368</sup> See also *United States v. Young*, 23 C.M.A. 471, 50 C.M.R. 490 (1975).

<sup>369</sup> Chief Judge Fletcher dissented: this was his first dissent since joining the court. The Chief Judge found that extraordinary circumstances existed because of the foreign situs and other complexities in the case.

<sup>370</sup> The court rejected the proposition, hinted at in *United States v. Marshall*, 22 C.M.A. 431, 434, 47 C.M.R. 409, 412 (1973), that the seriousness of an offense, independent of its complexity, could be a basis for an extraordinary circumstance under *Burton*. *United States v. Henderson*, 24 C.M.A. 259, 262, 51 C.M.R. 711, 714 (1976).

stipulated chronology which apparently demonstrated *when* various events occurred, but not *why* they occurred when they did. CMA refused to fill in the blanks for the Government. In his final opinion on the court, Senior Judge Ferguson wrote:

The standard propounded in [*Burton*], is the law. It will not be ignored by this Court, and it must not be ignored by the trial and intermediate appellate benches. Where the Government fails to comport its conduct with the law, it is the Government which must satisfactorily explain that failure. This Court takes the record in the posture in which it is made by the Government. . . . The law cannot be ignored because it is distasteful to apply it, for even more important than the demand that convicted criminals are to be duly punished is the absolute imperative that the law is fairly and equally applied to all.<sup>371</sup>

In light of *Henderson*, it would be folly to rely upon an exception to the *Burton* 90-day rule. CMA still believes that the Government is frequently not doing all that it can to ensure speedy trials.<sup>372</sup>

<sup>371</sup> *United States v. Henderson*, 24 C.M.A. 259, 265, 51 C.M.R. 711, 717 (1976). See also *United States v. Dunks*, 24 C.M.A. 71, 51 C.M.R. 200 (1976); *United States v. Russo*, 23 C.M.A. 311, 50 C.M.R. 650 (1975). CMA has made clear that the Government must strictly adhere to the law before it may prosecute someone for violating it.

<sup>372</sup> CMA has emphasized the government's heavy burden in several other speedy trial cases; in so doing it appears to be particularly cognizant of the special degree of control exercised by the Government over the trial process in the military. In *United States v. McClain*, 23 C.M.A. 433, 50 C.M.R. 472 (1975), the court emphasized that the unavailability of a military judge did not relieve the Government of its speedy trial burden. In *United States v. Wolzok*, 23 C.M.A. 492, 50 C.M.R. 572 (1975), this admonition was repeated: "It follows that the primary responsibility for providing a forum in which to try the accused must rest with the convening authority rather than the military judge." *Id.* at 494, 50 C.M.R. at 574. In *United States v. Johnson*, 24 C.M.A. 147, 51 C.M.R. 337 (1976), the government's insistence on a joint Article 32(b) hearing, which was delayed at the request of a co-accused, resulted in a *Burton* violation and dismissal of charges. In *United States v. Dinkins*, 23 C.M.A. 552, 50 C.M.R. 847 (1975), a delay caused by the failure of a key government witness to secure a passport to permit his transit to Germany, the situs of the trial, was held chargeable to the Government, because it was responsible for assuring the presence of all witnesses. A *Burton* violation resulted in *Dinkins* and charges were dismissed.

Additionally, in *United States v. Schiff*, 24 C.M.A. 67, 51 C.M.R. 196 (1976), CMA indicated that it would carefully examine the true nature of any restraint and the basis for it to determine the applicability of the 90-day rule. In *Schiff*, imposition of correctional custody under U.C.M.J. art. 15 was condemned as a

The court has been just as strict in its application of the 90-day *Dunlap* requirement for post-trial processing.<sup>373</sup> In *United States v. Larsen*<sup>374</sup> the court found insufficient justification for the 137-day period it took to complete a 1000-page record of trial and a 191-page post-trial review. Alleged personnel shortages in the reviewing command were not deemed to be an appropriate consideration. In *Bouler v. United States*<sup>375</sup> the court, acting on a petition for extraordinary relief, ordered charges dismissed because action had not been taken although the accused had been confined for over 90 days. This exercise of extraordinary writ power was a dramatic demonstration of the court's unwillingness to bend the *Dunlap* requirement.

There have been signs that the court is growing increasingly disturbed over delays in processing where the accused is not in confinement. In *United States v. Powell*<sup>376</sup> CMA ordered charges dismissed where, although the accused was not confined, the government's "conduct throughout the entire [161

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subterfuge for pretrial confinement. Government accountability for this time triggered the 90-day mechanism. Compare *id.* with *United States v. Miller*, 23 C.M.A. Adv. Sh. 67, 34 C.M.R. Adv. Sh. 275 (1976). In *United States v. Powell*, 24 C.M.A. 267, 31 C.M.R. 719 (1976), the court held that not all pretrial restraint is tantamount to confinement. Query the impact of the *Heard* decision on these considerations.

It should be noted that while the court continues to advance a hard line in its opinions, there are some signs of dissatisfaction with this approach. In addition to Chief Judge Fletcher's separate opinions in *United States v. Henderson*, 24 C.M.A. 259, 265, 31 C.M.R. 711, 717 (1976) and *United States v. Perry*, 25 C.M.A. Adv. Sh. 297, 302, 34 C.M.R. Adv. Sh. 818, 818 (1977), in which he divorced himself from the majority's approach on speedy trial questions, the court recently denied petitions for review of cases in which there was pretrial confinement in excess of 90 days. See *United States v. Stone*, 3 M.J. 40 (C.M.A. 1977); *United States v. Douglas*, 3 M.J. 92 (C.M.A. 1977).

<sup>373</sup> CMA has refined the *Dunlap* rule slightly in several cases. In *United States v. Slama*, 23 C.M.A. 560, 30 C.M.R. 779 (1975), *Dunlap* was held to be entirely prospective in application. In *United States v. Brewer*, 24 C.M.A. 47, 31 C.M.R. 141 (1975), *Dunlap* was deemed to require that both convening authority and general court-martial convening authority actions must take place within 90 days of post-trial confinement, where such bifurcated review is required. See U.C.M.J. art. 65(b). In *United States v. Manalo*, 24 C.M.A. 297, 32 C.M.R. 8 (1976), CMA held that in computing the 90 days within which action must occur, the day in which the accused goes into confinement does not count, but the day on which action is taken does.

<sup>374</sup> 23 C.M.A. 560, 30 C.M.R. 779 (1976).

<sup>375</sup> 24 C.M.A. 152, 31 C.M.R. 342 (1976).

<sup>376</sup> 24 C.M.A. 267, 31 C.M.R. 719 (1976).

day] period reflect[ed] a lack of concern for the codal commands for expeditious prosecution."<sup>377</sup> It has been argued that in *Powell* CMA adopted a new standard, "lack of concern," to replace the old "oppressive design" test previously used in non-*Burton* speedy trial cases.<sup>378</sup> This is probably accurate; the court seems to be focusing much more sharply on the government's shortcomings in these cases and to be less demanding that an accused show specific prejudice.

The court, and especially Chief Judge Fletcher, is similarly concerned with delays in post-trial processing not covered by the *Dunlap* requirement. In *United States v. Ledbetter*,<sup>379</sup> in addition to the other issues discussed above, the court had to determine *Dunlap*'s applicability to an obvious attempt to circumvent its strictures. On the 88th day of post-trial confinement, the convening authority unilaterally deferred Staff Sergeant Ledbetter's confinement after twice having rejected his earlier requests for deferral. Although a majority of CMA was unwilling to eliminate this "safety valve" procedure,<sup>380</sup> Chief Judge Fletcher, who wrote the majority opinion, expressed his own displeasure with this device in a footnote, and added a cautionary admonition:

It is regrettable that efforts by this court to fashion guidelines with some flexibility invariably prompt more, rather than less, litigation. The ultimate, and I believe unfortunate, result is subsequent decisions which solidify a standard with little, if any, discretion left to those who must apply it. . . . Such a blatant attempt to avoid the speedy disposition standard enunciated in *Dunlap* as is evidenced in this case, would prompt me to close the perceived confinement "loophole." My brothers are unwilling to take that step *at this time*; however, those charged with administering the military justice system are forewarned of the continuing risks of falling into the last minute release syndrome utilized here.<sup>381</sup>

<sup>377</sup> *Id.* at 269, 51 C.M.R. at 721.

<sup>378</sup> *Speedy Trial Under United States v. Burton*, THE ADVOCATE, Nov.-Dec. 1976, at 9, 14.

<sup>379</sup> 25 C.M.A. Adv. Sh. 51, 54 C.M.R. Adv. Sh. 51 (1976).

<sup>380</sup> *Id.* at 54, 54 C.M.R. Adv. Sh. at 54.

<sup>381</sup> *Id.* at n.5. It should be noted that while Chief Judge Fletcher is threatening to impose more stringent requirements, the courts of military review are chafing at existing ones. See *United States v. Douglas*, 54 C.M.R. Adv. Sh. 843, 847 (A.C.M.R. 1977) (Costello, J. dissenting). See also *United States v. Johnson*, 54 C.M.R. Adv. Sh. 929 (N.C.M.R. 1977). The inequities of the rigidity of the 90-day



More recently, in *United States v. Burns*<sup>382</sup> the Chief Judge indicated that he would apply the dismissal sanction to a 447-day delay between the trial and the completion of supervisory review by the general court-martial convening authority, although the accused was confined for only 78 days. Judge Perry also expressed concern over the delay and indicated that if it were to become a "pattern" he would join Chief Judge Fletcher in applying the dismissal sanction.<sup>383</sup>

CMA is applying the *Burton* and *Dunlap* requirements, as well as the less rigid standards where those rules are inapplicable, with continuing strictness. The court feels that the Government is uniquely capable of processing military cases expeditiously. Moreover, the speedy trial and disposition of cases inures not only to the benefit of the accused, but also, although the sanctions for violations may be a bitter pill at times, to the Government. For these reasons, CMA will treat failures to fulfill these requirements with growing asperity. The speedy trial and disposition rules may be criticized for the heavy social costs which their operation imposes. Certainly the court is aware of this as both the majority and dissent in *Henderson* indicate; nevertheless these rules subsist. Unless the administrators of the system more critically evaluate their own procedures for processing cases, these requirements are likely to be extended.

#### D. SENTENCING

CMA's recent decisions reviewing the propriety and the legality<sup>384</sup> of sentences and sentencing procedures have been

rules are obvious and certainly CMA is aware of them. See note 372 *supra*. Nevertheless, Chief Judge Fletcher has recently made clear where he places the blame: "The culprits [for failure to provide speedy trial] are those persons in command charged with the responsibility of enforcing and acting within the purview of the Uniform Code of Military Justice." *United States v. Perry*, 25 C.M.A. Adv. Sh. 297, 308, 54 C.M.R. Adv. Sh. 813, 819 (1976) (Fletcher, C.J. concurring in the result).

<sup>382</sup> 25 C.M.A. Adv. Sh. 170, 174, 54 C.M.R. Adv. Sh. 278, 282 (1976) (Fletcher, C.J. dissenting).

<sup>383</sup> *Id.* at 173, 54 C.M.R. Adv. Sh. at 281 (Perry, J. concurring).

<sup>384</sup> While CMA may review only the legality, as opposed to the factual propriety of sentences, U.C.M.J. art. 67(d), the court will use whatever elasticity there is in the concept of "questions of law" to review sentences approved by the courts of military review. See *United States v. Reed*, 25 C.M.A. 558, 359 n.4, 50 C.M.R. 777, 778 n.4 (1975); cf. *United States v. Harden*, 24 C.M.A. 76, 51 C.M.R. 249

generally favorable to accuseds.<sup>385</sup> The court seems to suspect that commanders too frequently use their broad charging discretion as a bludgeon to increase sentences or to gain tactical advantages at trial. The court's somewhat awkward effort to come to grips with the perceived overemphasis on general deterrence in *United States v. Mosely*<sup>386</sup> is one example of this.

One sentencing problem which has long troubled military judges and practitioners is that of multiplicitous offenses.<sup>387</sup> In *United States v. Hughes*<sup>388</sup> CMA held that simultaneous possession of more than one type of contraband drug could be punished as only a single offense.<sup>389</sup> Such factors as the spatial proximity of the substances at the time of discovery, or the circumstances of their initial acquisition were irrelevant in this determination. In addition, Chief Judge Fletcher, writing for the majority, sternly cautioned military practitioners to avoid shotgun charging, and said, "To far too great a degree, how-

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(1976). See also *United States v. Larner*, 24 C.M.A. 197, 51 C.M.R. 442 (1976). There CMA held that the Court of Military Review's action in reducing the sentence by the amount of time the accused had spent in illegal pretrial confinement was unlawful, because it had the potential effect of increasing the total time of confinement under the Navy's structure for crediting good time for time served. CMA held that administrative credit toward his sentence for the time in illegal pretrial confinement was the proper remedy. *Larner* is also significant because the majority strongly condemned as inequitable the primitively graduated good time credit scheme in operation there. There is a hint in the opinions of Chief Judge Fletcher and Senior Judge Ferguson of interest in exercising a supervisory role over the corrections process.

<sup>385</sup> But see *United States v. Washington*, 24 C.M.A. 324, 52 C.M.R. 35 (1976) (holding conspiracy to commit an offense and commission of the substantive offense to be separately punishable).

<sup>386</sup> 24 C.M.A. 173, 51 C.M.R. 392 (1976). See notes 303-314 and accompanying text *supra*.

<sup>387</sup> See Youngblood, *Multiplicitous Pleading*, 8 MIL. L. REV. 73 (1960). See also *United States v. Armstrong*, 46 C.M.R. 857, 860 n.\* (A.C.M.R. 1972) (Beltman, J. dissenting).

<sup>388</sup> 24 C.M.A. 169, 51 C.M.R. 399 (1976).

<sup>389</sup> Specialist Hughes was charged under U.C.M.J. art. 92 for possessing hashish, amphetamines, and heroin. The gravamen of the offense was violation of the regulation by possession of controlled substances and the majority held that this violation occurred only once, regardless of the variety of substances possessed. Although arguably a different analysis might apply to multiple offenses charged under Article 134, the majority seemed to exclude the possibility by saying that the issue is whether the servicemember violated a "single regulation or statute." 24 C.M.A. at 170, 51 C.M.R. at 389 (emphasis added). Drug offenses under Article 134 also give rise to problems under *United States v. Courtney*, 24 C.M.A. 280, 51 C.M.R. 796 (1976). See notes 392-401 and accompanying text *infra*.

ever, multiplicitous charging appears to be used solely as a vehicle to encourage stiffer sentences."<sup>390</sup> The Chief Judge warned that multiple charges would receive careful scrutiny from appellate courts.<sup>391</sup>

Command discretion in charging was the central issue in *United States v. Courtney*.<sup>392</sup> Courtney was convicted of possessing marihuana in violation of Article 134. The trial court, in imposing sentence, considered the maximum punishment to be five years, as dictated under Article 134. Trial defense counsel contended that two years was the appropriate maximum, because the same misconduct also violated Article 92. The defense presented evidence that under similar circumstances others had been charged under Article 92. CMA ruled that the trial court improperly rejected the defense argument, holding that the accused's right to equal protection under the fifth amendment<sup>393</sup> was violated by the unguided choice between two equally applicable provisions with such disparate maximum sentences.

*Courtney* left unanswered several questions, however. The facts in *Courtney* were exceptionally favorable to the defense;<sup>394</sup> this suggested that the equal protection issue was a factual question to be determined in each case. On the other hand, the court's criticism seemed broader when it condemned

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<sup>390</sup> *United States v. Hughes*, 24 C.M.A. 169, 170 n.3, 51 C.M.R. 388, 389 n.3 (1976).

<sup>391</sup> *Id.* In *United States v. Smith*, 24 C.M.A. 79, 51 C.M.R. 252 (1976), CMA held that possession of a controlled substance and attempted sale of a portion thereof were multiplicitous for sentencing purposes on the facts of the case. Chief Judge Fletcher concurred in the result. He would have held that possession of a drug and sale, transfer, distribution or use of it are automatically multiplicitous. If nothing else, the Chief Judge's rule has the virtue of simplicity of application, and would eliminate or at least reduce many of the problems associated with multiplicity issues. See note 387 *supra*. *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977); *United States v. Waller*, 3 M.J. 32 (C.M.A. 1977).

