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Articles **Page**

Comments

THE ENLISTMENT CONTRACT: A UNIFORM APPROACH*

Captain David A. Schlueter**

I. INTRODUCTION

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.[1]

The enlistee completes the oath and a voice proudly announces: "You're in the Army now!" Despite the confidence with which this announcement is made, the United States Court of Military Appeals has, in a series of decisions,[2] cast doubt on the validity of hundreds of enlistments.[3] Those opinions highlight the continuing legal problems surrounding enlistments. There is a wealth of law in the area, but little uniformity. There are many judicial and administrative opinions covering the topic, but little statutory guidance.

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[1] 10 U.S.C. § 502 (1970) (enlistment oath).

[2] *See, e.g.*, United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975); United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974); United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974).

[3] The term "enlistment" is awkward. It has been used to describe the act of "enrolling" in the armed forces. *See* United States v. King, 11 C.M.A. 19, 28 C.M.R. 243 (1959). Periodically it is used to describe the completed act or the actual period of military service. Tyler v. Pomeroy, 90 Mass. (8 Allen) 480, 485 (1864). Research fails to find a decision which clearly differentiates between the two us-

The topic of enlistments arises with such regularity because the conceptual attributes of enlistment determine the substance of the soldier-state relationship. The nature, validity, and consequences of the enlistment contract touch almost every facet of military law, including such areas as court-martial jurisdiction, right to pay, discharges, and retirement benefits. Particularly troublesome is the fact that the rules which determine the validity of an enlistment contract in one area might be inapplicable in another area. This situation results from the fact that the federal district and circuit courts typically analyze the administrative and civil incidents of enlistment contracts while courts-martial and the Courts of Military Review and Appeals restrict their inquiry to relationship between the enlistment and military criminal jurisdiction over the enlistee. Perhaps because of this difference in focus, the inconsistencies between the federal district and circuit courts' perspective and the military courts' perspective of the enlistment are marked.

As the peace-time Army tests the feasibility of an all-volunteer force, the Court of Military Appeals has declared the enlistment to effect a change of "status" and to create a unique legal relationship. The mainstream of the American judicial system, however, has shown an increasing tendency to label all legal relationships as "contractual." For better or worse, the soldier-state relationship has not been immune from this tendency to characterize relationships as binding contracts, agreements, compacts, and covenants.

What has prompted the difference in perspective? There are no standard answers but three factors seem to lie at the root of the problem:

a. Lack of a concise and uniform definition of the term

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ages. For purposes of this article, the term "enlistment" will be used to describe the act of becoming a soldier (servicemember, enlistee) in the armed forces.

The "enlistee" is a person who has entered the armed forces voluntarily, *see* 10 U.S.C. § 104(4) (1970), or a reserve unit, *see id.* § 261 (1970). He is to be distinguished from (1) inductees, who are inducted into the armed forces under the Selective Service laws, Eman v. Clifford, 287 F. Supp. 334, 338 (S.D. Cal. 1968); or (2) officers, who are appointed to office by the President. *Cf.* Babbit v. United States, 16 Ct. Cl. 202 (1880), *aff'd*, 104 U.S. 767 (1882), where the court distinguished West Point cadets from officers, noncommissioned officers and enlistees. The court also noted that "enlistment" is a technical word with a technical meaning, derived from British law. 16 Ct. Cl. at 213.

The term "enlistment" is often used in conjunction with the terms "enrollment" and "muster." Enrollment might be defined as joining the ranks and muster refers to the calling together of an armed force. Although both terms were used frequently in early opinions, they are no longer a part of the vocabulary used to assess the validity and effect of "enlistments."

"enlistment." Does it create a contractual relationship or a status or both? Or neither?

b. Diverse opinions as to what rules or bodies of law apply to the soldier-state relationship.

c. The role of public policy in determining the validity of the enlistment agreement and the resulting status.

This article examines the diverse views, the resulting problems, and the feasibility of a uniform approach to enlistments. The inquiry begins with an historical analysis of the soldier-state relationship.

II. HISTORICAL ROOTS OF THE SOLDIER-STATE RELATIONSHIP

The concept of the soldier-state relationship has deep roots. It draws from centuries of tradition, and although the surface characteristics have changed through the years, the core of the relation has remained unchanged: The sovereign's power to raise armed forces is paramount and all citizens may be called upon to serve in those forces.

Feudal armies were raised by lords who pledged their allegiance to the monarch for a specified period in return for lands, honors, and reciprocal protection. Subjects of the lord owed allegiance only to him and performed military services for him. When their specified period of service was completed they returned to their farms and families.

The feudal army model remained until the advent of what we might call international wars. For example, in the Hundred Years War, Charles V of France hired a professional army of infantry, cavalry, and artillery. These bands of fighting men worked under a captain or colonel like workmen under a contractor. They served in return for wages, and when the money ran out, the soldiers left their posts.[4]

Direct sovereign control of national armies began with the reign of Louis XIV. He raised mass professional armies which were paid by him and owed allegiance directly to him. He supplied them with the king's uniform and demanded loyalty from both officers and private soldiers. The soldiers were recruited by enticing them with a bounty, and their service consisted largely of standing ready to fight for the king.[5]

The early British armies varied little from the French model. One

[4] F. STERN, THE CITIZEN ARMY 55 (1957).
[5] *Id.* at 56.

writer suggests that the roots of the American military tradition trace back to the Assize of Arms promulgated by King Henry II.[6] The soldier's pay and allegiance were linked directly to the reigning monarch. During periods of national stability, recruiting practices and terms of service remained unchanged. However, during periods of unrest, the monarch was at liberty to impress vagrants into service and increase the punishments for misconduct.[7]

It was this system of direct allegiance that eventually found its way into the new world. Instead of relying heavily on the professional army, the early American colonies looked almost exclusively to the militia, farmers and townspeople ready to take up arms. However, the militia proved to be of limited value when their own homes were not being threatened and the fighting was taking place hundreds of miles away.[8] The British responded to the inadequacies of the militia by shipping professional soldiers to the colonies and intensifying their recruiting techniques. Their techniques for obtaining adequate numbers of American recruits often included the use of fraud, trickery, and alcoholic spirits.[9]

During the American Revolution, the colonial plan of depending on the regular enlistees was barely adequate in light of the recruiting problems and the oft-cited shortages of supplies. George Washington's frustrations in maintaining an effective fighting force led him to propose the unpopular concept of compulsory service.[10] Thus, by the time of the Revolution, American armed forces were

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[6] R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 3 (1967). *See* Tyler v. Pomeroy, 90 Mass. (8 Allen) 480 (1864), which contains a good review of the British treatment of enlistments.

[7] Common soldiers were in fact the dregs of European society, vagabonds, ne'er-do-wells, and criminals, the only sorts of men who were willing to risk their lives for the little pay bestowed upon them. . . . Recruiting armies from the most shiftless and criminal of men necessitated in turn an extremely stiff discipline which in a vicious circle, made army life still more unattractive and required still more impressment of undesirables.

On the other hand, once a soldier was disciplined and trained in warfare, he represented a considerable financial investment, and therefore his government did not desire to see him killed. Accordingly commanders planned campaigns and battles in such a way that the loss of life would be minimized.

R. WEIGLEY, *supra* note 6, at 18–19.

[8] Colonel George Washington, after experiencing serious recruiting and discipline problems during the French and Indian War, wrote:

> Militia, you will find, Sir will never answer your expectations, no dependence is to be placed upon them! They are obstinate and perverse, they are often egged on by the Officers, who lead them to acts of disobedience, and when they are ordered to certain posts for the security of stores, or the protection of the Inhabitants, will, on a sudden, resolve to leave *them*, and the United vigilance of their officers can not prevent them.

Id. at 16.

[9] *Id.* at 18.

[10] Voluntary enlistments seem to be entirely out of the question [he wrote as early as 1778]. all the allurements of the most exorbitant bounties and every other inducement that could be

composed of a volunteer regular army augmented by conscripts and a strong militia.

With some minor adjustments, this formula of a standing army serving with a strong militia has prevailed. Likewise, the American army has been composed of those who have volunteered their services and those who, through legislative process, have been inducted into service. Even with the suspension of conscription there continues to be a class of soldier that enters the Army to avoid what may be perceived as a less desirable alternative. Despite the manner through which the soldier enters the armed forces, the soldier-state relationship is no longer indirect in nature (soldier-lord-king); but rather direct (soldier-state). Soldiers owe allegiance directly to the state.

As the relationship between the soldier and the state has changed, so has the judicial and administrative treatment of that relationship. As the relationship has gained sophistication, new legal questions concerning pay, recruiting practices, and terms of service have arisen. Defining the relationship and assessing the legal basis of the relationship have not been easy tasks. Courts and administrative systems have struggled with the issue and have in some cases reached directly opposite results.

A. EARLY JUDICIAL VIEWS OF THE ENLISTMENT

The early enlistment cases generally dealt with two recurring problem areas: the nature of the enlistment contract and the effect of statutory and regulatory controls on its execution. *United States v. Cottingham* [11] provides an interesting starting point in reviewing the early judicial view of the subject.

Cottingham had immigrated from Ireland and, after reenlisting in the Army, claimed to be an alien, not having taken any steps to become a naturalized citizen. The statute which set forth the qualifications for enlistment spoke in terms of enlistment of "citi-

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> thought of, have been tried in vain, and seem to have had little other effect than to increase the rapacity and raise the demands of those to whom they were held out. We may fairly infer, that the country has been already pretty well drained of that class of Men whose tempers, attachments and circumstances disposed them to enter permanently, or for a length of time, into the army. . . .

Id. at 41. The debate over use of compulsory service continues even after the arrival of the "all-volunteer" Army. *See, e.g.*, H. MARMION, THE CASE AGAINST A VOLUNTEER ARMY (1971); WHY THE DRAFT? (J. Miller ed. 1968). No doubt there is a fear that only the "dregs of society" will agree to serve. *See* note 7 *supra*.

[11] 40 Va. (1 Rob.) 615 (1843).

zens." [12] The Supreme Court of Virginia rejected the soldier's arguments that the statute prohibited enlistments of aliens and that any such enlistment would be unlawful and void; and that as a contract, the enlistment was void because it lacked the indispensible ingredient of mutuality. The court observed that the Government could either enforce the soldier's agreement (or contract) to serve or summarily release him from his obligation, with or without cause. The soldier held no such advantage. Despite this lack of mutuality, the enlistment could not be voided, because contracts of enlistment could not be treated as typical contracts.

The qualifications of age, height, and citizenship were, according to the court, intended for the protection of the Government.[13] If the recruit were a minor, he was protected from youthful mistakes of judgment by the requirement that he obtain consent from an adult. The court assumed that an adult recruit would be aware of his disability, and, if he enlisted, he would be guilty of either fraud or collusion with the recruiter. Although either or both could be punished, it was the government's prerogative to either void or validate the enlistment.[14]

But what of the statutory language which required the recruit to be a citizen of the United States? The court stated that the Government could waive the disqualification:

> There is no better rule of interpretation than this, that "no statute shall be construed in such manner as to be inconvenient or against reason." If a recruit were to claim exoneration from the service, on the ground that at the time of his enlistment he was under size, or under age, or infirm in body, would it not be a sufficient answer that the government, in its discretion, waived the objection, because he had since attained the requisite height or age, or had recovered, or would probably recover, from his disease; or because he possessed qualities which would more than compensate for his alleged deficiencies? And so if the plea be that of alienage, is it not enough to say that, though constrained to the admission that the native or naturalized citizen must be supposed to possess greater valour, higher intelligence and more approved fidelity than a mere stranger, yet there may be exceptions to the general rule; and that in the particular case

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[12] Act of Mar. 16, 1802, ch. 9, 2 Stat. 132, "An Act fixing the military peace establishment of the United States."

[13] 40 Va. (1 Rob.) at 667. The provisions of the 1802 Act had a fourfold purpose: (1) To keep up the peacetime establishment of the Army by volunteer enlistments; (2) to encourage recruiting by paying a premium to the recruiting officer and a bounty to the recruit; (3) to procure for the Government recruits best adapted to the service, and protect it against inadequate selections; and (4) to protect minors from their own improvident engagements.

[14] 40 Va. (1 Rob.) at 667.

> the petitioner is a gallant and disciplined soldier, whose oath of fidelity when he took the bounty, and his long residence and connections and interest in the country, furnish sufficient security for the faithful discharge of his duties? [15]

This construction of the statute was "in the true spirit of the law; while the opposite would open the door widely to the vilest frauds upon the public service."[16] *Cottingham* did not stand alone; however, it provides a good summarization of the concepts employed by early American courts in dealing with enlistment problems.[17]

Equally troublesome to the courts was the problem of determining the validity of minority enlistments. The presence of minors in the armed services was commonplace, and to complicate matters, the age requirements fluctuated with the alternating states of war and peace. Three years after deciding that an alien could be enlisted, despite congressional language to the contrary, the Supreme Court of Virginia in *United States v. Blakeney*[18] once again dealt with the enlistment. This time it turned its attention to the enlistment of a minor.

Blakeney, who was between the ages of nineteen and twenty years, had enlisted with a company of Virginia volunteers and was subsequently mustered into service with the United States when the war with Mexico began. The Act of March 1802,[19] which had fixed the peacetime establishment of the United States Army, required enlistees between the ages of eighteen and twenty years to obtain the consent of their parents. No consent had been given in this case. At the time of the enlistment, however, Congress, by the Act of 1846,[20] had authorized the President to call up to 50,000 volunteers without stating any qualifications concerning the age of the troops. Blakeney was among those answering the call. The treatment of the problem by the majority and dissenting opinions reveals a great deal about the prevailing philosophies concerning the soldier-state relationship (specifically, the enlistment) in the first half of the nineteenth century.

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[15] *Id.* at 669–70.
[16] *Id.* at 672.
[17] *See* United States v. Wyngall, 5 Hill (N.Y.) 16 (1843), where the court was concerned with the effect of an alien's enlistment in the Army. The court considered the enlistment valid, holding the controlling statute to be only "directory," and finding no public policy against enlisting aliens. Historically, the practice had been common.
[18] 44 Va. (3 Gratt.) 387 (1847).
[19] Act of Mar. 16, 1802, ch. 9, 2 Stat. 132.
[20] Act of May 13, 1846, ch. 16, 9 Stat. 9, "An Act providing for the prosecution of the existing war between the U.S. and the Republic of Mexico."

The majority opinion reluctantly recognized the soldier-state relationship as contractual [21] and stressed that the requirement of consent found in the Act of 1802 must be interpreted in light of a nation at war:

> Every presumption was in favor of the ability to carry arms of volunteers thus brought forth and embodied; and nothing more was contemplated. If such ability in reference to this statute was still to be a subject for judicial decision, instead of official discretion, then it must be determined, not by the special circumstances of each particular case, but by a general rule of uniform application. We know, as a matter of fact, that at the age of eighteen, a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole legislation of Congress, and of the State of Virginia, and of all the States of the Union, perhaps without exception. There was no temptation and scarcely any room for abuses in the execution of the law; and cases of fraud, and want of consent from mental aberration or debility, are exceptions from every rule, and applicable to every age.[22]

The court further adopted the philosophy that the contract of a minor to serve the State was binding "whenever such an agreement is not positively forbidden by the State." [23]

The dissenting opinion maintained that the public law should not be construed so broadly as to grant the right to contract to anyone capable of bearing arms:

> The relation between parent and child, is, of all others, the most important. . . . The whole superstructure of civil society rests upon it. But until there is an express declaration of an intention to change the rule in reference to military contracts, they must be controlled and regulated by the principles applicable to other contracts. We must look to the common law as existing amongst ourselves, modified and adapted to our peculiar institutions, to ascertain whether the party entering into a contract of this kind, possesses the legal capacity to bind himself by such an engagement.[24]

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[21] The court hesitated to label the enlistment as a contract "unless we suffer it to mislead us as to the true character of the thing." 44 Va. (3 Gratt.) at 391.

[22] *Id.* at 399.

[23] *Id.* at 405. The majority opinion, citing Judge Story's opinion in United States v. Bainbridge, 24 F. Cas. 946 (C.C.D. Mass. 1816) (No. 14,497), stated that "Under the Acts of Congress for the employment of men and boys in the navy, the contracts of enlistment of the latter are obligatory upon them, though made without the consent of parent, master or guardian." Judge Story stated, "The disabilities of an infant are intended by law for his own benefit, and not for the protection of the rights of third persons. . . ." 24 F. Cas. at 950. That minority position was later modified when it was recognized that the statutes could be for the protection of the parent or guardian. *See, e.g.*, United States v. Reaves, 126 F. 127 (5th Cir. 1903). Note that the minimum age of enlistment in the Navy was at one time as low as thirteen years of age. *See Ex parte* Brown, 4 F. Cas. 325, 326 n.2 (C.C.D.C. 1839) (No. 1,972).

[24] 44 Va. (3 Gratt.) at 409 (Allen, J. dissenting).

The dissent's rationale for considering the minority enlistment invalid was this: In the absence of congressional action, the courts should look to the state or municipal law of the location of the formation of the enlistment contract. Because the Act of 1846 calling for the volunteers was silent as to the capacity to contract, and because the Commonwealth of Virginia had not acted specifically on the capacity of minors to enlist, the Act of 1802 controlled. Therefore, parental consent should have been obtained.[25]

The majority and dissenting opinions in *Blakeney* reflect the conflicting views of the two schools of thought concerning the nature of the enlistment agreement. The one school proposed that the enlistment was a contract but that in times of national need, the capacity to enter the contract should be liberally expanded whether specifically so stated by Congress or not. Stated another way: "A man old enough to die for his country is old enough to serve it." [26] The opposite view was that unless Congress had specifically acted in this area, the municipal law of contracts applied. The capacity to contract should not be loosely interpreted.

A review of the early judicial posture toward the enlistment reveals the beginning of two common threads. First, the power of the sovereign to raise and support armies is paramount. The nature of the relationship and the procedures for entering into it may change, but the power to either ask for or demand the service of the citizenry is ever present. Second, the courts have traditionally treated the enlistment as a contract, the terms of which are to be examined in the light of the sovereign's ability to raise an army and determine the criteria for service in that army. Public law must be considered in interpreting the criteria. These common threads have taken some interesting and sometimes bewildering turns. In doing so, they have provided the base for the numerous and diverse cases to follow.

III. THE SUPREME COURT AND ENLISTMENTS

In the last half of the 1800's the federal judiciary began dealing

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[25] *Id.* at 420.

[26] *Id.* at 406. In a concurring opinion, Justice Brooke rejected the application of the common law of contracts to the case, and noted that the minor owed higher obligations to his country. Continuing that theme and reminiscing that the military age in the "Revolution" was sixteen, Brooke added: "[C]ommissions were given to many who were not twenty-one years of age. I myself received a commission as first lieutenant in Col. Harrison's regiment of artillery before I was seventeen years of age, whilst I was at school; and served three years, to the end of the war." *Id.* at 421-22.

more and more with enlistments and related issues such as defining the nature of the enlistment and effect, if any, of the enlistment oath. The opposing views of the majority and dissenting judges in *United States v. Blakeney* noted in the preceding section were typically reflected in later federal opinions. In 1890, the United States Supreme Court addressed the issue.

A. *UNITED STATES v. GRIMLEY* [27]

On February 18, 1888, John Grimley, age forty years, appeared at a recruiting rendezvous in Boston, represented himself to be twenty-eight years old, and indicated an interest in joining the Army. He took a physical examination, signed the requisite oath and received an issue of clothing. He went home, stayed there, and was later convicted of desertion. While confined, Grimley sought a writ of habeas corpus in a Massachusetts district court, alleging that his enlistment was void, and that the court-martial had been without jurisdiction to try him. The basis for this contention was that the enlistment statute required recruits to be "between the ages of sixteen and thirty-five years, at the time of their enlistment." [28] Both the district and circuit courts agreed with Grimley and held that he was not amenable to court-martial jurisdiction because his enlistment was void.

Before the Supreme Court, both parties relied on the numerous enlistment cases rendered by both state and federal courts.[29] The thrust of the government's argument was that the enlistment agreement was completed at the taking of the oath, and because the statutory restrictions were for the benefit of the Government, the contract was voidable only by the Government. The lawyers for Grimley relied on a line of cases which had ruled that enlistments of minors were void because the statutory language was clearly prohibitive.[30] In addition, they argued that the proceedings at the

[27] 137 U.S. 147 (1890).

[28] Section 116 of the Revised Statutes provided: "Recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment."

[29] The wealth of cases cited by both sides is set forth in the reporter's preface to the opinion. At least one writer feels that the Court completely ignored the briefs of the parties and rendered an "absurd" opinion. Carpenter, Enlistment—A Contract, Status, or Marriage? (March 1973) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

[30] Grimley's lawyers cited *United States v. Cottingham* in support of their argument that the congressional intent was clear. The recital of "citizen of the United States" had been subsequently dropped, but the age limitation had been retained. Thus, they argued, the mandatory character of the age requirement was emphasized. 137 U.S. at 147.

rendezvous did not constitute a valid enlistment.

The Court rejected Grimley's arguments and held that an enlistment had taken place and that the enlistment was voidable only at the instance of the Government for whose benefit the statute had been drafted. Because there was no inherent vice in a forty-year old recruit serving his country, the Court felt that public policy would not justify setting the enlistment aside. Dealing with the jurisdictional question, the Court in *Grimley* utilized language which characterized the enlistment as a matter of contractual relation.[31] However, the Court continued:

> But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations and put an end to the marital relations. But this is never done at the instance of the wrong-doer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof.[32]

Although this language is found in many subsequent cases dealing with enlistments, an often overlooked portion of the opinion dealt with the issue of the public good. There were repeated references to

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[31] 137 U.S. at 150. The Supreme Court had referred to the enlistment as a contract on at least one prior occasion. In assessing a soldier's right to pay in United States v. Landers, 92 U.S. 77 (1876), the Court noted that the contract of enlistment called for faithful service. "The contract is an entirety; and if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned." 92 U.S. at 79. *Compare id. with* Bell v. United States, 366 U.S. 393 (1961) (right to accrued pay based upon statute not contract rights) *and* Word v. United States, 158 F.2d 499 (8th Cir. 1947).

[32] 137 U.S. at 151.

Grimley's misrepresentation and the government's reliance on that falsehood.

Implicit in the decision is the common thread revealed earlier in *United States v. Cottingham* and *United States v. Blakeney*. Because the Government possesses the ultimate power to require the service of *all* persons, the statutes regulating the qualifications of the recruits are for the convenience of the Government:

> Now, there is no inherent vice in the military service of a man forty years of age. The age of thirty-five, as prescribed in the Statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens, and may, when emergency arises, justly exact that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter which in any given case it may waive; and it does not lie in the mouth of anyone above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge.[33]

B. MORRISSEY v. PERRY [34]

The same day *Grimley* was decided, Justice Brewer, again writing for the Supreme Court, dealt with the problem of minority enlistments. In *Morrissey*, a seventeen-year-old enlisted in the Army without his mother's consent. At the time of his enlistment the statutory minimum age was sixteen, and because he was under twenty-one years of age parental consent was required. When he enlisted he swore that he was twenty-one years and five months old. He received his clothing issue and served for approximately three weeks before deserting. After an absence of five and one-half years he reappeared and demanded his discharge on the ground that he had enlisted as a minor.

The Court ruled that Morrissey was not only a *de facto* soldier but a *de jure* soldier as well. Congress, the Court went on to say, can set the age at which an "infant" can be competent to perform either military or civil acts; the requirement of consent was for the benefit of the parents alone.[35] Citing its opinion in *Grimley*, the Court stated that an enlistment was not only a contract but also a

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[33] *Id.* at 153.

[34] 137 U.S. 157 (1890).

[35] *Id.* at 159. At common law an enlistment was not voidable by either the minor or his parents. *See* United States v. Blakeney, 44 Va. (3 Gratt.) at 405.

change of status. Therefore, it was not voidable by a minor as if it were an ordinary contract.[36]

What is the significance of these two cases? In arguing their respective positions, both sides presented to the Supreme Court a comprehensive list of existing authorities on the subject of enlistments. It follows that *Grimley* and *Morrissey* serve as both the capstone of the law of enlistments before 1890 and as the cornerstone for the body of law which followed.

IV. FEDERAL DISTRICT AND CIRCUIT COURTS' CONSIDERATION OF ENLISTMENTS

Following the rationale in the Supreme Court's opinions, the lower federal courts [37] have generally applied contract law principles when deciding enlistment questions. Where the validity of the enlistment contract is in question, the cases before the federal courts fall into three categories: [38]

a. Those cases where the servicemember has enlisted in violation of one or more statutory provisions.
b. Those cases where the servicemember's enlistment is violative of a service regulation.
c. Those cases where, during the course of the enlistment, an alleged breach (by either party) has occurred.

The soldier may be raising the invalidity of his enlistment contract to avoid the jurisdiction of a court-martial,[39] or he may simply be

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[36] The effect of *Morrissey* was reviewed in United States v. Reaves, 126 F. 127 (5th Cir. 1903). The court provided a synopsis of the minority enlistment problems and rejected the argument that because public policy favors parental control, the enlistment entered without the required parental consent should be considered null and void. That position, the court stated, had been adopted in *In re* Chapman, 37 F. 327 (N.D. Ga. 1889), but had been overruled by the Supreme Court in *Morrissey* and *Grimley*. The lower court opinion in *Reaves*, at 121 F. 848 (M.D. Ala. 1903), presents a thorough discussion of the "void *ab initio*" argument for minority enlistments entered into without parental consent.

[37] In this article the term "federal courts" refers to those courts established under Article III of the United States Constitution.

[38] Each category could in turn be broken down into those cases which deal with the "criminal" aspects of the enlistment (validity of the enlistment contract for purposes of court-martial jurisdiction) and those which concentrate on the civil aspects (formation and performance questions). For the most part, the contemporary federal courts are dealing only with the civil aspects. This is due in large part to requirement that an individual subjected to trial by court-martial first exhaust questions of jurisdiction within the military system. *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738 (1975); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

[39] The servicemember may challenge his military "status" even though no court-

attempting to avoid further service under the agreement. The ultimate question, though, centers on the nature and validity of the relationship between the United States government and the soldier.[40]

A. EFFECT OF STATUTORY CONTROLS

With some exceptions, the statutory qualifications for entering the armed forces have changed little. In establishing criteria for service, the Congress has determined who may enter into a contractual relationship with the Government.[41] What if an enlistment contract is formed in contravention of a statute which restricts the capacity of one of the parties to enter into the contract? The outcome depends upon what is being restricted and for whose benefit the restriction has been drafted.

The statutory restriction most frequently considered deals with minority enlistments.[42] Almost all federal authorities now agree that if a minor enlists under the minimum statutory age the contract is void.[43] Although the military courts have decided the issue,[44] the federal judiciary has not specifically determined whether such a contract ever becomes a voidable or a valid enlistment after the minor reaches the minimum age. Likewise, the federal courts have not decided whether a minor under the minimum statutory age who commits a crime is nonetheless amenable to court-martial jurisdiction. Early federal decisions indicate that even statutory defects (such as enlistment without the required parental consent) [45] which

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martial is pending. *See* Billings v. Truesdale, 321 U.S. 542 (1944). Often relief is sought through a petition for habeas corpus because military status has been equated to "custody" for that purpose. *See* Jones v. Cunningham, 371 U.S. 236 (1962); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). For a recent discussion of habeas corpus review, *see* McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533 (1976).

[40] In a number of cases the alleged irregularities involve both statutory and regulatory provisions. For instance, in *Ex parte* Beaver, 271 F. 493 (N.D. Ohio 1921), the servicemember was an alien minor (age sixteen) and in *Ex parte* Dostal, 243 F. 664 (N.D. Ohio 1917), the servicemember alleged a fradulent enlistment because he was an alien minor who had failed to indicate that he had a dependent mother. Both enlistments were found to be valid.

[41] *See* Morrissey v. Perry, 137 U.S. 157 (1890); United States v. Blakeney, 44 Va. (3 Gratt.) 387, 396 (1847) (Allen, J. dissenting). *See also In re* Davison, 21 F. 618 (S.D.N.Y. 1884).

[42] 10 U.S.C. § 505(a) (Supp. V 1975).

[43] Morrissey v. Perry, 137 U.S. 157 (1890); United States *ex rel.* Laikand v. Williford, 220 F. 291 (2d Cir. 1915); *cf. Ex parte* Beaver, 271 F. 493 (N.D. Ohio 1921).

[44] United States v. Brown, 22 C.M.A. 162, 48 C.M.R. 778 (1974).

[45] Dillingham v. Booker, 163 F. 696 (4th Cir. 1908); United States v. Reaves, 126 F. 127 (5th Cir. 1903); *In re* Miller, 114 F. 838 (5th Cir. 1902).

render an enlistment illegal are moot after the soldier has committed a crime. Whether contemporary federal courts will maintain that position is questionable.

The *Grimley* rationale was reiterated in a series of cases arising when soldiers claimed that their enlistments, entered into while they were pending induction, were void. The controlling statute,[46] the courts declared, was intended for the benefit of the Government (the Selective Service boards) and not for the potential inductee.[47] Statutory restrictions [48] concerning alienage,[49] mental competency [50] and criminal records should also be considered for the benefit of the Government absent some showing that there is some inherent evil in the contractual relationship.

Therefore, statutory violations in forming the enlistment contract do not always render the contract void—at least in the eyes of the federal courts.[51] In most cases they are voidable at the instance of

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[46] 50 U.S.C. app. § 465(d) (1970), which states: "[N]o person shall be accepted for enlistment after he has received orders to report for induction."