<sup>392</sup> 24 C.M.A. 280, 51 C.M.R. 796 (1976).

<sup>393</sup> U.S. Const. amend. V.

<sup>394</sup> Courtney's commander originally preferred charges under Article 92, but subsequently changed his mind because Courts and Boards, "kicked back" the charge as originally preferred with the direction that the offense be charged under Article 134. It was evident that the commander gave little consideration to the selection which he made. Moreover, the defense demonstrated that another member of Courtney's command, with a similar background, was prosecuted under Article 92 for the identical offense.

the "unbridled discretion" the accuser had to select which provision to charge under, and the "utter lack of guidance" provided him.<sup>395</sup> It also pointed out that "[n]either Government counsel at trial nor on this appeal has suggested what, if any, standard is utilized in determining whether to charge an offense under Article 134 as opposed to Article 92. . . ."<sup>396</sup> This implied more fundamental misgivings.

Some of these questions were answered in *United States v. Jackson*.<sup>397</sup> After holding *Courtney* to be prospective only in application,<sup>398</sup> the court indicated that the equal protection rationale requires uniform maximum sentences throughout the armed forces. Thus it said:

[T]he Court believes that the absence of *statutory or Manual* guidance to insure equal treatment of *all* servicemembers coupled with the existence of two statutes which punish virtually identical conduct in different ways renders the use of a more severe penalty for Article 134 drug offenses than that prescribed for similar violations of drug regulations under Article 92 unconstitutional.<sup>399</sup>

*Jackson* thus establishes the "class" within which all are to be treated equally as the entire military. While there is language in the opinion which may restrict the otherwise endless stream of comparisons which such an approach invites,<sup>400</sup> the equal protection rationale opens doors to many defense arguments. It is often difficult to erect principled stopping points once such thresholds have been traversed. In any event, the source of the court's concern is in large part the discretion exercised by commanders who are not legally trained and whose interests are often parochial.<sup>401</sup>

<sup>395</sup> *United States v. Courtney*, 24 C.M.A. 280, 282, 51 C.M.R. 796, 798 (1976).

<sup>396</sup> *Id.* at 282-83, 51 C.M.R. at 798-99.

<sup>397</sup> 3 M.J. 101 (C.M.A. 1977).

<sup>398</sup> In holding *Courtney* not retroactive the court disposed of several hundred cases containing the same issue. See *United States v. Jackson*, CM 432738 (A.C.M.R. 24 Sept. 1976).

<sup>399</sup> *United States v. Jackson*, 3 M.J. 101, 102 (C.M.A. 1977) (emphasis in original; footnotes omitted).

<sup>400</sup> For example, if comparisons are to be drawn between the services, what of regulations that punish different conduct? What of the different programs for dealing with pretrial confinement? What of providing counsel at summary courts-martial? Indeed, one might ask whether the U.S. Army in Europe has, by creating a regulatory 45-day speedy trial rule, see note 165 *supra*, established a standard which must be adopted throughout the military.

<sup>401</sup> Cf. *United States v. Keller*, 29 C.M.A. 345, 50 C.M.R. 716 (1975), construing Manual paragraph 85c to require the convening authority to explain his decision

*E. SELF-INCRIMINATION*

The military justice system has long protected servicemembers against self-incrimination,<sup>402</sup> and Article 31 of the UCMJ has been construed to afford broader safeguards in this respect than the fifth amendment.<sup>403</sup> It may be argued that the pressures and compulsions inherent in a hierarchical structure like the military necessitate these greater protections as a counterweight to ensure meaningful enjoyment of the values included in the right against self-incrimination.<sup>404</sup>

The present court is keenly aware of the special threat posed to the right against self-incrimination by the authoritarian atmosphere of the military. The court will not permit the unique relationship of the individual to the Government in the military to undermine the accused's rights in this area. Once again, where the standards of the justice system and the commander's interest in discipline, order, and morale clash, the former must prevail. Thus, the court has moved to extend Article 31's already broad protections.

In *United States v. Seay*,<sup>405</sup> CMA held that statements made by the accused to his commander, during a counseling session about bad checks, without benefit of prior Article 31 warnings, were inadmissible; and that they fatally tainted subsequent

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not to follow the staff judge advocate's recommendations in the post-trial review, regardless of the nature of the disagreement. See also *United States v. Dunks*, 24 C.M.A. 71, 51 C.M.R. 200 (1976).

<sup>402</sup> See generally Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 2-9 (1976). See also W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 329 (2d ed. 1920 reprint).

<sup>403</sup> Unlike rights warnings requirements under the fifth amendment, Article 31 by its terms requires warnings be given to any suspect, not just one in custody. Compare *Miranda v. Arizona*, 384 U.S. 436 (1966) with U.C.M.J. art. 31(b). See also *United States v. Musquire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958). Arguably, the authoritarian structure of the military makes coercion inherent in any superior-subordinate relationship, regardless of the presence or absence of custody in a *Miranda* sense. See *United States v. Gibson*, 3 C.M.A. 746, 751-52, 14 C.M.R. 164, 169-70 (1954).

<sup>404</sup> It does not appear to have been Congress' intent to protect a broader range of activities than those protected by the fifth amendment. See Lederer, *supra* note 402, at 7-8. Obviously, however, Congress intended to apply greater procedural safeguards to those activities it meant to protect. See U.C.M.J. art. 31(b). Regardless of Congress' intent, CMA has traditionally construed Article 31 to protect more types of activity than are shielded by the fifth amendment. See Lederer, *supra*, at 9-10.

<sup>405</sup> 24 C.M.A. 7, 51 C.M.R. 37 (1975).

statements taken after proper warnings had been given.<sup>406</sup> Each judge wrote a separate opinion: all agreed, however, that the commander's obligatory role<sup>407</sup> as financial counselor in this situation could not defeat the accused's right not to incriminate himself. Judge Cook so held on the relatively narrow basis that there existed an implied promise not to use the accused's earlier unwarned statements against him.<sup>408</sup> Chief Judge Fletcher and Senior Judge Ferguson grounded their decisions more directly in Article 31, holding that once an individual is a suspect, he is entitled to the protections of Article 31 regardless of the motives or perspective of the interrogator. Seay's commander was, therefore, obliged to warn him of his rights even though he only intended to counsel him about bad checks.<sup>409</sup>

<sup>406</sup> After twice making admissions to his commander without Article 31 warnings, Specialist Four Seay was properly warned and interrogated by the same commander. At that third session, the accused admitted writing the checks. This statement was introduced against him at trial. CMA held that it was the toxic fruit of the earlier poisoned statements. Chief Judge Fletcher indicated that only the "strongest combination" of four factors would purge the taint of an earlier illegally obtained statement:

Among the factors to be weighed in resolving whether the presumptive taint of the former interrogation has been overcome are the time lapse between the questioning periods, whether the accused was again questioned by the individual who obtained the prior inadmissible statement, whether the accused himself made an acknowledgement that his prior admissions did not influence his decision to incriminate himself again, and whether the interrogator relied upon the prior admissions in seeking a subsequent statement.

United States v. Seay, 24 C.M.A. 7, 10, 51 C.M.R. 57, 60. See also United States v. Ricks, 25 C.M.A. Adv. Sh. 244, 54 C.M.R. Adv. Sh. 571 (1977); United States v. Nargi, 25 C.M.A. Adv. Sh. 238, 54 C.M.R. 565 Adv. Sh. 565 (1977).

<sup>407</sup> The commander was required to engage in such counseling by Army Reg. No. 600-15, Indebtedness of Military Personnel, para. 31c (11 Feb. 1970).

<sup>408</sup> See United States v. Haynes, 9 C.M.A. 792, 27 C.M.R. 60 (1958). Judge Cook decided that the later statement, taken after proper warnings, was inadmissible as the fruit of the earlier inadmissible ones. This is somewhat puzzling, for if, because of the "implied promise," the accused understood that those statements could not be used against him, it is difficult to see how they rendered his later statement improper.

<sup>409</sup> Chief Judge Fletcher and Senior Judge Ferguson differed insofar as the Chief Judge would have required warnings only where the interrogator acted in an official capacity. see notes 414-415 *infra*, while Senior Judge Ferguson asserted that any person subject to the UCMJ must warn a suspect before asking him any questions. The Senior Judge's approach appears inconsistent with the majority opinion he authored in United States v. Beck, 15 C.M.A. 333, 35 C.M.R. 305 (1963).

*Seay* signals the court's refusal to permit the noninvestigatory motives of the questioner to undermine the absolute protections of Article 31. This refusal was extended in *United States v. Dohle*.<sup>410</sup> Dohle made incriminating statements in response to inquiries put to him by a sergeant who was guarding him. The sergeant asserted that he asked the questions solely as a friend; no Article 31 or *Miranda-Tempia*<sup>411</sup> warnings were given. As in *Seay*, CMA wrote three separate opinions.

Judge Cook, in a brief and somewhat cryptic two sentence opinion, voted to reverse, citing *United States v. Beck*.<sup>412</sup> Under a *Beck* analysis, this sort of case turns essentially on the position and motive of the questioner.<sup>413</sup> If the questioner acted in a purely personal capacity, no warnings are required. The brevity of his opinion makes it unclear whether Judge Cook concluded that, as a matter of law, the sergeant was acting in an official capacity, or whether he perceived some other unidentified infirmity.

In his opinion, Senior Judge Ferguson reiterated his *Seay* position that anyone subject to the Code must warn a suspect of his Article 31 rights before he may ask him questions about any offense. Chief Judge Fletcher seemed to build upon his *Seay* approach by adopting the rule that where the interrogator occupies a "position of authority"<sup>414</sup> of which the accused is aware, the interrogator's motives are irrelevant and Article 31 warnings must be given. This focus on the state of mind of the suspect and objective factors, instead of on the motives of the questioner reflects two things. First, it demonstrates that where a suspect is aware that he is dealing with a person in a position of authority, Chief Judge Fletcher will

<sup>410</sup> 24 C.M.A. 34, 51 C.M.R. 84 (1975).

<sup>411</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

<sup>412</sup> 15 C.M.A. 333, 35 C.M.R. 305 (1965).

<sup>413</sup> See, e.g., *United States v. Souder*, 11 C.M.A. 59, 28 C.M.R. 283 (1959); *United States v. Dandaneau*, 5 C.M.A. 462, 18 C.M.R. 86 (1955).

<sup>414</sup> *United States v. Dohle*, 24 C.M.A. 34, 36, 51 C.M.R. 83, 85 (1976). How broadly "position of authority" is to be defined is unclear. See Lederer, *supra* note 402, at 19. If the interrogator does not occupy a position of authority, then presumably Chief Judge Fletcher would fall back on the interrogator's motivations.

Chief Judge Fletcher's "known position of authority" test would permit the possibility of undercover agents and informants to operate without automatically running afoul of Article 31. Senior Judge Ferguson would seemingly have applied Article 31's requirements to such situations as well, despite the obvious detrimental impact this would have on law enforcement.

presume that the psychological pressures arising from that relationship will affect the suspect. Second, it reflects Chief Judge Fletcher's view that it is exceedingly difficult to distill official purposes from personal interests: and regardless of whether that can be done, the effect of questioning like this has identical effects on the accused, whatever its intent.<sup>415</sup>

In addition to broadening the range of situations in which warnings must be given, CMA has expanded other protections under Article 31 even though the Supreme Court is restricting the applicability of parallel safeguards under the fifth amendment.<sup>416</sup> In *United States v. Hall*,<sup>417</sup> CMA in a very short opinion, refused to apply the harmless error rule to a violation of the accused's rights under *Miranda-Tempia*. At trial, the accused's testimony was impeached by the introduction of pre-trial statements elicited without proper *Miranda-Tempia* warnings, although Article 31 warnings had been given.<sup>418</sup> CMA refused to follow the Supreme Court's lead<sup>419</sup> by finding that a *Miranda* violation could be harmless error. Instead the

<sup>415</sup> Cf. *United States v. Thomas*, 24 C.M.A. 228, 233-34, 51 C.M.R. 607, 612-13 (1976) (Fletcher, C.J. concurring in the result).

<sup>416</sup> See, e.g., *Oregon v. Mathiason*, 45 U.S.L.W. 3505 (U.S. Jan. 25, 1977); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

<sup>417</sup> 23 C.M.A. 349, 50 C.M.R. 720 (1975).

<sup>418</sup> It would seem that the Government could have made an argument that no error was committed. In *Hall* the accused was impeached with a statement taken after warnings were given which were defective only as to *Miranda-Tempia* counsel advice, not Article 31. The Supreme Court has held that such a *Miranda* violation does not preclude the use of statements for impeachment purposes. *Harris v. New York*, 401 U.S. 222 (1971). It is true that CMA previously held that such statements may not be used for impeachment purposes, but its basis for so doing was the language of MCM, 1969, para. 140a(2) which, as the court noted, applies a broader standard than is constitutionally necessary. *United States v. Jordan*, 20 C.M.A. 614, 44 C.M.R. 44 (1971). See also *United States v. Girard*, 23 C.M.A. 263, 266, 49 C.M.R. 438, 441 (1975). However, in *United States v. Clark*, 22 C.M.A. 370, 48 C.M.R. 77 (1973), CMA held that paragraph 140a(2) is descriptive of constitutional requirements only, and that a failure to follow the prescribed rules of that paragraph, beyond what is constitutionally mandated, was not error. Under *Clark*, therefore, the language of paragraph 140a(2) which goes beyond constitutional requirements is mere excess verbiage. It is difficult, if not impossible, to reconcile *Clark* with *Jordan* and *Girard*. CMA's avoidance of the issue in *Hall* is perhaps indicative of its desire to avoid constitutional analysis in this shifting area, and to simply stick to Article 31 where the court has more control over present and future doctrine.

<sup>419</sup> See *Milton v. Wainwright*, 407 U.S. 371 (1972).



court chose to link the counsel warning requirement to Article 31. Judge Cook wrote:

By its terms [Article 31] protects an accused's right to remain silent and does not grant him the right to counsel. However, the Supreme Court has stressed that at a custodial interrogation, counsel's presence is essential to effectuate the accused's right to remain silent. In that situation, therefore, the right to counsel and the right to remain silent coalesce.<sup>420</sup>

Using this construction CMA applied the rule that a violation of Article 31 is prejudicial error per se<sup>421</sup> to a *Miranda-Tempia* violation.

The principles contained in *Hall*, and the very brevity with which they were discussed, are indicative of CMA's reluctance to reconcile a healthy and robust Article 31 with a sickly, and perhaps terminally ill *Miranda*. Indeed *Hall* might indicate that CMA believes Article 31 is sufficiently broad to carry some of the protections heretofore supported solely by *Miranda*. Of these protections, the counsel provisions in *Miranda* have been the most important. In *United States v. McOmber*<sup>422</sup> the court took a step well beyond its vague allusion in *Hall* to this safeguard's connection with Article 31.

Airman McOmber had been under investigation for several larcenies for some time when he was interrogated by an investigator who knew McOmber had already obtained an attorney to assist him in the matter.<sup>423</sup> Airman McOmber was warned of his rights, including his right to counsel, and waived them, but the agent did not notify McOmber's counsel before the questioning. On appeal the defense contended that such activity was a violation of the sixth amendment right to counsel. CMA agreed that the agent's action was error, but avoided basing its decision on constitutional grounds.<sup>424</sup> Instead the court held that:

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<sup>420</sup> *United States v. Hall*, 25 C.M.A. 549, 350, 30 C.M.R. 720, 721 (1975) (citation and footnote omitted).

<sup>421</sup> *United States v. Kaiser*, 19 C.M.A. 104, 41 C.M.R. 104 (1969); *United States v. Wilson*, 2 C.M.A. 248, 8 C.M.R. 48 (1953).

<sup>422</sup> 24 C.M.A. 207, 31 C.M.R. 452 (1976).

<sup>423</sup> It is unclear whether the attorney had actually been detailed to represent Airman McOmber. An attorney-client relationship had been formed.

<sup>424</sup> One can only speculate as to why the court avoided a constitutional basis.

[O]nce an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.<sup>425</sup>

The court went on to say that to permit any other result "would utterly defeat the congressional purpose of assuring military defendants effective legal representation without expense."<sup>426</sup> Thus, *McOmber* formally links, for the first time, the right to counsel under Article 27 to Article 31.

While the *McOmber* result is salutary,<sup>427</sup> and its statutory basis is prudent,<sup>428</sup> the hitherto undiscovered juxtaposition of Articles 27 and 31 seems a bit strained.<sup>429</sup> *McOmber* is another example of the court's willingness to interpret the UCMJ liberally in order to mold the military justice system to its liking, and its desire to avoid the pitfalls of constitutional interpretation, where possible, while the Supreme Court seems to be limiting fundamental protections. It is not impossible that in *McOmber* CMA may have found a theoretical basis to continue the requirement for counsel warnings even if *Miranda* is overruled.

Aside from the normal judicial convention of deciding cases on nonconstitutional bases where possible, *McOmber* reflects CMA's desire to use the UCMJ to protect rights and to avoid erosion as the tides of the Warren Court years continue to ebb in the Supreme Court. See note 416 *supra*. While it is tempting to so conclude, it seems unlikely that the Supreme Court's decision in *Middendorf v. Henry*, 425 U.S. 25 (1976), directly affected CMA's analysis in *McOmber*. *McOmber* was handed down on April 2, 1976, only nine days after *Middendorf* was released. It is highly unlikely that *McOmber* was written and published within that time.

<sup>425</sup> *United States v. McOmber*, 24 C.M.A. 207, 209, 31 C.M.R. 452, 454 (1976).

<sup>426</sup> *Id.*

<sup>427</sup> See MCM, 1969, para. 44. It should be noted that in *United States v. Lowry*, 25 C.M.A. 85, 54 C.M.R. 85 (1976), CMA held that where a law enforcement agent interrogated a suspect, whom the agent knew to have an attorney, about offenses related to those for which the attorney represented the suspect, the *McOmber* rule applied. The court reemphasized that this is a matter of statutory interpretation, and that constitutional principles are inapplicable.

<sup>428</sup> The Supreme Court's recent decision in *Brewer v. Williams*, 45 U.S.L.W. 4287 (U.S. Mar. 23, 1977), demonstrates the wisdom of CMA's choice in *McOmber*. Although a five-member majority reversed Williams' conviction because of post-arraignment questioning that violated Williams' previously exercised right to counsel, the decision was limited to those facts. The majority clearly disavowed any per se rule prohibiting interrogating a suspect who already has an attorney.

<sup>429</sup> CMA's analysis in *McOmber* has been criticized. See Lederer, *United States v. McOmber, A Brief Critique*, THE ARMY LAWYER, June 1976, at 5. At the heart of the

### F. SEARCH AND SEIZURE

CMA's recent decisions dealing with the fourth amendment<sup>430</sup> have been among its most perplexing, as well as its most important. CMA seems deeply troubled by the difficulties inherent in reconciling the fourth amendment values of individual privacy and effective law enforcement. The tension between these values is especially acute in the military context. CMA's problems have been complicated by its own tendency to try to establish broad rules of general application, a particularly severe problem in an area of law as dependent upon specific facts as is the fourth amendment; and by its inability to achieve internal consensus on fundamental issues underlying a wide range of questions.

#### 1. CMA's Treatment of the Exclusionary Rule: Foreign Searches

In *United States v. Jordan*<sup>431</sup> CMA initially held that the fruits of a search of a member of the United States military, by foreign agents in a foreign country, would be admissible

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criticism of *Mcomber* is the fact that Article 27 provides only for counsel to be detailed to represent the accused at a special or general court-martial. While the right to counsel at other proceedings has long been recognized, it has generally rested on constitutional grounds, *see, e.g.*, *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Webster*, 40 C.M.R. 627 (A.C.M.R. 1969), or other statutory bases. *See, e.g.*, U.C.M.J. art. 32 and *United States v. Tomazewski*, 8 C.M.A. 266, 24 C.M.R. 76 (1957); U.C.M.J. art. 49(a) and *United States v. Brady*, 8 C.M.A. 456, 24 C.M.R. 266 (1957). Although good arguments can be made to support the proposition that the right to representation at trial is rendered less effective, or even meaningless, if the benefits of representation are not extended to critical pretrial stages, *see Escobedo v. Illinois*, 378 U.S. 478 (1964), CMA did not make them. The court ought to extend its analysis where, as here, it is establishing a major change in the law.

<sup>430</sup> U.S. CONST. amend. IV. Unlike the self-incrimination area, where military law has its own source of authority in Article 31, the law of search and seizure is derived directly from the fourth amendment because there is no intervening standard. *But cf.* MCM, 1969, para. 152 which establishes an exclusionary rule of evidence for the military and which purports to establish certain standards for the admissibility of seized evidence. Query the validity of these standards independent of their constitutional base as established by the Supreme Court and CMA. *See* note 298 *supra*.

The absence of statutory bases for certain types of searches has troubled CMA. *See United States v. Roberts*, 25 C.M.A. Adv. Sh. 59, 46, 54 C.M.R. Adv. Sh. 39, 46 (1976) (Perry, J.); *United States v. Thomas*, 24 C.M.A. 228, 235, 51 C.M.R. 607, 614 (1976) (Fletcher, C.J. concurring in the result); *United States v. Carter*, 24 C.M.A. 129, 130 n.3, 51 C.M.R. 319, 320 n.3.

<sup>431</sup> 23 C.M.A. 525, 50 C.M.R. 664 (1975).

against that member in a court-martial only if the search met the standards of the fourth amendment. On reconsideration of this opinion, CMA retreated somewhat from the breadth of its initial rule. The standard under the second *United States v. Jordan*<sup>432</sup> decision required that either the search meet the standards of the fourth amendment, or that the search be conducted in accordance with local law, without any instigation or participation by United States officials, and that it not shock the conscience.<sup>433</sup>

The *Jordan* rule is open to analytical and practical criticism.<sup>434</sup> It does, however, reflect the differences in the philosophy of Chief Judge Fletcher, who authored both *Jordan* decisions, and that of the Supreme Court with regard to the fourth amendment and the exclusionary rule. In the first *Jordan* decision the Chief Judge wrote:

<sup>432</sup> 24 C.M.A. 156, 51 C.M.R. 375 (1976).

<sup>433</sup> Even under this less restrictive formulation, Airman Jordan's conviction was reversed. Indeed, as CMA acknowledged, 24 C.M.A. at 160, 51 C.M.R. at 379, the facts in this case mandated reversal even under the preexisting standard. See *United States v. DeLeo*, 5 C.M.A. 148, 17 C.M.R. 148 (1954); MGM, 1969, para. 152. CMA overruled *DeLeo* in *Jordan*. That it did so in a case in which it concededly did not have to is demonstrative of the desire of the court, and especially Chief Judge Fletcher, to establish its own rules as quickly as it can. The court may be criticized in this for the violence it does to the doctrine of *stare decisis*. See note 187 *supra*.

<sup>434</sup> CMA appears to be the only court which has extended the exclusionary rule this far in its treatment of foreign searches. See, e.g., *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976); *United States v. Nagelberg*, 434 F.2d 585 (2d Cir. 1970); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968). See also *United States v. Janis*, 44 U.S.L.W. 5308, 5310 n.91 (U.S. July 6, 1976). The *Jordan* formula was expressly rejected in *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976).

Despite the weight of federal authority against the *Jordan* rule, however, there may be a sound basis for a different rule in the military. Unlike the typical traveler abroad, the servicemember is in a foreign country under orders of the Government. Moreover, under status of forces agreements, the United States Government and the host government agree to share and cooperate in certain law enforcement functions. Thus in a sense, the foreign agents act in a form of partnership with United States officials such as is not ordinarily the case when dealing with civilians.

The practical effect of *Jordan* still appears to be that the host country will, where evidence is inadmissible in a court-martial under *Jordan*, assume jurisdiction under status of forces agreements, thus depriving the accused of other constitutional rights. This may occur even though agents of the U.S. Government do all that is reasonably possible to avoid infringing a servicemember's privacy interest.

The extent of an American's constitutional protections in an American court should not be lessened or removed by virtue of the fact that he is ordered to an overseas post for service. It is American judicial power that is being exerted against him and in such a case, it is by American constitutional standards that he should be judged.<sup>435</sup>

Thus, in the Chief Judge's view, the court commits a constitutional violation when it admits evidence seized in violation of privacy interests which the fourth amendment is designed to protect. While *Jordan II* retreats a bit from the sweeping rule of *Jordan I*, the fact that the fruits of a wholly foreign search may still be excluded in some situations indicates that Chief Judge Fletcher still perceives that admission of such tainted evidence is a constitutional violation. The exclusionary rule is thereby treated primarily as a fair trial right rather than solely as a deterrent mechanism.<sup>436</sup>

Contrast this approach with the Supreme Court's recent treatment of the exclusionary rule as a purely deterrent device designed to discourage future violations of the fourth amendment.<sup>437</sup> The defendant has no right to exclusion but is rather a gratuitous beneficiary of the rule's operation in furtherance of other social goals.<sup>438</sup> Therefore, the constitutional violation is complete at the moment of the illegal search or seizure, and a court commits no constitutional wrong of its own in admitting such evidence.<sup>439</sup>

This distinction highlights Chief Judge Fletcher's view of the administration of justice as an integrated process. Unfairness which disadvantages an individual at one stage of the proceedings cannot be permitted to distort the subsequent

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<sup>435</sup> 23 C.M.A. at 327, 50 C.M.R. at 666 (1975).

<sup>436</sup> To the extent that deterrence plays a role in Chief Judge Fletcher's analyses, it is a sort of "institutional deterrence." See notes 323-324 *supra*; *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1976). Obviously, the *Jordan* exclusionary rule, or the threat of it, will seldom, if ever, directly deter the foreign police official from violating United States constitutional standards. The only such impact the rule may have is on U.S. officials who deal with host country officials at higher echelons and persuade them to alter their police procedures to accommodate the *Jordan* rule.

<sup>437</sup> See *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>438</sup> *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>439</sup> *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

administration of justice with its continuing ripple effect. Cases like *Jordan* (and *McOmber*) demonstrate why CMA has moved to extend judicial administration of justice to the earliest stages of the process.<sup>440</sup> Justice cannot be done in a series of separate discrete proceedings, especially where so many proceedings have been subject to so much command discretion, for these proceedings are interrelated, and require constant and continuing attention from the judiciary.

## 2. *Seizure of the Person: United States v. Kinane*

Like the *Jordan* decisions, the majority opinion in *United States v. Kinane*,<sup>441</sup> authored by Chief Judge Fletcher, represents an effort to establish some broad rules in the law of search and seizure. Kinane was detained for questioning about the theft of identification cards, and in the course of interrogation was instructed to empty his pockets, whereupon he produced the stolen cards. Chief Judge Fletcher rejected the possibility that this was either a consent search<sup>442</sup> or a "necessity search." As to the latter, the Chief Judge indicated that the "necessity search" doctrine applies only to vehicles and, possibly, to other moveable objects, but not to persons or dwellings.

<sup>440</sup> See, e.g., *Courtney v. Williams*, 24 C.M.A. 87, 51 C.M.R. 260 (1976); *United States v. Dunks*, 24 C.M.A. 71, 51 C.M.R. 299 (1976).

<sup>441</sup> 24 C.M.A. 120, 51 C.M.R. 310 (1976).

<sup>442</sup> In *Kinane* as well as in *United States v. Jordan*, CMA refused to find voluntary consent where it appeared the servicemember had done no more than acquiesce in the authority of the official to search. Although no warnings are required for a voluntary consent search, *United States v. Rushing*, 17 C.M.A. 298, 38 C.M.R. 96 (1967), CMA has recently found consent in only two cases. In *United States v. Collier*, 24 C.M.A. 183, 51 C.M.R. 428 (1976), the accused was given Article 31 and *Miranda-Tempia* warnings before consenting to a search; in *United States v. Morris*, 24 C.M.A. 176, 51 C.M.R. 395 (1976), the accused was advised of his right to withhold consent before he consented. In four other cases CMA has found mere acquiescence and hence no consent. See *Jordan* and *Kinane*, *supra*, and *United States v. Chase*, 24 C.M.A. 95, 51 C.M.R. 268 (1976); *United States v. Mayton*, 23 C.M.A. 565, 50 C.M.R. 784 (1975). While warnings are not mandatory, it seems likely that in their absence the government's burden of proving voluntary consent will be exceedingly difficult to meet. Unlike earlier cases which focus largely upon the presence or absence of external constraints placed upon the accused's free will by the officials requesting consent, see *United States v. Noreen*, 23 C.M.A. 212, 49 C.M.R. 1 (1974); cf. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the present court will probably devote more attention to examination of the subjective intent of the subject. Cf. *United States v. Dohle*, 24 C.M.A. 34, 51 C.M.R. 84 (1975).

The Chief Judge then discussed at some length searches incident to apprehension and the necessary prerequisites to them. He stated that "the terms 'apprehension' and 'custodial arrest' or 'arrest' are synonymous in military practice,"<sup>443</sup> thereby apparently obliterating the distinction between Article 7 and Article 9 of the UCMJ. He went on to say that a valid arrest or apprehension is a necessary prerequisite to the search incident to it, construing very narrowly the exception to this rule carved out by the Supreme Court in *Cupp v. Murphy*.<sup>444</sup> Chief Judge Fletcher took care to distinguish between mere detention of an individual and the degree of control necessary for an apprehension to occur.<sup>445</sup>

Chief Judge Fletcher's intentional confusion of the terms apprehension and arrest and his insistence on conceptually separating them from other forms of detention probably stem from two factors. First, unlike the civilian community, members of the military are always subject to governmental controls upon their liberty. Second, because of the law enforcement functions of military superiors, the power to apprehend is spread much more broadly throughout military society. These factors blur the lines between the status of being apprehended and that of lesser forms of detention. The Chief Judge appears to have attempted in *Kinane* to more sharply define the distinctions between these various statuses to preclude unique military circumstances from obliterating them.

### 3. *The Commander's Power to Search*

The court has been most troubled by the traditionally broad powers of commanders to invade privacy and with the impact of such invasions on the administration of justice. Unfortunately, as of now the extent of the commander's authority is uncertain. There have been suggestions from members of the court that the commander's authority to order searches upon probable cause may be in jeopardy. This power has its roots in tradition<sup>446</sup> and has been recognized in the Manual for

<sup>443</sup> *United States v. Kinane*, 24 C.M.A. 120, 123 n.7, 51 C.M.R. 310, 313 n.7 (1976).

<sup>444</sup> 412 U.S. 291 (1973).

<sup>445</sup> See *United States v. Fleener*, 21 C.M.A. 174, 181, 44 C.M.R. 228, 235 (1975), partially overruled by CMA in *Kinane*. See also *United States v. Davis*, 34 C.M.R. Adv. Sh. 188 (A.C.M.R. 1976).

<sup>446</sup> *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952).

Courts-Martial.<sup>447</sup> Originally the power stemmed from the commander's inherent authority and responsibility for his organization;<sup>448</sup> in recent years, the commander has been equated to a neutral and detached magistrate in the civilian community.<sup>449</sup>

CMA now has before it several cases in which the issue is whether a commander as such may qualify as a neutral and detached magistrate.<sup>450</sup> Some language in recent opinions suggests that there are substantial misgivings within the court about the commander's power in this regard. Judge Perry recently said:

I do not share the assuredness expressed in the dissenting opinion that the unit commander in the military "has the power of a magistrate in the civilian community to authorize" searches. Whether such an officer, by the nature of his position and duties, can be the neutral and detached magistrate constitutionally mandated is not a subject before this Court in the instant case.<sup>451</sup>

If the pretrial confinement decisions are any precedent, the prognosis is not favorable for the commander's authority to search.

Certainly there is reason to question the neutrality and detachment of a commander ordering a search, despite the honesty and good faith with which most commanders approach such decisions. The commander is, after all, often "engaged in the enterprise of ferreting out crime."<sup>452</sup> If CMA does conclude that the commander is disqualified from ordering searches, however, serious problems would ensue. Although the Army and Coast Guard have provisions empowering mili-

<sup>447</sup> MCM, 1969, para. 152.

<sup>448</sup> *United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952); *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952).

<sup>449</sup> *United States v. Hartsook*, 15 C.M.A. 291, 35 C.M.R. 263 (1965). This recognition has not been without expressions of doubt from CMA and elsewhere. *See, e.g.*, *United States v. Sam*, 22 C.M.A. 124, 127, 46 C.M.R. 124, 127 (1978); *United States v. Withers*, CM 433281 (A.C.M.R. 25 Feb. 1976).