[47] Tuxworth v. Froehlke, 449 F.2d 763 (1st Cir. 1971); Stokum v. Warner, 360 F. Supp. 261 (C.D. Cal. 1973). *But see* Moore v. Dalssio, 332 F. Supp. 926 (D. Mass. 1971). *See also* Whitmore v. Tarr, 331 F. Supp. 1369 (D. Neb. 1971).

[48] No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases for the enlistment of deserters and persons convicted of felonies.

10 U.S.C. § 504 (1970).

[49] *See Ex parte* Beaver, 271 F. 493 (N.D. Ohio 1921); *Ex parte* Dostal, 243 F. 664 (N.D. Ohio 1917); United States v. Wyngail, 44 Va. (3 Gratt.) 387 (1847); United States v. Cottingham, 40 Va. (1 Rob.) 615 (1843). Congress has authorized the enlistment of aliens as a means of securing needed linguists, skilled military specialists and technicians. *See* DAJA-AL 1972/4744, 31 Aug. 1972 (discussion of Lodge Act, Act of June 30, 1950, Pub. L. No. 81-597, 64 Stat. 316 (expired June 30, 1959)). The requirement of citizenship is covered in 10 U.S.C. § 3253 (1970):

> Army: persons not qualified.
>
> In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of chapter 12 of title 8.

[50] *See In re* Judge's Petition, 148 F. Supp. 80 (S.D. Cal. 1956) (servicemember must show that he was insane on date of enlistment). Enlistment of "insane" persons is prohibited by 10 U.S.C. § 504 (1970). The Comptroller General has held that there is no substantial basis for regarding a servicemember as an insane person unless he has been the subject of a prior judicial determination of mental incompetence. *See* 39 Comp. Gen. 742, 747 (1960).

[51] Courts have also dispensed with statutory formalities where equity demands such. In Coe v. United States, 44 Ct. Cl. 419 (1909), the claimant had missed the deadline for receiving his statutory reenlistment bonus because of a heavy recruiting schedule. The court ruled in his favor because he had filled out the necessary paperwork before the time limit had expired. *In In re Agustin*, 62 F. Supp. 832 (N.D. Cal. 1945), a Filipino national (who had served the United States as a guer-

the Government; in some minority cases they are voidable at the instance of the minor's parents or guardian.[52]

B. EFFECT OF REGULATORY CONTROLS

If a soldier cannot convince a federal court that his enlistment contract is invalid on statutory grounds, he can advance the argument that in the process of entering into the contract a military regulation was violated. Despite the oft-cited rule that the Government is required to follow its own regulations,[53] not every regulatory violation will entitle the soldier to the relief he requests. If the servicemember has suffered no prejudice,[54] if the regulation is not for his benefit,[55] or if it appears that he has acted in bad faith,[56] the federal courts generally will rule that a violation of the regulation does not entitle him to relief.

An example of the courts' interpretation of regulatory controls is found in *Johnson v. Chafee*.[57] Johnson (already on active duty) had

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rilla fighter in World War II) was granted citizenship although the "formal" enlistment or induction into the United States armed forces was lacking. Federal courts have also held that "the equivalent of an enlistment" may be found where the servicemember has continually served after the removal of the disqualification. *See* Barret v. Looney, 158 F. Supp. 224 (D. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir.), *cert. denied*, 357 U.S. 940 (1958); *Ex parte* Hubbard, 182 F. 76, 81 (D. Mass. 1910).

The Comptroller General has also found "constructive enlistments." *See* 45 Comp. Gen. 218 (1965); 40 Comp. Gen. 428 (1961) ("ratification" of a void formal enlistment); 39 Comp. Gen. 860, 863 (1960) ("equivalent" enlistment after removal of disqualification).

[52] Regular enlisted members: minority discharge.

Upon application by the parents or guardian of a regular enlisted member of an armed force to the Secretary concerned within 90 days after the member's enlistment, the member shall be discharged for his own convenience, with the pay and form of discharge certificate to which his service entitles him, if—

(1) there is evidence satisfactory to the Secretary concerned that the member is under eighteen years of age; and

(2) the member enlisted without the written consent of his parent or guardian.

10 U.S.C. § 1170 (1970). The Army's procedure for discharging minors is found in Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 7 (C 33, 8 Feb. 1972) [hereinafter cited as AR 635-200].

[53] *See, e.g.*, Vitarelli v. Seaton, 359 U.S. 535 (1959); Harmon v. Brucker, 355 U.S. 579 (1958); Service v. Dulles, 354 U.S. 363 (1957). *See also* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 33-37 (1975).

[54] United States *ex rel.* Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970).

[55] *See, e.g.*, Allgood v. Kenan, 470 F.2d 617 (9th Cir. 1972) (regulation for benefit of Government); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972) (conscientious objector regulation for servicemember's benefit).

[56] Wier v. United States, 474 F.2d 617 (Ct. Cl. 1973).

[57] 469 F.2d 1216 (9th Cir. 1972); *accord*, Kubitschek v. Chafee, 469 F.2d 1221 (9th Cir. 1972). *But see* Savage v. Middendorf, 4 Mil. L. Rep. 2380 (Civ. No. 75-1114-

signed a two-year extension agreement with the Navy whereby he would receive special training in a nuclear program. Contrary to naval requirements, Johnson's agreement was sworn to before a warrant officer.[58] Rejecting the argument, and the lower court's holding, that execution of the agreement had to comport with the regulations, the court found that a "formal defect" should not defeat an otherwise valid agreement.[59] The court continued:

> Far from being prejudiced from the fact that a noncommissioned officer accepted the contract terms on behalf of the Navy, Johnson was the recipient of considerable benefits under the agreement: thirty-three weeks of special training which he would not otherwise have received. On its part, the Navy, by enrolling Johnson in the Nuclear Field Program, manifested its intent to be bound by the extension agreement, regardless of any flaw existing in the execution of the contract. Thus, even assuming for the moment that the notarial defect prevented the parties from being legally bound at the time of signing, their subsequent acts constituted a dual ratification of the contract terms.[60]

A certainly different result is found in cases where the soldier has

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S, S.D. Cal. May 20, 1976), where the district court granted a writ of habeas corpus to Navy servicemember who had voluntarily enlisted in the Navy in return for dismissal of pending civilian criminal charges. Navy recruiting regulations prohibited such procedures. The court frowned upon the petitioner's "manipulative behavior" (using the Navy to solve his legal problems, then using the legal system to solve his Navy problem), but focused on the conduct of the recruiter and his superiors. Citing United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975), *see* notes 120 to 126 and accompanying text *infra*, the court voided the enlistment.

[58] The pertinent provision of the Naval Manual provided:

> *General.* In order to be considered legal and binding, pertinent portions of the Agreement to Extend Enlistment must be filled in as shown in Exhibit 1A–1 of Article 8–2311 and signed by both the individual and the commissioned officer administering the oath on or prior to expiration of enlistment. . . . *Agreements entered into subsequent to the date of expiration of enlistment are without legal force and effect.*

469 F.2d at 1218 n.3.

[59] The court cited United States *ex rel.* Stone v. Robinson, 431 F.2d at 553:

> Certainly, any routine failure of appellant to swear to his execution of his extension form would not affect the validity of the enlistment extension, just as the violation of every regulation in some particular does not always invalidate the action taken thereunder. If the Regulation in this instance was not complied with in the respect indicated, appellant was not prejudiced in any way."

469 F.2d at 1219.

[60] *Id.* The court also noted that even if Johnson had neglected to take the oath, his signature would have sufficed to bind him. *See* Nixon v. Secretary of the Navy, 422 F.2d 934, 938–40 (2d Cir. 1970); United States *ex rel.* Stone v. Robinson, 431 F.2d 548, 552 (1970). Such language indicates a departure from the pivotal importance of the "oath" noted in *Grimley*.

been inducted [61] or involuntarily activated.[62] The important element of "voluntariness" has been found lacking [63] and in those cases a formal defect has invalidated the government's attempt to enforce the induction statute or the reserve agreement.

C. BREACH OF CONTRACT

Perhaps the strongest indication of the federal courts' perspective of the enlistment is found in those enlistment cases where an alleged breach has occurred. Despite an earlier reluctance to review government activities in general, the federal courts do consider the merits of the servicemember's arguments and show a disposition to void enlistments where a material breach is proved.[64] The breach of contract argument can arise in various ways. It has, for instance, been raised by reservists who have been involuntarily activated, whether as a result of presidential direction or because of repeated acts of misconduct while in reserve status.[65] Relief is usually sought on the argument that the Government has illegally modified the contract.

An example of involuntary activation can be found in *Pfile v. Corcoran*.[66] The enlistment contract provided that the enlistee could be ordered to active duty for training for a maximum period of forty-five days if at any time he failed to perform satisfactorily. After the contract was entered, Congress increased the period of required active duty to twenty-four months.[67] Pfile subsequently missed the required summer camp and was ordered to active duty for two years. His argument, that Congress could not change the terms of his original enlistment contract, was rejected. A contract of this type, the court noted, "always stands in the shadow of the

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[61] Billings v. Truesdale, 321 U.S. 542 (1944); United States v. Mellis, 59 F. Supp. 682 (M.D.N.C. 1945) (distinguishing *Billings*). *See also* Mayborn v. Heflebower, 145 F.2d 864 (5th Cir. 1944).

[62] Konn v. Laird, 460 F.2d 1318 (7th Cir. 1972) (unexcused absences which prompted activation were improperly assessed against reservist). However, failure of the service to follow its own regulations was not fatal in White v. Callaway, 501 F.2d 672 (5th Cir. 1974), or in Alston v. Schlesinger, 368 F. Supp. 537 (D. Mass. 1974). A discussion of involuntary activation is found in Dilloff, *Involuntary Activation of Reservists*, 63 KY. L.J. 895 (1975).

[63] The voluntary entry sets enlistments apart from inductions. Brown v. McNamara, 387 F.2d 150, 152 (3d Cir. 1967).

[64] *But see* United States *ex rel.* Lewis v. Laird, 337 F. Supp. 118, 120 (S.D. Ill. 1972), where the court doubted that extraordinary relief would be available to obtain review of an alleged breach of the enlistment contract by the Government.

[65] *See* note 62 and accompanying text *supra*.

[66] 287 F. Supp. 554 (D. Colo. 1968).

[67] Act of June 30, 1967, Pub. L. No. 90-40, § 6(1), 81 Stat. 105.

exercise by Congress of positive paramount sovereign powers." [68] The "sovereign powers" in this case were the congressional war powers.[69]

The breach of contract argument is usually raised where the servicemember alleges that his enlistment options were not fulfilled. Illustrative of the trend of the federal courts in this area is *Bemis v. Whalen*.[70] The petitioner, Bemis, sought a discharge from the Marine Corps on the grounds of false representations and breach of contract. He had enlisted after being guaranteed a military occupational specialty (MOS) in electronics. He was, in the words of the court, also desirous of completing his military obligation and being able to take advantage of educational benefits under the G.I. Bill. The military made a mistake and Bemis was extensively trained in a different MOS as a telephone/teletype technician. The error was discovered and Bemis was assigned to a school for training in the original specialty. Seeking relief, he nonetheless took his cause to federal court and sought his discharge.

The court, relying on *Grimley*, defined an enlistment as a "contract between the United States and the enlistee [that] in the absence of supervening statute, is governed by general principles of contract law [and] a party induced by fraud or mistake to enter into a contract may rescind that contract. . . ." [71] Using repeated contractual references such as "contractual obligations" and "benefit of bargain," the court ruled that Bemis was in fact receiving what he had bargained for. Because time was not of the essence in receiving the guaranteed training, there was no material breach of contract.[72]

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[68] 287 F. Supp. at 561.

[69] *See* U.S. CONST. art. I, § 8, cl. 11 (power to declare war); *id.* cl. 12 (power to raise and support armies); *id.* cl. 14 (power to make rules for the government and regulation of the land and naval forces). *See also* Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971), where the court, in declaring that a reservist could be activated notwithstanding clauses in his enlistment contract to the contrary, stated:

> Here, the possible detriment to the individual is great. If the activation order is upheld, his liberty will be significantly limited by military discipline, and there is a significant risk that he might be wounded in battle or even killed. But at the same time, the governmental interest in raising an army has, without exception, been considered by the courts to be paramount. Thus the ordinary balancing tests are rendered almost irrelevant by the transcendent importance of the war power.

Id. at 594 (citations omitted).

[70] 341 F. Supp. 1289 (S.D. Cal. 1972).

[71] *Id.* at 1291.

[72] The "material breach" requirement was also relied upon in rejecting a serviceman's request for recission of his enlistment contract in Crane v. Coleman, 389 F. Supp. 22 (E.D. Pa. 1975). In that case the servicemember claimed that he had not received allotments as promised. The court reasoned that the breach was not

A material breach of contract was found in *Novak v. Rumsfeld*.[73] Novak enlisted in the Navy in December 1974 for a period of four years and shortly thereafter executed a two-year extension contract for the purpose of attaining eligibility for the Nuclear Field Training Program. During a preparatory six-week refresher course, he experienced "scholastic difficulties" and was dismissed from the program. When he was subsequently assigned to a clerical position he requested a discharge from the Navy. His request was denied.

In granting the servicemember's petition for a writ of habeas corpus, the court noted that Novak had entered into both the original enlistment contract and the extension agreement because of the opportunity for advanced training.[74] By not providing the promised training, the Navy, according to the court, had materially breached not only the extension agreement but also the original enlistment agreement.[75] The court further noted that the Navy had not

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so material and substantial in nature that it affected the essence of the contract and defeated the object of the parties. In Hayes v. Secretary of Defense, 515 F.2d 668 (D.C. Cir. 1975), the court rejected a breach of contract argument. The servicemember had not received a promised military intelligence assignment. The court examined the enlistment contract and determined that the Government had properly reassigned him. He had not "qualified" for the position—a condition precedent specifically provided for in the contract. And in United States *ex rel.* Roman v. Schlesinger, 404 F. Supp. 77 (E.D.N.Y. 1975), the servicemember was deemed to have waived the equitable relief of recission because he had waited almost a year after discovering that he was not going to receive the schooling indicated in his enlistment contract. The servicemember in Matzelle v. Pratt, 332 F. Supp. 1010 (E.D. Va. 1971) was also denied relief. Government delay (several days) in paying a lump sum bonus was not a material breach. The court noted that the servicemember was more interested in rescinding his enlistment contract than in receiving the money. The case contains a good discussion of the remedy of recission.

[73] 423 F. Supp. 971 (N.D. Cal. 1976).

[74] There is no indication whether Novak's motives for originally enlisting were ever incorporated into the enlistment contract or its annexes. Normally, the servicemember is bound by the "Statements of Understanding" absent a showing of fraud. Chalfant v. Laird, 420 F.2d 945 (9th Cir. 1969). Oral promises are not binding on the Government. Jackson v. United States, 551 F.2d 282 (Ct. Cl. 1977). Nonetheless the court seemed content in setting aside the original contract on the basis of the servicemember's allegations concerning his motives for executing it.

[75] Navy regulations provided that extension agreements could be set aside if promised benefits were not provided. But no provisions were cited which allowed the servicemember to avoid the original enlistment contract. The court distinguished Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1960), where the servicemember had received substantially all of his promised benefits before seeking recission. The court made no mention of its earlier decision in Quinn v. Schlesinger, 4 Mil. L. Rep. 2383 (No. C-75-1670 WHO, N.D. Cal. Dec. 22, 1975) (oral opinion). In *Quinn* the naval servicemember had enlisted for service on the West Coast. When he was assigned to Okinawa, he sought and was denied a discharge. After he instituted judicial proceedings, he was assigned to San Diego. The court, in granting the petition for a writ of habeas corpus, distinguished

adequately informed Novak of the rigorous program requirements. No mention was made of any possible justification for the "breach" by the Government.[76]

Relief under contract principles was also granted to the servicemember in *Larionoff v. United States*.[77] In *Larionoff* the petitioner enlisted in June 1969 for a period of four years. In July 1969 he executed an agreement to extend his period of service by two years for the purpose of serving in a critical military skill and in consideration of the "pay, allowances, and benefits which will accrue . . . during the continuance of [his] service." [78]

When Larionoff signed the extension agreement the Government was offering variable reenlistment bonuses (VRB's) [79] which he would receive upon the commencement of the extended period of service. However, in July 1972 (while he was still serving under his original four-year enlistment) the Navy discontinued the payment of VRB's for the critical military skill in which Larionoff was qualified. When he commenced his two-year extension of service, he was paid the Regular Reenlistment Bonus.

Larionoff was joined by other servicemembers in a class action suit brought under the Tucker Act [80] to recover amounts allegedly due under the VRB's. The federal district court granted relief and declared that if the servicemembers were bound to the reenlistment contracts from the time of their execution, then mutuality of agreement required that the Government also be bound by its promise to pay the bonuses. The court noted that the language of the contract must be considered in light of the situation and relationship of the parties, the circumstances surrounding them at the time of the contract, the nature of the subject matter, and the purpose of the contract. Here, because the servicemembers had relied upon the in-

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Bemis v. Whalen because of the delay in receiving the promised benefits.

[76] The Statement of Understanding provided in part: "To remain eligible for the one year formal nuclear training, personnel must continually display excellent military performance and demonstrate the academic potential to complete Nuclear Power School by standing in the upper two-thirds of their basic "A" School class." The court did not read this provision as requiring academic "excellence" at the preschool although it might be argued that the Navy was justified in dismissing Novak for failure to "continually display excellent military performance" (posting below average grades in the preschool).

[77] 365 F. Supp. 140 (D.D.C. 1973), *aff'd*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 97 S.Ct. 2151 (1977).

[78] 365 F. Supp. at 144.

[79] The circuit court reviewed the early statutes providing for monetary bonuses. *See* 533 F.2d 1167, 1173 nn. 16 & 17 (D.C. Cir. 1976).

[80] 28 U.S.C. § 1346(a)(2) (1970).

ducement of the bonus and because the Government had received the bargained-for services from the enlistees, the Government was bound to pay the vested bonuses to those who had signed their contracts for extension prior to the Navy's announced termination of the VRB's in March 1972.

The decision was affirmed by the circuit court.[81] In its affirmance the court rejected the government's argument that the servicemembers were entitled only to the VRB (if any) in effect when they actually entered into the period of extended service. It accepted the servicemembers' argument that they had signed their extension contracts in consideration of, among other things, the VRB. The court further noted:

> The Government authored those extensions contracts, and it could easily have inserted a provision limiting an enlisted member's VRB eligibility to the award level in effect on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment. But there is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military regulations.[82]

Continuing, the court held that servicemembers who had signed their extension agreements prior to congressional termination of the VRB's in 1974 [83] were also entitled to their bonuses:

> Since contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. . . . And although Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the "War Powers," . . . Congress is "without power to *reduce expenditures* by abrogating contractual obligations of the United States." [84]

Because the court could find no basis in the legislative history to establish that Congress was exercising some paramount power which might justify abrogation of existing contract rights, the contractual entitlement to the VRB stood unimpaired.

The Supreme Court, in a five-to-four decision, affirmed the circuit court's decision.[85] However, the Court based its decision on congressional control over military pay and did not treat the serv-

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[81] 533 F.2d 1167 (D.C. Cir. 1976); *accord* Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975).
[82] 533 F.2d at 1178 (footnote omitted).
[83] Act of May 10, 1974, Pub. L. No. 93-277, § 2611, 88 Stat. 119.
[84] 533 F.2d at 1179 (citations omitted).
[85] 97 S. Ct. 2151 (1977).

icemembers' claims as contractual.[86] Justice Brennan, writing for the majority, reviewed the legislative history of the VRB's and concluded:

> The clear intention of Congress to enact a program that "concentrates monetary awards at the first re-enlistment decision point where the greatest returns per retention dollar can be expected," could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. Instead, the challenged regulations provided for a virtual lottery. We therefore hold that insofar as the Defense Department regulations required that the amount of the VRB to be paid to a servicemember who was otherwise eligible to receive one be determined by the award level as of the time he began to serve his extended enlistment, they are in clear conflict with the congressional intention in enacting the VRB program, and hence invalid.[87]

Consequently, Larionoff and the members of his class were entitled to bonuses computed at the level in effect when they agreed to extend their enlistments. Likewise, those who had agreed to, but had not actually commenced their periods of extended service prior to congressional termination of the VRB's in 1974 were entitled to bonuses computed at the level in effect when they agreed to extend their enlistments. The Court predicated this holding on the fact that nothing in the language of the 1974 Act expressed an intention to affect the rights of servicemembers who had previously extended their enlistments.[88]

Larionoff does reinforce the line of cases which have treated

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[86] "[T]he rights of the affected service members must be determined by reference to the statutes and regulations governing the VRB, rather than to ordinary contract principles. 45 U.S.L.W. at 4651 (citation and footnote omitted).

[87] *Id.* at 4654. Mr. Justice White, in a dissent in which Chief Justice Burger and Justices Blackmun and Rehnquist joined, noted that those who had executed reenlistment agreements had no vested right to any particular pay, allowance, or benefit and that any cancellation of the VRB prior to the commencement of the extended period of service was not forbidden by law. *Id.* at 4655. The Court noted that a constant theme in the hearings, committee reports, and the floor debates was the argument that the VRB would be effective as an inducement to reenlist because it would be provided at the "decision point." *Id.* at n.17. In this case Larionoff's decision point was in 1969 when he executed both his enlistment and extension agreements.

[88] The Court noted that its decision on this point was in conflict with the circuit court opinions in Collins v. Rumsfeld, 542 F.2d 1109 (9th Cir. 1976), *vacated* sub nom. Saylors v. United States, 45 U.S.L.W. 3818 (June 21, 1977) and Carini v. United States, 528 F.2d 738 (4th Cir. 1975), *vacated*, 45 U.S.L.W. 3818 (June 21, 1977), where the courts had equated bonuses to other forms of pay controlled by Congress and found no basis for holding that the right to the bonuses had accrued before the 1974 Act. The decisions seemed to rest on the traditional proposition that the Congress, in exercise of its paramount powers, could exercise a great deal of control over questions of military pay.

areas of pay and other monetary benefits as questions of statute and not contract. The decision should therefore be limited to its facts and should not be construed as a rejection of the growing body of law which views the soldier-state relationship as a matter of contract.

D. SUMMARY

The federal courts still pay the necessary homage to the Supreme Court's opinion in *United States v. Grimley*. Yet, there is a trend away from language in *Grimley* which indicated that "no breach of the contract destroys the new status. . . ." *Grimley*, of course, dealt only with the criminal aspects of an enlistment contract. Contemporary federal courts are dealing primarily with the civil aspects, namely questions of contract performance. Cases such as *Novak v. Rumsfeld* may portend widespread abrogation of enlistment contracts where the Government has materially breached the agreement. Whether the federal courts on the whole will at some point completely disregard the peculiar status-creating nature of the enlistment contract and treat both the Government and servicemember as private parties remains to be seen.[89] That approach has been suggested.[90]

V. THE MILITARY PERSPECTIVE: THE ENLISTMENT IS PRIMARILY A CHANGE OF STATUS

While at first blush there would not seem to be any variance, there are important distinctions in the approaches taken by the federal courts and the military judicial system. As noted in the preceding section, the federal courts generally utilize principles of contract law when determining the validity of an enlistment agreement. The military courts do not.[91] However, the administrative opinions rendered by the Army's Judge Advocate General [92] do indicate some

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[89] Adams v. Clifford, 294 F. Supp. 1318 (D. Hawaii 1969). Once formed, the particular status is not easily set aside. Illegality or material breach must be shown. *See, e.g., In re* Green, 156 F. Supp. 174 (S.D. Cal. 1957).

[90] Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974).

[91] In this article a distinction is made between federal courts and the military courts. The former are established pursuant to Article III of the United States Constitution. The latter are formed under the provisions of Article I, § 8 of the United States Constitution.

[92] For purposes of this article, the term "The Judge Advocate General" will be used to designate The Judge Advocate General of the Army.

application of contract principles. The distinctions in the positions of the military courts, the Office of The Judge Advocate General, and the federal courts have not always been so clear.

A. THE MILITARY AND FEDERAL PERSPECTIVES— ONE AND THE SAME

Because early courts-martial were not subject to judicial review within the military,[93] there is no early military judicial position on the question of enlistments. However, military treatises [94] and opinions by the Office of The Judge Advocate General of the Army provide a rich source of material which reveal the early military approaches to enlistments.

The treatises are instructive. Colonel Winthrop's coverage of the area seems thorough and closely linked to the federal perspective. Who influenced whom is not clear.[95] One thing is clear: until the middle of the twentieth century the military departments considered enlistment contracts to be personal service contracts. The enlistment contract was peculiar, but it was nonetheless a contract to be interpreted by application of contract law.

The early military position was comparable to that taken by the Supreme Court and lower federal courts when faced with an irregular enlistment. Drawing heavily from both state and federal decisions, the military writers and the Army's Judge Advocate General followed those decisions almost to the letter:

a. Statutory requirements were for the benefit of the Government and a statutorily defective enlistment was voidable, not void, unless the enlistee was without legal capacity to contract by reason of intoxication, insanity or youth.[96]
b. Contravention of military regulations did not per se affect the validity of the contract. The contract would be voidable.[97]

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[93] A convicted servicemember could seek a writ of habeas corpus on the basis that his court-martial lacked jurisdiction to try him. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[94] G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (1898); W. WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920 reprint).

[95] Winthrop's work was cited numerous times by the federal courts, and in at least one case Winthrop was a counsel of record. *See In re* McVey, 23 F. 878 (D. Cal. 1885).

[96] W. WINTHROP, *supra* note 94, at 545. *But see* note 102 and accompanying text *infra*.

[97] G. DAVIS, *supra* note 94, at 349; W. WINTHROP, *supra* note 94, at 546.

c. Once a contract was entered into, a breach by the enlistee would not automatically void the contract. Likewise, the Executive could not materially alter the terms of the contract authorized by Congress.[98]

These general principles varied little until the post-World War II years when Congress, in reorganizing the military judicial system, created an appellate judicial tribunal to review courts-martial.[99]

B. THE FEDERAL VIEW AND THE MILITARY VIEW: A PARTING OF THE WAYS

The new United States Court of Military Appeals was soon confronted with the enlistment questions which the federal and state courts had reviewed many times during the preceding 150 years. The court, citing the rationale of *Grimley*, reiterated that an enlistment is a contract which gives rise to a status.[100] In *United States v. Blanton* [101] the accused had enlisted at the age of fourteen years and went AWOL one day before his sixteenth birthday. According to the court, his enlistment was void [102] because he had at no time served in the Army when he was legally competent to do so.[103] The Government's argument, that the minimum age requirement was for the benefit of the Government, was rejected. The capacity of a minor to change his status, the court stated, had been limited by statute.[104] In language which set the tone for things to come the court noted:

An agreement to enlist in an armed service is often referred to as a

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[98] G. DAVIS, *supra* note 94, at 349; W. WINTHROP, *supra* note 94, at 547.

[99] The United States Court of Military Appeals was established by the Uniform Code of Military Justice, Act of May 5, 1950, ch. 169 (art. 67), 64 Stat. 129 (codified in 10 U.S.C. § 867 (1970)).

[100] United States v. Downs, 3 C.M.A. 90, 11 C.M.R. 90 (1953).

[101] 7 C.M.A. 664, 23 C.M.R. 128 (1957).

[102] In *Blanton* the Government argued that at the most, the minor servicemember's enlistment was "voidable." That position reflected a longstanding policy which had been asserted by the framers of the 1928 and 1949 Manuals for Courts-Martial and the Army's Judge Advocate General. *See* JAG 250.4, 11 May 1918, *as digested in* DIG. OPS. JAG 1912–1940 § 359(c)(3), at 168; MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1928, para. 157; MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1949, para. 189. There was no such reference in the 1951 Manual for Courts-Martial. Army Reg. 615–362, para. 15 (14 July 1947), provided that commanders could review the enlistment of a minor and use discretion in retaining or discharging him. That provision was rescinded in Army Reg. 615–362, para. 15 (14 July 1948).

[103] 10 U.S.C. § 3256 (1956) (repealed 1968).

[104] The court virtually ignored the massive body of federal law (*Grimley* and *Morrissey*'s progeny) which had applied contract principles in determining the validity of enlistment contracts.

> contract. However, more than a contractual relationship is established. What is really created is a status. As a result, no useful purpose is served by reviewing the common-law rules of contract and whether the contract of a minor is, under the common law, voidable at his election and in his own time, with or without formal proceedings. The United States Supreme Court has emphasized that the "age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature." We must, therefore, look to the statutes to determine whether Congress has established a minimum age at which a person is deemed incapable of changing his status to that of a member of the military establishment.[105]

Later opinions of that court specifically cite the *Blanton* opinion for the proposition that "[e]nlistment in the armed forces does not establish a contract relationship between the individual and the Government, but a status." [106] The court has continued to emphasize that point.[107]

What effect, if any, does the difference in approach to enlistments have? If the enlistment contract is viewed as a voluntary agreement which changes status but nonetheless creates a contractual or quasi-contractual relationship, then broader principles of contract law may be applied to determine both the existence of an agreement and the parties' respective rights and obligations under such an agreement. If, on the other hand, the enlistment is viewed primarily as a voluntary change of status from civilian to soldier, then the statutory requirements which control the process of effecting this "change" become the operative legal principles and other concepts

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[105] 7 C.M.A. at 665, 23 C.M.R. at 129.

[106] United States v. Hout, 19 C.M.A. 299, 41 C.M.R. 299 (1970). *See also* United States v. Anderson, 51 C.M.R. 45 (A.F.C.M.R. 1975).