<sup>450</sup> *See, e.g.*, *United States v. Hunter*, Docket No. 32-651 (pet. granted Aug. 20, 1976).

<sup>451</sup> *United States v. Roberts*, 25 C.M.A. Adv. Sh. 39, 41 n.6, 54 C.M.R. Adv. Sh. 39, 41 n.6 (1976) (Perry, J.). Chief Judge Fletcher has written, "To this judge, when we say that commanders are acting in a neutral and detached capacity, we are prolonging a fiction." Fletcher, *supra* note 107, at 6.

<sup>452</sup> *Johnson v. United States*, 333 U.S. 10, 13 (1948).



tary judges to issue search warrants,<sup>453</sup> the Air Force and Navy do not, and, in any event, the judiciary would be inadequate to handle all search applications itself. Besides manpower problems, many installations, units, and ships do not have direct access to a military judge, nor is telephonic or radio authorization always possible, let alone desirable.

Even if the court does not disqualify the commander on a *per se* basis, it seems likely that it will call for much closer scrutiny of the authorization process on a case by case basis. The neutrality and detachment of a given commander will be much more carefully evaluated than has been the case in the past.<sup>454</sup> Any active involvement of the commander in the investigation of a case will probably disqualify him. Therefore, it would be prudent, even if not presently necessary, for those seeking authorization to search to obtain authorization from a judge or magistrate, if available, or from an appropriate commander detached from active involvement in the case. The practice of orally authorizing searches on the basis of unsworn information also seems likely to be questioned.<sup>455</sup> The fourth amendment itself provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation"<sup>456</sup> and CMA has long complained about the lack of any written confirmation of the authorization proceedings.<sup>457</sup>

CMA has already moved to limit those who may order searches either by delegation or devolution of authority. In *United States v. Carter*<sup>458</sup> the court held that a search of the accused's belongings in a postal facility was illegal because it was authorized by the noncommissioned officer in charge of

<sup>453</sup> See Army Reg. No. 27-10, Military Justice, ch. 14 (C15, 9 Sept. 1974); CG-475, Coast Guard Search Warrant Manual. If CMA were to rule that commanders are disqualified as magistrates, the Coast Guard provision would be questionable because it rests upon a delegation of authority to military judges from the Commandant of the Coast Guard.

<sup>454</sup> See, e.g., *United States v. Guerrette*, 23 C.M.A. 281, 49 C.M.R. 381 (1975); *United States v. Staggs*, 23 C.M.A. 111, 48 C.M.R. 672 (1974); *United States v. Carlisle*, 46 C.M.R. 1250 (A.C.M.R.), *aff'd*, 22 C.M.A. 564, 48 C.M.R. 71 (1973).

<sup>455</sup> CMA has granted a petition on a related issue. *United States v. Dillard*, Docket No. 33,040 (pet. granted Nov. 8, 1976).

<sup>456</sup> U.S. Const. amend. IV. CMA has indicated that for a different rule than the civilian standard to apply in the military, compelling reasons must be shown. *Courtney v. Williams*, 24 C.M.A. 87, 89, 51 C.M.R. 260, 262 (1976). See note 139 and accompanying text *supra*.

<sup>457</sup> See *United States v. Hartsook*, 15 C.M.A. 291, 294, 35 C.M.R. 263, 266 (1965).

<sup>458</sup> 24 C.M.A. 129, 51 C.M.R. 319 (1976).

the facility. Of importance to the majority was the absence of statutory and regulatory authority for the NCOIC's authorization.<sup>459</sup> The court condemned the search on an even more fundamental ground, however: "It is constitutionally impermissible to saddle noncommissioned officers not only with determining the necessity for inspections or searches but also with the responsibility for implementing appropriate inspection or search procedures."<sup>460</sup> *Carter* indicates that CMA will not permit the power to conduct searches to be diffused throughout the command structure. Moreover, it hints that the commander's power to delegate his search authority<sup>461</sup> will be limited if not eliminated.<sup>462</sup>

### 5. Unit Inspections

A related aspect of the commander's power in this area is his authority to inspect his unit. The court has recently dealt with key elements of this issue in two major cases; unfortunately, each judge has adopted a different position from which to take aim on the problems he perceives. This has resulted in a crossfire which makes it hazardous for commanders and counsel, let alone commentators, to venture into the area with any confidence. In *United States v. Thomas*<sup>463</sup> and *United States v. Roberts*<sup>464</sup> the court has divided three ways on the disposition of an inspection of barracks by marijuana detection dogs,<sup>465</sup> although in each instance the result was to reverse the conviction.

The facts in both cases were similar. The command, in response to information (not amounting to probable cause) which indicated possible drug use by unidentified barracks occupants, ordered a walk through of living areas by a marijuana dog. The search party and the dog physically entered

<sup>459</sup> *Id.*, at 131, 51 C.M.R. at 321.

<sup>460</sup> *Id.*

<sup>461</sup> MCM, 1969, para. 152 (4th paragraph).

<sup>462</sup> See *United States v. Drew*, 15 C.M.A. 449, 456-62, 35 C.M.R. 421, 428-34 (1965) (Ferguson, J. dissenting).

<sup>463</sup> 24 C.M.A. 228, 51 C.M.R. 607 (1976).

<sup>464</sup> 25 C.M.A. Adv. Sh. 39, 54 C.M.R. Adv. Sh. 39 (1976).

<sup>465</sup> While these cases leave unresolved a wide variety of inspection issues, they do appear to eliminate the admissibility of items discovered in other than common areas in the barracks as the result of marijuana dog inspections. A majority of the court would permit such inspections for purposes of confiscating drugs, however. See Dep't of Army Message No. 3062244, 1 Nov. 1976.

rooms or cubicles assigned to individual members of the unit.<sup>466</sup> In each case the dog alerted on property in possession of the accused; searches pursuant to these alerts revealed marihuana, possession of which led to the convictions of Private Thomas and Sergeant Roberts. In *Thomas* the court unanimously agreed, for different reasons, to reverse Thomas' conviction. In *Roberts*, the decision to reverse was two-to-one, again with three separate bases for decision.

Before examining the respective analyses of the judges, it is well to keep in mind the standard for measuring the validity of unit inspections which prevailed before *Thomas* and *Roberts*. That test, which may be denominated the "purpose test" was derived largely from *United States v. Lange*.<sup>467</sup> Under it, the essential issue was whether the commander's motive or intent was to examine the fitness and preparedness of his unit to perform its mission, or was to discover evidence for use in criminal prosecutions. If the former, the intrusion was deemed an inspection, which is administrative in nature and therefore proper as within the commander's inherent authority.<sup>468</sup> If the latter, the activity was labeled a true search and, absent an independent legal basis, violated the fourth amendment.<sup>469</sup> Along with several practical problems, this test suffered from a fundamental defect in that the commander's purpose was seldom so clearly defined as to permit the simple classification the test called for. Moreover, even assuming the commander had no preexisting prosecutorial intent, the end result was the same if he developed this intent after the search had been conducted. Consequently, the distinction between prosecutorial and administrative purposes envisioned by *Lange* was thoroughly blurred once a case reached the court-martial process; to borrow a phrase from Mr. Justice Frankfurter, an inspection is "an amphibian."<sup>470</sup>

The members of the present court have chosen to handle this problem in different ways; in discussing these, however, it

<sup>466</sup> In *Roberts* the entries were made at 0430 hours on a Saturday; in *Thomas* the entries apparently occurred during normal duty hours.

<sup>467</sup> 15 C.M.A. 486, 35 C.M.R. 458 (1965).

<sup>468</sup> See *United States v. Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959). See also *United States v. Grace*, 19 C.M.R. 409, 42 C.M.R. 11 (1970); *United States v. Tate*, 50 C.M.R. 504 (A.C.M.R. 1975).

<sup>469</sup> *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965); *United States v. Goldfinch*, 41 C.M.R. 500 (A.C.M.R. 1969).

<sup>470</sup> *Culombe v. Connecticut*, 367 U.S. 568, 605 (1961).

is important to keep in mind the narrow sort of activity involved in *Thomas* and *Roberts*. Except for that of Chief Judge Fletcher, the positions of the judges on other types of inspections are not entirely clear, and Judge Perry's likely departure injects additional uncertainty into the equation.

Judge Cook would grant the commander broad authority to inspect his unit. Although he voted to reverse in *Thomas* on relatively narrow grounds,<sup>471</sup> Judge Cook deemed the activity in *Roberts* legitimate on the basis of "tradition and reason,"<sup>472</sup> and upheld the admissibility of the marijuana, apparently on a plain view rationale.<sup>473</sup> Judge Cook indicated that this search was reasonable because the commander was confronted with substantial information of drug abuse in a unit which handled volatile fuels. The existence of this condition implies that in the absence of such factors Judge Cook might find such an intrusion unreasonable. Therefore, he may be applying a limited balancing type test;<sup>474</sup> in any event he is willing to leave this balancing largely to the commander's judgment.

Chief Judge Fletcher announced in *Thomas* that while he considers unit inspections a legitimate and necessary command prerogative, there is great potential for abuse in such power. The Chief Judge concluded that "to discourage future unlawful police activity, the fruits of all such inspections may not be used as evidence in a criminal or quasi-criminal proceeding or as a basis for establishing probable cause under the Fourth Amendment."<sup>475</sup> The Chief Judge would therefore permit the commander sweeping power to inspect his unit, but would prohibit the admission of evidence of crime discovered thereby in subsequent courts-martial and other proceed-

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<sup>471</sup> Judge Cook ruled that the information supplied to the officer who ordered the search was inaccurate and inadequate to establish probable cause for the search.

<sup>472</sup> *United States v. Roberts*, 25 C.M.A. Adv. Sh. 39, 49, 54 C.M.R. Adv. Sh. 39, 49 (1976). See also *United States v. Miller*, 24 C.M.A. 192, 192-96, 51 C.M.R. 437, 437-41 (1976) (Cook, J. dissenting).

<sup>473</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971); *Harris v. United States*, 309 U.S. 234 (1968).

<sup>474</sup> See *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). See also Cooke, *United States v. Thomas and the Future of Unit Inspections*, *THE ARMY LAWYER*, July 1976, at 1.

<sup>475</sup> *United States v. Thomas*, 24 C.M.A. 228, 235-36, 51 C.M.R. 607, 614-15 (1976) (Fletcher, C.J. concurring in the result).

ings.<sup>476</sup> I have elsewhere criticized this rule as an analytically unsound application of the exclusionary rule, as well as an ineffective practical protection of the servicemember's privacy interests.<sup>477</sup> One point may be made here. It is clear that Chief Judge Fletcher is not primarily concerned with a privacy interest as such; he is willing to leave regulation of the barracks to the commander. The Chief Judge is concerned with the impact which such intrusions have on the administration of justice. His interest is in the fair trial rights of the accused.<sup>478</sup>

By his rule the Chief Judge erects an artificial barrier between the justice and disciplinary aspects of the military justice system. This extends too far the court's dichotomization between justice and discipline for it separates not only the functions into separate hands, but divides the concepts themselves. If the commander cannot bring his disciplinary problems to the justice system for resolution, serious problems may ensue not only for the commander, but for all within the military system.<sup>479</sup>

If Chief Judge Fletcher's approach has, at least, the virtue of clarity, Judge Perry's views remain somewhat of an enigma. In

<sup>476</sup> It is not clear what Chief Judge Fletcher meant by quasi-criminal proceedings. He may have been referring to summary courts-martial, see *Middendorf v. Henry*, 425 U.S. 25 (1976); to nonjudicial punishment under Article 15, or to administrative discharges. See *Cooke*, *supra* note 474, at 6-7 n.18.

<sup>477</sup> See *Cooke*, *supra* note 474.

<sup>478</sup> Thus, the Chief Judge stated:

Having concluded that such inspections are "reasonable" in order to permit the military society to perform and accomplish its primary mission "to fight or be ready to fight wars should the occasion arise," the inquiry must proceed to the effect of such a course of action on the administration of military justice.

*United States v. Thomas*, 24 C.M.A. 228, 235, 31 C.M.R. 607, 614 (1976) (footnote omitted).

<sup>479</sup> See *Cooke*, *supra* note 474, at 4. See also Thorne, *Marihuana Dogs, Searches and Inspections—More Questions than Answers*, *THE ARMY LAWYER*, Dec. 1976, at 1. Chief Judge Fletcher's approach obviously rests on his pragmatic assessment that regardless of the commander's expressed intent for conducting an inspection, drugs are always an item he is looking for in an inspection. If this is true, then Chief Judge Fletcher may be analytically correct in excluding drugs under the plain view rule, because their discovery is never inadvertent. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). However, discovery of an item that was truly unanticipated, such as a murder weapon, raises other problems. The Chief Judge's blanket rule would apparently apply to such evidence as well, although under a plain view analysis, it should be admissible.

view of Judge Perry's pending departure, we can anticipate further confusion in this area. Nevertheless, his views bear scrutiny for it appears that, like Chief Judge Fletcher, Judge Perry is concerned about the inadequacies of the "purpose" test; yet he is reluctant to adopt the sweeping response proposed by the Chief Judge. Two factors seem to underlie this hesitancy. First, Judge Perry places greater emphasis on privacy interests and fears that the Chief Judge's approach will give the commander carte blanche authority to violate these expectations. Second, he is unwilling to say that when a fourth amendment intrusion is reasonable, evidence seized thereby still may be excluded.

Judge Perry condemned the "shakedown inspection"<sup>480</sup> in *Roberts* as a "fishing expedition" without constitutional foundation. Judge Perry agreed with Chief Judge Fletcher that the admixture of administrative and prosecutorial motives and results in such inspections has an adverse impact on the administration of justice. Unlike the Chief Judge, he focused on the "specific object oriented" nature of intrusions like this one. On the other hand, Judge Perry indicated that he would permit "the traditional military inspection which looks at the overall fitness of a unit to perform its mission"<sup>481</sup> as a legitimate exercise of command authority.

Where Judge Perry would draw the line between the traditional military inspection and the specific object oriented shakedown inspection is unclear. The doubts Judge Perry expressed about the commander's authority to authorize searches,<sup>482</sup> as well as his misgivings about the absence of statutory authority for such invasions of constitutionally pro-

<sup>480</sup> *United States v. Roberts*, 25 C.M.A. Adv. Sh. 39, 45, 54 C.M.R. Adv. Sh. 39, 45 (1976). The AFMCR had so characterized this intrusion in its opinion, *United States v. Roberts*, 50 C.M.R. 699 (A.F.C.M.R. 1975). Judge Perry described a shakedown inspection as containing the following elements:

Apparently, the event is contemplated as a thorough search of a general area, such as a barracks or a group of buildings (as opposed to a particular living area or room) of all persons and things in that area (as opposed to a particular, suspected person) for specific fruits or evidence of a crime, based upon "probable cause" to believe that such material will be found somewhere in that general area.

25 C.M.A. Adv. Sh. at 45, 54 C.M.R. Adv. Sh. at 45. Query the continuing validity of such cases as *United States v. Drew*, 15 C.M.A. 449, 35 C.M.R. 421 (1965).

<sup>481</sup> *United States v. Roberts*, 25 C.M.A. Adv. Sh. 39, 48, 54 C.M.R. Adv. Sh. 39, 48 (1976).

<sup>482</sup> *Id.* at 41, 54 C.M.R. Adv. Sh. at 41. See note 451 *supra*.

tected rights,<sup>463</sup> suggest, however, that he would not construe the commander's authority too liberally. Indeed, it seems likely that Judge Perry would view any inspection which aimed, even among other more traditional goals, at the confiscation of drugs for prosecutorial purposes, as unconstitutional. In other words, it would be improper to combine a "traditional inspection" with a "specific object oriented" one; if Judge Perry were to rule otherwise, then his seemingly far reaching opinion in *Roberts* would amount to no more than a temporary roadblock forcing the commander to take a slightly less direct route to the same ultimate destination.

## VI. CONCLUSION

*The inn that shelters for the night is not the journey's end.  
The law, like the traveler, must be ready for the morrow. It  
must have a principle of growth.*

—Benjamin N. Cardozo<sup>464</sup>

It cannot be gainsaid that during the last two years the United States Court of Military Appeals has instigated or instituted many major changes, including some controversial ones, in the military justice system. Nor can it be disputed that the court has probed the periphery of its powers in the process. This has led to criticism and, in view of the breadth of the court's assault on long accepted practices and procedures, no little uncertainty about the present state of the law. Yet, with the caveat that Judge Perry's probable departure will have an obvious effect, the court seems likely to continue to follow the same path for the foreseeable future.

CMA will continue to require that ultimate power within the judicial system be exercised by truly neutral and legally trained judicial officers. The commander's interests are but a factor to be weighed, along with many others, in the course of litigation; they cannot be a force whose hidden presence may dominate the proceedings. This is a problem not only of functions, but of attitudes. It is often difficult for military members, including lawyers, who are trained to execute the commander's desires, not to give undue weight to the commander's needs, be they explicit or implicit. CMA is demanding that the system treat the commander's needs like any other element

<sup>463</sup> *Id.* at 46, 54 C.M.R. Adv. Sh. at 46.

<sup>464</sup> B. CARDOZO, *supra* note 313, at 20

which may affect the outcome of a case: they must be "proven, not presumed."<sup>485</sup> "[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."<sup>486</sup>

Of course, as the highest agency in the military judicial structure, CMA reserves to itself ultimate authority over the system. The court's power would seem to be somewhat restricted by its statutory foundation, and its position as an Article I court. Nevertheless, the court will explore and exert whatever express or implied powers it has. Along these lines, it should be recognized that in several areas the court has exerted authority in order to fill apparent vacuums. As *McPhail* indicates, the court will not tolerate what it perceives to be an injustice anywhere within the military justice system, and, in order to maintain the integrity of the system, will move to correct such problems itself.

This notion that it is protecting the integrity of the justice system is the foundation of the court's activism. The military's need for its own legal system has long been recognized. Yet, as the servicemember's rights take on the same proportions as those of civilians, the justifications for a separate system of military justice may diminish, and the pressure will become greater for military justice to merge with its civilian counterparts. In CMA's view, its own active protection of the integrity of the military justice system is necessary to keep such pressure from overwhelming the military justice system.

Two basic criticisms of the court do seem appropriate. First, the court's efforts to reduce the commander's control of the system have at times produced undesirable results. It is one thing to say that a commander may not himself exercise judicial functions because of his disciplinary role. It is another thing to say that the commander's interest in discipline should play no part in judicial determinations. Cases like *United States v. Mosely* and Chief Judge Fletcher's *Thomas* opinion are troubling in this regard. While the judicial system may, and should, be insulated from control by commanders, it should not, and cannot be insulated from the basic elements of the

<sup>485</sup> *United States v. Tucker*, 24 C.M.A. 311, 312, 52 C.M.R. 22, 23 (1976). See also *United States v. Grunden*, 25 C.M.A. Adv. Sh. 327, 332 n.9, 54 C.M.R. Adv. Sh. 1053, 1058 n.9 (1977).

<sup>486</sup> *Courtney v. Williams*, 24 C.M.A. 87, 89, 51 C.M.R. 260, 262 (1976).



military society it serves without seriously distorting the results it produces.

Second, on a more jurisprudential level, it must be recognized that courts are not, ordinarily, the best mechanism through which to institute widespread revision of the law. Our innate suspicions of power are magnified when such power is wielded by "a nonrepresentative, and, in large measure, insulated judicial branch."<sup>497</sup> CMA has covered much ground in a short time, and it has tried to change more than the law. It has tried to change attitudes. There is in this process an educational function which the court has occasionally neglected in its desire to move quickly. This has, not surprisingly, generated much uncertainty and distrust. To the extent that CMA fails to allay the concerns of its constituents, its job as a governing agency is made more difficult.

Nevertheless, CMA's overall direction is apparent. This movement should generate reevaluation, not retrenchment. Military justice has been changing for at least fifty years. It should now be clear that the status quo is an unavailable alternative. CMA is calling on the legal profession within the military to improve the military justice system and, ultimately, to run it.

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<sup>497</sup> *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J. concurring).



## O'CALLAHAN REVISITED: SEVERING THE SERVICE CONNECTION \*

Major Norman G. Cooper \*\*

### I. O'CALLAHAN AND THE SUPREME COURT

We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.<sup>1</sup>

In *O'Callahan v. Parker*,<sup>2</sup> the Supreme Court held that courts-martial possess no jurisdiction to try offenses which are not "service connected." Considerable comment and criticism followed that decision and the Supreme Court sought to, and to a limited extent, did provide an exegesis of its *O'Callahan* decision in *Relford v. Commandant*.<sup>3</sup> There the Court specifically rejected the argument that court-martial jurisdiction be restricted to purely military offenses, confined its decision to the scope of *O'Callahan*<sup>4</sup> and left the issue of *O'Callahan's* retroactivity to "other litigation where, perhaps, it would be solely dispositive of the case."<sup>5</sup> Two years later in *Gosa v.*

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\* The opinions and conclusions expressed 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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<sup>1</sup> *Relford v. Commandant*, 401 U.S. 355, 369 (1971).

<sup>2</sup> 395 U.S. 258 (1969).

<sup>3</sup> See 401 U.S. 355, 356 n.1 (1971).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 370.

*Mayden*,<sup>6</sup> the Supreme Court held that *O'Callahan* had no retroactive application; it interpreted its earlier decision as having fashioned a rule limiting the exercise of court-martial jurisdiction, not as having held that military tribunals were and always had been without authority to exercise jurisdiction over offenses which were not service connected.

In 1975, the Supreme Court was again afforded an opportunity to interpret the scope of *O'Callahan* in *Schlesinger v. Councilman*,<sup>7</sup> a case involving the off-post possession of marijuana. Rather than directly addressing the *O'Callahan* issue, however, the Supreme Court based its decision on the question of whether federal courts possess equitable jurisdiction to intervene in court-martial proceedings.<sup>8</sup> Thus, the high water mark of *O'Callahan* in the Supreme Court was *O'Callahan* itself; since the date of its initial decision the Supreme Court has been content to apply *O'Callahan* only on an *ad hoc*, prospective basis, eventually all but closing the door on further federal court interpretation.<sup>9</sup> Indeed, the Court's final words in *Schlesinger v. Councilman* clearly invited military courts to define the limits of *O'Callahan's* requirement: "[But] we have no doubt that military tribunals *do* have both experience and expertise that qualify them to determine the facts and to evaluate their relevance to military discipline, morale, and fitness."<sup>10</sup>

## II. O'CALLAHAN AND THE COURT OF MILITARY APPEALS

### A. THE COURT OF MILITARY APPEALS CONFRONTS O'CALLAHAN

The diligent efforts of COMA . . . have resulted in a crystallization of guidelines. . . . [G]enerally speaking, all matters relating to *O'Callahan* can now be put to rest.<sup>11</sup>

<sup>6</sup> 413 U.S. 665 (1973).

<sup>7</sup> 420 U.S. 738 (1975).

<sup>8</sup> *Id.* at 749; see Bartley, *Military Law in the 1970's: The Effects of Schlesinger v. Councilman*, 17 A.F.L. REV. 65 (Winter 1975).

<sup>9</sup> Prior to *Councilman* there were numerous federal district and circuit court cases concerning the *O'Callahan* issue. See Munnecke, *O'Callahan Revisited and Buttoned Up*, 46 JUDGE ADVOCATE JOURNAL 11, 13 n.6 (1974).

<sup>10</sup> 420 U.S. 760, 761 n.34 (1975) (emphasis supplied by the Court).

<sup>11</sup> Munnecke, *supra* note 9, at 12-13.

Thus it appeared to one author that several years after the *O'Callahan* decision the Court of Military Appeals had successfully established definite and workable guidelines which answered all the jurisdictional questions raised by *O'Callahan*. It is true that a few months after the *O'Callahan* decision the Court of Military Appeals went to work on the *O'Callahan* problem and had, over the next several years, carved out various circumstances which would or would not render an offense service connected.<sup>12</sup> A brief review of these categories is necessary for an understanding of the *O'Callahan* problem as it exists in military courts today.

### B. THE OVERSEAS EXCEPTION

The Court of Military Appeals first addressed *O'Callahan* in terms of an exception to its application; that is, it found that *O'Callahan* had no application to offenses committed overseas.<sup>13</sup> In *United States v. Keaton*,<sup>14</sup> the Court of Military Appeals elaborated on this "overseas exception." In *Keaton* the accused was tried by general court-martial for assault with intent to commit murder in the Republic of the Philippines. The Court of Military Appeals reasoned that essential to the *O'Callahan* holding was "the fact that the crime must be cognizable in the civil courts of the United States, either State or Federal, and that such courts be open and functioning."<sup>15</sup> Such was not the case in *Keaton*; therefore the Court of Military Appeals determined that *O'Callahan* was "inapplicable to courts-martial held outside the territorial limits of the United States."<sup>16</sup>

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<sup>12</sup> The Court of Military Appeals first mentioned *O'Callahan* in *United States v. Goldman*, 18 C.M.A. 516, 40 C.M.R. 228 (1969), a short opinion which held that an accused is triable by court-martial for offenses committed by him when he is on active overseas duty in a zone of conflict. The first definitive case on the application of *O'Callahan*, however, was *United States v. Borys*, 18 C.M.A. 545, 40 C.M.R. 257 (1969), involving off-post, off-duty sex offenses committed against civilians. The situation in *Borys* was sufficiently analogous to that in *O'Callahan* to satisfy the majority of the Court of Military Appeals that the offenses were not service connected and thus not triable by court-martial. The *Borys* decision was somewhat mechanical in its application of *O'Callahan*, and in a biting dissent, Chief Judge Quinn accused the majority of a "rote" application of *O'Callahan*.

<sup>13</sup> *United States v. Goldman*, 18 C.M.A. 516, 40 C.M.R. 228 (1969); see note 12 *supra*.

<sup>14</sup> 19 C.M.A. 64, 41 C.M.R. 64 (1969).

<sup>15</sup> *Id.* at 65, 41 C.M.R. at 65.

<sup>16</sup> *Id.* at 68, 41 C.M.R. at 68.

This exception to *O'Callahan* was subsequently strengthened and reaffirmed by the Court of Military Appeals. Even in Okinawa, where civilian courts established by authority of the United States were open and functioning, *O'Callahan* did not deprive a special court-martial of jurisdiction over an accused for an off-post robbery offense.<sup>17</sup> The Court of Military Appeals decided that the civilian courts in Okinawa had no in personam jurisdiction over the accused; therefore, the military courts were not divested of jurisdiction and the overseas exception applied.<sup>18</sup> Indeed, in *United States v. Newvine*,<sup>19</sup> the overseas exception to *O'Callahan* was applied by the Court of Military Appeals to an offense of unpremeditated murder committed by an accused in "a foreign country to which he had journeyed for private reasons."<sup>20</sup> The rationale for this overseas exception is simply that the constitutional benefits of indictment and trial by jury guaranteed by the fifth and sixth amendments as secured by *O'Callahan v. Parker*<sup>21</sup> for offenses without service connection are unavailable to an accused when the offenses are not cognizable in an American civilian court.<sup>22</sup> However, courts-martial do not retain jurisdiction over all crimes committed overseas. When a servicemember violates an American civil penal statute which has extraterritorial effect and is triable in a United States civilian forum, the "overseas exception" is inapplicable.<sup>23</sup> In brief, the Court of Military Appeals has consistently recognized and applied an overseas exception to *O'Callahan*.<sup>24</sup>

### C. THE ON-POST EXCEPTION

Following *O'Callahan v. Parker*, the Court of Military Appeals held that on-post offenses affected "the security of a

<sup>17</sup> *United States v. Ortiz*, 20 C.M.A. 21, 42 C.M.R. 218 (1970).

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

<sup>19</sup> 23 C.M.A. 208, 40 C.M.R. 960 (1974).

<sup>20</sup> *Id.* at 210, 46 C.M.R. at 962.

<sup>21</sup> 395 U.S. 238 (1969).

<sup>22</sup> *United States v. Newvine*, 23 C.M.A. 208, 48 C.M.R. 960 (1974).

<sup>23</sup> *United States v. Lazzaro*, 23 C.M.A. Adv. Sh. 164, 34 C.M.R. Adv. Sh. 272 (1976).

<sup>24</sup> See, e.g., *United States v. Bryan*, 19 C.M.A. 184, 41 C.M.R. 184 (1969); *United States v. Gill*, 19 C.M.A. 93, 41 C.M.R. 93 (1969); *United States v. Higginbotham*, 19 C.M.A. 73, 41 C.M.R. 73 (1969); *United States v. Stevenson*, 19 C.M.A. 69, 41 C.M.R. 69 (1969); *United States v. Easter*, 19 C.M.A. 68, 41 C.M.R. 68 (1969); *United States v. Weinstein*, 19 C.M.A. 29, 41 C.M.R. 29 (1969).

military post,"<sup>25</sup> even under circumstances where only civilian persons and property were involved.<sup>26</sup> Thus, once an offense was determined to have been committed on post (a determination not reached without difficulty in those situations where part of the offense occurs off post)<sup>27</sup> the Court of Military Appeals routinely found the requisite service connection.

In 1976, the Court of Military Appeals<sup>28</sup> undertook a re-examination of the service connection issue. The Court of Military Appeals construed the Supreme Court's decision in *Schlesinger v. Councilman* as foreclosing a "more simplistic formula"<sup>29</sup> than the case-by-case approach dictated in *Relford v. Commandant*. It recognized, however, that the Supreme Court had fashioned "a more workable standard for a limited number of cases,"<sup>30</sup> namely, "that when a serviceman is charged with an offense committed within or at the geographic boundary of a military post and violative of the security of a person or property there, that offense may be tried by court-martial."<sup>31</sup> After *Schlesinger v. Councilman*, the Court of Military Appeals, in effect, first focuses on whether the offense occurred on or off post, deeming the situs of the offense more significant than the status of any victim of the crime.<sup>32</sup> The service connection inquiry continues if the offense is determined to have occurred off post;<sup>33</sup> however, service con-

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<sup>25</sup> 395 U.S. at 274.

<sup>26</sup> *United States v. Paxiao*, 18 C.M.A. 608, 40 C.M.R. 320 (1969) (on-post wrongful appropriation of a civilian-owned pick-up truck).

<sup>27</sup> Compare *United States v. Crapo*, 18 C.M.A. 594, 40 C.M.R. 306 (1969) (robbery offense begun on post and completed off post held violative of base security and triable by court-martial) with *United States v. Black*, 24 C.M.A. 162, 51 C.M.R. 381 (1976) (conspiracy begun overseas, completed off post held not triable by court-martial).

<sup>28</sup> The Court of Military Appeals' membership in 1976 became Chief Judge Albert B. Fletcher, Judge William B. Cook and Judge Matthew J. Perry.

<sup>29</sup> *United States v. Moore*, 24 C.M.A. 293, 295, 52 C.M.R. 4, 6 (1976) (attempted larceny, conspiracy to steal and larceny of monies derived from governmental insurance programs held triable by court-martial because accused abused his military status to effect crimes and because of the impact of such abuses on military society).

<sup>30</sup> *United States v. Moore*, 24 C.M.A. 293, 295, 52 C.M.R. 4, 6 (1976).

<sup>31</sup> *Relford v. Commandant*, 401 U.S. 355, 368 (1971).

<sup>32</sup> *United States v. Tucker*, 24 C.M.A. 311, 52 C.M.R. 22 (1976) (off-post concealment of property stolen from on-post servicemen victims held not to be triable by court-martial).

<sup>33</sup> *United States v. Moore*, 24 C.M.A. 293, 295, 52 C.M.R. 4, 6 (1976).

nection is deemed axiomatic if the offense is found to have occurred on post—or is it?

Although at least one commentator has perceived possible jurisdictional issues stemming from the on-post situs of what might be termed nonmilitary activities and property,<sup>34</sup> the Supreme Court in *Relford* clearly stated that offenses "within or at" the boundaries of a military post were triable by court-martial. Perhaps more intriguing are the issues raised by the language in *Relford* which suggests that to be service connected an offense must not only be "on-post" but also "violative of a person or property there."<sup>35</sup> The Court of Military Appeals abruptly terminates its inquiry and finds military jurisdiction when it determines that an offense occurred on post. Illustrative of the peculiar results of the Court of Military Appeals' shortened examination of subject-matter jurisdiction in those circumstances in which one offense occurs on post and others occur off post is the case of *United States v. Hedlund*.<sup>36</sup>

In *Hedlund*, the accused was convicted of conspiracy to rob, robbery and kidnapping. While on post he and others agreed to go off post to rob someone, and secured iron pipes and forks fashioned into weapons to carry out their scheme. After they had left the post, the accused and the others picked up a Marine who was an unauthorized absentee from another base and a civilian, transported them down a dirt road and robbed them. The Court of Military Appeals first determined that the off-post offenses of robbery and kidnapping possessed no service connection despite the fact that one of the alleged victims was a serviceman. In cases following *O'Callahan* but predating *Relford* the Court of Military Appeals had consistently held that the military status of a victim of an offense gave rise to a service connection, even if the offense occurred off post.<sup>37</sup> In *Hedlund*, however, the Court of Military Appeals found its precedent wanting under the *Redford* delineation of "service connection," especially in this circumstance where the military

<sup>34</sup> Munnecke, *supra* note 9, at 11.