[107] Through this opinion and in many others which followed, the Court of Military Appeals has emphasized the word "status" when citing the familiar language from *Grimley*. *See, e.g.*, notes 118, 119 & 120 and accompanying text *infra*. *See also* Taylor v. Reasor, 19 C.M.A. 405, 42 C.M.R. 7 (1970); United States v. Noyd, 18 C.M.A. 483, 40 C.M.R. 195 (1969); United States v. Anderson, 51 C.M.R. 45 (A.F.C.M.R. 1975). The military courts' view of the enlistment as primarily a change of "status" seems especially strong in those cases where an accused servicemember argues that because his term of agreed service has passed, the court-martial has no jurisdiction. Perhaps the courts fear that viewing the enlistment as a contract will strengthen the servicemember's argument. If so, that fear is unfounded. The enlistment contract provides that the terms of the agreement are also governed by statutes and regulations. *See* Goldstein v. Clifford, 290 F. Supp. 275, 279 (D.N.J. 1968). Controlling statutes and regulations provide for court-martial jurisdiction over persons whose term of enlistment has expired. *See, e.g.*, 10 U.S.C. § 803 (1970); note 170 and accompanying text *infra*. The fact that in certain cases status may continue past the term provided for in the enlistment contract does not compel the conclusion that no contractual relationship has existed between the Government and the servicemember.

tend to become obscured. Under such a "status" analysis, if the statutory and regulatory requirements are not met, the enlistment may be ruled invalid because the Government has failed to follow its own regulations. A brief overview of the military position confirms this. The military's judicial and administrative opinions tend to fall within two major areas:

a. Those cases where the enlistment contract was executed in contravention of statutes or military regulations, and
b. Those cases where a "breach" (by either party) of the enlistment contract has taken place.

C. ENLISTMENTS VIOLATING STATUTES OR REGULATIONS

Most statutory irregularities are found in the category of minority enlistments.[108] In cases where the validity of a minority enlistment has been raised, the military courts and The Judge Advocate General have followed the *Blanton* rationale that Congress has promulgated the standards for changing status from civilian to soldier.[109] By looking exclusively at the statutory formalities required to change an individual's status, the courts and The Judge Advocate General have not given adequate attention to *Morrissey*'s reliance

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[108] The following are minority enlistment cases: United States v. Graham, 22 C.M.A. 75, 46 C.M.R. 75 (1972); United States v. Lenoir, 18 C.M.A. 387, 40 C.M.R. 99 (1969); United States v. Bean, 13 C.M.A. 203, 32 C.M.R. 203 (1962) (numerous citations to minority enlistment cases); United States v. Scott, 11 C.M.A. 655, 29 C.M.R. 471 (1960); United States v. Overton, 9 C.M.A. 684, 26 C.M.R. 464 (1958); United States v. Reese, 9 C.M.A. 205, 25 C.M.R. 467 (1958); United States v. Howard, 51 C.M.R. 371 (A.F.C.M.R. 1975); United States v. Garback, 50 C.M.R. 673 (A.C.M.R. 1975); United States v. Brodigan, 50 C.M.R. 419 (N.C.M.R. 1975); United States v. McNeal, 49 C.M.R. 668 (A.C.M.R. 1974) (minor enlisted while in reform school); United States v. Alston, 48 C.M.R. 733 (A.F.C.M.R. 1974); United States v. Mills, 44 C.M.R. 460 (A.C.M.R. 1971); United States v. Liggins, 43 C.M.R. 534 (A.C.M.R. 1970); United States v. Williams, 39 C.M.R. 471 (A.B.R. 1968) (although void minority enlistment may be converted to voidable enlistment at age seventeen, here there was insufficient indication of constructive enlistment where accused served for only five days after seventeenth birthday before going AWOL); United States v. Graves, 39 C.M.R. 438 (A.B.R. 1968) (discussion of federal minority cases); United States v. Fant, 25 C.M.R. 643 (A.B.R. 1958); United States v. DeGraffenreid, 23 C.M.R. 659 (N.B.R. 1957).

[109] *See, e.g.*, DAJA-AL 1976/5073, 30 July 1976 (statutory qualifications regarding age). The Secretary of the Army may prohibit or restrict individuals from enlisting except in those cases where a person is granted a statutory right to enlist. For example, he may temporarily restrict enlistment of persons who are not high school graduates. *See* DAJA-AL 1976/4895, 21 June 1976.

on the fact that Congress had authorized sixteen-year olds to "contract" with the military.[110]

In *United States v. Robson* [111] the accused was a Canadian who had fradulently represented himself to be a United States citizen when he enlisted. The Army Board of Review rejected the defense argument that the accused had been incompetent to enlist because he was not a citizen as required by the statute. According to the board, Robson was presumed to be competent to enlist; therefore, the *Blanton* rationale did not apply and the accused was subject to court-martial jurisdiction. In its holding the board recognized that in the past, Congress had permitted enlistment of a limited number of aliens under specific conditions.[112]

Statutory language prohibiting enlistment of persons who are intoxicated [113] was not seen as a disability in *United States v. Julian*.[114] When confronted with arguments that the enlistment was void, the court said:

> We need not answer any of these precise questions as all are premised upon the illegality of an enlistment of an intoxicated person. We do not hold that such enlistments are either void or *void ab initio* as claimed. We find it unnecessary to examine the fineness of the contentions.
>
> As we conceive the argument brought here the question for our consideration is not to determine the legality, *vel non* of a contract of enlistment regular on its face, but whether the court below possessed the legal power to try appellant for his military offenses because appellant was in *actual service*. This is what the trial judge found even conceding the fact that he found the accused was intoxicated at the time he was enlisted.
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> Appellant's enlistment contract having been executed, albeit accomplished as he now contends, while intoxicated, it does not follow that he can escape either his court-martial or its penalty.[115]

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[110] The Supreme Court stated: "The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature." 137 U.S. at 159. Considering the fact that the Court was speaking to the question of the validity of contracts of enlistment, the above language implies that Congress had authorized sixteen-year-olds to enter enlistment *contracts*. And in United States v. Williams, 302 U.S. 46 (1937), the Supreme Court stated that by enacting legislation governing enlistments, Congress had declared who was capable of making *contracts* to enter military service.

[111] 24 C.M.R. 375 (A.B.R. 1957).

[112] 10 U.S.C. § 621c (1950) (Lodge Act) (expired June 30, 1959). The current statute is 10 U.S.C. § 3253 (1970). *See also* note 49 *supra*. The court believed that the statute embodied the policy that military service will, in general, be performed by citizens rather than foreign mercenaries.

[113] 10 U.S.C. § 504 (1970).

[114] 45 C.M.R. 876 (N.C.M.R. 1971).

[115] *Id.* at 877.

The rationale for sustaining jurisdiction rested on the policy that once a soldier commits a crime, the validity of his enlistment cannot be used as a bar to jurisdiction.[116]

Recent cases have considered the effect of violations of regulations during the enlistment process. Almost all aspects of the enlistment procedure are now covered by regulations.[117] A quick review of the pertinent regulations reveals many possibilities for claiming that an enlistment is invalid because the military did not follow its own regulations. The principal cases dealing with this contention are the Court of Military Appeals' decisions in *United States v. Catlow*,[118] *United States v. Brown*,[119] and *United States v.*

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[116] The court was making a distinction between *de facto* service and *de jure* service. In doing so it fell in line with the federal opinions which either made the distinction or simply decided that pending charges temporarily mooted the issue of validity of the enlistment. No mention was made of the concept of "constructive enlistments." *See* note 227 *infra*. *See In re* McVey, 23 F. 878 (D. Cal. 1885); note 45 and accompanying text *supra*.

[117] The basic Army regulation governing enlistments is Army Reg. No. 601-210, Regular Army Enlistment Program (15 Jan. 1975). It spells out in detail how enlistments are to be effected and where necessary, refers the reader to the other regulations governing the processing of recruits. *See, e.g.*, Army Reg. No. 611-5, Army Personnel Tests (1 Oct. 1975); Army Reg. No. 340-18-7, Maintenance and Disposition of Military Personnel Functional Files (14 Aug. 1969); Army Reg. No. 601-270, Armed Forces Examining and Entrance Stations (18 Mar. 1969); Army Reg. No. 611-201, Enlisted Career Management Fields and Military Occupational Specialties (1 Oct. 1973); Army Reg. No. 40-501, Standards of Medical Fitness (5 Dec. 1960); Army Reg. No. 601-208, Recruiting/Reenlistment Publicity Program (15 May 1973).

[118] 23 C.M.A. 142, 48 C.M.R. 758 (1974) (no court-martial jurisdiction over "coerced" volunteer). The problem of "coerced volunteers" is ageless. The decision in *Catlow* gives no real indication of the Army's long campaign to eliminate the practice of offering an offender the choice of going to jail or joining the Army. *See* DAJA-AL 1976/4356, 19 May 1976. The court did refer to a letter from the Army's Judge Advocate General to various chief justices which solicited assistance in stopping the practice. The court noted that "implicit in the letter were findings of fact predicated upon empirical experience." If such data existed it was not presented by the defense. Nonetheless the court determined that the regulation prohibiting such enlistments was also for the benefit of the soldier. The case prompted a number of articles and cases. *See, e.g.*, United States v. Barret, 23 C.M.A. 474, 50 C.M.R. 493 (1975); United States v. Dumas, 23 C.M.R. 278, 49 C.M.R. 453 (1975); United States v. Martinez, 52 C.M.R. 59 (A.C.M.R. 1976); United States v. Barksdale, 50 C.M.R. 430 (N.C.M.R. 1975); United States v. Ross, NCM 75 1292 (N.C.M.R. 20 Mar. 1975) (unpublished); United States v. Day, NCM 75 0053 (N.C.M.R. 9 Sept. 1974) (unpublished); Dilloff, *The Involuntary Volunteer: Coerced Military Enlistments*, 25 AM. U. L. REV. 437 (1976); Ziegler, The Impact of *United States v. Catlow* (March 1976) (unpublished paper in The Judge Advocate General's School, United States Army).

Recently the Army Court of Military Review affirmed a finding of jurisdiction over a "coerced inductee" who had submitted to induction in return for dismissal of draft law violation indictments. The court distinguished *Catlow* and noted that the accused had no right to be free of the draft. *See* United States v. Wood, 54

Russo,[120] although these decisions do not stand alone.[121]

Of the three, *Russo* presents the greatest insight into the potential problems presented by enlistments which in some form violate a regulation. Russo suffered from dyslexia, a nervous condition which severely impairs the ability to read. Both he and his mother informed the recruiter of his disability; the recruiter then provided Russo with a list of numbers and letters to put on the Armed Forces Qualifications Test. Russo was enlisted, and later tried and convicted by a court-martial. On appeal, he contended that he was not subject to court-martial jurisdiction. The Court of Military Appeals agreed and set aside his conviction.

The court noted that the controlling regulations are for the ultimate protection of the individual, and that the recruit "can best as-

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C.M.R. Adv. Sh. 345 (A.C.M.R. 1976). *See also* Korte v. United States, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959) (no man has constitutional right to be free from call to military service).

[119] 23 C.M.A. 162, 48 C.M.R. 778 (1974). Brown, age sixteen, bribed and forged his way into the Army by presenting himself as a seventeen-year-old who possessed the parental consent required for enlistment at his age. The facts were contested by affidavits on appeal. In reversing the Army Court of Military Review's decision, which found jurisdiction based upon a constructive enlistment, the Court of Military Appeals held that "fairness" prevented the Government from relying on a constructive enlistment as a basis for court-martial jurisdiction. According to the court, the Government was estopped because (1) the recruiter had failed to witness the "forged" parental consent form and (2) Brown's company commander had not acted properly after receiving notice of Brown's true age. The court noted that ordinarily an enlistee under the age of seventeen may constructively enlist where he continues to serve after passing the minimum statutory age. *Before reaching that minimum age, however, he was "statutorily incompetent to acquire military status."* 23 C.M.A. at 164, 48 C.M.R. at 780. The Army's Judge Advocate General later ruled that Brown's service records, under the regulations, could not reflect any bar to enlistment. *See* DAJA-AL 1975/3991, 22 May 1975. Brown, whose conviction for robbery was nullified, could again enlist in the armed services, assuming he met other eligibility requirements.

[120] 23 C.M.A. 511, 50 C.M.R. 650 (1975).

[121] In the following cases the enlistments were challenged on the grounds that the Government failed to follow its regulations: United States v. Muniz, 23 C.M.A. 530, 50 C.M.R. 669 (1975); United States v. Bobkoskie, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); United States v. Ruggerio, 54 C.M.R. Adv. Sh. 683 (N.C.M.R. 1977); United States v. Robinson, 51 C.M.R. 838 (N.C.M.R. 1976); United States v. Jones, 50 C.M.R. 92 (A.C.M.R. 1975); United States v. Huddlestone, 50 C.M.R. 99 (A.C.M.R. 1975); United States v. Bunnel, 49 C.M.R. 64 (A.C.M.R. 1974); United States v. Deville, 49 C.M.R. 263 (A.C.M.R. 1974); United States v. Parker, 47 C.M.R. 762 (C.G.C.M.R. 1973); United States v. Holloway, 18 C.M.R. 909 (A.F.B.R. 1955); United States v. Perry, 1 C.M.R. 516 (N.B.R. 1951); United States v. Mott, NCM 75 1940 (N.C.M.R. 20 Oct. 1975) (unpublished); United States v. Van Allen, NCM 75 1516 (N.C.M.R. 12 Sept. 1975) (unpublished); United States v. Rios, NCM 75 0787 (N.C.M.R. 31 July 1975) (unpublished). *See also* United States v. Burden, 23 C.M.A. 510, 50 C.M.R. 649 (1975) (court cited *Russo* in voiding induction); United States v. Arthur, 51 C.M.R. 757 (A.C.M.R. 1975) (court voided inductions because Government failed to follow regulations).

sure enforcement" of such protections.[122] Because the regulations in question are for the protection of the individual's personal liberties or interests, the court noted that the Government is bound to abide by its own rules and regulations.[123] Citing language from *Grimley*, the court stated that the Government may not knowingly violate its own regulations by entering into "illegal enlistment contracts" and then "rely upon the change of status doctrine as a shield to avoid judicial scrutiny. To so conclude would be to countenance on behalf of recruiters the very procedure found objectionable in *Grimley*." [124] The court continued:

> Because fradulent enlistments are not in the public interest, we believe that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fradulent enlistment statute, as was the situation here, the resulting enlistment is void as contrary to public policy. Hence the change of status alluded to in *Grimley* never occurred in this case.[125]

The court optimistically added that its holding would have the "salutary effect of encouraging recruiters to observe applicable re-

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[122] 23 C.M.A. at 512, 50 C.M.R. at 651. The regulatory provision (Trainability Requirements) in question was Rule C, Tables 2–1 and 2–2, Army Reg. No. 601–210, Personnel Procurement, Regular Army Enlistment Program (24 Mar. 1969). The court in effect disregarded the *Grimley* language which stated that such qualifications were for the benefit of the Government.

[123] *See* 23 C.M.A. at 512, 50 C.M.R. at 651. The court's reliance on American Farm Lines v. Black Ball Freight, 397 U.S. 532 (1970) was misplaced. In that case the procedural regulations were for the benefit of the Government (ICC), not the complaining individuals. The court stated: "[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." 397 U.S. at 553. United States v. Shaughnessy, 347 U.S. 260 (1954), also relied upon to support this position, can likewise be readily distinguished from *Russo*. In *Shaughnessy*, the Court was concerned with the legality of the Attorney General side-stepping existing regulations and depriving an alien of his "right" to a fair hearing before the Board of Immigration Appeals. The regulation in question was clearly instituted for the benefit of aliens facing deportation.

Only by using strained logic can it be argued that the eligibility criteria in question (Army Reg. No. 601–210) were intended for the *primary* benefit of the servicemembers. The general rule is that the regulation in question must be for the *primary* benefit of the complaining party. At best, the Court of Military Appeals in *Russo* only delineated collateral benefits to the enlistee.

[124] The "procedure found objectionable in *Grimley*" must have been Grimley's argument that *his* fraud served to void his enlistment. *See* 137 U.S. at 150–51. The Court of Military Appeals seems to be laboring under the false assumption that sustaining jurisdiction will countenance the illegal actions of the recruiter. If the recruiter has violated applicable statutes or regulations, administrative and/or criminal sanctions should be imposed.

[125] 23 C.M.A. at 513, 50 C.M.R. at 652.

cruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices." [126]

The *Russo* rationale was galvanized in *United States v. Little* [127] where the recruiter, after having been told that the recruit was illiterate, allegedly assisted him on his second Armed Forces Qualifications Test by explaining the meaning of some of the words. This technical violation,[128] according to the court, succeeded in destroying the only vehicle available to determine literacy, one of the "essential prerequisites for enlistment." [129]

The long range effect of these cases is not clear.[130] The Court of

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[126] *Id.* at 512, 50 C.M.R. at 651. In adopting what in effect amounts to an "exclusionary" rule, the court adopted an ironic twist in military law. Because the burden rests upon the Government to prove jurisdiction over the accused, the trial counsel is placed in the position of establishing the *innocence* of the recruiter. If he fails and the military judge dismisses the charges on the *Russo* rationale, does not that ruling amount to a finding that the recruiter's "misconduct amounts to a violation of the fradulent enlistment statute?" *See* UNIFORM CODE OF MILITARY JUSTICE art. 84, 10 U.S.C. § 884 (1970). If the Court of Military Appeals continues to bind itself to the *Russo* posture, then it should also adopt the rule that: (1) it must be presumed that the accused was competent to enlist; and (2) in order to rebut that presumption, the accused must show his disqualification *and* that recruiter misconduct, if any, amounted to an intentional violation of the fraudulent enlistment statute. For a discussion of the Government's burden of proof in establishing jurisdiction *see* United States v. Spicer, 3 M.J. 689 (N.C.M.R. 1977); United States v. Bobkoskie, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); United States v. Brede, NCM 76 1946 (N.C.M.R. 23 Feb. 1977) (unpublished); United States v. Barefield, NCM 76 0435 (N.C.M.R. 21 June 1976) (unpublished).

[127] 24 C.M.A. 328, 52 C.M.R. 39 (1976).

[128] In *Russo*, the court predicated avoidance of the enlistment on "violation of the fraudulent enlistment statute." However, in *Little* the court voided the enlistment not on an intentional violation of the statute but rather on what could be characterized as a good faith effort on the part of the recruiter. The court, therefore, has not made a distinction between active misconduct and good faith "technical violations." In United States v. Holmes, CM 433150 (A.C.M.R. 6 May 1976) (unpublished), the accused had enlisted in spite of mental and physical bars to enlistment. The court held that enlistment was void; while the accused's allegation fell short of an affirmative showing of "misconduct," it did establish that the recruiter was at least "negligent" in failing to investigate the accused's qualifications. *Accord*, United States v. Johnson, NCM 76 0332 (N.C.M.R. 12 August 1976) (unpublished). *But see* United States v. Ewing, CM 433114 (A.C.M.R. 27 May 1977 (unpublished) and United States v. Harrison, NCM 77 0239 (N.C.M.R. 18 Aug. 1977) (unpublished) (negligence does not void enlistment).

[129] What is an "essential prerequisite for enlistment?" The court seems dangerously close to legislating prerequisites for military service. Establishing criteria for enlistment is a function of either Congress or the executive department. It is not a function of judicial bodies, federal or military. *See, e.g.*, United States v. Standard Oil Co., 332 U.S. 301, 316 (1947).

[130] At least one writer feels that these recent military cases have rung the death knell of the constructive enlistment concept. *See* Grayson, *Recent Developments in Court-Martial Jurisdiction: The Demise of Constructive Enlistment*, 72 MIL. L. REV. 117 (1976). However, several recent opinions have revitalized the concept. *See, e.g.*, United States v. Wagner, CM 433607 (A.C.M.R. 20 Jul. 1977),

Military Appeals stated in *Russo* that it was applying common law contract principles, but an examination of the common law applications and a review of the court's prior positions on the subject indicate that the court was really applying a "change of status" test.[131] The primary question, in the court's view, was: "Did the enlistment comport with all controlling statutes and regulations?"

These cases obviously deal with the limited question of court-martial jurisdiction, but the rationale has been adopted by The Judge Advocate General in dealing administratively with questionable enlistments.[132] If it is determined by either the military courts or The Judge Advocate General that an enlistment is invalid,[133] collateral questions such as a servicemember's right to accrued pay and veterans' benefits arise.[134] Army regulations now facilitate

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___ M.J. ___ (A.C.M.R. 1977); United States v. De La Puente, CM 434626 (A.C.M.R. 20 June 1977) (memorandum opinion). *See also* Morrow, Informal Entry Into the Military Service (1966) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

[131] In *Russo*, *Catlow*, and *Brown* the Court of Military Appeals applied an estoppel theory which prevented the Government from arguing constructive enlistment. *See*, United States v. Marshall, 3 M.J. 612 (N.C.M.R. 1977). Under common law contract principles, the *Government is not estopped* by the unauthorized acts of one of its officials. *See* United States v. Rossi, 342 F.2d 505 (9th Cir. 1965) and the cases cited therein.

[132] The decision in *Russo* required a shift in position for The Judge Advocate General on the subject of irregular enlistments. *See* DAJA-AL 1975/5179, 4 Nov. 1975. The earlier position had declared that an enlistment entered with frauds being committed by both the enlistee and the recruiter was voidable, not void. *See* DAJA-AL 1975/4137, 9 July 1975. For a discussion of irregular enlistments preceding *Russo*, *see* Goddard, Constructive and Fraudulent Enlistment (1962) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

[133] A great deal of confusion in this area would be eliminated by declaring the enlistment contract in question to be either voidable or valid. Corbin points out that one who says that an "agreement or promise is 'void' usually supposes that it has no legal operation whatever; being in many cases quite unaware that a number of important legal relations have been created." 1 A. CORBIN, CONTRACTS 15 (1963). The legal relation formed here would be the servicemember's "status." Status is not solely dependent upon a valid enlistment contract. That concept has been recognized by the Court of Military Appeals, *see* United States v. King, 28 C.M.R. 243 (1959) (dictum), and the military in general since 1896. *See* DIG. OPS. JAG 1912 *Enlistments* para. 1A–3c, at 603–04 (1896); *accord*, United States v. Reaves, 126 F. 127, 133 (5th Cir. 1903) (enlistment in the Army may be annulled and vacated but its effects remain); United States v. Luce, 2 C.M.R. 734 (A.F.B.R. 1951) (court cites numerous authorities for proposition that fraudulent enlistment has both civil and criminal effects; enlistment may be void for civil purposes but not criminal purposes). To simply declare enlistments "void" often ignores years of valuable and good faith service of a soldier. If an enlistment is considered voidable, the servicemember can at least argue ratification.

[134] Relying on opinions of the Comptroller General, the Army's Judge Advocate General has ruled that once it is determined that an individual is serving under a void enlistment, he is not entitled to any further pay. *See* DAJA-AL 1976/4202, 30 Mar. 1976. *See also* DAJA-AL 1975/3991, 24 Jan. 1975; 55 Comp. Gen. 1421 (1976);

summary separation of a servicemember who claims to have fraudulently enlisted with recruiter connivance.[135] If in fact the enlistment is determined to be void, the individual is released without a discharge and the appropriate personnel forms are completed to show "no service." [136]

D. BREACH OF THE ENLISTMENT CONTRACT

Although the military courts and The Judge Advocate General consider the enlistment to be primarily a question of status when reviewing the basis of court-martial jurisdiction, The Judge Advocate General does consider the enlistment to have the "attributes of the contract" when determining whether there has been a breach of the enlistment agreement.[137] Misconduct by the soldier can be compared to a breach of contract because the soldier has impliedly

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54 Comp. Gen. 291 (1974); 47 Comp. Gen. 671 (1968); 39 Comp. Gen. 360 (1960); 39 Comp. Gen. 742 (1960).

[135] *See* DAPC-EPA-A302228Z Mar. 76, SUBJ: Interim Change to AR 635–200 and 635–206. *See also* DAPE-MPR 301300Z Nov. 76, SUBJ: Processing Fraudulent Enlistments Involving Improper Aid by Recruiting Officials (so-called Recruiter Connivance); DAPE-MPE-PS 011359Z Dec. 76, SUBJ: Clarification of Recruiter Connivance Procedures in Chapter 14, 635–200. Pursuant to these message changes, a commander must void the enlistment if after reasonable inquiry it appears that recruiter connivance was involved. Recruiter connivance does not void the enlistment unless (1) the eligibility requirement in question actually amounted to a disqualification and (2) the disqualifying feature actually existed at the time of enlistment. If the enlistment is void, a commander exercising general court-martial jurisdiction may authorize immediate enlistment of an individual who:

(1) Requests such enlistment; and
(2) Either has no prior service, or if prior service, was eligible at the time of last separation for enlistment without waiver; and
(3) Whose disqualification is waivable (except adult felony conviction); and
(4) Has service prior to voidance which is of a character that clearly supports enlistment.

The individual's personnel records are changed to reflect that any period of voided service is not creditable for promotion or longevity.

[136] DAJA-AL 1975/5186, 29 Oct. 1975. Inequities do exist in such a process. The soldier who has served honorably forfeits arguably gained benefits and the military is subjected to possible enlistment of military offenders at a later time. The appropriate personnel form, DD 214 (Report of Separation From Active Duty) is completed in accordance with Army Reg. 635–5, Personnel Separations-Separation Documents (20 Aug. 1973). The information on this form may serve as a basis for determining what benefits, if any, the individual will receive.

Some of the inequities may be softened by The Judge Advocate General's opinion, DAJA-AL 1976/6028, 30 Dec. 1976. Where the servicemember has acquiesced in good faith to recruiter connivance, he should be separated, when necessary, under AR 635–200, para. 5–31, which gives recognition for previous service. For purposes of court-martial jurisdiction, however, no such distinction is made. According to *Russo*, the enlistment is void. DAJA-AL 1975/5186, 4 Dec. 1975.

[137] DAJA-AL 1975/5398, 2 Dec. 1975 (where servicemember agreed to serve in Korea for 12-month tour, no material breach occurred when Congress changed tour to 13 months). *See also* DAJA-AL 1975/4380, 16 July 1975 (distinguishing technical and material breaches).

agreed to serve in accordance with service regulations. If he fails to do so, the Government in its discretion may discharge him or may instead choose to discipline him and retain him for future service.[138]

What if the Government acts in a manner inconsistent with the terms of the enlistment agreement? Most problems in this area arise in cases in which the servicemember enlists under one of the many options which may include either special training or choice of assignments. When he does not receive what he bargained for, he seeks relief. The Judge Advocate General has noted that in the absence of a supervening statute, emergency, or waiver, an enlistment is normally governed by general principles of contract law.[139] The Government is required to fulfill those commitments included in the enlistment contract.[140]

But according to The Judge Advocate General, not all departures from the terms of the contract are "material breaches" which give rise to a remedy.[141] If, for example, the servicemember receives an occupational specialty other than that promised, a material breach has not occurred if the servicemember's misconduct precluded the "option." [142] If, however, the servicemember is blameless, a material breach serves as the basis for relief.[143] Until recently, temporary deployment (thirty days or less) of servicemembers who were promised specific units or geographical locations did not amount to a material breach.[144] Now, changes to enlistment option agreements

[138] The Government must retain flexibility in retaining or discharging soldiers. One reason for retaining a fraudulent or erroneous enlistee is purely economic in nature. Historically, the military has recognized the cost of training, housing, and feeding recruits. Recovering those expenditures from fraudulent enlistees who are discharged is impractical and the costs may be offset by retaining those enlistees and requiring them to fulfill their enlistment contracts. Although courts hesitate to specifically enforce personal service contracts, the military enlistment contract seems to be the exception. *See* Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121, 147 (1974).

[139] DAJA-AL 1975/5174, 6 Nov. 1975. *See also* DAJA-AL 1975/5398, 2 Dec. 1976; notes 66–69 and accompanying text *supra*.

[140] DAJA-AL 1976/5074, 6 Aug. 1976. *See also* DAJA-AL 1973/4142, 13 June 1973 (DD Form 4, enlistment contract, is of paramount significance in determining nature and duration of individual's military status).

[141] *See* DAJA-AL 1975/4380, 16 July 1975, where a distinction is made between technical and material breaches—a distinction recognized by the federal courts. *See, e.g.*, Crane v. Coleman, 389 F. Supp. 22 (E.D. Pa. 1975); Bemis v. Whalen, 341 F. Supp. 1289 (S.D. Cal. 1972); *see* notes 70–75 and accompanying text *supra*.

[142] DAJA-AL 1976/4881, 26 July 1976 (servicemember's misconduct made it impossible for him to serve in promised area; transfer by Army no breach). *See also* DAJA-AL 1972/4779, 28 Aug. 1972.

[143] The soldier may be separated under the provisions of AR 635–200, para. 5–32 (DAPC-PAS-IC 071400Z Feb. 75). *See also* DAJA-AL 1975/5354, 15 Dec. 1975 (servicemember received substantially different Military Occupational Specialty).