<sup>35</sup> *Relford v. Commandant*, 401 U.S. 855, 868 (1971).

<sup>36</sup> 25 C.M.A. Adv. Sh. 1, 54 C.M.R. Adv. Sh. 1 (1976).

<sup>37</sup> See *United States v. Everson*, 19 C.M.A. 70, 41 C.M.R. 70 (1969), and cases cited therein; U.S. DEPT OF ARMY, PAMPHLET NO. 27-174, JURISDICTION para. 6-3 b(6) (1976) [hereinafter cited as DA Pam 27-174].



status of the victim was not known to the accused. Thus, the Court of Military Appeals found that "the degree of interest in this AWOL Marine is de minimis and, alone, will not result in service connection as that term has come to be known."<sup>38</sup>

In contrast to the de minimis analysis of the service connected nature of the off-post robbery and kidnapping, the Court of Military Appeals automatically found service connection in the conspiracy to rob: "However, as the conspiracy was formulated on post, and as the gathering of the weapons—a step toward effecting the object of that conspiracy—occurred on post, the court-martial did possess jurisdiction to try the conspiracy charge."<sup>39</sup> The ultimate result in the case is that while there was nothing service connected in the conspiracy offense—it was not in any way violative of a person or property on post—court-martial jurisdiction was sustained; yet the off-post offenses which had an apparent military nexus in the status of the victim were not triable by military courts. Thus, ignoring precedent<sup>40</sup> and a close reading of legal history,<sup>41</sup> the Court of Military Appeals carried the on-post exception to a paradoxical conclusion in the factual setting of *Hedlund*: The only tangible military interest threatened during the commission of the offenses was the physical well-being of one of its members, albeit an apparently reluctant member, and that interest was not vindicated.<sup>42</sup> In any event, the Court of Military Appeals now automatically assumes military jurisdiction for offenses committed on post, and has affirmed an "on-post exception" to the service connection requirement of *O'Callahan*.

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<sup>38</sup> *United States v. Hedlund*, 25 C.M.A. Adv. Sh. 1, 7, 54 C.M.R. Adv. Sh. 1, 7 (1976).

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

<sup>40</sup> See note 37 *supra*.

<sup>41</sup> Judge Cook, dissenting in *Hedlund*, pointed out that the on-post preparation for the off-post offenses, coupled with a lack of concern by civilian authorities in the prosecution of the robbery and kidnapping offenses, might provide a basis for military jurisdiction. In addition, he read the Supreme Court decisions and the traditions of military law as implicitly sanctioning jurisdiction based solely upon the military status of the victim. See *United States v. Hedlund*, 25 C.M.A. Adv. Sh. 1, 8-10, 54 C.M.R. Adv. Sh. 1, 8-10 (1976).

<sup>42</sup> The Navy Court of Military Review's opinion in a companion case to *Hedlund* provides some insight into the military community's interests which argue against the result in *Hedlund*. See *United States v. Lynch*, NCM 75 1401 (N.C.M.R. 16 Aug. 1976).

#### D. THE PETTY OFFENSE EXCEPTION

As with the overseas exception to *O'Callahan*, the petty offense exception is based upon the premise that individuals charged with offenses which fall into this category are not otherwise deprived of the benefits of indictment by a grand jury and trial by a jury of their peers when they are tried by court-martial.<sup>43</sup> Applying this rationale to the military offense of drunk and disorderly in uniform in an off-post public place, the Court of Military Appeals found it to be the type of offense appropriate for trial by court-martial.<sup>44</sup> That is, as to minor offenses the accused suffers no constitutional deprivation at a military trial and "[s]o too, does the efficient administration of our national defense demand provision for the speedy and summary disposition of minor offenses by courts-martial."<sup>45</sup> Thus, the Court of Military Appeals has preserved military jurisdiction over petty offenses, exempting such offenses from the service connection requirement of *O'Callahan*.<sup>46</sup>

#### E. THE NEW NONEXCEPTIONS: DRUGS AND VICTIMS

The Court of Military Appeals in its resolution of the *O'Callahan* service connection requirement early recognized that drug offenses posed special dangers to the military community,<sup>47</sup> and the court adhered to its position that drug offenses, whether committed on or off post, were generally service connected.<sup>48</sup> Thus, drug offenses were *sui generis* in military law; they posed an inherent threat to the military community and became a kind of exception<sup>49</sup> to the *O'Callahan* rule until 1976.

<sup>43</sup> *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969).

<sup>44</sup> *United States v. Sharkey*, 19 C.M.A. 26, 41 C.M.R. 26 (1969).

<sup>45</sup> *Id.* at 28, 41 C.M.R. at 28.

<sup>46</sup> The Air Force Court of Military Review has extended the petty offense exception to include offenses considered petty under civilian law. See *United States v. Wentzel*, 50 C.M.R. 690 (A.F.C.M.R. 1975).

<sup>47</sup> *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>48</sup> The federal courts, in contrast to the Court of Military Appeals, have not adopted the axiomatic service connection approach in drug cases. For an excellent discussion and comparison of the case law concerning drug offenses and service connection, see DA PAM 27-174, *supra* note 37, at para. 6-5b(4).

<sup>49</sup> The Supreme Court seemed implicitly to sanction the Court of Military Ap-

On September 24, 1976, in *United States v. McCarthy*,<sup>50</sup> the Court of Military Appeals decided that its *O'Callahan* precedent was no longer viable to the extent that it indicated that drug offenses are an exception to the general service connection requirements of *O'Callahan*; that is, the court held that off-post, off-duty drug offenses by servicepersons do not automatically pose special dangers to the military community. Of course, as to off-post drug offenses which directly affect the military community, where tangible factors weigh in favor of military jurisdiction, trial by court-martial is appropriate. Therefore, as to an off-post transfer of marihuana four specific factors provided the military community with "the overriding, if not exclusive, interest in prosecuting this offense."<sup>51</sup> Those factors were the formation of the criminal intent on post; the nexus between the accused's duties and the offense; the fact that the transferee was performing military duties when the transfer agreement was made, such being known to the accused; and the threat to the military community by the transfer of a substantial quantity of marihuana to a serviceperson known as a drug dealer.<sup>52</sup> Absent factors such as these, off-post, off-duty possession of drugs by a serviceperson for his personal use has been held not to be service connected,<sup>53</sup> a clear indication that drug offenses do not enjoy the exceptional status once granted by the Court of Military Appeals.<sup>54</sup>

Crimes against other servicepersons, like drug offenses, were treated differently than other cases when the court con-

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peals' approach to drug offenses. Mr. Justice Powell, in *Schlesinger v. Councilman*, observed:

It is not surprising, in view of the nature and magnitude of [the military drug abuse] problem, that in *United States v. Becker* the Court of Military Appeals found that the "use of marihuana and narcotics by military personnel on or off-base has special military significance" in light of the "disastrous effects" of the substances "on the health, morale and fitness for duty of persons in the armed forces."

420 U.S. 738, 760 n.34 (1975) (citation omitted).

<sup>50</sup> 25 C.M.A. Adv. Sh. 30, 54 C.M.R. Adv. Sh. 30 (1965).

<sup>51</sup> *Id.* at 35, 54 C.M.R. Adv. Sh. at 35.

<sup>52</sup> *Id.* at 34, 54 C.M.R. Adv. Sh. at 34.

<sup>53</sup> *United States v. Williams*, 25 C.M.A. Adv. Sh. 176, 54 C.M.R. Adv. Sh. 284 (1976).

<sup>54</sup> Judge Cook dissented in both *McCarthy* and *Williams*. He viewed drug offenses as posing a special threat to the military community and questioned whether that interest will be adequately vindicated in civilian courts.

sidered the service connection issue.<sup>55</sup> As discussed with respect to the on-post exception to *O'Callahan, United States v. Hedlund*<sup>56</sup> overruled the decisions of the Court of Military Appeals which equated the victim's military status with service connection.

*United States v. Tucker*<sup>57</sup> is illustrative of the extent to which the Court of Military Appeals has eviscerated its own precedent. Tucker was convicted of the off-post concealment of property stolen from his fellow servicemen on post. Regardless of the fact that the larcenies which gave rise to the charged offense took place on post, the Court of Military Appeals observed that "in resolving questions of military jurisdiction, the situs of the offense is far more significant than the status of the accused or the victim."<sup>58</sup> Concealment off post being the gravamen of Tucker's offense, the court-martial was held to be without jurisdiction in spite of the serviceperson victims and on-post origins of the crime. The Court of Military Appeals in *Tucker* found precedent which seemed clearly to dictate a contrary result<sup>59</sup> much too simplistic in light of the criteria set out in *Relford*.<sup>60</sup>

<sup>55</sup> For a discussion and summary of cases concerning offenses against other servicepersons, see DA PAM 27-174, *supra* note 37, at para. 6-5b(6).

<sup>56</sup> 25 C.M.A. Adv. Sh. 1, 54 C.M.R. Adv. Sh. 1 (1976). See also *United States v. Wilson*, 25 C.M.A. Adv. Sh. 26, 54 C.M.R. Adv. Sh. 26 (1976); *United States v. Reed*, 25 C.M.A. Adv. Sh. 11, 54 C.M.R. Adv. Sh. 11 (1976).

<sup>57</sup> 24 C.M.A. 311, 52 C.M.R. 22 (1976).

<sup>58</sup> *Id.* at 312, 52 C.M.R. at 23.

<sup>59</sup> "We have consistently held that as to an offense affecting or involving another member of the military services, jurisdiction exists, whether or not the overt circumstances apprised the accused of the fact that he was dealing with a military person." *United States v. Sexton*, 23 C.M.A. 101, 102, 48 C.M.R. 662, 665 (1974).

<sup>60</sup> The Supreme Court listed twelve criteria by which to measure "service-connection" in *Relford v. Commandant*:

- (1) The serviceman's proper absence from the base.
- (2) The crime's commission away from the base.
- (3) Its commission at a place not under military control.
- (4) Its commission within our territorial limits and not in an occupied zone of a foreign country.
- (5) Its commission in peace time and its being unrelated to authority stemming from the war power.
- (6) The absence of any connection between the defendant's military duties and the crime.
- (7) The victim's not being engaged in the performance of any duty relating to the military.
- (8) The presence and availability of a civilian court in which the case can be prosecuted.
- (9) The absence of any flouting of military authority.

In sum, the Court of Military Appeals has re-examined and departed from its prior opinions which had automatically found service connection in cases involving drug offenses and offenses involving servicemember victims. By reinterpreting the *Relford* criteria, the Court of Military Appeals has disturbed two areas of case law which provided axiomatic service connection and thus court-martial jurisdiction.

### III. THE COURTS OF MILITARY REVIEW IN CONFUSION

#### A. DRUGS AND SERVICE CONNECTION

The several services' courts of military review reacted variously to the Court of Military Appeals' precedent-disturbing activity in the *O'Callahan* area. Generally speaking, the courts have reacted most strongly to the Court of Military Appeals' decision in *United States v. McCarthy*,<sup>61</sup> which drastically altered settled beliefs respecting drugs and service connection. In cases decided prior to *McCarthy*, the courts of review gave short shrift to *O'Callahan* arguments where the charges alleged drug offenses.<sup>62</sup> After the Court of Military Appeals changed the name of the *O'Callahan* game regarding drug offenses, the courts of military review found themselves between the Scylla of well established precedent and the Charybdis of *McCarthy*.

The Navy Court of Military Review first considered several off-post drug offenses in *United States v. Gonzales*.<sup>63</sup> It applied the *Relford* criteria<sup>64</sup> as mandated by the Court of Military Appeals in *United States v. Moore*,<sup>65</sup> where Chief Judge Fletcher, writing for the court, noted that "what *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service connec-

(10) The absence of any threat to a military post.

(11) The absence of any violation of military property.

(12) The offense's being among those traditionally prosecuted in civilian courts.

401 U.S. 355, 363 (1971).

<sup>61</sup> 25 C.M.A. Adv. Sh. 30, 54 C.M.R. Adv. Sh. 30 (1976). The decision was handed down on September 24, 1976.

<sup>62</sup> See, e.g., *United States v. Bender*, ACM 22009 (A.F.C.M.R. 21 July 1976) (off-post conspiracy to sell marijuana).

<sup>63</sup> NCM 76 0797 (N.C.M.R. 30 Sept. 1976) (unpublished).

<sup>64</sup> See note 60 *supra*.

<sup>65</sup> 24 C.M.A. 293, 52 C.M.R. 4 (1976).

tion issue in all cases tried by court-martial."<sup>66</sup> The Navy Court of Military Review carefully scrutinized the off-post drug offenses, which were unrelated to military duties and which involved an undercover government agent as the buyer. The only on-post activity was a "confirmation" of the intended sale; the actual negotiations and transfer took place off post. Therefore, the Navy Court of Military Review concluded that the court-martial lacked jurisdiction over the off-post drug offenses. Indeed, the result appears dictated by *United States v. McCarthy*.

In contrast to the holding in *United States v. Gonzales*, another panel<sup>67</sup> of the Navy Court of Military Review found sufficient facts to justify court-martial jurisdiction over an off-post drug offense.<sup>68</sup> In *United States v. Sawyer*,<sup>69</sup> the Navy Court of Military Review found that the criminal intent was formulated on post; that the accused was engaged in military duties at the time of the negotiations for a drug sale; that the other party to the negotiations was also on duty at the time of the negotiations; and that a threat to military personnel and hence to the military community existed by the transfer of drugs by a Marine gate guard who solicited the transfer while on duty at the gate. Thus, despite its first opinion which found no service connection, the Navy Court of Military Review adjusted to the Court of Military Appeals' *McCarthy* decision and continued to find service connection and court-martial jurisdiction over drug cases which involved off-post transfers and use.<sup>70</sup>

<sup>66</sup> *Id.* at 295, 52 C.M.R. at 6.

<sup>67</sup> Judge Michael Patrick Murray was the author of the *Gonzales* opinion and concurred in the result in *United States v. Sawyer*, NCM 75 1203 (N.C.M.R. 30 Sept. 1976) (unpublished).

<sup>68</sup> *United States v. Sawyer*, NCM 75 1203 (N.C.M.R. 30 Sept. 1976) (unpublished).

<sup>69</sup> *Id.*

<sup>70</sup> See *United States v. Roulo*, 54 C.M.R. Adv. Sh. 661 (N.C.M.R. 1976) (off-post use of marijuana held service connected because of jeopardy to military personnel and property where the accused was a noncommissioned officer in a crash crew and the use of marijuana was deemed to cause "perceptual aberrations"; also, use of marijuana with subordinates was an abdication of leadership responsibilities and military authority which threatened the community); *United States v. Sauter*, 54 C.M.R. Adv. Sh. 650 (N.C.M.R. 1976) (off-post sales of drugs held service connected because of nexus between duties and crimes and because of threat to military community); *United States v. Turner*, 54 C.M.R. Adv. Sh. 213 (N.C.M.R. 1976) (off-post drug offenses held service connected where drug dis-

The Air Force Court of Military Review first faced the drug offense service connection problem in an oblique manner. In *United States v. Phillippy*,<sup>71</sup> the accused was convicted, contrary to his pleas, of several drug-related offenses, including conspiracy to import heroin into a territory of the United States. The conspiracy was formulated and the overt acts were committed off post. However, the involvement of military personnel and property in the plan and the ultimate impact upon military society were found sufficient to provide service connection.<sup>72</sup> As to the off-post sale of drugs, the Air Force Court of Military Review had no difficulty finding service connection where the intent was formed on post, the sale involved another serviceperson and was related to on-post sales of drugs.<sup>73</sup>

A more difficult resolution of the jurisdictional issue was presented in *United States v. Campbell*.<sup>74</sup> In that case the accused argued that the court-martial had no jurisdiction over the off-post, off-duty use and transfer of heroin. Without directly criticizing the Court of Military Appeals, the Air Force Court of Military Review nonetheless conveyed the opinion that the highest military court had deviated from the Supreme Court's tacit acknowledgement that drug offenses are service connected.<sup>75</sup> Indeed, after paying the necessary homage to the required *Relford* analysis,<sup>76</sup> the Air Force Court of Review held that

[I]t is clear beyond cavil that the use of a drug so contemporaneous to performance of military duty is deleterious to the morale, discipline, and health of military personnel and seriously effects [*sic*] the integrity of the

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tribution had impact upon the military post and involved military personnel and on-post drug activity); *United States v. Glenn*, 54 C.M.R. Adv. Sh. 210 (N.C.M.R. 1976) (service connection issue noted for rehearing where drug offenses took place in off-post government quarters); *United States v. Jarvis*, 54 C.M.R. Adv. Sh. 147 (N.C.M.R. 1976) (off-post possession, transfer and sale held service connected because of immediate on-post threat to military personnel).