[144] DAJA-AL 1976/4881, 26 July 1976.

provide that servicemembers who enlist for special units or assignments may be deployed with those units.[145] Once undertaken, actions to discharge the servicemember for misconduct or because the Government has breached its "commitment" must be in compliance with due process protections either expressed or implied in the pertinent regulations.[146]

If the servicemember feels that he has not received all that was promised him, he may not use the government's shortcomings as a defense to any misconduct or self-help actions.[147] His remedy lies in either seeking a discharge within military channels or testing the validity of his enlistment by means of a habeas corpus proceeding.[148] If the servicemember's position is sound, regulations require that corrective action be taken.[149]

E. SUMMARY

The difference in the military and federal perspectives might be explained by simply recognizing that each body focuses on different facets of the enlistment. The contemporary federal courts focus on contractual (civil) aspects such as promised assignments, schooling, and pay. Contemporary military courts focus on the resulting military status for the purpose of determining court-martial jurisdiction (criminal aspects). Such an explanation is only superficial. The distinctions between the two perspectives run deeper; they are grounded on divergent views of the very nature of the soldier-state relationship. The federal courts view the relationship largely as a

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[145] DAJA-AL 1977/3797, 30 Mar. 1977. The pertinent "Statement of Enlistment" (DA Form 3286-18) now provides in part:

> e. In the event the unit or activity to which I am assigned or attached under the provisions of this option, or the subordinate element of the unit to which I am assigned or attached is deployed, inactivated, disbanded, discontinued, reorganized or redesignated prior to the expiration of the guaranteed minimum period of assignment, I will remain assigned to the activity, unit, or subordinate element of that unit or be reassigned, in accordance with the needs of the Army.
>
> f. I may be subject to periods of temporary duty assignment on an individual basis away from the activity, unit or subordinate element of the unit for which enlisting. Such periods of temporary duty will not count against the guaranteed period of stabilization indicated in 1b, above.

[146] *See* note 129 *supra*.

[147] *See, e.g.*, United States v. Bell, 48 C.M.R. 572 (A.F.C.M.R. 1974). Bell unsuccessfully argued at his court-martial that he had gone AWOL only after the Air Force's repeated failure to rectify what he considered false promises made by the recruiter.

[148] Service in the armed forces is considered sufficient deprivation of liberty to constitute "custody" for purposes of habeas corpus. *See* Jones v. Cunningham, 371 U.S. 236 (1962); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

[149] AR 635-200, para. 5-32 (DAPC-PAS-071400Z Feb. 75) details the procedures for actions on unfulfilled or erroneous enlistment commitments.

creature of contract where the relationship has been voluntarily assumed. The military courts tend to treat it as a creature of statutes and regulations.

Although it seems unlikely that the military courts will in the near future shift gears and recognize the contractual aspects of the enlistment, as long as the Government relies upon contractual promises to induce enlistment, disposition of both civil and criminal aspects should reflect that reliance.

The position of the present Court of Military Appeals on the question of enlistments is largely a reflection of its over all interest in protecting the rights of the individual servicemember.[150] The Government, therefore, must bear the heavy burden of satisfying all statutory and regulatory requirements when enlisting servicemembers. Failure to do so will probably not be fatal to the civil aspects of the enlistment (*e.g.*, enforcement of enlistment options) because general principles of contract law tend to be flexible. But, failure to adhere to statutory or regulatory provisions will, for the present, be fatal to the criminal, or jurisdictional, aspects. Is such a distinction necessary? The following sections examine the possibility of treating both criminal and civil enlistment problems in a uniform manner.

VI. THE ENLISTMENT: A UNIFORM APPROACH

Comparison of the early forms of the soldier-state relationship with today's form reveals significant differences. And despite the large amount of litigation, no satisfactory statutory definition of the relationship exists.[151] Time and again the courts have struggled with the issue and in doing so have often only clouded the issue. In efforts to explain the relationship, courts have compared it to citizenship,[152] marriage,[153] and the employer-employee relationship.[154]

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[150] *See* Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

[151] 10 U.S.C. § 501 (1970) simply states: "In this chapter 'enlistment' means original enlistment or reenlistment." Army Reg. 601–210, Regular Army Enlistment Program, para. 1–4*e* (C3, 1 Dec. 1975), is equally vague:

> *e. Enlistment.* A voluntary enrollment in the Regular Army as an enlisted member. An enlistment is consummated by subscription to the prescribed oath of enlistment. The term "enlistment," as used in this regulation, includes enlistment of both nonprior service and prior service personnel, with the latter category also including prior Army personnel and personnel with prior service in any of the other Armed Forces.

[152] United States v. Grimley, 137 U.S. 147 (1890).

[153] *Id.*

[154] Parker v. Levy, 417 U.S. 733, 751 (1974). The Supreme Court noted that the relationship of the Government to members of the military is "not only that of lawgiver to citizen, but also that of employer to employee." The Court added that

A. THE SOLDIER-STATE RELATIONSHIP: WHAT IS IT?

In *United States v. Standard Oil Co.*[155] the court discussed the soldier-state relationship in the context of a suit brought by the Government to recover costs expended in treating a soldier negligently injured by the defendant. The court recognized the unique nature of the relationship but hesitated to label it as a master-servant or employer-employee relationship. Instead, the court viewed the Government obligations toward a soldier as "more legislative than contractual": [156]

> When a man becomes a soldier, a status is created whether the soldier enlists voluntarily or is selected under a Selective Service law. A voluntary enlistment originates in a contract for a definite period. But there any similarity between it and other contractual relationships, such as master and servant, ceases. The essence of the relation of master and servant is the freedom of the servant to end it, subject, of course, to responsibility for wrongful termination. But even a volunteer cannot withdraw from the army during the period of enlistment. Wrongful ending or even long, unexcused absence, is punishable as a crime both in peace and in war time.[157]

The court continued in its effort to label the relationship by noting:

> For, after making due allowance for the differences, we still have a cohesive pact which, like the pactum subjectionis—the pact between king and subject in mediaeval Europe—ties the soldier to the Government, at the same time reserving to each rights and obligations which flow from their union. Or we might apply to it the word which French jurists have coined to characterize certain solidarities which lie at the basis of social action—*institution*. Such *institution* gives rise to droit institutionnel, a body of rights arising from the communality of the group, such as the family, in which each member exercises certain rights and has obligations not as an individual, but as a member of the *institution*, according to the position he occupies—suam cuique dignitatem. These rights or obligations stem, not from the members as individuals (in the case of the family, parents or children), but from the basic fact which brought it into being (in the case of the family, marriage).[158]

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the Government is often "employer, landlord, provisioner, and lawgiver rolled into one." *Id.*

[155] 60 F. Supp. 807 (S.D. Cal. 1945), *rev'd on other grounds*, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947) (judicial establishment of new grounds for liability would intrude into congressional area of control).

[156] 60 F. Supp. at 810.

[157] *Id.*

[158] *Id.* at 811. The soldier-state relationship has also been characterized as being that of an employer-employee. Parker v. Levy, 417 U.S. 733, 751 (1974).

Adding to the confusion is the fact that there is disagreement among legal writers over the advisability of labeling legal relationships as contractual, or quasi-contractual.[159] And there are those who view society as a movement of relationships from status to contract,[160] while others specifically reject that position.[161] Recent domestic judicial posture seems to favor the consideration of most legal relationships as contractual or at least quasi-contractual. Where does the legal relationship we know as the "enlistment" fit and how should it be treated? These questions are met with mixed and conflicting responses. Some resolution of the conflicts may lie in a uniform or standard approach to the problem.[162]

B. A UNIFORM APPROACH

The lack of consistency on the subject of enlistments should be apparent from the preceding sections. But, is the law of enlistments subject to consistency? Consider first the views of one writer on the matter:

> The courts are constantly oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards upon the other. It is impossible that in a progressive society the law should be absolutely certain. It is equally impossible that the courts should render decisions conforming to the prevailing notions of equity without thereby causing a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their application to new and unforeseen conditions.[163]

The illusive nature of "absolute certainty" should not act as a deterrent in any search for uniformity. The preceding sections confirm that a great deal of uniformity has been subordinated to "flexibility." The conflicting perspectives seem to stem from diverse applications of broad, well-settled principles of law. Unnecessary diversity arises when those broad principles are abandoned or when they are distinguished out of existence by attention to the individual facts of each case. One writer has stated:

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[159] 60 F. Supp. at 812.

[160] H. MAINE, ANCIENT LAW 170 (1st ed. 1861).

[161] *See* Hume v. Moore-McCormack Lines, 121 F.2d 336, 343 nn. 19–22 (2d Cir. 1941).

[162] *See* 3 R. POUND, JURISPRUDENCE 732–36 (1959). Pound's view is that our judicial system is approaching a condition where codification is likely to be resorted to. His position is based to some extent on five defects of form which exist in Anglo-American law: want of certainty; waste of labor entailed by the unwieldly form of the law; lack of knowledge on the part of those who amend it; irrationality, due to partial survival of obsolete precepts; and confusion. The same "defects" may be used as a basis for applying a standard approach to the law of enlistments.

[163] J. WU, JURISPRUDENCE 291 (1955).

> Law, as St. Thomas Aquinas has pointed out, belongs to "practical reason," and deals with contingent matters, that is, with variables. This is why, however certain the basic principles of law may be, the more we descend to the details the less degree of certainty we find. In order to secure a practical certainty, which is necessary for social order and peace, there must be established some intermediary rules between universal principles and concrete cases. Such rules must needs deal with the average, and proceed in gross and on the whole. In order to reduce the infinite complexities of human affairs to some kind of order, the law must classify them into certain broad categories, and affix to each category some rules and measures more or less appropriate to it. For if there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many things.[164]

One method of dealing with broad principles or general rules is to establish a common or uniform approach which employs those general rules. The term "uniform approach" is used to describe a standard application of criteria for measuring the validity and effect of any enlistment contract. In other words, the uniform approach is an attempt to establish a definite methodology for solving enlistment problems.

Any common approach would require consideration of the three factors which have contributed to the needless diversity:

a. The lack of a common definition of the term "enlistment." The term is used interchangeably to refer to the act of becoming a soldier as well as to the completed act or status.
b. Diverse opinions as to what rules or bodies of law govern the soldier-state relationship known as the "enlistment."
c. The role of public policy in determining the validity of the "enlistment."

1. Recognition of a Common Definition: Contract, Status, or Both?

The term "enlistment" will continue to be a well-recognized method of describing the voluntary soldier-state relationship. However, its meaning is unclear and problems arise when the term "enlistment," through judicial or administrative actions, takes on diverse meanings. For example, it should not be used to describe the soldier-state relationship established by induction.

Some of the definitional inconsistencies can be attributed to the

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[164] *Id.* at 289.

philosophy that a legal relationship is either a contract or a status, but never encompasses both concepts. However, the Supreme Court in *Grimley* did not hesitate to use both terms in defining the enlistment.[165] Although the Court explained how the terms could both be utilized, later decisions have attempted to further clarify the effect of the now famous *Grimley* definition:

> Enlistment in the military service of the United States is a voluntary act establishing a contractual relationship. . . .
>
> Respondent asserts that enlistment differs from normal contractual relationships in that the enlistee thereby changes his status from civilian to soldier. While this may indeed be the case, . . . this has no relevant effect on the basic rights of the parties here involved. The fact that the enlistee has changed his status means that he cannot through breach of the contract throw off this status. But change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld, under proper circumstances, by a court of law.[166]

The change of status from citizen to soldier can be either voluntary or involuntary. When the change is effected by an agreement, contract, or compact with the Government, the effectuation of a new status is presumed to have been voluntary. In addition, the emergence of the new status cements the contract because of the extraordinary characteristics of the soldier-state relationship. But the voluntary relation is still contractual in nature.

An examination of the enlistment agreement itself confirms this.[167] The parties may agree to length of service, assignments, training, compensation, date of entry, and promotions. These agreements may be indicated either on the enlistment agreement itself or in attached annexes. Physically, the entire enlistment

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[165] 137 U.S. 147, 150–51 (1890). One writer has noted that although the concepts of contract and status are "protean and elusive," at the time of the *Grimley* decision, they were "mutually exclusive." *See* Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783, 785 n.14 (1972).

[166] Pfile v. Corcoran, 287 F. Supp. 554, 556–57 (D. Colo. 1968).

[167] Department of Defense Form 4 (1 June 1975) contains sections entitled "Agreements," "Benefits" and "Understandings." Although the language in each of these sections is couched in contractual terms, item 16 provides a glimpse of the type of terms that are used:

> 16. I hereby certify that *I have read* this agreement *carefully*; it has been fully explained to me, and I understand it and the conditions under which I am enlisting. I understand that ONLY those promises concerning assignment to duty, geographical area, training, or a particular school or special program; Government quarters; physical and other qualifications for assignment to a particular school, rating, or specialty; bonuses or other compensation; promotions; or transportation of and support to dependents contained herein or recorded on the Annexes attached hereto, if any, will be honored and that any other promises not contained therein made by any person are not effective and will not be honored.

agreement often approximates a personal service contract.[168] The nature of the agreement has prompted at least one federal judge to say that not only is it a contract, but principles of equity require that some degree of mutuality is required even in a military enlistment contract.[169]

It is the requirement of mutuality, or rather the lack of it, which renders the enlistment contract unique. However, the enlistment agreement does not appear so one-sided with the advent of enlistment options, increased pay and benefits, and the federal courts' posture of reviewing military status by habeas corpus.[170] If a defect arises in the execution of the agreement of service, the agreement may still become binding by virtue of the parties' conduct. An implied contract may result.[171] In either case, the civilian acquires the status of a soldier.

The soldier's "status" may be compared with the common law position of public officers. They were considered to possess what has been characterized as "compulsory" status. Once they accepted the responsibilities of their offices, they were subject to mandamus until their resignations were accepted. The rationale for such a binding status was based on the view that the public should not suffer from the lack of public servants.[172] That reasoning and the

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[168] For contrast, consider the form of an early enlistment contract found in *Ex parte* Brown, 4 F. Cas. 325 (C.C.D.C. 1839) (No. 1,972).

> I, William Brown, do acknowledge that I have voluntarily enlisted myself to serve four years in the marine corps of the United States, unless sooner discharged, upon the terms mentioned in the act passed the 11th day of July, 1798 [1 Stat. 594], entitled "An act for establishing and organizing a marine corps"; and also the act passed the 2d day of March, 1833 [4 Stat. 647], entitled "An act to improve the condition of the non-commissioned officers and privates of the army and marine corps of the United States, and to prevent desertion"; and that I have had read to me the rules and articles of the army and navy against mutiny and desertion.
>
> Witness my hand this 7th day of January, 1835.
>
> his
> "William X Brown."
> mark

Id.

[169] Larionoff v. United States, 365 F. Supp. 140 (D.D.C. 1975), *aff'd*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 97 S. Ct. 2151 (1977). *See also* Shelton v. Brunson, 335 F. Supp. 186 (N.D. Tex. 1971), *aff'd in part, vacated in part*, 454 F.2d 737 (5th Cir. 1973) (Wisdom, J., dissenting) (if contract principles are to be applied, principles applicable to contracts of adhesion should be used).

[170] *See* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975).

[171] For a good discussion by the Court of Military Appeals on constructive enlistments (implied contracts) *see* United States v. King, 11 C.M.A. 19, 28 C.M.R. 243 (1959). *See also* U.S. DEP'T OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK 3-45 (1973); note 51 *supra*.

[172] *See* Edwards v. United States, 103 U.S. 471, 473-74 (1850). For further discussion of "status," *see* 4 R. POUND, JURISPRUDENCE 262-76 (1959).

Grimley rationale, which forbade the soldier from casting off his military status, seem to be of the same fabric.

The terms "contract" and "status" not being inconsistent for definitional purposes, the following definition would serve well:

> Enlistment: The act of voluntarily agreeing to serve in an armed force as a servicemember for a fixed period of time. The agreement is usually effected by executing an enlistment contract. Execution of that document (1) places contractual obligations on both the Government and the volunteer, and (2) changes the volunteer's legal status from civilian to servicemember. Absent a valid formal enlistment contract, the parties may nonetheless by their actions accomplish the same end.

Any common definition should include consideration of both elements—contract and status. To ignore the importance of "status" relegates the enlistment agreement to a mere contract. To ignore the contractual element encourages a rigid and formulaic approach to the problem and elevates form over substance.

2. Application of General Principles of Contract Law

The proposed common definition recognizes the voluntary soldier-state relationship as being primarily contractual in nature.[173] Principles of contract law should be consulted first in determining (1) the validity of the enlistment contract at its inception and (2) the rights of the parties under the enlistment contract. For example, contract law should be applied if the issue concerns the jurisdiction of a court-martial or if a purely administrative determination is required.

Rather than applying the law of contracts of the place of execution of the enlistment contract, the approach should instead be federal in character—looking to sources such as federal case law or the *Restatement of Contracts*.[174] Pertinent statutes and regulations

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[173] *See, e.g.*, Op. Att'y Gen. 187, 190 (1853) (enlistments are contracts which ought to be construed according to general principles of contract law. *But see* United States v. Standard Oil Co., 60 F. Supp. 807, 810 (S.D. Cal. 1945), where the court noted that the soldier-state relationship was primarily "legislative." One writer has proposed that the relationship should be viewed as governed partly by statute, partly by military regulation and partly by contract. Casella, *supra* note 165, at 807.

[174] Colden v. Asmus, 322 F. Supp. 1163, 1164 (S.D. Cal. 1971) (court will look to general principles of contract law, including law of federal contracts as interpreted in federal court decisions). *See also* United States v. Standard Oil Co., 332 U.S. 301, 305 (1947), where the Supreme Court stated:

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons

should be considered as indications of congressional and executive intent to declare persons eligible to enter into the enlistment contract. As such, they must be considered to be for the benefit of the Government unless specifically stated otherwise. Likewise, enlistment regulations should be considered procedural or directory in nature and should not invalidate an otherwise valid enlistment if not strictly followed. Unless specifically stated otherwise, they too should be presumed to be for the benefit only of the Government.[175]

A great deal of inconsistency and inequity would be precluded by restricting the concept of "void" enlistments.[176] The concept connotes the complete absence of any legal relations when in fact a servicemember may have obtained "status" as a soldier notwithstanding defects in the enlistment contract.[177] It would be much simpler to label enlistment contracts either "voidable" or "valid." That would more closely comport with prevailing principles of contract law.[178] Questions of the validity of enlistment contracts entered into by minors and insane persons present special problems. They may be dealt with in a number of ways. First, they may continue to be considered void, with no legal force and effect for either civil or criminal aspects. Alternatively, they could be viewed as voidable at the option of the Government for civil and/or criminal purposes.[179]

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outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

[175] The fallacy in declaring eligibility regulations to be for the benefit of the recruit lies in the fact that with a mixture of imagination and a little logic, any requirement could be construed to be for the benefit of the recruit. To avoid the problem, perhaps the Government should drastically simplify the regulatory requirements so that any "able-bodied citizen" may enlist. In all probability, that requirement would also be construed to be for the benefit of the "citizen." Another alternative would be to specify requirements for enlistment with express declarations as to which provisions were for the benefit of the Government. *See* Section VII *infra*.

[176] Enlistments should be labeled as "void" only where the governing statute or regulation expressly declares them to be "void." *See* ETS-Hokin & Galvan, Inc. v. Maas Transport, Inc., 380 F.2d 258, 260 (8th Cir.), *cert. denied*, 389 U.S. 977 (1967). The statutory requirements for enlistment have been viewed time and again as being directory in nature and current Army Regulations provide that the Secretary of the Army may approve a fraudulent enlistment otherwise invalid because of a "non-waivable" disqualification. *See* DAPC-PAS-S 261400Z Jun 75, SUBJ: Change to AR 635-200, para. 14-12(f).

[177] 1 A. CORBIN, CONTRACTS 12-17 (1968). *See also* note 188 *supra*.

[178] *Id.*

[179] *See, e.g.*, Paulson v. McMillan, 8 Wash. 2d 295, 299-300, 111 P.2d 983, 985 (1941). *See also* note 212 and accompanying text *infra*.

Historically, these two categories have received special treatment because they both raise questions concerning "competence" to enter into contractual relations.[180] If an individual is of age and of sound mind, then failure to meet qualifications (such as citizenship or absence of felony convictions) should render the contract voidable.[181] The same should hold true for similar regulatory qualifications. To consider all statutory and regulatory qualifications as measures of "competence" only dilutes and confuses the issue. Characterizing such contracts as "voidable" would allow the Government the necessary ability to release unqualified soldiers and permit personnel to avoid some of the inequities which result from summarily declaring periods of prior service to be void. Although the enlistment agreement may be defective, the resulting service is often honorable and rendered in good faith.

3. Balance of Interests

Implicit in almost all enlistment cases is a balancing of the interests of the parties involved. It is this balancing which provides the needed flexibility in determining the validity of the enlistment contract and the subsequent obligations and rights of the parties to that agreement.[182] In any case the interests to be considered are:

(a) The servicemember's interest.
(b) The Government's interests.
(c) The public's interests.

We turn first to the interests of the servicemember, the individual who has volunteered his service to the Government. The servicemember's interests are personal in nature. Although he may have enlisted because of a sense of patriotic duty, he is still interested in receiving promised benefits which translate into financial security. For instance, the servicemember does live a somewhat restricted lifestyle. The environment subjects him to higher requirements of discipline, and he is subject to punishment for actions considered by his civilian counterparts as harmless.[183] When an in-

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[180] *See, e.g.*, United States v. Robson, 24 C.M.R. 375 (A.B.R. 1957), where a twenty-year old alien was presumed "competent" to enlist.

[181] *See* note 136 *supra*.

[182] Implementing a standard treatment for a problem does not necessarily lead to an inflexible treatment. In this instance it cannot, because the proposed balance of interests test includes consideration of the public's interest—public policy. Such consideration provides some flexibility.

[183] Despite continued reforms in military justice, many writers cling to obsolete visions of soldiers serving in involuntary servitude without any constitutional

dividual agrees to serve as a soldier he may exercise one of several enlistment options.[184] He can expect that the Government will stand behind its promises of special training or assignments.[185] He can expect that his constitutional rights will not be disregarded and he will discover that numerous judicial and administrative safeguards have been incorporated into the system for his benefit.[186] In return for his honorable service he can also expect promised remuneration in the form of pay, promotion, and benefits.[187]

The government's interests, on the other hand, lie chiefly in fulfilling its mission of maintaining an armed force fully capable of meeting national needs as they arise. An element of meeting this mission is the requirement for discipline. Because it is the Government which plays the role of employer in the soldier-state relationship, the Government determines whom it will employ. In the same manner, it is the Government which decides if the soldier-state relationship will be continued or dissolved. The government's interests are paramount but not always absolute. They stand with the enlistment contract itself in the shadow of the Constitution.[188]

When the validity of the enlistment contract is questioned, the delicate balance of the two competing interests is often tipped when a third interest, the public's interest, is considered.[189] The public's interest is usually expressed in terms of public policy: "a very unruly horse . . . once you get astride it you never know where it will carry you." [190]

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safeguards. *See* Casella, *supra* note 165, at 799. *See also* Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969); Smith v. Reasor, 406 F.2d 141 (2d Cir. 1969); Krill v. Bauer, 314 F. Supp. 965 (E.D. Wis. 1970). The recent decision in Parker v. Levy, 417 U.S. 733 (1974), however, shows an awareness by the Supreme Court of the "fairness" of the military judicial system. That decision recognizes the uniqueness of the military system. Thus, we see another argument for distinguishing military enlistment contracts from purely private employment contracts.

[184] The ability of the recruit to take advantage of the options may be dependent on meeting qualifications, especially where the option requires specialized training. Army Reg. No. 601-210 contains the thirteen primary enlistment options.

[185] *See, e.g.*, Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972); Bemis v. Whaler, 341 F. Supp. 1289 (S.D. Cal. 1972); DAJA-AL 1976/5074, 6 Aug. 1976; DAJA-AL 1975/4380, 16 July 1975.

[186] *See, e.g.*, United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971) (90-day speedy trial rule).

[187] *See* Bell v. United States, 366 U.S. 393 (1961) (statutory right to accrued pay).

[188] The Government must accord due process to the servicemember if he is to be discharged from the service. *See* Allgood v. Kenan, 470 F.2d. 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972).

[189] The third interest may not always be the "public" interest as such. The interest of a parent of a minor enlistee might tip the balance. It certainly did so in earlier cases where the right of the parent to the custody of a minor enlistee was considered paramount absent pending court-martial charges.

[190] J. WU, JURISPRUDENCE 143 (1958).

Public policy is considered to be an implementation of the common good. When applied to the area of contracts the following is apropos:

> The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes. Public policy has its place in the law of contracts,—yet that will-o'-the-wisp of the law varies and changes with the interests, habits, needs, sentiments and fashions of the day, and courts are adverse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain.
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> This raises a question for the student of Jurisprudence as to whether that which the law looks upon with favor is not the result of a stronger policy of law. In fact, Sir George Jessel, M.R., explicitly appealed to public policy in support of the freedom of contract: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice: Therefore, you have this paramount public policy to consider in that you are not lightly to interfere with this freedom of contract." [191]

In addition to the careful consideration of the servicemember's and government's interests, the public has an interest in the "institution" of the soldier-state relationship.[192] Thus we see the comparison of the enlistment to marriage and citizenship. These relationships have traditionally been considered special because it is in the public's best interest that they be maintained and not easily dissolved. The public's best interest requires that once bound by a contract with the Government, the servicemember may not at his pleasure reject the agreement which binds him. Consider the position of a court faced with the question of the validity of a minority enlistment:

> It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction, his parents objecting. We cannot approve a view that leads to such results.[193]

The balance of interests provides flexibility to the uniform ap-

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[191] *Id.* at 144.
[192] United States v. Standard Oil Co., 60 F. Supp. at 811.
[193] *In re* Miller, 114 F. 838 (5th Cir. 1902).

proach. Flexibility can lead to foot-loose application of both the definition of enlistment and the applicable law. And it can lead to inconsistency. Nonetheless, the risk is reasonable. The interests should be balanced. The Supreme Court in *United States v. Grimley* considered it to be against public policy to allow a deserter to avoid his responsibilities by deceiving the Government and then pleading his disability as a bar to court-martial jurisdiction. Public policy required paramount consideration of the government's interests.

Regarding the role of public policy in determining the validity of enlistments, Winthrop wrote:

> That the United States should be held to be precluded from ratifying an irregular enlistment where the disqualification did not impair, or had ceased to impair, the value of the soldier, who meanwhile had performed service, received pay, etc.; or where the soldier had committed a military offense and his trial by court-martial and punishment were called for by the interests of discipline—*would be an unfortunate contingency and against public policy.*[194]

The Court of Military Appeals, however, ignored the foregoing considerations and held it to be against public policy to sustain court-martial jurisdiction over a servicemember who had fradulently enlisted with the aid of a recruiter.[195] Public policy, according to the court, required paramount consideration of the servicemember's interests notwithstanding his criminal conduct. Both the Supreme Court and the Court of Military Appeals applied what they perceived to be the "public policy." Both rode the "unruly horse."[196]

C. APPLICATION OF THE UNIFORM APPROACH: GENERAL CONSIDERATIONS

The uniform approach is not a simplistic application of rules of contract law to enlistments. It fully recognizes the importance of the change of "status" and the competing interests involved. The utility of the approach is seen in its application. Uniform or stand-

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[194] W. WINTHROP, *supra* note 94, at 545–46 (emphasis added). Arguably, Winthrop was noting two separate grounds for Government ratification of an irregular enlistment. The one is constructive enlistment. The other is commission of an offense.

[195] United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975). *See* notes 120–126 and accompanying text *supra*.

[196] *See* note 190 *supra*.

ard tests do not guarantee uniform results, but an accepted uniform approach will promise a degree of predictability and will cut through the needlessly diverse treatment of enlistment problems. Consider the following in the application of the uniform approach.

1. Formation of the Enlistment Contract

The initial inquiry should be: Have the parties to the enlistment contract satisfied the elements required for the formation of a valid and binding agreement? The prerequisites for the formation of a simple contract are (1) mutual assent, (2) consideration, (3) two or more parties having at least limited capacity, and (4) the agreement must not be one declared void by statute or by rule of common law.[197] If these requirements are met, the enlistment contract is valid and binding for all purposes. If any of the requirements is not satisfied, the agreement may still be found binding on the equitable theory of implied contract—the constructive enlistment.[198] Despite some commentators' position that the constructive enlistment is no longer viable,[199] the concept is well-founded and should remain a useful method of curing defects in the enlistment contract.

Because the enlistment contract is a contract which changes status, even serious defects should not invalidate the agreement. Unless a statute clearly restricts the capacity of a citizen to enter into an armed forces enlistment contract, defects resulting from the implementing regulations should only render the enlistment contract voidable. The interests of the public favor preservation of the agreement.[200]

Likewise, misfeasance or malfeasance on the part of the recruiter should not automatically void the enlistment contract. The recruiter, under prevailing rules of contract and agency law, is an agent for the principal, the United States Government.[201] The unauthorized acts of the agent are outside his actual authority and are not binding upon the Government. However, the latter should be able to ratify the agreement if it so chooses. It may decide to do so in a case where the servicemember is singularly distinguished in his

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[197] L. SIMPSON, CONTRACTS § 8 (2d ed. 1965).
[198] *See* notes 130 & 171 *supra*.
[199] *See* note 130 *supra*.
[200] The argument for preserving the agreement in time of war is especially strong and the argument remains persuasive during peacetime. The military is required to maintain a ready armed force. Unless courts are capable of predicting periods of peace or war, enlistments should be treated as if the armed force is engaged in wartime activities.
[201] *See* Shelton v. Brunson, 465 F.2d 144 (5th Cir. 1972).

service, and it should certainly be able to ratify the agreement where serious charges have been preferred against a servicemember.[202] In that case, even equity should not intervene in the criminal proceeding.[203] Once again, the interests of the public and the Government outweigh the interests of the servicemember who *is pending trial.*[204]

Public policy requires that if the servicemember has committed an offense, he should be tried, notwithstanding a defective enlistment. If a recruiter acted improperly in recruiting him, he too should be subject to disciplinary action.[205] To void the enlistment contract would, as Winthrop noted, violate public policy.[206]

2. Performance of the Enlistment Contract

The enlistment contract may delineate specific responsibilities of the parties.[207] Specific remedies usually are not indicated. For the most part, both the responsibilities and the remedies are found in the numerous regulations which now govern almost every aspect of military life. If either party fails to fulfill its responsibilities, the injured party may attempt to avoid the agreement on a breach of contract theory.[208] As discussed in preceding sections, both the fed-

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[202] *See* note 221 and accompanying text *infra*.

[203] "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experiences in Anglo-American law." Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

[204] *See* note 194 and accompanying text *supra*. Historically, civil courts have granted no relief to accused servicemembers serving under illegal contracts of enlistment as long as they are undergoing military trial or discipline. *See In re Robert, 2 Hall Law 192 (Pa. 1809); Grace v. Wilber, 12 Johns (N.Y.) 68,* where the court stated:

> The contract [of enlistment] may be void, and he may be entitled to his discharge; but it does not follow that he is to be his own judge, and to discharge himself by desertion. Any person detained by military authority or military force may obtain his discharge, if he is entitled to it, by application to the proper civil authorities, but a soldier in actual service cannot be allowed to desert at pleasure.

Cited in United States v. Julian, 45 C.M.R. 876, 878 (N.C.M.R. 1971). *See* notes 45 & 113–116 and accompanying text *supra*.

[205] The recruiter may be punished administratively or under the provisions of the UNIFORM CODE OF MILITARY JUSTICE arts. 84 & 92, 10 U.S.C. 884 & 892 (1970).

[206] *See* W. WINTHROP, *supra* note 94, at 545–46.

[207] *See* Dep't of Defense Form 4 (1 June 1975).

[208] *But see* Benway v. Barnhill, 300 F. Supp. 483 (D.R.I. 1969) where the Government unsuccessfully argued that a conscientious objector could not be discharged because he had a binding and enforceable contract with the Government. *See also* McCullough v. Seamans, 348 F. Supp. 511 (E.D. Cal. 1972) where the Government failed in its attempt, on cross-claims, to collect costs for educating Air Force Academy graduates who later were discharged as conscientious objectors. The Government had relied on common law contract principles of recision and unjust enrichment. Under principles of contract law, the equitable remedy of

eral courts and the Army's Judge Advocate General are disposed to set aside contracts where a "material breach" has occurred.[209]

Voiding the enlistment contract for any lesser defect would emasculate the importance of the element of "change of status." The language from *United States v. Grimley* that no breach may destroy the status created by the enlistment contract does not deter the orderly recission of an enlistment contract. The unique nature of the enlistment, the change of status, should be preserved and should be considered carefully before an enlistment contract is declared null and void.[210]

It is in the area of performance of the enlistment contract that delineation between the concepts of status and contract must be clear. The "enlistment contract" gives rise to the "status." The parties' conduct during the "status" is controlled to some extent by the terms of the enlistment contract. For example, the parties may agree to the length of the status and may also agree on the so-called enlistment options. But, the nature of the soldier-state relationship demands that statutes, regulations, or special circumstances may also control the "status" and may override terms of the enlistment contract.[211] Pending court-martial charges may require extension of

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recision is available if plaintiff is willing to make restitution. Matzell v. Platt, 332 F. Supp. 1010 (E.D. Va. 1971).

[209] *See* notes 137 & 141 *supra*. It has been suggested that the law of contracts should be applied only where the servicemember is alleging a breach of contract as to his enlistment option(s). *See* Casella, *supra* note 165.

[210] One writer, in analyzing the contractual aspects of the enlistment, has noted that:

> The use of contract law will also further due process and general fairness by giving notice to the volunteer of *all possible contingencies*. In order for the enlistment to be legitimately termed a "contract," these prerequisites must be met, and the unfortunate characterization of enlistment as being a change in status will be banished forever in the catacombs of sovereign supremacy.

Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121, 149 (1974).

The "change of status" concept should not be banished. It is idealistic to conceive that an enlistment contract will advise the volunteer of all possible contingencies. General clauses will suffice. To disregard the concept of the change of status ignores the unique nature of the soldier-state relationship. That uniqueness was recently recognized and approved by the Supreme Court in Parker v. Levy, 417 U.S. 733 (1974). For now, the military represents a distinct society governed by its own rules and regulations. To pass from the civilian sphere into the military is certainly a change of status.

[211] *See*, Rehart v. Clark, 448 F.2d 170, 173 (9th Cir. 1971) (existing statutes and regulations are read into the enlistment contract); *accord*, Schulz v. Reasor, 332 F. Supp. 708, 711 (E.D. Wis. 1971); Goldstein v. Clifford, 290 F. Supp. 275, 279 (D.N.J. 1968).

When the servicemember enlists, he states that he understands that:

the status, even though the enlistment contract provides for a fixed term of service.[212] Modification of the terms of military service, however, does not make the enlistment contract any less a contract.

D. SPECIFIC ENLISTMENT PROBLEMS

In the preceding subsections, the three-step uniform approach and general considerations in its application were examined. Here, the inquiry will center on application of the uniform approach to several specific, frequently encountered enlistment problems. Graphically, the application of the uniform approach can be pre-

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(1) In time of war or national emergency, or when otherwise authorized by law, I shall be required to serve as ordered by competent authorities, notwithstanding the provisions of any Annex(es) attached hereto or any other promises made to me in connection with my enlistment (reenlistment).
(2) Statutes and regulations applicable to personnel in the Armed Forces of the United States may change without notice to me and that such changes may affect my status, compensation, or obligations as a member of the Armed Forces, the provisions of this enlistment agreement to the contrary notwithstanding; and
(3) An enlistment in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard in effect at the beginning of a war or entered into during a war continues in effect, unless sooner terminated by the President, until six months after the termination of that war.

See DD Form 4, Enlistment Agreement, Part IV.

[212] The mere expiration of a servicemember's term of service does not automatically terminate his military status. *See* Messina v. Commanding Officer, 342 F. Supp. 1330 (S.D. Cal. 1972); Taylor v. Reasor, 19 C.M.A. 405, 42 C.M.R. 7 (1970); United States v. Hout, 19 C.M.A. 299, 41 C.M.R. 299 (1970). Such extensions of military status are controlled by MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 11*d* and AR 635–200, para. 2–4*a* (Interim change, 4 Apr. 77) which now provides:

> A member may be retained beyond the expiration of his term of service when an investigation of his conduct has been initiated with a view to trial by court-martial; charges have been preferred; or the member has been apprehended, arrested, confined or otherwise restrained by the appropriate military authority. However, if charges have not been preferred, the member shall not be retained more than 30 days beyond the expiration of his term of service without the personal approval of the general court-martial convening authority concerned.

Failure of the Government to comply with similar controls resulted in the reversal of a court-martial conviction in United States v. Walck, 54 C.M.R. Adv. Sh. 308 (A.C.M.R. 1975) (The predecessor to the above provision required approving action by the convening authority, or his designee, even though other actions to bring the accused to trial had commenced). The Secretary of the Army subsequently changed the provision into its present form. *See Criminal Law Section*, THE ARMY LAWYER, Feb. 1977, at 19. The earlier provision was also the subject of judicial review in United States v. Torres, 3 M.J. 659 (A.C.M.R. 28 Apr. 1977) (en banc), where the court overruled *Walck* insofar as it held (1) that failure of the Government to comply with its own regulations divests the court of jurisdiction to try the accused, and (2) that the sole remedy is dismissal of the charges. The majority opinion noted that the convening authority had in effect complied with the requirement to give necessary approval for retention where he referred the accused's case to trial. The court noted:

> We further find no reason to penalize the Government in this case to insure compliance with the regulation in the future. Noncompliance is not in and of itself a violation of a basic constitu-

sented in a decision flow chart.[213] Three situations in which the questionable validity and effect of enlistments commonly arise are:

a. During his court-martial, the accused servicemember alleges that his enlistment contract is invalid and he is therefore not subject to the court-martial's jurisdiction.
b. A servicemember, not under pending charges, seeks an administrative discharge on the grounds that his enlistment contract was entered illegally.
c. A servicemember argues that when he enlisted, he was specifically promised training in a specialty area, and an accelerated promotion upon completion of that training. He states that he has received neither and argues breach of his enlistment contract.

The first two situations fall within the area of formation of con-

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tional right so as to require such a drastic measure as dismissal of the charges. Accordingly, we hold that each case must be reviewed for prejudice in the manner we determine is best suited to apply when the Government fails to comply with its own regulations. Finding no prejudice here, there is no relief to be given.

3 M.J. at 668 (emphasis added).

In his dissenting opinion, Judge Cook stated that permitting the Government to go to trial in spite of the fact that it had violated its own regulation nullifies the rule that the Government is bound by its own regulations. In his view, the Government was estopped to contend that the accused remained subject to court-martial jurisdiction.

The reasons and requirements for exercising criminal jurisdiction over those persons awaiting a discharge were set forth in a concurring opinion by Judge Costello.

1. To maintain integrity of the military force as by inhibiting soldiers from walking off an active battlefield on the day their enlistments nominally expire.
2. To provide order and regularity during the delay incident to the muster-out of troops after the need for massive mobilization has passed.
3. To prevent fortuitous cleansing of the slate by the routine discharge of those who deserve both to be called to account and to be barred from reenlistment.
4. To foster disciplined conduct by individuals in the final few days or hours of service.
5. To provide a legal status and basis for payment and management of such persons.

See generally AR 635-200, ch. 2, for examples of extensions (voluntary and involuntary) of terms of enlistment agreements. *See also* United States v. Downs, 3 C.M.A. 90, 11 C.M.R. 90 (1953) where the period of military status was extended while the soldier received hospital treatment. Likewise, it is possible to effect a "constructive discharge" when both parties by their actions, or inactions, make it clear that they acquiesce in a "discharge status." United States v. Santiago, 1 C.M.R. 365 (A.B.R. 1951) (accused's confinement by the Army after a discharge did not constitute service which would effectuate a constructive enlistment). *See* DAJA-AL 1976/5049, 3 Aug. 1976.

[213] *See* Appendix A.

tracts. The third would be considered a contract performance question.

First, as to the court-martial jurisdiction problem: Is there a valid contract under governing rules of contract law? This step requires close consideration of the contract as a whole and the conduct of the parties in executing the agreement. If the answer is "yes," valid de jure status follows and the court-martial has jurisdiction. If the answer is "no," the inquiry continues.

Although there is not a valid formal contract, is there an implied contract under principles of contract law which gives rise to a constructive enlistment? If not, there is no jurisdiction absent an alternate basis for jurisdiction.[214] If there is a constructive enlistment, the balancing test is employed to determine if there are any reasons which preclude jurisdiction. For example, under the current rationale used by the Court of Military Appeals, equity prevents the Government from relying on a constructive enlistment where a recruiter's malfeasance has resulted in an invalid enlistment contract.[215] If the balance, however, swings in favor of the Government, jurisdiction would be present.[216]

In the second case, the issue is once again the validity of the enlistment contract at its formation. The question arises, however, in an administrative setting and again the initial inquiry is whether a valid, formal contract was entered into in accordance with general principles of contract law. If so, the servicemember is not entitled to a discharge on the grounds of an invalid enlistment contract. If there is not a valid formal enlistment agreement and no constructive enlistment has arisen, a balance of interests test is employed to determine if there is any just reason for retaining the servicemember.[217]

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[214] A proposed statutory change would provide an alternate basis for court-martial jurisdiction. *See* Section VII, *infra*. Even absent a statute, the rationale for basing jurisdiction on "de facto" status may be sufficient. *See* United States v. Julian, 45 C.M.R. 876 (N.C.M.R. 1971); notes 114–116 and accompanying text *supra*. If the individual is not amenable to court-martial as a servicemember, he may still be subject to court-martial under provisions which provide court-martial jurisdiction over civilians. *See* UNIFORM CODE OF MILITARY JUSTICE arts. 2(10) & 18, 10 U.S.C. §§ 802(10) & 818 (1970).

[215] United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975). *See* notes 120–126 and accompanying text *supra*.

[216] *See* note 194 and accompanying text *supra*.

[217] A variation of this problem might be simply stated as follows: An individual under the minimum statutory age enlists and honorably completes a two-year tour before reaching that minimum age. He later reenlists and upon completing a total of twenty years' service seeks a discharge and retirement benefits. He learns that the original two-year enlistment is considered "void" and that he owes the Gov-

Analysis of the third case, involving a breach of the enlistment contract, follows the method used in the first two situations. The initial inquiry is whether there is a valid formal contract, or a substitute therefore, under general principles of contract law. If so, has a "material breach" occurred? If the answer is "no," there is no remedy. But, if the answer is "yes," a balance of interests test is used to decide if there are any just reasons for the material breach, such as a national emergency.[218]

The above methodology has been somewhat simplified. There are, of course, at each level of inquiry, related and detailed inquiries. In each problem, it is important that the enlistment contract be viewed from its four corners before applying any balancing tests. All too often, courts have applied the balancing tests, determined the outcome and then applied those general principles which support the conclusion. Such a reverse application tends to ignore careful examination of the definition and nature of an "enlistment" and the enlistment contract in question.

VII. PROPOSALS FOR IMPLEMENTION OF THE UNIFORM APPROACH

Aside from judicial recognition of a uniform methodology, specific steps can be taken to clarify the law and reduce some of the inconsistencies in this area.[219]

A. AMENDMENT OF THE UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice should be amended to provide for court-martial jurisdiction over individuals who may be serving under so-called "void" enlistments.[220] The basis for such an amendment is well-founded. Despite recent decisions by the Court of Military Appeals, the long-standing and overwhelming weight of

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ernment two more years of service before he will be eligible for retirement. Is the result equitable? What public policy is being furthered in such a case? If the individual had committed an offense while serving in the original "void" enlistment what public policy would have been violated by considering him amenable to court-martial jurisdiction. If an enlistment is to be declared valid (or at least voidable) for one purpose (civil aspect of recognizing honorable service) then it should also be declared valid for purposes of court-martial jurisdiction.

[218] *See* notes 66–69 & 138 *supra*.

[219] Appropriate sections of Title 10, United States Code, and Army Reg. 601–210, Regular Army Enlistment Program (15 Jan. 1975) should also be amended to reflect a workable definition of the terms "enlistment" and/or "enlistment contract."

[220] *See* notes 176–179 and accompanying text *supra*.

authority requires that a servicemember pending court-martial charges may not use his invalid enlistment as a shield against prosecution.[221]

Jurisdiction would, in effect, be based upon a statutory recognition of the "constructive enlistment." The constructive enlistment (implied contract) amendment would require that the parties had at some point intended that the accused enter into the soldier-state relationship. The recognized criteria would apply: (1) voluntary submission to military authority, (2) performance of military duties, (3) receipt of pay and allowances, and (4) acceptance of the services by the Government.[222] Recruiter misconduct would not, by itself, nullify jurisdiction unless such misconduct amounted to coercion or duress to enlist, and the servicemember never voluntarily submitted to military authority: [223]

Article 3, Uniform Code of Military Justice should be amended by adding the following provision:

> (d) Persons who are charged with committing an offense punishable by this chapter are amenable to court-martial jurisdiction notwithstanding the absence, for any reason, of a valid, formal enlistment agreement if:
> (1) They voluntarily submitted to military authority,
> (2) They performed military duties,
> (3) They received pay and allowances, and
> (4) The Government accepted the services rendered.
> The Government's lack of knowledge of the invalid formal enlistment agreement will not relieve the person of amenability to jurisdiction.

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[221] *See, e.g.*, note 194 *supra*. Allowing an accused to so shield himself amounts in most cases to a grant of immunity. If the military is unable to prosecute the case, there is usually little, if any, interest on the part of federal or state authorities to further burden their judicial systems. This is especially true for the military offenses (desertion, AWOL, disrespect, *etc.*) which are of little concern to the civilian community but which nevertheless have a direct and dibilitating effect on the military community.

[222] U.S. DEP'T OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK 3-45 (1973). The four criteria are a compilation drawn from numerous opinions, both federal and military, which have discussed constructive enlistments.

[223] A servicemember who was coerced into enlisting may still effect a constructive enlistment if he voluntarily performs military duties after the coercive influence, if any, is removed. United States v. Catlow, 23 C.M.A. 142, 146, 48 C.M.R. 758, 762 (1974). *See also* United States v. Barksdale, 50 C.M.R. 430 (N.C.M.R. 1975). However according to United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975), any recruiter misconduct in conjunction with the coercion voids the enlistment and estops the Government from showing a constructive enlistment.

This provision should have no difficulty passing constitutional muster. It does not provide for jurisdiction over civilians.[224] Rather it is proposed as a method of overcoming the "estoppel" theory relied upon by the Court of Military Appeals.[225] The amendment permits, indeed, requires, the Government to prove military status. This statutory change would simply codify the long-standing rule that invalid enlistments could be cured by a "constructive enlistment." [226] It should not be viewed as legislative condonation of recruiter malfeasance.

A broader basis for jurisdiction might be founded on a de facto status theory. Satisfaction of the four constructive enlistment criteria would not be required to establish court-martial juristiction. Public policy would favor this basis only if strict limitations were placed upon its use. For instance, jurisdiction could be established only in those cases where the accused was pending charges punishable by a stated minimum punishment such as confinement at hard labor for one year. Another limitation might consist of restricting the de facto basis of jurisdiction to overseas war-time situations.

Article 3, Uniform Code of Military Justice could be amended to provide that:

> (e) In time of war, persons located overseas, not serving under a valid formal enlistment agreement nor satisfying the requirements of Article 3(d) of this chapter, may be amenable to court-martial jurisdiction if they have voluntarily represented themselves to be members of the armed forces and the Government has relied upon that representation.

This provision finds little direct support in military or federal opinions. To date, no opinion clearly equates or distinguishes the concepts of "constructive enlistment" and de facto status. A few opinions suggest that "equivalent acts" of military service may con-

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[224] The Supreme Court has forbidden the military to exercise court-martial jurisdiction over civilians. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (no court-martial jurisdiction over discharged soldier for offenses committed while on active duty); Reid v. Covert, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents accompanying armed forces overseas in peacetime); Kinsella v. Singleton, 361 U.S. 234 (1960) (expanded *Reid* to prohibit jurisdiction over civilian dependents in time of peace regardless of whether offense was noncapital or capital); Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian employees accused of committing noncapital offenses in peacetime).

[225] *See, e.g.*, note 119 and accompanying text *supra*.

[226] A similar provision could be incorporated into the enlistment provisions of 10 U.S.C §§ 504–505 (Supp. VI 1976).

stitute a valid change of status.[227] Arguments against such a provision rest on judicial reluctance to expand court-martial jurisdiction, especially over "civilians." However, the individuals falling within this provision would not be civilians in the truest sense of the term. The amendment contemplates that the individuals would have voluntarily recognized their military status and used it to their advantage. Adoption of the proposed amendment would alleviate the troublesome jurisdictional loophole left by *Unites States v. King* where the accused, previously discharged, forged documents authorizing his movement as a soldier to Europe. The Court of Military Appeals, finding no enlistment contract and no "meeting of the minds" labeled King an interloper and found no court-martial jurisdiction over him.

Adoption of a broader base of jurisdiction would considerably re-

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[227] There is a distinction between the two theories. The constructive enlistment theory has been traditionally based upon an "implied contract" rationale. The four recognized criteria are usually the criteria used by courts in upholding an otherwise invalid contract. *See* note 222 and accompanying text *supra*. A good discussion of constructive enlistments can be found in United States v. King, 11 C.M.A. 19, 28 C.M.R. 243 (1959) where the accused had falsified orders and posed as a serviceman. The Court of Military Appeals held that criminal activity could not effect an enlistment. The accused was an interloper and there had been no meeting of the minds. There had been no attempt to effect an enlistment.

The "de facto status" theory should be broad enough to encompass even interlopers. Although one of the elements of an implied or constructive enlistment may be missing, the servicemember may nonetheless have satisfied the requirement of "actual service." *See* United States v. Julian, 45 C.M.R. 876 (N.C.M.R. 1971). This theory cuts right to the heart of court-martial jurisdiction without pausing to ponder the legal effects of an invalid enlistment contract. If a competent accused is serving as a uniformed servicemember and commits a crime, any claim he may have of casting off his status should be stayed pending disposition of his court-martial.

Whether the de facto status theory requires some attempt to form an enlistment contract is not clear. One case equates constructive enlistment to de facto enlistments and also speaks in terms of acquiring the status of a soldier by acts which "are the equivalent of an enlistment." *See* United States v. Fant, 25 C.M.R. 643, 646 (A.B.R. 1958). A reading of *Julian*, *supra*, indicates that the "equivalent acts" theory is probably really the de facto theory—the existence of an attempted enlistment contract is not required. Subsequent acts in themselves constitute a valid change of status. *See also Ex parte* Hubbard, 182 F. 76, 81 (D. Mass. 1910); Barret v. Looney, 158 F. Supp. 224 (D. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir. 1958), *cert. denied*, 357 U.S. 940 (1958); *In re* McVey, 23 F. 878, 879 (D. Cal. 1855) (petitioner was a de facto soldier because (1) he voluntarily assumed obligations and (2) he had attempted to secure the rights of an enlisted man). *But see* Jackson v. United States, 551 F.2d 282 (Ct. Cl. 1977), where the court stated in dicta that 10 U.S.C. § 505 (1970) required written instruments for enlistment, "otherwise there would be no way the government could determine which branch of the service was involved nor the term or conditions of the enlistment." 551 F.2d at 285.

duce the inconsistencies between the federal and military courts.[228] Both theories incorporate a balance of interests test. Where the servicemember has committed a crime, his interests are outweighed by the interests of the Government and the public.

B. AMENDMENT OF ARMY REGULATION 635–200 PERSONNEL SEPARATIONS– ENLISTED PERSONNEL

The uniform approach could also be implemented in changes to personnel regulations which prescribe procedures for processing fradulent or irregular entry cases. Specifically, Army Regulation 635–200, Chapter 14,[229] should be amended to reflect the following:

(1) An enlistment is a contract which changes status. Although the servicemember may have entered the service in a fraudulent manner, the subsequent conduct of the parties may have formed an implied contract.

(2) All cases should be referred to a board of officers for disposition. The board should, upon the advice of the Staff Judge Advocate:

(a) examine the enlistment contract and its annexes;

(b) consider all available evidence and, according to general principles of contract law, determine if an implied contract has been formed; [230] and

(c) balance the interests of the servicemember, the Government, and the public. Factors to be considered are: (i) the basis for disqualification; (ii) na-

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[228] The statutory basis might arguably extend in war time to inductees serving under an invalid induction order. Although the element of voluntariness would probably be missing, the needs of the war-time Army vastly outweigh the inductee's right to avoid court-martial jurisdiction on what usually amounts to the argument that the Government failed to follow its regulations. The intent here is to fill jurisdictional gaps for those who in some manner "volunteer" their services and commit an offense.

[229] The purpose of proposed changes to the personnel regulations is to recognize that fraudulent enlistments should be viewed as voidable at the option of the Government. Chapter 14 is only one area of proposed change. Appropriate amendments would have to be made to other provisions dealing generally with enlistment contracts. *See, e.g.*, DAPC-PAS-071400Z Feb. 75, SUBJ: Interim Change to AR 635–200 Paragraphs 5–32 and 5–12. For comments on current procedures for disposition of fraudulent enlistments see notes 116–119 *supra*.

[230] The four recognized criteria for finding a constructive enlistment would be applied. *See* note 222 *supra*.

ture of recruiter misconduct, if any; (iii) the length and character of creditable service; and, (iv) the servicemember's potential contribution to the service.

(3) The board's conclusions and recommendations should be forwarded to MILPERCEN, Wash. D.C. for action.

A centralized collection point for enlistment problems lends considerably to uniformity.

C. AMENDMENT OF ARMY REGULATION 601–210, RECRUITING PROCEDURES

A particularly bothersome area of enlistments is found in the potential abuse in declaring eligibility requirements to be for the primary benefit of the servicemember. The problem could be eliminated by amending the appropriate tables to reflect that the requirements are for the benefit of (1) the Government, (2) the recruit, or (3) both the Government and the recruit. Such an amendment could be included in a "policy" paragraph or as an amendment to each eligibility requirement or to a series of eligibility requirements. So designating the eligibility criteria would greatly reduce the leeway now enjoyed by the courts in interpreting the eligibility criteria.[231] At the same time the Government would continue to exercise paramount control over eligibility requirements.

VIII. CONCLUSION

> *If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.*[232]

In *United States v. Blakeney* the Virginia Supreme Court addressed the ability of a minor to enter into an enlistment contract and bear arms:

> If such ability in reference to [the statutory age requirement] was still to be a subject of judicial decision, instead of official discretion,

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[231] *See, e.g.*, United States v. Little, 24 C.M.A. 328, 52 C.M.R. 39 (1976); United States v. Russo, 23 C.M.A. 511, 50 C.M.R. 650 (1975). *See generally* notes 106–112 *supra*.

[232] F. BACON, THE ADVANCEMENT OF LEARNING, ch. 5 (1605).

> then it must be determined not by the special circumstances of each particular case, but by a general rule of uniform application.[233]

The three-step uniform approach proposed in this article is a means of disposing of enlistment problems by a rule of general application. It is an attempt to resolve some of the uncertainties and inequities that exist in the law of enlistments. In applying the uniform approach several principles must be considered:

(a) The Government's power to raise and support armies is paramount. It decides who may serve and the conditions of military service.
(b) The enlistment contract between an individual and the Government changes the individual's status from citizen to soldier and places enforceable obligations (as does any other contract) on both parties.
(c) Although general principles of contract law should be applied in interpreting an enlistment contract, the contract is unique. The Government's paramount powers and the absence of complete mutuality are factors which render it unique. Thus, the element of "contract" and the element of military "status" must be considered together in determining the effect and validity of the enlistment contract.
(d) Public policy should prevent the servicemember from avoiding court-martial jurisdiction by using an invalid enlistment contract as a shield.

Each of these four principles is a composite of numerous rules, opinions, policies, and decisions. In the aggregate, they represent the mainstream of judicial and administrative authority. They should be applied in resolving any enlistment problem.

The inconsistent judicial and administrative views toward the enlistment contract often arise from detailed attention to individual fact situations and from inattention to controlling principles of applicable law. This whole area of law is a collage of opinions with little rhyme or reason—no one statute controls, no one decision is dispositive.

The uniform approach is a blending of the foregoing principles. It recognizes the federal position that enlistment contracts create a contractual relationship between the soldier and the state. And it also recognizes the equally important emphasis by military au-

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[233] 44 Va. (3 Gratt.) 387 (1847). *See also* notes 18–26 and accompanying text *supra*.

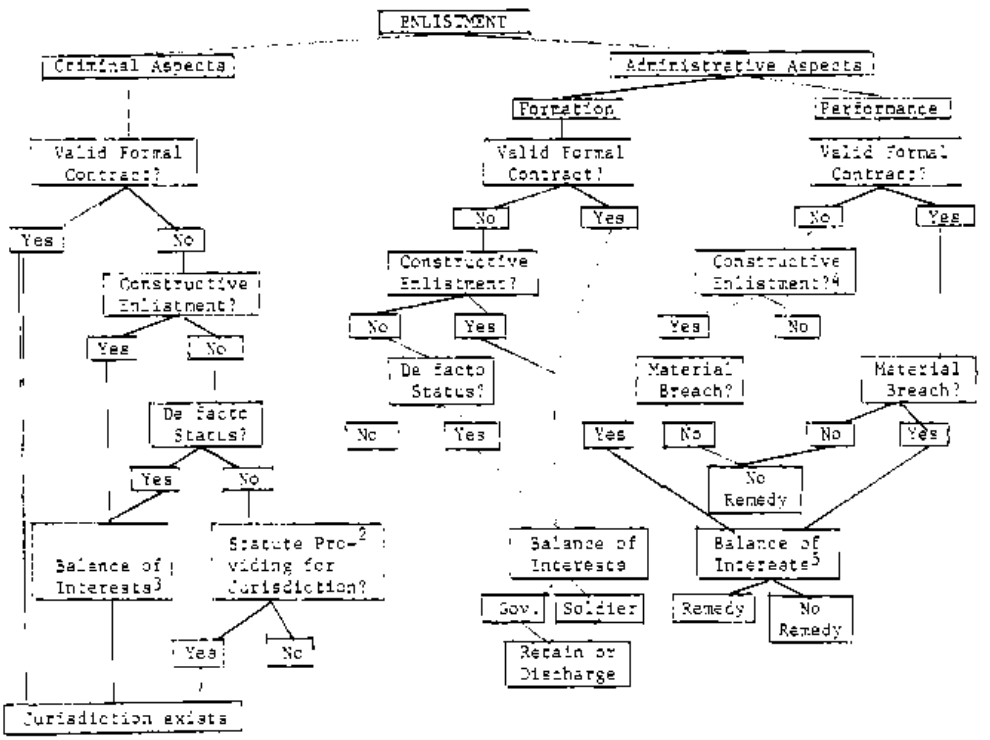
thorities on the creation of a unique status. As a hybrid approach, it draws from the best of many divergent perspectives. Thus, as a practical application which adopts a common definition, applies contract principles, and balances the interests, the uniform approach is both a plausible and desirable method for solving enlistment problems.

> *What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed.*[234]

[234] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928).