<sup>71</sup> ACM 22063 (A.F.C.M.R. 12 Oct. 1976) (unpublished).

<sup>72</sup> The service connection in conspiracy cases appears well covered by the *Phillippy* and *Hedlund* cases. That is, off-post conspiracies which have on-post impacts are service connected as are on-post conspiracies. Only off-post conspiracies which only affect off-post activities do not justify court-martial jurisdiction.

<sup>73</sup> *United States v. Gaylord*, ACM 22098 (A.F.C.M.R. 15 Oct. 1976) (unpublished).

<sup>74</sup> 54 C.M.R. Adv. Sh. 447 (A.F.C.M.R. 1976).

<sup>75</sup> *Id.* at 450 n.2.

<sup>76</sup> See note 60 *supra*.

base, itself, as well as the military operation, and mission.<sup>77</sup>

The Air Force Court of Review in *United States v. Campbell* thus paid lip service to the language of *United States v. McCarthy* but avoided that case's meaning in order to reach the results which would have obtained under the pre-*McCarthy* decision in *United States v. Beeker*.<sup>78</sup> The Court of Military Review adopted this course although the Court of Military Appeals had in no uncertain terms determined that *Beeker* was no longer a viable precedent.<sup>79</sup> Indeed, the Air Force Court of Military Review's resistance to the Court of Military Appeals hardened to the extent that it soon declared that "drug abuse offenses, whether committed on or off-base, are of such singular military significance as to inherently satisfy the *Relford* criteria for determining service connected crimes."<sup>80</sup> In so announcing its resistance, the Air Force Court of Military Review stated it was "fully cognizant that our conclusion appears contrary to the opinion expressed by a majority of the Court of Military Appeals. . . ." <sup>81</sup> The Air Force Court of Military Review, in brief, has strongly resisted,<sup>82</sup> but not totally defied,<sup>83</sup> the Court of

<sup>77</sup> *United States v. Campbell*, 54 C.M.R. Adv. Sh. 447, 451 (A.F.C.M.R. 1976).

<sup>78</sup> 18 C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>79</sup> *United States v. McCarthy*, 25 C.M.A. Adv. Sh. 30, 35, 54 C.M.R. Adv. Sh. 30, 35 (1976).

<sup>80</sup> *United States v. Artis*, ACM 22028 (A.F.C.M.R. 22 Oct. 1976) (unpublished).

<sup>81</sup> *Id.* at 2.

<sup>82</sup> See *United States v. Coker*, ACM 22019 (A.F.C.M.R. 29 Oct. 1976) (unpublished) (military had primary interest in prosecuting off-post drug possession and use offenses where critical mission was at stake; the Air Force Court of Military Review suggested in dicta that if a serviceperson is before a court-martial for a service connected offense, he might also be tried for nonservice connected offenses); *United States v. Smith*, ACM 21558 (A.F.C.M.R. 22 Oct. 1976) (unpublished) (off-post sale, transfer and possession of hashish inherently service-connected). See also *United States v. Chastain*, 54 C.M.R. Adv. Sh. 765 (A.F.C.M.R. 1976) (various off-post drug offenses service connected because of their threat to military society); *United States v. Cruz*, 54 C.M.R. Adv. Sh. 744 (A.F.C.M.R. 1976) (off-post sales of marijuana interrelated and military community had primary interest in their prosecution); *United States v. Merchant*, 54 C.M.R. Adv. Sh. 737 (A.F.C.M.R. 1976) (off-post sale and possession of LSD are offenses for which there should be no constraints upon the exercise of military jurisdiction); *United States v. Guillot*, 54 C.M.R. Adv. Sh. 732 (A.F.C.M.R. 1976) (off-post marijuana offense service connected because a portion of the marijuana was acquired on post and because the offenses posed a substantial threat to military personnel involved); *United States v. Strangstalien*, 54 C.M.R. Adv. Sh. 727 (A.F.C.M.R. 1976) (off-post sales of drugs which contemplated use by mili-



Military Appeals in its opinions which find court-martial jurisdiction over off-post drug offenses.

The Army Court of Military Review has not resisted the Court of Military Appeals' decisions concerning jurisdiction over off-post drug offenses in the extreme fashion of the Air Force Court of Military Review nor to the lesser extent of the Navy Court of Military Review.<sup>84</sup> Nevertheless, it has evinced some concern about recent decisions of the Court of Military Appeals.

In those cases where the allegations state that the offense took place off post, but the jurisdictional issue was not raised and litigated, the Army Court of Military Review has re-

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tary personnel were service connected); *United States v. Kuriger*, 54 C.M.R. Adv. Sh. 533 (A.F.C.M.R. 1976) (off-post transfer of drugs was offense "appropriate" for the exercise of military jurisdiction); *United States v. Schochen*, 54 C.M.R. Adv. Sh. 530 (A.F.C.M.R. 1976) (off-post possession of marihuana conceded to be "nonservice-connected" by government counsel; nonetheless held service connected by court of review because of the threat to the military in the likelihood that the marihuana would end up on post); *United States v. Henderson*, 54 C.M.R. Adv. Sh. 523 (A.F.C.M.R. 1976) (off-post transfer and possession of controlled substance service connected because of dangers to military in transfer of drug to another serviceperson); *United States v. Clay*, 54 C.M.R. Adv. Sh. 519 (A.F.C.M.R. 1976) (off-post sale, use, possession and transfer of marihuana service connected because military authority flouted and because of threat posed to military community); *United States v. Batson*, 54 C.M.R. Adv. Sh. 488 (A.F.C.M.R. 1976) (off-post sale, use, and possession of drugs service connected because military interest in such offenses is predominant); *United States v. Alef*, 54 C.M.R. Adv. Sh. 480 (A.F.C.M.R. 1976) (off-post sale and possession of drugs service connected primarily because drug was a narcotic and the recipient was a serviceperson); *United States v. Gash*, 54 C.M.R. Adv. Sh. 463 (A.F.C.M.R. 1976) (off-post sale of drugs held service connected in main part because the criminal intent was formulated on post); *United States v. Fuller*, 54 C.M.R. Adv. Sh. 460 (A.F.C.M.R. 1976) (off-post sale, attempted sale and possession of drugs at a civilian airport where Air Force had real property interest held under military control for purposes of service connection); *United States v. Murphy*, 54 C.M.R. Adv. Sh. 454 (A.F.C.M.R. 1976) (off-post possession and sale of several drugs service connected: the court in dicta suggested that prosecution of servicepersons who traffic in drugs in military courts is essential because of the unique function of the military service); *United States v. Rock*, 49 C.M.R. 235 (A.F.C.M.R. 1974).

<sup>83</sup> See *United States v. Cartagena*, ACM 21890 (A.F.C.M.R. 26 Oct. 1976) (unpublished) (off-post sale of marihuana to undercover agent posing as civilian not service connected where only small amount of marihuana was involved and accused was off duty and out of uniform).

<sup>84</sup> See notes 70 & 82 *supra*. The Court of Military Review cases discussed herein all were decided prior to January 1, 1977. The Coast Guard Court of Military Review rendered no published decisions in the area of off-post drug offenses during the last several months of 1976.

manded the record of trial to The Judge Advocate General of the Army for an ultimate limited hearing on the jurisdictional issue.<sup>85</sup> This is an appropriate disposition in light of the Court of Military Appeals' view that jurisdiction must be affirmatively established by the Government at trial.<sup>86</sup> Where sufficient facts appear in a record of trial for the Army Court of Military Review to make an informed decision as to court-martial jurisdiction, it is evident that most members of that court are sensitive to the military interest in drug cases: "Such military interest may be engendered by the potential for both harm to soldiers individually and for disruption of essential military relationships which exists when traffic in contraband is conducted in and around a military unit."<sup>87</sup> What is particularly disturbing to some judges of the Army Court of Military Review is "the prospect of soldiers having increased opportunities to plot criminal misconduct on post with impunity and then to enter an unsuspecting civilian community to execute their criminal designs. . . ."<sup>88</sup> Where there is a factual nexus between drugs off post and legitimate military concerns on post, the Army Court of Military Review, not unexpectedly, discovers service connection and upholds court-martial jurisdiction.<sup>89</sup> On the other hand, the Army Court of Military Re-

<sup>85</sup> See, e.g., *United States v. Hood*, 54 C.M.R. 359 (A.C.M.R. 1976); *United States v. Brockerman*, CM 433514 (A.C.M.R. 14 Dec. 1976) (unpublished); *United States v. Felty*, CM 434963 (A.C.M.R. 14 Dec. 1976) (unpublished); *United States v. Jenkins*, SPCM 11903 (A.C.M.R. 13 Dec. 1976) (unpublished) (rather than authorize limited hearing to resolve jurisdiction issue on two offenses, the Army Court of Military Review dismissed the offenses to terminate the litigation on those offenses); *United States v. Williams*, CM 433960 (A.C.M.R. 13 Dec. 1976) (unpublished); *United States v. Beason*, CM 434588 (A.C.M.R. 18 Oct. 1976) (unpublished).

<sup>86</sup> *United States v. McCarthy*, 25 C.M.A. Adv. Sh. 30, 34 n.2, 54 C.M.R. Adv. Sh. 30, 34 n.2 (1976).

<sup>87</sup> *United States v. Zorn*, 54 C.M.R. Adv. Sh. 198 (A.C.M.R. 1976). As expressed by Judge Costello, the potential dangers from drugs might include both individual harm and harm to military relationships: "One obvious example . . . is the serum hepatitis common among those who scratch or inject controlled substances. . . . [P]lainly the 'space cadet' will not respond to orders, and what if a sergeant becomes hostage to the private who is his pusher?" *Id.* at 200.

<sup>88</sup> *Id.*

<sup>89</sup> See *United States v. Rockwell*, 54 C.M.R. Adv. Sh. 637 (A.C.M.R. 1976) (various off-post drug offenses service connected where they were intimately related to on-post activity and ultimately affected soldiers on post); *United States v. Eggleston*, 54 C.M.R. Adv. Sh. 634 (A.C.M.R. 1976) (off-post distribution of LSD service connected because of military relationship between parties to the transaction).

view has not blindly upheld the government's assertion of service connection in every off-post drug case.<sup>90</sup>

Considered as a whole, the Courts of Military Review have generally followed the Court of Military Appeals' recent decisions concerning court-martial jurisdiction over off-post drug offenses. Nonetheless, they all have manifested a certain reluctance to do so, and, where possible, now seek and seize upon any indice of real or imagined military interest to provide service connection. The Air Force Court of Military Review, in particular, seems not to recognize the Court of Military Ap-

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accused was supply sergeant in company to which informant was assigned as company clerk); *United States v. Long*, 54 C.M.R. Adv. Sh. 612 (A.C.M.R. 1976) (off-post sale of heroin service connected where agreements to sell to serviceman formulated on-post); *United States v. Grundy*, 54 C.M.R. Adv. Sh. 393 (A.C.M.R. 1976) (off-post possession of heroin with intent to distribute preceded by apparent on-post activity was service connected); *United States v. Valles-Santana*, 54 C.M.R. Adv. Sh. 383 (A.C.M.R. 1976) (off-post sale of LSD service connected because criminal intent formed on-post; LSD is a danger to individuals and a large quantity was involved near post); *United States v. Ortiz-Negron*, 54 C.M.R. Adv. Sh. 362 (A.C.M.R. 1976) (off-post sale of drugs service connected when only consummation of sale took place off post and negotiations took place on post); *United States v. Kelly*, 54 C.M.R. Adv. Sh. 338 (A.C.M.R. 1976) (off-post possession and sale of drugs service connected because criminal intent formed on post, drug use adversely affected military duties, and drugs were transferred to fellow soldier); *United States v. Burston*, 54 C.M.R. Adv. Sh. 313 (A.C.M.R. 1976) (off-post use of heroin service connected because of particular dangers of heroin, intent to use heroin on post); *United States v. Johnson*, SPCM 11811 (A.C.M.R. 30 Dec. 1976) (unpublished) (off-post marijuana offense service connected because it was part of large scale drug operation which would have impacts on post); *United States v. Freeman*, CM 434265 (A.C.M.R. 16 Dec. 1976) (unpublished) (off-post sales of LSD service connected because of total criminal enterprise which began and had impacts on post); *United States v. Mayberry*, SPCM 11941 (A.C.M.R. 14 Dec. 1976) (unpublished) (off-post distribution of LSD held service connected because inception of offense was on post); *United States v. Dunn*, CM 434129 (A.C.M.R. 26 Nov. 1976) (unpublished) (off-post sale of drugs service connected because criminal intent formed on post, sale was related to military duties, and the large quantity of drugs constituted a threat to the post); *United States v. Sands*, CM 433708 (A.C.M.R. 26 Nov. 1976) (unpublished) (rationale identical to that in *Dunn*).

<sup>90</sup> See *United States v. Williams*, 54 C.M.R. Adv. Sh. 367 (A.C.M.R. 1976) (off-post possession, transfer and sale of phencyclidine involved only activities in civilian community and a small quantity of drugs, hence there was an inadequate showing of service connection); *United States v. Edmundson*, 54 C.M.R. Adv. Sh. 342 (A.C.M.R. 1976) (off-post, off-duty sale of phencyclidine to one not known to be a serviceperson without any on-post activity not service connected); *United States v. Smith*, CM 433833 (A.C.M.R. 8 Dec. 1976) (unpublished) (no proof of service connection where possession and sale took place entirely within civilian

peals as "the Supreme Court of the military judicial system,"<sup>91</sup> at least with respect to questions of jurisdiction over off-post drug offenses.

### B. OTHER O'CALLAHAN OFFENSES

Aside from the uncertainties provoked by the recent decisions of the Court of Military Appeals on the *O'Callahan* question, the service connection requirement still raises difficulties for the Courts of Military Review. A critical first determination, of course, is whether an offense occurred on post or off post, as the former situation gives rise to an automatic service connection.<sup>92</sup> The case of *United States v. Mitchell*<sup>93</sup> illustrates that the on-post finding is not always an easy determination to make.

Captain Mitchell was convicted of premeditated murder of his wife and sentenced to dismissal and life imprisonment. He was charged with committing the murder at Fort Bragg, North Carolina, but found guilty of committing the crime alleged "at or near Fort Bragg, North Carolina."<sup>94</sup> Although the victim's body was found on post, she was last seen alive off post and only circumstantial evidence was available to determine the location of the murder. The Army Court of Military Review found sufficient facts to support a conclusion that the offense occurred on post, in spite of the trial court's uncertainty. Two judges<sup>95</sup> further opined that the occurrence of the offense "at or near" post was sufficient for court-martial jurisdiction; the

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community); *United States v. Britton*, SPCM 11429 (A.C.M.R. 18 Nov. 1976) (unpublished) (off-post transfer of marijuana not service connected when all activities occurred in civilian setting without possibility of any impact on military community); *United States v. Garner*, CM 434912 (A.C.M.R. 15 Nov. 1976) (unpublished) (off-post cocaine offenses involved no on-post, on-duty impact and were without service connection); *United States v. Bobinchuck*, CM 434465 (A.C.M.R. 12 Nov. 1976) (unpublished) (off-post marijuana offenses involving undercover agent lacked requisite proof of service connection); *United States v. Keith*, SPCM 11779 (A.C.M.R. 27 Oct. 1976) (unpublished) (off-post possession and sale of marijuana to undercover agent believed to be a civilian not service connected).