APPENDIX A

ENLISTMENT PROBLEMS: DECISION FLOW CHART



NOTES:
1. A distinction can be made between "constructive enlistment" and "de facto status." See note 203 *supra*.
2. For proposed statute *see* section VI *supra*.
3. Where serviceremember is pending charges, public policy should usually tip balance in favor of Government (jurisdiction exists).
4. Although formal valid contract is lacking, individual may have standing to argue material breach of contract on grounds of constructive enlistment (implied contract).
5. Even though material breach may have occurred, factors such as "supervening statute" and "national emergency" should be considered.

A PRACTICAL GUIDE TO FEDERAL CIVILIAN EMPLOYEE DISCIPLINARY ACTIONS*

Major M. Scott Magers**

I. INTRODUCTION

There is a well entrenched myth that it is impossible for managers to take disciplinary action against civilian employees of the federal government. The genesis of this myth would be difficult to trace, but certainly the procedure for taking disciplinary action is difficult and confusing.[1] In addition to the system's inherent perplexities, the manager's lack of training and experience in the use of disciplinary procedures makes the process of taking adverse or disciplinary action against federal employees a frustrating matter.[2]

Federal managers and supervisory personnel have not been alone in recognizing the procedure's complexity. One commentator has charged that "[t]he critical factor of civil service today is that covered employees are rarely discharged from government for inadequately doing their jobs. The Civil Service system has provided the equivalent of life tenure (at least until retirement) once a brief probation period is passed, absent what the government considers a serious act of misconduct." [3]

Whether or not the system of taking adverse actions against civilian employees is too difficult has been widely debated.[4] On one side

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

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[1] For an excellent article describing the historical development of the adverse action process and proposals for reforming the procedure, *see* Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

[2] According to Civil Service Commission guidance, the term "adverse actions" applies to "disciplinary and nondisciplinary removals, suspensions, furloughs without pay, and reductions in rank or pay." FEDERAL PERSONNEL MANUAL SUPPLEMENT 752-1, Subchapter S1, ¶ S1-1a (1976) [hereinafter cited as FPM]. *See* note 15 *infra* for an explanation of the Federal Personnel Manual system.

[3] Frug, *Does The Constitution Prevent the Discharge of Civil Service Employees?* 124 U. PA. L. REV. 942, 945 (1976).

[4] *See, e.g.*, Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178 (1972); authorities cited note 3 *supra* & notes 5 & 6 *infra*.

of the argument lies the obvious need for management to effectively control its work force, and on the other the necessity to protect merit system employees from arbitrary action on the part of their supervisors.[5] Complicating the issue further is the fact that the Government, which is circumscribed in its activities by the Constitution, is the employer. One author has argued that the tension between employment rights and government procedures must inure to the benefit of the federal employee "[b]ecause employment is an indispensable personal interest [and] ought to receive maximum protection under the due process clause." [6] The same author realizes that this protection of governmental employment rights breeds complacency and that "[o]ne of the main reasons individuals choose to work for the government is that they believe that they thereby achieve personal security." [7] Nonetheless, the interest of the public in the debate between effective management control of employees and employee protection from arbitrary action is often ignored. Perhaps it is true that "[t]he more entrenched the government work force, the less likely it becomes that the public can receive fair and effective treatment from its government." [8]

Despite the theoretical debate over, and the practical complexities of, the current procedures for disciplining government em-

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[5] A thorough discussion of the merit system's development is found in D. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION (1971).

[6] Note, *The Due Process Rights of Public Employees*, 50 N.Y.U.L. REV. 310, 358 (1975).

[7] *Id.* at 358 & 359. Others have been less complimentary in describing the type of individual working for the federal government. One author quotes an historian of the last century as complaining that:

> The government formerly served by the elite of the nation, is now served to a very considerable extent by its refuse . . . In the year of our Lord 1859, the fact of a man's holding office under the government is presumptive evidence that he is one of three characters, namely, an adventurer, an incompetent person, or a scoundrel. From this remark must be excepted those who hold offices that have never been subjected to the spoils system, or offices which have been taken out of politics.

D. ROSENBLOOM, *supra* note 5, at 57.

[8] Frug, *supra* note 3, at 978.

[9] The following statistics were published in U.S. DEP'T OF ARMY, CIVILIAN MANAGEMENT ANNUAL EVALUATION, FY 76 AND FY 7T, at 45:

Disciplinary Actions FY 1973–FY 7T
(Rate per 1,000 Employees)

	Total Actions		*Reprimands*	*Suspensions*	*Removals*
Fiscal Year	*Number*	*Rate*	*Rate*	*Rate*	*Rate*
1973	2,900	8.82	4.79	3.31	0.71
1974	2,751	8.68	4.56	3.30	0.82
1975	3,205	9.91	5.01	3.96	0.93
1976	3,885	12.1	5.44	4.83	1.76
FY 7T	962	2.9	1.20	1.30	.30

ployees, statistics reflect that the number and rate of disciplinary actions in the Department of Army continue to rise.[9] The Department of the Army Annual Evaluation of Civilian Personnel Management states that the "increase recorded in the removal rate indicates that supervisors are following the latest Army guidance and are instituting removal action for unsatisfactory performance rather than assigning unsatisfactory performance ratings." [10] In light of these increases in the imposition of disciplinary sanctions, managerial personnel and their legal advisors must be fully aware of the proper procedures for imposing these sanctions.

The Army lawyer's involvement in this area of the law is a relatively recent development. It was not until July of 1974 that, as a normal practice, military attorneys became involved in giving advice on matters dealing with disciplinary actions.[11] Today the labor counselor is involved in all aspects of federal sector labor law including advising on disciplinary actions,[12] reductions in force, equal employment opportunity problems,[13] and questions dealing with federal sector unions. Because of his involvement in federal labor law activities, the military attorney must be aware of the legal issues involved in employee disciplinary actions.

This article will not debate the appropriateness of the current job protection rights accorded federal employees, nor discuss the constitutional issues dealing with the adverse action process.[14] Its pur-

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[10] *Id.* at 44. Chapter 430 of the Civil Service Regulations covers performance ratings, FPM 430 (1972), while the procedure for removals is set forth in FPM 752 (1976).

[11] *See* Dep't of Army Letter, DAJA-CP 1974/8342, 15 July 1974, Subject: The Army Lawyer as Counselor to the Civilian Personnel Officer. This letter stated "an Army Lawyer will be designated at each installation to provide comprehensive legal services to the civilian personnel officer and his personnel management specialists." The lawyer is generally a member of The Judge Advocate General's Corps, but some Department of the Army civilian lawyers have been appointed labor counselors.

[12] The CPR now specifically states that:

> [I]n instances where legal issues are involved or litigation is anticipated [in the adverse action procedure], advice and assistance should be obtained from the Staff Judge Advocate office to reduce the possibility of later reversals. In these cases, Staff Judge Advocate participation should be maintained throughout the adverse action proceedings and, if the employee appeals, through the appellate proceedings as well.

CPR 752-1 (C3) 54-1.c. (1975).

[13] A discussion of reductions-in-force is found in FPM 351 (1973), and FPM 713 (1976) contains information about the federal government's Equal Employment Opportunity program.

[14] *See* Lowy, *Constitutional Limitations on the Dismissal of Public Employees*, 43 BROOKLYN L. REV. 1 (1976). *See also* Note, *supra* note 6, for a discussion of "what constraints the due process clauses of the fifth and fourteenth amendments

pose is to explain the requirements of the disciplinary action procedure. This will be a "how to" guide, which will attempt to simplify and consolidate the detailed instructions provided by the Civil Service Commission and relate various administrative and judicial decisions to the regulatory guidance.[15] This article will identify areas that are particularly troublesome to the federal manager, with particular emphasis on the regulatory requirements which pertain to disciplinary actions in the Department of the Army.[16] Once the regulatory system is understood, the administrative procedure becomes less confusing and more manageable. Hopefully this article will show Department of the Army managers and labor counselors that the procedure is workable—disciplinary action, when appropriate, may be taken with minimum difficulty.

II. DEFINING EMPLOYEE DISCIPLINE

A. STATUTORY LANGUAGE

The statutory provision which authorizes disciplinary actions against employees in the competitive service [17] provides that an individual in the competitive service "may be removed or suspended without pay only for such cause as will promote the efficiency of the service." [18] The statute also sets forth procedural rights to which an

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place upon the government's ability to sever the employment relationship." *Id.* at 810–11.

[15] The Civil Service Commission's regulation, instructions, and related materials are published in the Federal Personnel Manual (FPM) system. The system contains the basic manual, supplements, letters and bulletins. The regulations dealing with employee discipline are found in both the FPM and the *Code of Federal Regulations*. Citations to the FPM system will include chapter, subchapter and paragraph. For example, the citation to the material explaining the use of the Federal Personnel Manual system would appear as FPM 171.52–1 through .52–10. When citing to the basic regulation, the C.F.R. reference will be used. *See* U.S. DEP'T OF ARMY, PAMPHLET NO. 27–21, MILITARY ADMINISTRATIVE LAW HANDBOOK ¶ 4–2 (1976).

[16] The Department of the Army's regulation supplementing the FPM is the Civilian Personnel Regulation [hereinafter cited as CPR]. An explanation of the purpose of the CPR and its numbering system is found in CPR 272 (C2) 272.2. Generally the CPR system is keyed to the FPM system so that topics covered by both systems are filed together. For example, the subject "Merit of Adverse Action" is found in FPM SUPP. 752–1, S3 (1976), while the same subject is covered in CPR 752–1 (C5), S8 (1976).

[17] FPM 212 explains the significance of a position being in the "competitive service" and defines the competitive service as "all civilian positions in the federal government which are not specially excepted from the civil service laws by or under statute, by the President, or by the Commission. . . ." FPM 212 S1–2.a. (1969).

[18] 5 U.S.C. § 7501(a) (1970).

employee subjected to disciplinary action is entitled.[19] Similarly, preference eligible employees [20] are subject to adverse action "only for such cause as will promote the efficiency of the service." [21] In the past, such employees had been accorded more extensive procedural rights than other classes of employees.[22] To eliminate the distinction between rights available to different classes of employees, the President, by Executive Order, granted all employees in the competitive service "rights identical in adverse action cases to those provided preference eligible [employees]. . . ." [23]

B. REGULATORY LANGUAGE

Civil Service Commission regulations set forth the types of disciplinary actions available for management use. One portion of the regulation deals with the major actions of removal, suspension for more than 30 days, furlough without pay, and reduction in rank or pay,[24] while a subsequent portion pertains to the less drastic action of suspension for 30 days or less.[25] These regulations and interpreting guidance are found in the Federal Personnel Manual system which is the primary reference source for problems of federal sector labor law.[26]

C. TYPES OF ACTIONS AVAILABLE

Federal managers may initiate disciplinary actions against civilian employees that range from counseling to removal. Other actions involve issuance of letters of reprimand, suspensions for 30 days or less, suspensions for more than 30 days, furloughs without pay, and

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[19] *Id.* § 7501(b). This section provides that an individual in the competitive service whose removal or suspension without pay is sought, is entitled to

> (1) notice of the action sought and of any charges preferred against him; (2) a copy of the charges; (3) a reasonable time for filing a written answer to the charges, with affidavits; and (4) a written decision on the answer at the earliest practical date. Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay.

[20] A preference eligible employee is defined in 5 U.S.C. § 2198 (1970). Generally such an employee is an individual who has served as a member of the Armed Forces or is the mother or spouse of such a member who meets other qualifications. *See generally* FPM 211 (1972).

[21] 5 U.S.C. § 7512 (1970).

[22] These rights are set forth in 5 U.S.C. §§ 7511, 7512 & 7701 (1970).

[23] Exec. Order No. 11,491, 3 C.F.R. 254 (1974), *reprinted in* 5 U.S.C. § 7301 app., at 169 (Supp. V 1975).

[24] 5 C.F.R. § 752.201(b) (1977).

[25] *Id.* at § 752.301(b) (1977).

[26] For a discussion of the use of the FPM system *see* note 15 *supra*.

reductions in pay or rank.[27] The Army Civilian Personnel Regulation distinguishes between informal actions such as oral admonitions and warnings which are considered counseling sessions; and written reprimands, suspensions, and removals, which are deemed formal disciplinary actions.[28]

Whatever method is used, good management principles suggest that the action taken be both reasonable and timely. The Department of the Army encourages the use of informal disciplinary methods whenever possible. The CPR suggests that "[w]here corrective action can be accomplished through closer supervision, on-the-job training, or oral admonitions or warnings, formal disciplinary actions should not be taken." [29] Because of this guidance, Department of the Army managers who propose major disciplinary actions should be prepared to show that they have previously taken informal steps to improve the employee's conduct or efficiency.

The method of documenting informal disciplinary actions merits discussion. The Commission has placed a limit on how a supervisor may record the occurrence of informal admonitions or other minor disciplinary events involving a civilian employee. The FPM states that "[n]o record or file for employees, in addition to those designated as official or authorized [in FPM Supp. 293–31], may be established without the prior approval of the Civil Service Commission." [30] The proper record to be used in documenting counseling sessions or noting oral admonitions is Standard Form 7-B, Employee Record Card,[31] which the Army's CPR requires supervisors to maintain for each civilian employee.[32] Where practical, the card is kept at the lowest supervisory level and is used as a quick access record of the individual's employment.

Of significance to the disciplinary action process is the requirement that periodic counseling sessions be noted on the card as they occur.[33] The supervisor who uses the card to record oral admonitions and warnings involving misconduct and substandard performance has a converient record of past performance if the employee is

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[27] 5 C.F.R.§§ 752.201 & 752.301 (1977); FPM SUPP. 752–1, S1 (1972).
[28] CPR 700 (C14), 751.1–2.a.(1)–(2) (1973).
[29] *Id.* at 751.1–2.a. (1973).
[30] FPM SUPP. 293–31, S8–3.a. (1976).
[31] FPM 295, S7–4. (1969). This section states that the Employee Record Card is used by operating officials as a basis for initiating personnel actions; recording personnel actions, training, and qualifications; and noting reprimands and other matters pertinent to the personnel job of the operating official.
[32] CPR 200 (C20), 295.7–4.a. (1972).
[33] *Id.* at 295.7–4.b.(2).

later subjected to more serious disciplinary action. Such use of the form was upheld in a case where an employee objected to its introduction during a Civil Service Commission hearing on an appeal of a removal action. The court stated, "It would seem ludicrous, when considering whether a termination will promote the efficiency of the Service, to foreclose the use of a report made by superiors with first hand knowledge of the facts, which shows that the employee had a consistent pattern of inefficiency. . . ." [34]

Although a supervisor should counsel an employee before taking formal disciplinary action, under some circumstances only strong, formal action will be appropriate. Ideally, in such cases a formal written reprimand will be adequate to correct the problem, and suspension or removal will not need to be proposed.[35] The written reprimand, although considered a minor penalty, involves formal procedures which emphasize the gravity of the misconduct or substandard performance underlying the action. Regulations promulgated by both the Civil Service Commission and the Department of the Army outline the procedures required for issuing a formal written reprimand. The Army's CPR grants an employee who may receive such a reprimand many of the rights that are available to the employee who is to receive a notice of suspension or removal.[36]

The Civil Service Commission regulation on adverse actions expressly recognizes the use of suspensions [37] which may be denominated either major or minor depending on their length. Because the employee is in a nonpay status while suspended, the penalty typically reflects the seriousness of the conduct at issue. Although there is no regulatory limitation on the length of a suspension, the loss of the employee's services during the period normally dictates that suspensions be of short duration. As with other actions, the facts and circumstances of the individual case will determine the length of the suspension, but because of the required formalities, the manager must be certain that the proposed action is appropriate.

Although included as an adverse action in the Civil Service Commission regulations,[38] a furlough is not considered a disciplinary ac-

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[34] Dozier v. United States, 473 F.2d 866, 868 (5th Cir. 1973).

[35] The Army's CPR states that a formal written reprimand is appropriate "when more stringent disciplinary action than an oral reproof is warranted and the circumstances justify the inclusion of a record in the employee's official personnel folder." CPR 700 (C17), 751.3-2.a. (1973).

[36] For an explanation of the procedure for processing a formal written reprimand, *see* CPR 700 (C17), 751.3 (1973).

[37] 5 C.F.R. §§ 752.201-.301 (1977).

[38] *Id.* § 752.201 (1977).

tion. The Army's CPR states that "[a] furlough not to exceed 30 days is an action placing an employee in a temporary nonduty and nonpay status due to lack of work or funds or for other nondisciplinary reasons." [39] Consequently, the use of the furlough will not be further discussed in this article.[40]

Civil Service Commission regulations list reduction in pay or rank as adverse actions.[41] The Army's CPR states that reduction in rank will not normally be used as a disciplinary measure although

> [s]uch actions are appropriate, . . . to reassign or demote an employee from a position for which the employee has been determined unsuited either by reason of performance or behavior. For example, action to reassign or demote an employee from a supervisory position to a nonsupervisory position may be appropriate when the supervisor has been found by competent authority to engage in discriminatory practices. Similarly, reassignment or demotion of an employee from a position in which the employee's performance has been judged inadequate to a position in which the employee has previously performed in a satisfactory manner may be appropriate.[42]

If an employee voluntarily accepts a demotion, the adverse action procedure need not be utilized, but the acceptance must be shown to have been voluntary and not coerced.[43] This point may be illustrated by a case in which supervisor informed an employee that if he did not accept a position demotion, the supervisor "would do something else." When the employee asked how long he had to consider this option, he was told he had "approximately five minutes." A Federal Employee Appeals Authority field office found that this was not a voluntary demotion because it was obtained by "time pressure" [44] in violation of regulatory provisions.[45]

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[39] CPR 752-1 (C3), S1-6.b. (1975). Similar language is found in FPM SUPP. 752-1, S1-6.a. (1976).

[40] Furloughs are discussed in FPM SUPP. 752-1, S1-6.b. (1976).

[41] 5 C.F.R. § 752.201 (1977).

[42] CPR 752-1 (C3), S1-4.d. (1973).

[43] For a discussion of voluntary reductions *see* FPM 715, S4 (1969).

[44] Dec. No. DA 752B70035, 3 Dig. of Significant Decisions 4 (1976). The Civil Service Commission has established a two-level appellate procedure to hear appeals of adverse actions taken by agencies. The first level is the Federal Employee Appeals Authority [hereinafter cited as FEAA] and the second level is the Appeals Review Board [hereinafter cited as ARB]. For an explanation of the function of the FEAA *see* Mahoney, *Federal Employee Appeals Authority*, 22 FED. B. NEWS 41 (1975). The Commission publishes a "Digest of Significant Decisions" of both the FEAA and the ARB. This Digest may be obtained by writing to: FEAA Headquarters Office, 1900 E Street, N.W., Washington, D.C. 20415. All decisions of the FEAA and the ARB are available on microfiche. The decision numbers are keyed to the FPM system so that decisions are readily identified by subject matter. For purposes of this article, the numbering system used by the Commission

In many cases employees who have received notices of proposed disciplinary action resign to avoid the action. Although the adverse action procedures need not be used when an employee resigns voluntarily, the Commission will accept an employee's appeal if he alleges that his resignation was obtained by "duress, time pressure, intimidation, or deception." [46] Freedom of choice is the key, so it is proper to inform the employee that disciplinary action procedure will be initiated if he does not submit his resignation. The Commission instructions state:

> The fact that the employee may be faced with an inherently unpleasant situation or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action. However, if the agency uses deception, coercion, duress, time pressure or intimidation to force him to choose a particular course of action, the action is involuntary and appealable to the Commission.[47]

Once a resignation has been submitted, an employee's request to withdraw the resignation must be in writing. Any rejection of the request must include the reasons for denial.[48] The FPM suggests that a valid reason for refusing to accept the withdrawal would be that the position resigned has subsequently been filled.[49]

Courts will generally presume a resignation to have been voluntary unless the employee is able to submit sufficient evidence to overcome that presumption. In one case where an employee had resigned upon receiving notification that a removal action was being proposed, the court found no evidence of duress or coercion and restated the well established Court of Claims' rule upholding "the voluntariness of resignations where they were submitted to avoid threatened termination for cause." [50]

The fact that the affected employee may consider a reassignment to be a "bureaucratic step down" does not mean the transfer is a disciplinary action if there is no change in grade or pay. In *Com-*

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indicating appellate office, type of appeal, fiscal year and accession number will be used.

Example:	DC	752B	7	0001
	office	type of appeal	FY	accession #

If two decision numbers are cited, the first will be from the FEAA and the second from the ARB.

[45] FPM SUPP. 752-1, S1-2.a.(1) (1976).

[46] *Id.*

[47] *Id.* at S1-2.a.(3).

[48] CPR 752-1 (C3), S1-1.b.(7) (1975).

[49] FPM SUPP. 752-1, S1-1.b.(7) (1976).

[50] Christie v. United States, 207 Ct. Cl. 333 (1975).

beriate v. United States [51] an employee who refused a transfer from Washington, D.C. to Cleveland, Ohio contended the proposed transfer was disciplinary in nature despite the fact that it did not involve any reduction in grade or pay. The court refused to find the transfer unlawful, pointing out that federal agencies have wide discretion in transferring employees within their jurisdiction.[52] In another case dealing with an employee transferred to Cleveland, a GS-15 argued that his transfer from Washington, D.C. to another GS-15 position was a reduction in rank because the responsibilities in the new job were less extensive than those in the Washington position.[53] The Civil Service Commission had upheld the agency's finding that in fact there was no adverse action because there was no reduction in rank. The circuit court observed that the adverse action regulations do not state "how and by whom it is to be decided whether a given action constitutes one of the 'adverse actions' to which the regulations apply," [54] and went on to give great weight to an agency's interpretation of its own regulations. In light of these principles, the court was "unable to say that the governing regulations were dishonored. . . ." [55]

When an employee refuses to accept reassignment, the agency may propose a removal action. A Federal Employee Appeals Authority field office and the Sixth Circuit have validated this course of action. In the case of an employee who, upon notice of reassignment, refused to accept the reassignment, the FEAA stated that when the employee's refusal to accept the reassignment was received the agency should have sent him a notice of proposed adverse action based on his refusal to move.[56] The Sixth Circuit has upheld the validity of a removal action based on an employee's refusal to accept a transfer to a position not involving reduction in rank or pay. In *Sexton v. Kennedy*,[57] the agency proposed the transfer because the employee was not able to get along with his fellow work-

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[51] 203 Ct. Cl. 285 (1973).

[52] Emphasizing the need for federal agencies to have discretion in this area, the court stated, "but no one in the government could ever be transferred if the measure for lawfulness of the move were whether the employee was subjectively satisfied, i.e., felt it offered sufficient glamour and excitement, or feared transfer to the 'boondocks'." *Id.* at 290.

[53] Leefer v. Administrator, 543 F.2d 209 (D.C. Cir. 1976).

[54] *Id.* at 213.

[55] *Id.*

[56] Dec. No. SE 753B60097.

[57] 523 F.2d 1311 (6th Cir. 1975).

ers. The court, finding the reason for the transfer valid, held the removal to have been proper.[58]

The disciplinary action of removal is so serious that it should be considered only after less severe penalties have proven unsuccessful or when the conduct in question is of such a serious nature that removal is the only remedy appropriate. This action is, for example, appropriate where an employee continues a pattern of tardiness after numerous warnings, letters of reprimand and suspensions; likewise where the employee has committed a serious criminal act, there is no need to propose a minor disciplinary action prior to proposing removal. Because removal results in the employee's loss of his current position and may make securing future employment more difficult, it is the one disciplinary action that is most likely to be challenged by the employee. Because the impact on the employee is so serious, and because the action is so likely to be challenged, the justification for proposing this action and the documentation justifying it must clearly support the action. Nonetheless, supervisors should not hesitate to propose removal actions where the underlying facts require removal: as much harm is caused by taking no action when misconduct or inefficiency is discovered as is caused by choosing a penalty which cannot withstand review.

III. CONDUCT WHICH SUBJECTS EMPLOYEES TO DISCIPLINARY ACTION

A. STATUTORY STANDARD

The broad and somewhat vague federal statutes [59] which authorize disciplinary action against federal employees have survived constitutional challenge.[60] The Commission has published guidance to assist the federal manager in interpreting this statutory standard. The FPM states that "cause" for disciplinary action encompasses "offense[s] against the employer-employee relationship, including inadequate performance of duties and improper conduct on or off the job." [61] In addition to this general definition, the FPM emphasizes management's need to consider the facts of each indi-

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[58] *Id.*

[59] *See* notes 18 through 23 *supra*.

[60] Arnett v. Kennedy, 416 U.S. 134 (1974). For an analysis of this important case, *see* Comment, *Arnett v. Kennedy—A Dubious Approbation of Adverse Action Procedures*, 16 WM. & MARY L. REV. 153 (1974).

[61] FPM SUPP. 752–1, S3–1.a. (1976).

vidual case, act reasonably, and prove the facts underlying the action.[62]

As further guidance to the federal manager, the Civil Service Commission has established suitability factors for federal employment. These factors, denominated "general," "specific," and "additional" are found in a supplement to the FPM entitled *Determining Suitability for Federal Employment* [63] which explains the meaning of the specific and additional factors in detail. This explanatory material provides significant guidance for management officials who consider preparing notices of proposed action.[64]

The Civil Service Commission regulations state that the suitability factors listed in the FPM Supplement are "among the reasons which constitute" adequate cause for adverse action,[65] although other nonlisted factors may also serve as a basis for adverse action.[66] In explaining the use of the suitability guidelines in the adverse action procedure, the Commission points out that "[t]he many complexities in human behavior preclude the development of a formula to assist . . . in deciding individual cases. The guidelines are based on the concept that each case must be decided on its own merits." [67]

This principle of judging each case on its merits coupled with the requirement that no employee may be removed except "for such cause as will promote the efficiency of the service" demands that management officials involved in the adverse action procedure exercise care and sound judgment. In addition, federal managers should be prepared to show a connection between the statutory standard and the conduct in question. Interpreting the statutory standard for adverse actions, the Commission has advised that action may be taken "only if it can be shown that the conduct may reasonably be expected to interfere with the ability of the person to function in the position or the agency's ability to discharge its responsibilities. In

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[62] *Id.* at S3–1.b.
[63] FPM SUPP. 731–1 (1975).
[64] *Id.* at S3 & S4 (1975).
[65] 5 C.F.R. § 752.104 (1977).
[66] Halsey v. Nitze, 390 F.2d 142 (4th Cir.), *cert. denied*, 392 U.S. 939 (1968). In *Halsey*, the appellant argued that because he was removed for reasons not listed in Civil Service Commission regulations, his discharge was not for such cause as will promote the efficiency of the service. The court disagreed and held the reasons listed in 5 C.F.R. § 731.201 (b)–(g) are "among the reasons which constitute adequate cause, . . ."
[67] FPM SUPP. 731–1, S1–1.b. (1975).

other words, there must be some rational connection between a person's conduct and the efficiency of the service." [68]

B. SPECIFIC CONDUCT

1. Inefficiency and Substandard Performance

Many federal managers simply do not believe the adverse action process is a practical or feasible method to remedy inefficient or substandard employee performance. Instead of proposing adverse actions, such managers attempt to adjust to the employee's failings. Although inefficiency or substandard job performance is often difficult to substantiate, a disciplinary action may be successfully taken on the basis of such delicts. Illustrative of the type of inefficiency or substandard performance which demands some action is the case of two historians employed by the Department of Defense.[69] Apparently, the employees became dissatisfied with the management of the project to which they were assigned. This dissatisfaction led to a drop in their job performance and finally the historians refused to do any assigned task, although they did report to work. The agency removed the employees for "failure to perform assigned duties." [70] This action was upheld by an FEAA office on the basis that "an employee is expected to perform and accomplish a reasonable day's work on his assigned duties for each day's pay that he receives." [71] The employees then appealed the removal decision to the Court of Claims. The court, upholding the agency's right to remove the employees for this conduct, emphasized that "the prime duty and foremost obligation of any employee is to exert effort and energy in the accomplishment of assigned tasks." [72] The court then turned to the fact that the employees did practically no work for a six-month period and pointed out that "[s]omewhere along the line the plaintiffs simply allowed their dissatisfaction to get the best of them, and they lost sight of the fact that their principal duty was 'to research and write history, which is the job they were hired to do.' " [73] In this case the lack of work over an extended period clearly indicated the need for disciplinary action, but the principle of

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[68] *Id.* at S1–1.d. (1975).
[69] Boyle v. United States, 515 F.2d 1397 (Ct. Cl. 1975).
[70] *Id.* at 1400.
[71] *Id.*
[72] *Id.* at 1401.
[73] *Id.* at 1402.

requiring "effort and energy" in the job is one that should be applied to all positions.[74]

The key to taking disciplinary action for inefficiency is documentation of the case.[75] The Army's CPR sets forth special rules for taking disciplinary action against employees for inefficiency [76] which require the Army manager to demonstrate that substantial efforts were made to correct the employee's deficiencies prior to initiating an adverse action. These efforts include counseling the employee about the reasons for management displeasure with his work and showing that good faith efforts were made to assist the employee in any attempt to improve his performance.[77] These requirements may be documented through the use of counseling, oral admonitions and warnings which are posted on the Standard Form 7-B, letters of reprimand and short periods of suspension.

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[74] The Supreme Court must also wonder whether it is possible to take disciplinary action for inefficiency. In Arnett v. Kennedy, 416 U.S. 134 (1974), the Court stated:

> A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials. This is not such a case, however, since Kennedy was terminated on specific charges of misconduct.

Id. at 186.

[75] For an example of the type of documentation that is necessary in a case dealing with inefficiency *see* Perlstein v. United States, 182 Ct. Cl. 865 (1968).

[76] CPR 752–1 (C3), S4–3.b. (1975).

[77] *The CPR sets forth the following detailed requirement:*

> **S4–3. SPECIFICITY AND DETAIL**
>
> b. **Special situations.**
>
> (3) Inefficiency after "satisfactory" performance rating. Except as noted below, a written warning of unsatisfactory performance must be issued at least 90 days in advance of initiation of any proposed adverse action (as defined in this chapter) for inefficiency. As a minimum, the written notice will include
>
> (a) The specific performance requirements of the position (i.e., standards of fully satisfactory performance) and how the employee failed to meet those requirements.
>
> (b) What the employee must do to improve his/her performance during the warning period in order to meet established performance requirements.
>
> (c) Specific efforts that will be made by the employee's supervisor(s) to help improve the employee's performance to a satisfactory level, including such steps as training, periodic performance counseling, coaching, technical assistance, and letter of instruction.
>
> If the employee does not improve his/her performance to a satisfactory level by the end of the warning period, every reasonable effort will be made to reassign the employee to a position where his/her skills can be utilized. If reassignment efforts are not successful, the employee will be demoted to a position, the duties of which the employee has previously proven capable of performing in a satisfactory manner. If it is determined that there are no available positions to which the employee can be reassigned or demoted and that the employee is ineligible for disability retirement or optional retirement, or declines optional retirement, separation action for inefficiency will be initiated. The 90 day written warning requirement will be waived when retention of the employee in his/her official position would constitute a serious threat to the health or safety of personnel or national security.

Id.

Many managers are reluctant to propose a disciplinary action for inefficiency if the employee has a current performance rating of satisfactory or better. Although there is an obvious conflict between awarding such a favorable rating and then proposing action for inefficiency, the Commission states specifically in its guidance that "[t]he fact that an employee has a current official performance rating of satisfactory or better does not prevent the agency from taking appropriate adverse action on the basis of unsatisfactory performance." [78] Courts have consistently upheld this Commission rule which makes a distinction between the adverse action procedure and performance evaluation.[79]

2. Absence from place of duty

Employees may be subjected to disciplinary action if they absent themselves from their place of duty without proper authority. In such situations, the agency should first attempt to ascertain whether the employee intends to return to work. If the agency determines that the employee has abandoned his position, it may process a separation action without following the Commission's regulations which would otherwise dictate the procedures by which an employee may be separated.[80] The Army's CPR contains specific guidance for handling cases of unauthorized absence.[81] Of course, the supervisor must always consider the length and circumstances of an absence before determining what, if any, action is required. Although no specific formula may be proposed, the federal courts have upheld the removal of a clerk-typist from his position when he absented himself without leave for eleven days after his request for leave during the period had been denied.[82]

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[78] FPM SUPP. 752-1, S4-3.b.(3) (1976). The "Department of the Army Performance Evaluation Plan" is found in CPR 400 (C5), 430.c. (1974).

[79] A case illustrating this point was that of a GS-11 employee who was removed for inefficiency shortly after being told that he had received a "satisfactory" rating for his last rated period of employment. The court pointed out that there are two different standards involved, and further stated that it was well established that "an unsatisfactory performance rating is not a prerequisite to the removal of an inefficient employee." Armstrong v. United States, 405 F.2d 1275, 1279 (Ct. Cl.), *cert. denied*, 395 U.S. 934 (1969). In another case dealing with the relationship between adverse actions and performance evaluations, an employee was removed for inefficiency even though an unsatisfactory evaluation based on the same conduct was overturned. In upholding the removal action the court pointed out that there are different standards involved in performance ratings than in adverse actions. King v. Hampton, 412 F. Supp. 827 (E.D. Va. 1976).

[80] FPM 751, S2-1.b. (1972).

[81] CPR 700 (C14), 751.2-1 (1973).

[82] Chiriaco v. United States, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd*, 339 F.2d 588 (5th Cir. 1964).

3. Continual Tardiness

Continual tardiness, like absence without leave, may serve as a basis for a removal action if the agency is able to show it has counseled the individual and that the conduct is of such a nature that the "efficiency of the service" would be promoted by disciplinary action. The Federal Aviation Administration successfully removed an air traffic control specialist who developed a pattern of reporting late for work.[83] Prior to initiating the removal action, the agency cautioned, officially warned, reprimanded and suspended the employee for five days, but these minor disciplinary actions did not have the effect of improving his record of reporting to work on time. Because of the nature of the employee's work and the fact that he was on notice of the agency's displeasure with his conduct, the court upheld the removal.[84] There is no reason why other employees should not also be expected to adhere to the hours of work established by their agencies.

4. Alcohol or Drug Abuse

Alcohol or drug abuse affects federal civilian employees in the same manner as it does members of the general population. When employees cannot control their use of alcohol or drugs, they often are unable to properly perform their duties. Because the Army considers both alcohol and drug abuse to be medical problems, the CPR requires that managers refer employees to the Army Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) when alcohol or drug abuse results in substandard performance of duties:

> Initiation of adverse actions for absenteeism, misconduct, and marginal or unsatisfactory job performance related to alcohol or other drug abuse will be postponed for 90 consecutive days only for employees who are enrolled in and satisfactorily progressing in the ADAPCP unless retention in a duty status might result in damage to government property or personal injury to the employee or others.[85]

Although the Army's primary emphasis is on rehabilitation,[86] the CPR discusses the alternatives available to the manager when the

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[83] Coates v. United States, 208 Ct. Cl. 1035 (1976).

[84] In discussing the peculiar nature of the position, the court stated, "the stresses on FAA controllers are well known to everyone, and it could well seem too much for fellow controllers to be asked to remain overtime intermittently at their post to accommodate plaintiff's tardiness. . . ." *Id.* at 1037.

[85] CPR 752–1 (C5), S3–2.b.(9) (1976).

[86] Army Reg. No. 600–85, Personnel-General-Alcohol and Drug Abuse Prevention and Control Program, para. 1–5 (1 May 1976).

employee in question refuses assistance or does not improve his performance after completion of the program. The emphasis on rehabilitation does not preclude the agency from removing an employee for alcohol or drug abuse when attempts at treatment fail.[87]

These principles were illustrated in the case of an employee who was removed for a 25 day absence without leave.[88] The employee appealed his removal, claiming the absence was alcohol related and that he had subsequently been cured of his problem. The FEAA field office upheld the removal because the agency showed that it had taken all possible efforts to assist the employee with his drinking problem prior to the removal action. The employee's efforts after the removal came too late.

5. Mental or Physical Disabilities

A mental or physical disability may affect the type of disciplinary action an agency will propose. The FPM emphasizes that management must not rely solely on the medical condition: "The agency must establish a link between the medical condition and (i) observed deficiencies in work performance or employee behavior or (ii) high probability of hazard when the disabling condition may result in injury to the employee or others because of the kinds of work the employee does." [89] Commission instructions continue by giving specific examples of when mental or physical disabilities may warrant a removal:

> When an agency can clearly show high probability of serious hazard—for example, an agency has indisputable evidence that a truck driver with epilepsy is subject to grand mal seizures—the

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[87] CPR 752–1 (C5), S3–2.b.(9) (1976). If the treatment attempts fail, the manager may take the following action:

> If the employee refuses rehabilitation assistance or, upon completion of the rehabilitation period (NTE 90 consecutive days) fails to achieve satisfactory job performance and conduct, appropriate adverse actions may be initiated. Adverse action must be based on unacceptable conduct or performance and may not be initiated based upon failure to participate in or complete the rehabilitation program.
>
> Previously initiated adverse actions in which the final decision letter has not been issued will be canceled upon the employee's enrollment in the ADAPCP, provided the employee has not previously refused rehabilitation assistance. Such action may be initiated anew if, at the end of the 90 consecutive days of active rehabilitation, job performance or conduct is unsatisfactory or if, at any time during the active rehabilitation phase, the employee refuses such assistance. Once an adverse action has been initiated against an employee who previously refused rehabilitation assistance, the proposed adverse action need not be delayed as a result of the employee's subsequent request for rehabilitation (See chapter 7, AR 600–85 before considering any adverse actions against employees for offenses related to alcohol or other drug abuse.)

Id.

[88] Dec. No. BN 752B60073.

[89] FPM SUPP. 752–1, S1–3.a.(5)(f) (1976).

> agency does not have to wait for the employee to have a serious attack on the job before taking adverse action. The medical evidence linked with the showing of potential hazard would be sufficient cause for taking adverse action. In all cases, however, the agency must link the medical condition with the observed deficiency in work performance or employee behavior.[90]

6. Dishonest Conduct

The Supplement lists "dishonest conduct" as a specific factor which commonly subjects employees to disciplinary action. This term is described as "an act (or failure to act) which indicates deliberate disregard for rights of others—generally through the use of lies, fraud, or deceit—for the benefit of the applicant or employee or other person." [91] Specific examples of this type of misconduct include theft, willful disregard for the truth, falsification of records or accounts, and other types of misconduct.[92]

7. Criminal Conduct

Like "dishonest conduct," "criminal conduct" is included among the specific factors listed in the FPM Supplement which will allow the agency to take disciplinary action against an employee. The Commission regulations require certain procedural steps to be taken in such cases, and caution against basing action on the lone fact of arrest, indictment, or conviction. Although evidence of such steps in the criminal justice system may be considered among the factors in determining whether disciplinary action is appropriate,[93] the action should not be based *solely* on these steps in the criminal justice process.[94] The indictment might be dismissed or the conviction reversed. If a disciplinary action were based solely on the indictment or conviction, it would become defective upon dismissal of the indictment or reversal of the conviction.

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[90] *Id.*

[91] FPM SUPP. 731-1, S3-2.a.(2) (1975).

[92] *Id.* In defining such conduct the Supplement in this section states:

> The following examples of dishonest conduct are not intended to exclude other kinds of conduct which may also involve dishonesty:
>
> Misappropriation or misuse of funds.
>
> Falsification of records or accounts or willful failure to keep accurate records or accounts.
>
> Theft.
>
> Offer or acceptance of a bribe.
>
> Willful disregard for just financial obligations.
>
> Willful disregard for the truth.

[93] *Id.* S3-2.a.(1) & (2) (1976).

[94] *But see* text accompanying notes 189 to 191 *infra*.

The proper method is to base the action on the facts of the incident in question so that subsequent court action on the criminal case will not affect the administrative determination.[95] This point cannot be overemphasized. First, the criminal process normally takes a longer time to become "final" than does an administrative action; and second, a more stringent standard of proof is required for a criminal conviction than for an administrative action. This point is illustrated by the case of an Internal Revenue Service officer who was removed from his position on the basis of allegations that he accepted a bribe from a taxpayer.[96] The officer was subsequently acquitted of criminal charges stemming from the same incident. However, the acquittal had no effect on the removal action because different standards of proof were involved in the two proceedings. The court stated that even though the jury had not been convinced beyond a reasonable doubt of the agent's guilt, "the Commissioner [of Internal Revenue] could well have concluded that the evidence was substantial enough to justify a refusal to reinstate." [97]

Special problems arise with respect to the effects of juvenile crime on employee disciplinary actions. The FPM Supplement provides guidance for handling situations where juvenile crime may serve as a basis for disciplinary actions.[98]

The Government's policy of providing employment opportunities to rehabilitated criminals poses similar problems.[99] The Supplement notes: "Persons who have recently committed serious crimes involving basic questions of honesty, integrity, and character are usually disqualified for federal employment unless they have established records of rehabilitation." [100]

8. Infamous or notoriously disgraceful conduct

"Infamous or notoriously disgraceful conduct" is a specific factor that the Commission states may serve as a basis for adverse action.[101] There are obvious problems interpreting the meaning of this

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[95] FPM SUPP. 752-1, S3-2.a.(1) & (2) (1976).
[96] Finfer v. Caplin, 344 F.2d 38 (2d Cir.) *cert. denied*, 382 U.S. 883, *petition for rehearing denied*, 382 U.S. 949 (1965).
[97] *Id.* at 41. *See also* Alsburg v. United States Postal Service, 530 F.2d 852 (9th Cir. 1976), where a court upheld the removal of an employee for misappropriation of property although theft was not proven at a criminal proceeding. The court pointed out that a different standard was involved.
[98] FPM SUPP. 731-1, S3-2.d.(1)(c)(iv) (1975).
[99] *Id.* at S3-2.a.(1)(a) (1975). *See also* Prisoner Rehabilitation Act of 1965, Pub. L. No. 89-176, 79 Stat. 674.
[100] FPM SUPP. 731-1, S3-2.a.(1)(c) (1975).
[101] *Id.* at S3-2.a.(3).

language. The Commission suggests that "[t]he disqualification of infamous conduct relates to those few persons whose social behavior is so bizarre or so clearly aberrant that the conduct in itself evidences depravity. Notoriously disgraceful conduct is that conduct which is shameful in nature and is generally known and talked of in a scornful manner." [102] When dealing with conduct that may fall within this category, management officials must avoid allowing their personal disapproval of particular behavior to interfere with objective evaluation.[103]

Judges have struggled to set guides as to when federal employees may properly be disciplined for "infamous or notoriously disgraceful" conduct. A recent case dealing with the removal of an IRS agent illustrates the reluctance of courts to allow government interference or inquiry into an employee's private life.[104] The case concerned the employee's use of a "fun place" or "shack pad" for purposes of off-duty, extra-marital sexual affairs. Although the employee's conduct was "circumspect" and "clandestine," the IRS discovered his activities and removed him on the theory that his off-duty behavior "tends to discredit himself or the service." [105] In reviewing the removal action, the court held that the "Constitution prevents the discharge of an employee merely because his personal conduct during off-duty hours incurs the disapproval of his supervisor," [106] and that there was no rational basis for the conclusion that the employee's conduct brought discredit upon the IRS.[107]

Basing a disciplinary action upon an employee's homosexual activities raises particular problems. These difficulties are attributable to the fact that as with any activity giving rise to a disciplinary action, homosexual activities must have a nexus to job fitness and must reflect upon the efficiency of the service. Because society is having difficulty defining the limits of acceptable behavior, it is not surprising that federal managers and the administrative and judicial tribunals which review their decisions are having similar difficulties. For instance, at least one court has precluded the federal government from taking disciplinary action against an employee solely because of sexual preference,[108] but in *Singer v. United States* [109]

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[102] *Id.*
[103] *Id.*
[104] Major v. Hampton, 413 F. Supp. 66 (E.D. Ala. 1976).
[105] *Id.* at 67–68, 71.
[106] *Id.* at 70.
[107] *Id.* at 71. The opinion noted that the case arose in New Orleans which boasts that it is "the City that care forgot."
[108] Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). The court pointed out that

the Ninth Circuit upheld the removal of a homosexual where the Commission's hearing examiner and the Board of Appeals (now Appellate Review Board) found the action was based on the employee's " 'openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities' while identifying himself as a member of a federal agency." [110] The court held the agency had shown removal would "promote the efficiency of the service" because the employee had "lessen[ed] public confidence in the fitness of the Government. . . ." [111] by his activities.

The precedential value of this analysis is not clear at this time. The Supreme Court vacated the Ninth Circuit's decision "in light of the position now asserted by the Solicitor General . . . on behalf of the . . . Civil Service Commission." [111a] In the Commission's view, the Court's action was based on procedural grounds and was unrelated to the circuit court's substantive holding.[111b] Nonetheless, one district court has interpreted the Court's action as a substantive determination that the Ninth Circuit misapplied the law to the facts in *Singer*.[111c]

Regardless of the disposition of *Singer*, the circumstances surrounding the homosexual activity are of great importance. In *Singer* the court emphasized the employee's open and notorious ad-

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homosexual conduct of an employee could affect the efficiency of the service under certain circumstances, but found the agency had not shown the required connection in this case.

[109] 530 F.2d 247 (9th Cir. 1976) *vacated*, 97 S. Ct. 725 (1977). The court held that the agency had shown that removal would "promote the efficiency of the service" *where a clerk-typist for the Equal Employment Opportunity Commission had*, among other activities, applied for a marriage license to marry another man, and incited considerable publicity concerning his sexual preferences.

[110] *Id.* at 255.

[111] *Id.*

[111a] 97 S. Ct. 725 (1977).

[111b] Telephone interview with Mr. Earl Sanders, Office of the General Counsel, U.S. Civil Service Commission, August 2, 1977. The procedural issue concerned whether the Ninth Circuit should have applied the Commission regulations which were in effect at the time of Singer's dismissal or those which were adopted during the pendency of his appeal. *See* 530 F.2d at 254–55. The Court accepted the Commission's position that the Ninth Circuit should have applied the latter regulations in light of Thorpe v. Housing Authority, 386 U.S. 670 (1967). The Ninth Circuit had, however, noted that "We do not imply that the amended regulations and guidelines would require a different result under the facts of this case" 530 F.2d at 255 n.16.

[111c] Saal v. Middendorf, 427 F. Supp. 192, 200 n.7 (N.D. Cal 1977). The district court, in a footnote citation of the Supreme Court's action in *Singer* noted that the case had been vacated on other grounds, and in a parenthetical comment stated: "(rational connection required between conduct complained of and grounds for discharge of civilian employee). . . ." *Id.*

vocacy of homosexual behavior while identifying himself as an employee of the federal government. In another case, the Appellate Review Board upheld a decision that an agency could properly remove an employee who was discovered committing a homosexual act with a 16-year-old in a public restroom.[112] In that case the employee was on duty and in uniform when discovered, so the nexus between the conduct and the efficiency of the service was obvious. Because both societal attitudes towards homosexuality and the legality of taking disciplinary action on the basis of homosexual conduct [113] may change rapidly, managers considering taking disciplinary action on the basis of homosexual activity will be wise to consider not only regulatory directions but also judicial pronouncements.

The misconduct discussed in this section is only illustrative of the many types of conduct which will subject employees to disciplinary action. The need to apply the statutory standard to each case and to show the connection between the action taken and the efficiency of the service must be reemphasized. The federal government, like any other employer, requires a productive work force. The types of conduct which are detrimental to the efficiency of the service are set forth in the Guidelines; and when such conduct occurs and reduces governmental efficiency, the available disciplinary tools should be utilized.

IV. APPROPRIATENESS OF DISCIPLINARY ACTIONS

A. NEED FOR COUNSELING

Before proposing disciplinary actions, managers should remember the role that counseling plays in the disciplinary and corrective process. A counseling session not only places the employee on notice of management's concern about his substandard performance or misconduct, but also may have the desired effect of improving behavior. If employee behavior is corrected through the use of counseling, the agency will greatly benefit from the savings in time and effort which would have been required for processing an action under the disciplinary procedures.

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[112] Dec. No. RB 752B60013 (Doc. No. CH 752B50081), 2 Dig. of Significant Decisions 13 (1975).

[113] *See* H.R. 451, 95th Cong., 1st Sess. (1977), which would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of affectional or sexual preference.

B. REGULATORY REQUIREMENTS FOR PROPOSING PENALTIES

To assist management officials in deciding what penalty is appropriate for particular conduct, the Army's CPR contains "Tables Pertaining to Penalties for Various Offenses." [114] The regulation makes clear that the "Tables" are only a guide which reflects what the Department of the Army views as reasonable penalties for various offenses.[115] This guide may be exceeded in appropriate cases, but the CPR cautions that if it is exceeded the reasons for any departure must be clearly explained in the employee's notice of proposed action.[116] A violation of this requirement to explain any deviation from the guide could be considered procedural error.

Managers should always attempt to impose penalties which are consistent not only with the guide, but with penalties which have been given for similar offenses in the agency. If the issue of inconsistency is raised on appeal, the appeals authority has the power to reduce the penalty imposed if it finds a deviation from past agency policy or practice.[117] The key factor is fairness and consistency.

C. RELUCTANCE TO REVERSE AGENCY DECISIONS

The Commission is concerned that penalties set by agencies are appropriate for the offense and the circumstances. In the past, appeals authorities would cancel any action where they determined the penalty to be too harsh. At that point the agency would commence a new action and impose a lesser penalty or enumerate additional reasons to sustain the more severe penalty. However, the trend is changing. While the appeals authority occasionally reduces penalties it considers too harsh, it gives great weight to agency determinations on the appropriateness of the penalty. The Commission's deference to agency determinations may be illustrated by the case of an employee who was removed from his position for theft of government property.[118] The FEAA field office reversed the re-

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[114] CPR 700 (C14), 751.A.(1973). The "Tables" list various offenses such as insubordination, theft, gambling, disgraceful conduct, and discrimination and then suggest appropriate penalties for the first, second, and third offenses of the misconduct in question.

[115] *Id.* at 751.1-2.c.(3) (1973).

[116] CPR 752-1 (C5), S3-2.b.(7) (1976).

[117] FPM SUPP. 752-1, S3-2.b.(3) (1976).

[118] Dec. No. RB 752B60520 (Dec. No. DC 752B60226), 3 Dig. of Significant Decisions 6 (1976).

moval after determining the penalty to have been too harsh considering the small value of the property. The ARB reversed the field office stating it was the policy of the Commission not to overturn a decision of an agency dealing with theft of government property upon allegations that the penalty was too severe, that the property was of small value, or that the theft was the employee's first offense.[119]

Like the Civil Service Commission, the courts are reluctant to reverse agency decisions involving disciplinary matters.[120] Perhaps the reason for this reluctance is the narrow scope of judicial review; the courts will determine whether the agency abused its discretion in the process of taking the adverse action. The typical result may be seen in a recent district court decision in which the court upheld the removal of an employee with 24 years' unblemished service who was found to have stolen two government refrigerators. The court, noting the narrow scope of judicial review in such a case, said that it did not want to become a "super Civil Service Commission." [121]

Likewise, courts have sustained removal actions in cases that have involved theft and fraud by employees occupying positions of trust. In one case a district court upheld the removal of a postal employee who had stolen cheese from a package he came in contact with as a mail handler. The court found the required nexus between the theft and the statutory cause that "will promote efficiency of the service." [122]

In another case, the Court of Claims has upheld the removal of an employee for "altering and using an official document to defraud the United States." [123] His appeal charged that the penalty was too severe for his having misrepresented his grade in order to obtain better accommodations. The court found the employee had occupied a position of trust, and consequently "when [he] deliberately change[d] an official document so as to make it falsely represent his status, in significant fashion, and then deliberately use[d] it so as to obtain a substantial advantage for himself, removal cannot be branded as disproportionate to the offense. . . ." [124] The Court of

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[119] *Id.*
[120] *See* Johnson & Stoll, *Judicial Review of Employee Dismissals and other Adverse Actions*, 57 CORNELL L. REV. 178 (1972).
[121] West v. Department of the Air Force, No. C-3-76-168 (S.D. Ohio 1976).
[122] Kushner v. Berzak, 74 Civ. 5.001 (R.C.) (S.D.N.Y. 1975).
[123] Rifkin v. United States, 209 Ct. Cl. 566 (1976), *cert. denied*, 45 U.S.L.W. 3571 (1977).
[124] *Id.* at 589.

Claims has also upheld the removal of "an IRS tax technician—responsible for overseeing other taxpayers' returns—who deliberately or recklessly overstates his own deductions." [125]

It is also clear that agencies may make distinctions in the disciplinary actions they take on the basis of the employee's position.[126] That supervisory personnel may be held to a higher standard of conduct than others is illustrated in a case where supervisory personnel involved in a "sick out" were removed, while nonsupervisory personnel were subjected to lesser penalties.[127] The court held that the agency's decision to remove the supervisory personnel was not an abuse of discretion under the circumstances of the case.

D. REVIEW OF AGENCY DISCIPLINARY ACTIONS

Despite the reluctance of the Commission and the courts to review agency actions, under certain circumstances they will review the appropriateness of an agency's action. In the case of a nurse who had been promoted to a position with supervisory responsibilities and was later separated when she was unable to perform her managerial duties in a satisfactory manner, the FEAA said the removal was unreasonable and was not "for such cause as would promote the efficiency of the service." [128] The FEAA said the proper agency response would have been to remove the supervisory responsibilities from the nurse.[129]

The courts, restricting their review to whether the agency has abused its discretion, have reversed agency actions which they have deemed to be inordinately harsh. The Court of Claims, in the case of an employee removed for submitting false information in connection with a claim for travel expenses, set forth the usual abuse of discretion test.[130] With respect to disciplinary actions, this test requires the employee to establish "that the penalty is so harsh that there is an 'inherent disproportion between the offense and punishment.' " [131] Applied to the facts of the case, the court found the agency had abused its discretion by removing an employee with 25 years' unblemished service for what it viewed as "*de minimis* charges."

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[125] Hoover v. United States, 513 F.2d 603, 606 (Ct. Cl. 1975).
[126] *See* Kushner v. Berzak, 74 Civ. 5,001 (R.C.) (S.D.N.Y. 1975).
[127] Brown v. United States Civil Serv. Comm., Nos. 75-1940 & 75-2416 (E.D. Pa. 1976).
[128] Dec. No. BN 752B60015, 2 Dig. of Significant Decisions 33 (1975).
[129] *Id.*
[130] Power v. United States, 531 F.2d 505 (Ct. Cl. 1976).
[131] *Id.* at 507.

The Court of Claims also faced the issue of disproportionately harsh penalties in a case involving the removal of two low-level clerks working for the IRS.[132] The GS-2 and GS-3 employees, both with over 12 years' service, were removed for failure to file their tax returns when due. Each thought her husband would "take care of" the returns, but this mitigating factor did not deter the IRS from taking the removal action.[133] The court, reviewing the propriety of the penalty, emphasized that "[i]t is well established that the penalty for employees' misconduct is a matter usually left to the sound discretion of the executive agency." [134] However, under the facts of this case, the court found the agency had abused this discretion and rejected the IRS' deterence argument by stating: "In short, an unconscionably disproportionate penalty aids neither the goal of deterence nor the image of the IRS." [135]

V. EMPLOYEE PROCEDURAL RIGHTS FOR MAJOR ADVERSE ACTIONS

A. TYPE AND STATUS OF EMPLOYEE

All employees of the federal government are not eligible for the job protection rights provided by statutes, executive orders, and Civil Service Commission and agency regulations. The *Federal Personnel Manual* explains in detail who is and is not covered,[136] and this article will not discuss the issues that might arise concerning eligibility for the job protection rights. The reader should note that career or career conditional employees in the competitive service are normally covered.[137] Excepted service employees normally are not covered unless they are a "preference eligible." [138] It is impor-

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[132] Boyce v. United States, 543 F.2d 1290 (Ct. C.. 1976). This was an unusual case in that the Civil Service Commission Regional Office and the Board of Appeals and Review had held the penalty too harsh, but the Commissioners reopened the case and sustained the IRS action.

[133] *Id.* at 1293.

[134] *Id.* at 1292.

[135] *Id.* at 1295.

[136] FPM SUPP. 752-1 S-2. For a discussion of the historical development of the civilian employee's procedural rights, *see* Berzak, *Rights Afforded Federal Employees Against Whom Adverse Personnel Actions Are Taken*, 47 NOTRE DAME LAW. 853 (1972).

[137] FPM SUPP. 752-1, S2-1 & S2-2 (1976). This subchapter explains which employees are covered.

[138] *Id; see* 5 U.S.C. § 2108 (1970) for a definition of a "preference eligible."

tant to verify the status of each employee to be disciplined to ensure that the rights he is entitled to are provided.

B. REGULATORY PROCEDURAL RIGHTS

The FPM Supplement describes the procedural rights of covered federal employees who are subjected to disciplinary actions. Although every manager who proposes disciplinary actions must understand the procedures to be followed, the Supplement emphasizes that judgment is the key to the proper administration of the disciplinary action process. The Commission points out that "the people who are responsible for effecting adverse actions need to have a good overall understanding of what the law and the regulations are designed to accomplish, and they must possess the ability to make sound judgments." [139]

Federal managers should carefully note the job protection rights provided by both the Civil Service Commission and their own agency regulations.[140] The importance of this principle cannot be overstated because agency regulations often expand the rights required by the Commission; and agency regulations, like those of the Commission, have the full force and effect of law.[141] Managers who do not heed this advice to follow the procedural requirements often discover that the Commission or the federal courts will label the procedural error as fatal, and overturn the agency decision.

In a practical sense, it is as important for the agency to document each step it takes as it is to follow the current procedures. Because many employees who are disciplined will appeal the agency's action to the Commission or the federal courts, the agency must be prepared to prove each step it took in any given case. The recorded chronology should include not only a copy of the notice, answer, and decision, but also the material relied upon and the significant dates.[142]

To ensure the factual and legal propriety of their actions, federal managers who are considering taking disciplinary action should consult their local Civilian Personnel Office and that office's Management Employee Relations Branch.[143] This branch is responsible for

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[139] FPM SUPP. 752-1, Introduction, 4.6(1) (1972). This Introduction also provides a good explanation of the organization, purpose, and scope of this supplement on adverse actions.

[140] FPM 751, S1-1.c. (1976).

[141] FPM SUPP. 752-1, Introduction, 4.b.(3) (1972).

[142] *Id.* at S4-7.

[143] The other functional branches of the CPO are Position & Pay Management, Recruitment & Placement, and Training & Development. A description of the or-

giving technical advice to managers who are proposing disciplinary actions. The role of the Civilian Personnel Office is solely to give advice, not to make the ultimate decisions as to whether or not disciplinary action is appropriate or what penalty, if any, should be imposed. The role of the advisors in the Civilian Personnel Office is restricted to technical review of the proposed action, and as long as the technicians remain within the bounds of their authority, their activities will not be successfully challenged. One employee appealed his disciplinary action to the FEAA on the ground that an official in the Civilian Personnel Office improperly influenced the official taking the action.[144] The FEAA held that:

> [P]ersonnel office staff members served only in an advisory capacity; that their function in this area was to determine whether the actions were procedurally correct and whether the severity of the penalties imposed was in accordance with agency practice; and that agency managers were not required to follow the advice given by the Personnel Office.[145]

Under this rationale it is proper, and indeed advisable, for the personnel office to review the action proposed by agency management.