<sup>91</sup> *McPhail v. United States*, 24 C.M.A. 304, 309, 52 C.M.R. 15, 20 (1976).

<sup>92</sup> The on-post exception, as discussed, is alive and well in military courts.

<sup>93</sup> 54 C.M.R. Adv. Sh. 325 (A.C.M.R. 1976), *pet. denied*, 3 M.J. 105 (C.M.A.), *pet. for reconsideration denied*, 3 M.J. 183 (C.M.A. 1977).

<sup>94</sup> 54 C.M.R. Adv. Sh. at 326.

<sup>95</sup> Senior Judge Jones and Judge Felder.

remaining judge<sup>96</sup> concurred only in the result as to the jurisdiction issue. In any event, had the Court of Military Appeals reviewed this case,<sup>97</sup> it might have clarified what jurisdictional standards are to be applied to this troublesome class of on-post, off-post offenses.

Subsequent to the Court of Military Appeals' decision negating ipso facto service connection in cases involving military victims,<sup>98</sup> the Army Court of Military Review nonetheless was able to distinguish the off-post forgery of a check issued by the Army Finance Office from the off-post forgery of a personal check<sup>99</sup> and establish a service connection: "Maintenance of the integrity of the Army's financial system and the preservation of its appropriated funds from unlawful diversion are indubitably of paramount concern to the successful operation of the military establishment."<sup>100</sup> The Army Court of Military Review has also distinguished a recent Court of Military Appeals' decision finding a lack of jurisdiction over an off-post conspiracy offense,<sup>101</sup> finding that a drug importation conspiracy involving the misuse of the military postal system was sufficiently service connected to give a court-martial jurisdiction.<sup>102</sup> Finally, the Army Court of Military Review has distinguished military jurisdiction findings in *United States v. Tucker*,<sup>103</sup> the case involving off-post concealment of stolen property, from the off-post receipt of stolen property because the latter involved a "clear threat to the military post of the promotion of this type of activity. . . . [T]he victim's military

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<sup>96</sup> Judge O'Donnell.

<sup>97</sup> See note 93 *supra*.

<sup>98</sup> *United States v. Hedlund*, 25 C.M.A. Adv. Sh. 1, 34 C.M.R. Adv. Sh. 1 (1976); see text accompanying notes 53 to 60 *supra*.

<sup>99</sup> *United States v. Uhlman*, 24 C.M.A. Adv. Sh. 256, 51 C.M.R. Adv. Sh. 635 (1976) (off-post forgery of personal check not service connected).

<sup>100</sup> *United States v. Henderson*, 34 C.M.R. Adv. Sh. 349, 351 (A.C.M.R. 1976).

<sup>101</sup> *United States v. Black*, 24 C.M.A. 162, 51 C.M.R. 381 (1976) (essential agreement in conspiracy occurred overseas but offense not service connected because overt act necessary to complete the conspiracy occurred in United States, subject to civilian prosecution).

<sup>102</sup> *United States v. Fornash*, 34 C.M.R. Adv. Sh. 375 (A.C.M.R. 1976); cf. *United States v. Pieragowski*, 19 C.M.A. 508, 42 C.M.R. 110 (1970) (offense of smuggling marihuana into the United States not service-connected in spite of arrival of accused at a military installation by aircraft chartered by the military).

<sup>103</sup> 24 C.M.A. 311, 32 C.M.R. 22 (1976); see text accompanying notes 57 to 60 *supra*.

status, which resulted in his assignment to billets in a barracks, was the *causa sine qua non* for his sustaining this loss of property."<sup>104</sup> It is evident that the Army Court of Military Review recognizes that many off-post offenses affect or threaten military interests, and it is upon this basis that the Army Court will usually sustain military jurisdiction. This is especially true in off-post drug cases,<sup>105</sup> but also apparent from the *ratio decidendi* in cases involving other offenses. Indeed, where "a matter of substantial interest to military authorities"<sup>106</sup> exists, the Army Court of Military Review has little difficulty in upholding court-martial jurisdiction, regardless of where the offense occurs.

The Navy Court of Military Review has also had occasion to reexamine the service connection issue outside the drug area after the recent Court of Military Appeals decisions. In *United States v. White*,<sup>107</sup> the accused was convicted, upon his plea of guilty, of indecent assault. As a result of on-post activity, the accused became acquainted with the victim, a member of the Naval service, and ascertained when her spouse, also a servicemember, would be absent from their trailer home. The accused committed the offense at that off-post location. The Navy Court of Review, acknowledging the *Hedlund*<sup>108</sup> case which held that military jurisdiction must normally be based upon more than the military status of the victim, found the military relationships between the parties significant and that the intent to commit the offense was formulated on post. Therefore, it determined that the offense was service connected and triable by court-martial.

Another case, *United States v. Butts*<sup>109</sup> strengthens the view

<sup>104</sup> *United States v. Gelski*, SPCM 12319 (A.C.M.R. 17 Dec. 1976) (unpublished), slip op. at 3.

<sup>105</sup> "The judicial approach in this group of cases has proceeded from a threat analysis based on the circumstances in which the offense occurred rather than on the offense itself." *United States v. Freeman*, CM 434265 (16 Dec. 1976) (unpublished), slip op. at 5.

<sup>106</sup> *United States v. Hopkins*, 54 C.M.R. Adv. Sh. 352, 355 (A.C.M.R. 1976) (use of military status to effect theft by check off post is service connected because misuse of that status is a threat to the integrity of the military ID system); cf. *United States v. Wolfson*, 21 C.M.A. 549, 45 C.M.R. 323 (1976) (military status not essential to commission of off-post offense).

<sup>107</sup> 54 C.M.R. Adv. Sh. 419 (N.C.M.R. 1976).

<sup>108</sup> *United States v. Hedlund*, 25 C.M.A. Adv. Sh. 1, 54 C.M.R. Adv. Sh. 1 (1976); see text accompanying notes 36 to 42 *supra*.

<sup>109</sup> 54 C.M.R. Adv. Sh. 665 (N.C.M.R. 1976).

that the Navy Court of Military Review more often than not perceives an impact or threat to military interests and is determined to find many off-post offenses service connected. In *Butts*, the accused was convicted of several assault offenses growing out of an off-post drinking party which turned into a drunken melee involving members of the Marine Corps. The Navy Court of Military Review found overriding military interest in the prosecution of the offenses. First, the fight would have left bad feelings which would have been detrimental to duty performance; second, there was a flouting of military authority because "physical injury to personnel runs contrary to a commander's responsibility for ensuring the welfare of his personnel and the readiness of his command"; third, there was a threat to the "security of a military post inasmuch as the altercants were unlikely to observe the niceties of geographic boundary demarcations in continuation of their combative behavior"; and fourth, "[b]rawling among servicemen is hardly a crime traditionally prosecuted in civilian courts."<sup>110</sup> Thus, the Navy Court of Military Review joins the Army Court and clearly inclines toward finding court-martial jurisdiction even in circumstances other than off-post drug offenses.

The Air Force Court of Military Review has not specifically addressed service connection in cases other than those involving drug offenses; nonetheless, there is little doubt that it, too, will search for an impact upon or a threat to a military interest to sustain court-martial jurisdiction.

#### IV. THE NET RESULT

There is no question that the Supreme Court has for all practical purposes departed from the *O'Callahan* field and fenced out federal court interference, permitting the military courts to determine those areas where court-martial jurisdiction over offenses is appropriate and permissible. The current Court of Military Appeals<sup>111</sup> has taken the Supreme Court's abandonment of its *O'Callahan*-defining role as a license to revisit the service connection issue on a case-by-case basis and to apply a strict *Relford* standard even to settled areas of military jurisdiction. In contrast to the Court of Military Appeals' in-

<sup>110</sup> *Id.* at 670.

<sup>111</sup> It appears that Judge Perry will be leaving the court. *NEWSWEEK*, Feb. 14, 1977, at 7.

terpretation of the Supreme Court's *O'Callahan* message in *Schlesinger v. Councilman*,<sup>112</sup> the Courts of Military Review generally have viewed the Supreme Court's attitude as manifesting approval of subject-matter jurisdiction as defined in earlier decisions. Indeed, the narrow test of service connection fashioned by the Court of Military Appeals, which requires a balancing of the *Relford* factors by the trial judge to determine "whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and whether the distinct military interest can be vindicated adequately in civilian courts,"<sup>113</sup> seems to distort the Supreme Court's language to the effect that the service connection issue "turns in major part on gauging the impact of an offense on military discipline and effectiveness. . . ."<sup>114</sup> Thus, the Courts of Military Review, especially the Air Force Court of Military Review, have not followed the recent precedent-disturbing decisions of the Court of Military Appeals with any enthusiasm. If the Court of Military Appeals has adopted an approach to service connection which is less than satisfactory in terms of recognizing legitimate military interests, the Courts of Military Review are merely compounding the confusion over *O'Callahan's* meaning and application by stretching to justify court-martial jurisdiction in cases involving something less than a clear military interest. Indeed, those Air Force Court of Military Review decisions which appear contrary to recent mandates of the Court of Military Appeals<sup>115</sup> do not well serve modern military jurisprudence:

While we respect and value the opinions of the Courts of Military Review and welcome the presentation of their views which differ as well as agree with our previous decisions, the integrity of the military justice system demands that where such views are directly contrary to a decision of this Court [of Military Appeals], those views should be confined to a dissenting opinion, or the Court of Military Review may note its disagreement with the state of the law in the majority opinion so long as the

<sup>112</sup> 420 U.S. 738 (1975); see text accompanying notes 7 to 10 *supra*.

<sup>113</sup> *Schlesinger v. Councilman*, 420 U.S. 378, 760 (1975).

<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> See, e.g., *United States v. Artis*, ACM 22028 (A.F.C.M.R. 22 Oct. 1976) (unpublished).



disposition of the case conforms to the result previously reached by this Court.<sup>116</sup>

The net result of recent interpretations of the meaning and effect of *O'Callahan* by the Court of Military Appeals and the Courts of Military Review do not, as a whole, reflect a consistent, well-reasoned line of law or logic. Are these courts singularly inept in dealing with the nice subtleties of *O'Callahan*?

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<sup>116</sup> *United States v. Heflin*, 23 C.M.A. 505, 506 n.6, 50 C.M.R. 644, 645 n.6 (1975).



## BOOK REVIEW

Friedman, Milton R., *Contracts and Conveyances of Real Property*, New York: Practising Law Institute, 1975. Pp. 1140, Notes, Text, Index, and Table of Cases. \$45.00

Milton Friedman's *Contracts and Conveyances of Real Property* is primarily designed for the attorney who either specializes in or has a substantial real estate practice. The book concentrates on contracts and conveyances of commercial real property; however, real property is real property, and as such the book has many direct applications to contracting for and conveying residential real property. The book is not an essential treatise for every legal assistance officer; but having it on his bookshelf for more than an occasional reference should give the legal assistance officer the comfort of knowing he thoroughly considered all aspects of a real estate purchase or sale.

Chapter One deals with the Formal Contract of Sale, and is, in itself, a primer on real property conveyances. The material in this chapter is of utmost importance to military legal assistance officers, because they can provide their most important legal assistance to the military client by drafting or modifying contracts of sale. Friedman points out the importance of the contract of sale by emphasizing that it is with the execution of this document that the responsibilities of the parties and the conditions of the premises are fixed. He cautions that examination of the contract of sale is one of the first tasks in preparing for closing or settlement on the property. However, from a seller's point of view, one should keep in mind that examination of the real estate agency agreement is also extremely important. Throughout Chapter One, the author includes standard bits of information that attorneys who examine or prepare contracts of sale may forget. For instance, there is a brief discussion of what a purchaser's remedies might be when the seller of the real property files for bankruptcy after the execution of the contract of sale but before settlement. The author also points out and discusses the types of formats used for contracts of sale such as the bilateral contract, the offer-and-acceptance type contract, and the agent's deposit receipt. He also discusses the applicability of various local customs, cautioning the reader as to the importance of knowing which customs operate in the jurisdiction in which

the contract will be executed. In coincidence with local customs, the author discusses the differences in state laws which must be examined. This is a very important point for a military legal assistance officer, who, unlike his civilian brethren may be preparing contracts of sale or improvising upon already drawn contracts of sale which are designed to be executed in a jurisdiction with which he is unfamiliar. One extremely important point discussed by the author in this regard is the risk of loss, and whether it is to be borne by the legal or the equitable owner.

Friedman provides a real service to the parties to the contract of sale by pointing out, in an oblique manner, where the loyalties of the real estate agent lie. He does this by using boiler plate contracts of sale which are distributed, generally without charge, by real estate agencies ("sellers' agents"), and which usually place more liability on the seller than institutional forms or forms prepared by holders of substantial realty interests. This discussion gives the examining attorney further cause to look very closely at contracts of sale submitted to sellers or buyers through real estate agencies. While realtors may be the agents of the sellers, and they may have legal duties to the buyers as clients, their goal, and understandably so, is to secure a commission on the sale of a particular piece of real property. If the contract binds both parties as tightly as necessary to secure that commission, then so be it.

In Chapter One Friedman describes almost every conceivable term or item which may be included in a contract of sale. In so doing, he frequently sets out clauses designed to resolve traditional ambiguities, and he explains those clauses in detail. He also sets out different or alternating fact situations (existing mortgage requiring amortization, down payment delivered to seller, down payment placed in escrow) and he suggests methods to cover these particular situations.

The one section in Chapter One which puts the entire chapter in perspective is the section discussing the rule of *caveat emptor*: "[T]he doctrine not only applies, it flourishes." Friedman soberingly points out that, absent misrepresentation or fraud, "if the seller would only keep his mouth shut, almost anything goes." This section alone should place the examining or preparing attorney on notice of the importance of his task. On the other hand, Friedman does not include much language in this particular section on how to minimize, for the buyer,

the impact of the doctrine of *caveat emptor*. He does discuss express and implied warranties of fitness and habitability, and indicates that language can easily be drafted to modify these doctrines. However, one should keep in mind that such language in the contract of sale on a new house, especially a new house which has sat vacant for some period of time, may well be repugnant to a builder/seller. Near the end of Chapter One there is an exceptionally good discussion of binders, memoranda, and contracts. The author points out that many residential real property transactions begin, unfortunately for the parties, with binders and memoranda prepared not by lawyers but by people in the real estate business.

Chapter Three, Examination of Title, is extremely informative, but would be seldom used by military legal assistance officers because of the regulatory and practical constraints upon our practice. However, for those of us who share more than a passing interest in the Torrens System, Friedman includes an excellent discussion of that system. As a point of information, the author leaves readers with the idea that the Torrens System is not only nearly dead, but deserves to be interred; a bitter pill to swallow for those who believe that the present, almost universal grantor-grantee system is designed solely to keep title companies, title insurance companies and title-searching attorneys in business.

In Chapter Four, the author discusses the law of marketable title in such a fashion as to be easily understood by not only the neophyte real property attorney, but also the layman who might be involved in the conveyancing transaction. Chapter Six, like Chapter One on Contracts of Sale, could be more appropriately described as a well annotated checklist of items to consider, regardless of jurisdiction, when drawing up a mortgage or deed of trust.

Chapters eight through eleven cover Settlement Issues, more widely known as "the closing." It is here that the legal assistance officer must go outside the book, as no mention is made of the Real Estate Settlement Procedures Act, which is applicable to most residential real property transactions involving servicemembers. The failure of the author to include the RESPA and its 1975 amendments places these chapters substantially behind the times. Such an omission is understandable if the author intended the book to be used solely as a reference for commercial real property transactions. However, as

stated earlier, the book has a considerably wider focus and failure to discuss these issues substantially decreases the value of the text to the average practitioner.

The author has included an index of forms, which is really an index of forms *and clauses*, and a table of cases which are quite helpful. A useful tool for the legal assistance officer is Appendix B, *Checklist for Buyer*. The checklist is in the form of a words and phrases list which covers areas to be included or considered in the contract of sale, the mortgage or deed of trust, and in the inspection of the property itself.

In sum, this book is useful and informative to the real estate practitioner, but would not be on the "high priority list" of pragmatic treatises to be purchased by the occasional practitioner.

—Major F. John Wagner

By Order of the Secretary of the Army:

**BERNARD W. ROGERS**  
*General, United States Army*  
*Chief of Staff*

Official:

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