Despite an agency's conscientious attempts to comply with procedural requirements, occasionally an error will be made. The effect of a procedural error committed by the Government during the disciplinary action process depends in large part on its magnitude and effect on the employee's rights. This issue was addressed by the Court of Claims in a case involving an Internal Revenue Service employee who appealed his removal which had been based on a finding that he had falsified travel, work and per diem records.[146] The court found the factual conclusions fully supported and then discussed the employee's attack on the procedure the agency followed in effecting the removal. The court pointed out that:

> Like many other claimants, plaintiff makes the mistake of believing that any procedural lapse, no matter how unrelated to the end result, endows him automatically with a right to judgment and back-pay. We do not take that position, but look to see not only whether an error occurred, but whether it substantially affected plaintiff's rights and the removal process.[147]

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ganization and functions of operating civilian personnel offices is found in CPR 200 (C8), 250.1 S.5.

[144] Dec. No. DA 752B60089, 2 Dig. of Significant Decisions 47 (1976).

[145] *Id.*

[146] Pascal v. United States, 543 F.2d 1284 (Ct. Cl. 1976).

[147] *Id.* at 1288.

Clearly procedural error should be avoided, but all errors do not require reversal of the disciplinary action.

The FEAA procedures reflect the importance of this issue by requiring that the hearing examiner's first step be a review of an appealed case to ensure that the agency complied with proper procedures.[148] The FEAA appeals procedure states:

> If procedural error is discovered, a decision on that basis may be issued without consideration of the merits of the action. A finding of procedural error does not necessarily result in reversal. Procedural error in some cases may be "cured" by subsequent action in the case; it may be a harmless error, or it may result in a remand for the purpose of correcting the error. However, it may be of such substance as to render the action fatally defective and thus require reversal. Generally, an action which is reversed on procedural grounds may be brought again by the agency and a second action does not constitute "double jeopardy" since the merits of the action were not considered on appeal of the first action.[149]

The following sections will discuss employee rights of notice of any proposed action, opportunity to answer the allegations, and notice of the agency decision. The guidance concerning these rights published in the FPM Supplement will be cited at length, and the importance of following those instructions cannot be overemphasized. The procedural rights add strength to the merit system of federal employment and will be conscientiously enforced by the Commission and the courts.

VI. NOTICE OF PROPOSED ACTION

A. CONTENT OF THE NOTICE

The FPM emphasizes the importance of presenting an employee a properly prepared written notice of proposed action by setting forth guidance on how to prepare a proper notice.[150] To assist managers

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[148] Draft, FEAA Appeals Procedures, VIII.C. at p. 26.

[149] *Id.* This issue of "double jeopardy" was discussed in a case of an employee who was reduced in grade. Reynolds v. United States, 454 F.2d 1368 (Ct. Cl. 1972). The employee brought an action in the Court of Claims to recover monies lost as a result of this reduction. Among his allegations of error was the complaint that the charges that served as the basis for the demotion were the same charges that had been found procedurally defective the year before. He argued that the decision on the earlier charges should be res judicata to the later charges. The court disagreed with this contention and pointed out that the first proceedings were reversed for the procedural error, and there had been no decision on the merits. The court further noted it was not unusual for an agency to "begin anew" when the original adverse action charges are found procedurally defective.

[150] FPM SUPP. 752–1, S4–5.a. (1976) explains what information should be included in the proposed notice.

in complying with the notice requirements, an appendix to the Supplement contains samples of properly prepared notices.[151]

1. Nature of the proposed action

The notice of proposed action must state the most severe action that management is considering against the employee because:

> A notice which states merely that "appropriate disciplinary action" is proposed or that "necessary action" will be taken is procedurally inadequate since it may cause an employee to think in terms of a relatively mild action, with the result that he may not avail himself of his right to contest the action or may not bother to present his best defense.[152]

However, an agency may administer a less severe penalty than that stated in the notice.

Those proposing and reviewing notices should ensure that each notice clearly states that it is only a proposed action and that no final decision will be made until after the employee's answer is received. To this end, the letter should be labeled as a notice of proposed action, and language that in any way reflects that a final decision has been made should be avoided.[153] Fundamental fairness requires that the agency arrive at no decision until the employee has had an opportunity to rebut the allegations in the notice.

2. Requirement for Specificity and Detail

The Civil Service Commission and the courts place great importance on the requirement that the notice of proposed action state the reasons for the action with specificity and detail. Names, times, events, and places must be set forth so that the employee is under no misunderstanding as to the allegations. The Commission's test for adequate specificity and detail is, "Did the employee have a fair opportunity to refute the reasons given for the proposed action?" [154]

The requirement for specificity and detail may be illustrated by

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[151] *Id.* at App. B (1976).

[152] *Id.* at S-4.5.b.

[153] *Id.* at S4-4.a. (1976). This paragraph emphasizes the requirement with the following language:

> This can be made clear by a statement that it is notice of proposed adverse action and the employee's answer will be considered before a decision is reached. The agency should carefully avoid making any statements in the advance notice which can be construed as indicating that a decision has been reached, and if statements or conclusions are included in the notice they should be couched in terms which indicate that they are tentative and subject to any rebuttal which may be offered in reply.

[154] *Id.* at S4-3.a.(2) (1972).

the case of an employee who received a notice of proposed removal for "physical disability" that caused him not to be "fit for [his] position." [155] The FEAA field office found this notice defective because it did not cite the duties the employee was unable to perform nor did it set forth the medical findings upon which the agency based its conclusion of unfitness.

The Commission recommends that an agency avoid using legal terms to describe employee conduct in the notice of proposed action.[156] The use of such terms may raise difficulty in providing the allegations and may not be understood by employees who have had little formal education. The FPM Supplement suggests that the misconduct in question be described as simply as possible so that the agency need only establish the facts that support the charge.[157]

When the decision to take disciplinary action is based on several reasons, each of these reasons must be explained in the notice of proposed action.[158] This requirement assures that the employee is apprised of all the agency's allegations and that he has an opportunity to respond to each charge. The fact that an employee has submitted an exhaustive reply to a proposed notice is an indication that "he has understood the reasons for the proposed action and has had a fair opportunity to defend himself." [159]

In many cases an employee against whom an action is proposed has a previous record of either misconduct or inefficiency. If management desires to rely on this past record in making a decision concerning the employee's current difficulty, it must follow specific FPM guidance.[160] The essence of this guidance is that the normal specificity and detail standards must be met for the past conduct upon which the agency seeks to rely. Mere reference to the past record is allowed only if the required procedural rights were afforded to the employee at the time of the past disciplinary action.[161]

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[155] Dec. No. SL 752B60022, 2 Dig. of Significant Decisions 52 (1976).
[156] FPM SUPP. 752-1, S4-1.c.(2) (1972).
[157] *Id.*
[158] *Id.* at S4-2.a. This paragraph of the FPM explains that "it is essential that the agency include in its advance notice all the reasons that prompted it to propose the action—e.g., continued inadequate work performance, excessive tardiness, unauthorized absence, etc.—and support each of these reasons with detail, factual information."
[159] *Id.* at S4-1.a.
[160] *Id.* at S4-3.b.(1) (1976).
[161] In such a situation reference would be made to the type of disciplinary action previously taken and the effective date of that action.

3. Miscellaneous Details

The Civil Service Commission does not require that a notice of proposed action state how the proposed action will "promote the efficiency of the service," [162] and courts have upheld this position.[163] Nonetheless, it is good practice to include such language in the notice.

The question of which managerial official signs the notice of proposed action often causes difficulty. The only guidance provided by the Commission is that "[t]he notice of proposed adverse action should be signed by the official who has delegated authority to propose the action." [164] The Army's CPR requires that the notice of proposed disciplinary action be signed by a "supervisor or management official who is in a direct line of supervision over the employee against whom adverse action is proposed." [165] This regulation further states that "[i]n order to preclude confusion over who is the proposing official, no authority line should be used." [166]

B. PROCEDURAL REQUIREMENTS BEFORE TAKING ACTION

1. 30-Day Requirement

The law requires an employee be given at least 30 calendar days before any action under Subpart B of Part 752 of the Civil Service Commission regulations becomes effective.[167] The FPM emphasizes that 30 days are the minimum number required, and that nothing precludes an agency from extending the period beyond this *minimum limit.*[168] *There are often administrative reasons which* would make it difficult for an agency to process the action within a 30-day period. In such a situation the Commission recommends the advance notice contain a statement that any action to be taken will be made effective "not earlier than 30 days from the date of your receipt of this notice." [169] Occasionally an advance notice may be

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[162] FPM SUPP. 752–1, S4–1.b. (1972).
[163] *See* Begendorf v. United States, 340 F.2d 362 (Ct. Cl. 1965), a case involving the removal of a customs agent for improper conduct with reputed Mafia figure Vito Genovese.
[164] FPM SUPP. 752–1, S4–4.a. (1976).
[165] CPR 752–1 (C3), S4–1.c. (1975).
[166] *Id.*
[167] 5 U.S.C. § 7512 (1970) (preference eligible employees) and Exec. Order No. 11,491, 3 C.F.R. 254 (1974), *reprinted in* 5 U.S.C. § 7301 app., at 169 (Supp. V 1975) (competitive service employees).
[168] FPM SUPP. 752–1, S5–1.b.(1) (1974).
[169] *Id.*

amended to add additional reasons of justification. In such a situation, additional time must be made available so that any action taken will become effective more than 30 full calendar days from the date the original notice was amended.[170]

In computing the 30 full calendar days that must pass before an action is effective, the day on which the notice is delivered is not counted, but the last day of the notice period is counted if the action becomes effective at 12 midnight on that day.[171] Special rules are followed when the last day of the notice period falls on a Saturday, Sunday, or a holiday.[172] Because the timing requirements are precise, and it is easy for management to miscalculate the proper effective date of the proposed action, the Army regulation suggests that the notice period be increased beyond the required minimum.[173]

2. Taking Action Prior to Expiration of the 30-day Waiting Period

Although normally an employee has a right to a full 30 calendar days before the action is to become effective, the Commission regulations state that:

> When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency is not required to give the employee the full 30 days' advance written notice, but shall give him such less number of days' advance notice and opportunity to answer as under the circumstances is reasonable and can be justified.[174]

This "crime" provision deals only with the question of the duration of the notice period [175] and does not address the issue of the employee's work status during the period. This latter question is discussed separately in the Commission regulation and supplement.[176]

The general rule is that an employee will remain in a normal duty status during the notice period.[177] In emergency situations [178] the

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[170] *Id.* at S5-1.b.(2).

[171] *Id.* at S5-2.c. (1972). This section provides that "removals become effective at 12 midnight on the date specified in the notice of decision, unless some other particular time is stated by the agency."

[172] A Saturday, Sunday, or a legal holiday may not be designated as the last day of a notice period prescribed by regulations of the Commission or of the agency. When the 30th day of a 30 day notice period falls on a Saturday, a Sunday, or a legal holiday, the action may not be effective earlier than the next business day.

Id. at S5-2.b.

[173] CPR 752-1 (C8), S5-2.a. (1975).

[174] 5 C.F.R. § 752.202(c)(2) (1977).

[175] FPM SUPP. 752-1, S5-3.b. (1972).

[176] 5 C.F.R. § 752.202(3) (1977); FPM SUPP. 752-1, S5-4 (1972).

[177] FPM SUPP. 752-1, S5-4.a. (1972).

[178] Civil Service Commission regulations define such a situation as

agency may place the employee in a voluntary leave status or suspend him even for an indefinite period.[179] Further, under certain circumstances delineated in the FPM, an employee may be relieved from duty but continued in a pay status without charge to leave; [180] however, this status may not continue for more than five days. The FPM cautions that in most situations where these options are available, an early decision must be made whether to effect a suspension.[181] Should management desire to depart from these general rules, Civil Service Commission instructions should be followed carefully.[182]

In cases dealing with criminal activity, it is often appropriate to suspend the employee pending a decision whether the removal action should be processed. The FPM explains that the same reasons which underlie the proposed action may be used to suspend the employee during the notice period.[183] As the two actions are separate, both must be justified under the law and regulations.[184] The FPM explains in detail the procedure to be followed when these two actions are to be processed simultaneously.[185]

A danger in suspending an employee pending the completion of a criminal process is that the agency may later be precluded from removing the employee if both actions are based on the same conduct. In such a case, the FEAA reversed a removal which was based on the employee's conviction for unauthorized possession of agency property. . . .[186]

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when circumstances are such that the retention of the employee in active duty status in his position may result in damage to government property or may be detrimental to the interests of the government or injurious to the employee, his fellow workers or the general public. The agency may temporarily assign him to duties in which these conditions would not exist or place him on leave with his consent.

5 C.F.R. § 752.202(d) (1977).

[179] This suspension is discussed in 5 C.F.R. § 752.0201(e) (1977):

Suspensions during notice period. In an emergency case when, because of the circumstances described in paragraph (d) of this section, an employee cannot be kept in active duty status during the notice period, the agency may suspend him. This suspension is a separate adverse action.

[180] FPM 751, S1–3 (1976).

[181] *Id.*

[182] *See* FPM SUPP. 752–1, S5–4.b. & c. (1972).

[183] *Id.* at S1–6.d.(3) (1972).

[184] The Army regulation on this issue states that "when a suspension action is effected to place an employee in a nonpay status for all or part of a notice period prior to a proposed separation, the suspension action should be processed separately to include separate proposal and decision notices." CPR 752–1 (C8), S1–6.d(2)(b) (1975).

[185] FPM SUPP. 752–1, S1–6.d.(3) (1972).

[186] Dec. No. DC 752B70095, 3 Dig. of Significant Decisions 11 (1977).

The FEAA found that there was no longer a cause of action because, prior to the conviction, the employee had been suspended by a notice that contained the exact allegation found in the removal notice. If suspension pending the criminal process is to be used, the notice should clearly indicate that the reason for the suspension is the pending criminal process, not the conduct itself.[187]

The Court of Claims has upheld the Commission rule that in this limited situation a disciplinary action may be based on a criminal indictment or conviction in the case of an employee who had been suspended indefinitely pending the resolution of criminal charges.[188] The employee requested back pay for the period of his suspension, alleging that the suspension was procedurally defective because the notice improperly stated that the action was based on his indictment by a federal grand jury rather than the act underlying the indictment. The court found that the agency had followed the proper procedure by relying on language in the FPM that states an agency "should not base an adverse action on a criminal indictment or a conviction, ... [e]xcept when the agency suspends an employee indefinitely pending disposition of a criminal action." [189] As the agency had in fact suspended the employee "pending disposition of a criminal action," the court held the general rule did not apply.[190]

3. Delivery Requirements

Management should be alert to the problems that can develop in attempting to deliver the advance notice and should adhere to the Commission's detailed instructions concerning personal and mail delivery.[191] The Commission recommends that personal delivery be made whenever possible and specifically emphasizes that:

> The agency should be prepared to show in every case either that the employee actually received the notice on a timely basis, or that the action it took to accomplish delivery constituted an intelligent and diligent effort, in the circumstances, to have the employee receive the notice on a timely basis.[192]

Timing the delivery of the proposed notice is also important. It is

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[187] A sample notice covering this situation is found in FPM SUPP. 752-1, App. B.
[188] Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976).
[189] *Id.* at 542. *See also* FPM SUPP. 752-1, S3-2.a.(2) (1976).
[190] 533 F.2d at 543. This case dealt with an FHA appraiser who was suspended indefinitely pending criminal proceedings based on allegations that he accepted illegal payments in return for using his official position improperly to benefit others. The court upheld the agency's right to take such an action.
[191] FPM SUPP. 752-1, S4-8 (1976).
[192] *Id.* at S4-8.a.

required that the notice of the agency's decision be delivered to the employee "at the earliest practical date" and "at or before the time the action will be made effective." [193] If this requirement is not met, there is danger that the employee may conclude that the agency has decided to abandon its proposal. In the Department of Army there are special rules to be followed when presenting a notice of proposed disciplinary action overseas and to certain key employees. To avoid procedural error, these rules should be carefully followed.[194]

C. EMPLOYEES' ACCESS TO INFORMATION

If employees are to have fair opportunity to defend themselves, they must have access to all material relied upon by agency officials.[195] The Commission regulations state that this material includes "statements of witnesses, documents, and investigative reports or extracts from the reports." [196] If an agency plans to deny access to material which the employee considers relevant to the case, it must be prepared to show clearly that it did not rely on the material in question.[197]

There may also be situations where the material requested may be available from sources outside the agency. This was the situation in the case of an employee who was removed for accepting two loans from persons doing business with his agency.[198] The employee complained that he was not given access to an FBI report discussing his conduct. The court found that the agency had based its decision to remove the employee on his confession and affidavits from certain lenders, and not on material in the FBI report. Consequently, the denial of access to the FBI report was not error.

Similar questions arise when the employee requests access to restricted or classified material which formed the basis of the disciplinary action. The Commission guidance is clear on this point, stating that "[m]aterial which cannot be shown to the employee because

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[193] *Id.* at S7-6.a.

[194] CPR 752-1 (C3), S5-2.f. & g. (1975).

[195] FPM SUPP. 752-1, S4-1(a)(2) (1972).

[196] 5 C.F.R. § 752.202(a)(2) (1977):

> The material on which the notice is based and which is relied on to support the reasons in this notice, including the statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review this material.

[197] *See* Mitchell v. United States, 207 Ct. Cl. 981 (1975), *cert. denied*, 423 U.S. 1049 (1976), where the court found the agency did not rely on the material requested. Consequently, it was not necessary to make it available to the employee.

[198] Nelson v. Kleppe, No. CA3-6421-B (N.D. Tex. Aug. 1, 1975).

its disclosure would violate a pledge of confidence, or because it is some way restricted or classified, cannot be used to support reasons stated in the advance notice." [199] This means that if the information is necessary to justify the action it must be obtained in a form that may be disclosed to the employee.

VII. EMPLOYEE'S ANSWER

A. METHOD OF PRESENTING ANSWER

An employee has no right to a full hearing when he makes his oral reply,[200] but he must have an adequate opportunity to present a defense to the allegations.[201] The Commission view is that "[i]t is not proper to restrict his answer to matters relating solely to the agency's reason for proposing adverse action against him. He must be permitted to plead extenuating circumstances or make any other representation which he considers appropriate." [202]

Although employees may present their answer to the advance notice orally or in writing, when correspondence and discussion passes between employees and management throughout the notice period it is often difficult to determine what constitutes the answer. If such a situation should develop, the Army CPR cautions that every communication should be examined carefully "to determine whether it includes or constitutes a reply." [203]

B. TO WHOM IS THE ANSWER DIRECTED?

The question of which management official should receive the personal reply of the employee is difficult to answer. Commission regulations state that "[t]he representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made." [204] The FPM guidance

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[199] FPM SUPP. 752-1, S4-1.a.(3). (1975).

[200] 5 C.F.R. § 752.202(b) (1977):

> The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or a formal hearing with examination of witnesses.

See also Arnett v. Kennedy, 416 U.S. 134 (1974), which upheld the constitutionality of this regulatory provision.

[201] FPM SUPP. 752-1, S6-2.c. (1976).

[202] *Id.*

[203] CPR 752-1 (C3), S6-4.a. (1975).

[204] 5 C.F.R. § 752.202(b) (1977).

on this issue interprets judicial decisions as having established the rule "that the answer must be made to a superior of the employee and must not be made to an investigator." [205]

The role of the official who receives an oral reply should be more than that of a mere recorder of the employee's response to the notice of proposed action. This point was illustrated in the case of an IRS employee who was removed for improper business relations with a taxpayer.[206] The employee appealed the action on the theory that he was not given an adequate opportunity to make an oral reply. The official who received the reply did nothing more than listen and record the session. The court, after reviewing the Commission regulation [207] and the FPM,[208] held that an oral reply officer must be more than a mere transcriber of the material presented. While recognizing the difficulty in courts' suggesting how much conversation is required, the opinion stated "We do think he [the employee] was entitled to a general give and take discussion of the case. . . ." [209] The court further noted that employees should also be able to expect that the oral reply officer "be one whose recommendation would be meaningful, not an empty formality." [210] In the court's view this individual would normally be qualified "if he was one of the deciding officer's circle of staff and line aides and advisers whom he regularly consults in such matters. . . ." [211]

To assure that a written record is made of the oral response, the Army's CPR states that "[a] written record should be made of a personal reply and if possible the signature of the individual obtained as an indication that the employee agrees with the accuracy of the record." [212] This requirement may preclude a misunderstanding from arising as to what was said during the oral reply.

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[205] FPM SUPP. 752–1, S6–2.c.(1) (1976). The meaning of "superior" is defined in the following language:

> The Commission does not interpret the courts' decisions as restricting the meaning of the word superior to an official who exercises actual supervision over, or is higher in the normal operating chain of command than, the employee against whom adverse action is proposed. The word must be interpreted in the light of the function or authority vested in the official. Thus, when an official has been duly authorized to judge an employee's case and either decide on the final action or recommend what that action should be, he is, in that respect, a superior to the employee.

Id. at S6–2.d (2).

[206] Ricucci v. United States, 425 F.2d 1252 (Ct. Cl. 1970).

[207] 5 C.F.R. § 752.202(b) (1977).

[208] FPM SUPP. 752–1, S6–2.(d) (1976).

[209] 425 F.2d at 1254–55.

[210] *Id.*

[211] *Id.* at 1256.

[212] CPR 752–1 (C3), S6–2.(f) (1975).

C. TIME LIMITS FOR SUBMITTING AN ANSWER

The Civil Service Commission regulation gives little guidance on the amount of time an employee may take to answer an advance notice. The regulation merely provides that "an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer." [213] In the FPM, the Commission emphasizes the importance of the word "reasonable," but further suggests that a set number of days should be established so that the procedure will continue to move "towards some definite conclusion." [214] The FPM further suggests that the employee should be informed that additional time may be requested and, if appropriate, will be approved.[215] Department of the Army employees who have received a notice of a major adverse action will be given "15 days from the date of receipt of the notice" in which to reply orally or in writing.[216]

Experience has shown that answers are delayed for a multitude of reasons. When such a situation arises, the Commission has advised the agency to consider the delayed answer when "there are not compelling reasons for completing the action in the shortest possible time." [217] In interpreting this provision, the concept of reasonableness is normally the key to deciding whether or not a delayed answer should be considered. This point was illustrated in the case of an employee who received a letter of proposed removal that required him to respond orally or in writing to a certain official within 10 days.[218] The employee submitted a written response one day late to the wrong official; as a result, the agency refused to consider the reply. The FEAA field office held the agency could not show a compelling reason to reject the reply, and consequently found that the employee's due process rights had been violated. If the employee is in a duty status during the notice period, the regulations provide

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[213] 5 C.F.R. § 752.202(b) (1977). This paragraph of the regulation states further that "the time to be allowed depends on the facts and circumstances of the case and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits."
[214] FPM SUPP. 752-1, S6-3.b.(1) (1976).
[215] *Id.*
[216] CPR 752-1 (C3), S4-5.a. (1975).
[217] FPM SUPP. 752-1, S6-4.b. (1976).
[218] Dec. No. DE 752B60070, 2 Dig. of Significant Decisions 51 (1976).

that he may have a reasonable amount of official time for the purpose of preparing the oral or written response.[219]

D. ASSISTANCE OF COUNSEL

There is little discussion in either the FPM or the CPR concerning the employee's right to representation during the disciplinary process. The Army's CPR merely states that employees desiring to respond orally are entitled to have a representative present.[220] The Commission regulation says that "[a]n appellant is entitled to appear at the hearing or on his/her appeal personally or through or accompanied by a representative." [221] The Commission then limits the right of employees to choose a representative by allowing "the agency [to] challenge the appellant's choice of representative before the appeals officer on the grounds of conflict of position or conflict of interests." [222] Although this provision appears in a section of the regulation which discusses the right to a representative at the appeal level, it is contemplated that the employee had identical representation during the initial stages of the process.[223]

VIII. AGENCY DECISION MAKING

A. WHO MAKES THE DECISION?

Deciding which official should make the adverse action decision is often difficult. The Commission regulation states that "[t]he decision shall be made by a higher level official of the agency, when there is one, than the official who proposed the adverse action." [224] The Army has placed an additional limitation on who may sign a decision letter by suggesting that "[t]o avoid confusion as to whether an official is at a higher level than the proposing official, the deciding official should be in a direct line of supervision over the

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[219] 5 C.F.R. § 752.202(b) (1977).
[220] CPR 752-1 (C3), S6-2.a. (1975).
[221] 5 C.F.R. § 772.307(c) (1977).
[222] *Id.* § 772.307(c)(1) (1977). *See* FPM Letter 771-8 (April 8, 1977) for an explanation of amendments to the *Code of Federal Regulations* and the FPM sections dealing with appeals to the Commission. These sections explain the grounds on which the agency may challenge an employee's choice of representative and limit the time during which the challenge must be made and decided.
[223] Although opposed by the Commission, a bill has been introduced in the House of Representatives that would provide federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct. H.R. 3793, 95th Cong., 1st Sess. (1977).
[224] 5 C.F.R. § 752.202(f) (1977).

proposing official and should be of higher grade or rank." [225] This section of the regulation also emphasizes that "[t]he deciding official must have clear authority to exercise independent judgment in deciding the action to be taken." [226]

Illustrating this principle, a FEAA field office has stated that it is improper for one official to sign the decision letter "for" another. In a case in which one official signed the letter of proposed action and subsequently signed the decision letter "for" a higher level official, the field office held the official was signing under a delegation of authority from the higher level official—a delegation that was improper under Civil Service Commission regulations.[227]

The intent behind the requirement that the decision be made by a higher level official than the one who proposed the action is to produce an independent evaluation of the case. Even where the official who signs the decision letter is a higher level official than the one who signed the advance letters, a FEAA field office has found that the required independent evaluation may not be present. In one case the field office noted that the record contained a memorandum signed by both officials stating that they both believed the employee should be given a notice of proposed removal.[228] Because of this apparent involvement in the notice letter, the deciding official could not render an independent judgment. Consequently, the adverse action was overturned.

B. WHEN MUST THE DECISION BE MADE?

Hearing examiners and federal courts have had difficulty interpreting the Commission regulation which states that "[t]he employee is entitled to notice of the agency's decision at the earliest practical date." [229] The phrase "earliest practical date" does give the agency some discretion, although this discretion is subject to review. A quality assurance specialist who was removed for accepting gratuities from a company whose contract work he was assigned to monitor alleged that the failure of the agency to provide him with its decision for almost two months after it had received his reply constituted prejudicial error. The court disagreed because the delay was caused by a change of officials in the agency, and refused to grant the requested relief.[230]

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[225] CPR 752-1 (C6), S7-4 (1976).
[226] *Id.*
[227] Dec. No. BN 752B60026, 2 Dig. of Significant Decisions 42 (1975).
[228] Dec. No. NY 752B60259, 2 Dig. of Significant Decisions 69 (1976).
[229] 5 C.F.R. § 752.202(f) (1977).
[230] Valvo v. Hampton, No. 62-C-1540 (E.D.N.Y. Apr. 23, 1975).

In another case,[231] an employee who received a 30-day suspension objected to the agency's violation of its own regulation which required it to issue a decision 10 days after receiving the employee's reply. The agency rendered its decision 45 days after the response was presented, and the FEAA field office held this violation of the agency regulation to have been fatal because it affected the employee's right to a timely reply. The Appellate Review Board reversed, noting that

> (1) an employee's rights are not necessarily materially affected whenever an agency adverse action regulation is violated; and (2) an agency failure to adhere to one of its pre-established time standards is only a minor irregularity in no way prejudicial to the employee's defense and is not a fundamental error which would require corrective action.[232]

Certainly the delay may become completely unreasonable and justify the reversal of an action. Where an employee received notice of a proposed 10-day suspension on August 28, gave his response on September 5, and received a decision letter suspending him for three days on April 2 of the following year, the FEAA field office held the action procedurally defective.[233] The office determined that the agency had failed to take timely action and could show no reason for this delay.

C. WHAT INFORMATION MUST BE INCLUDED IN THE DECISION LETTER?

Any timely answer presented by an employee should be carefully studied and considered by the deciding official.[234] Although the Commission does not require the agency's decision letter to mention the employee's answer specifically, it suggests that a statement to that effect is good practice.[235] The Commission regulation sets forth the following requirements for the decision letter:

> The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee: (1) which of the reasons in the notice of proposed action have been found sustained and which have been found not sustained; (2) of his right of appeal to the

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[231] Dec. No. RB 752C60018 (Dec. No. BN 752C6008).
[232] *Id.*
[233] Dec. No. NY 752C500012, 2 Dig. of Significant Decisions 19 (1975).
[234] 5 C.F.R. § 752.202(b) (1977). This section of the Commission regulation provides: "If the employee answers, the agency shall consider his answer in reaching its decision."
[235] FPM SUPP. 752-1, S7-3.a. (1976).

> appropriate office of the Commission; (3) of the time limit for appealing as provided in section 752.204; and (4) where he may obtain information on how to pursue an appeal.[236]

The need for the agency to set forth clearly which charges are sustained is extremely important because the employee has the right to be informed of the reason for the action taken against him. This point was emphasized in a case where the decision letter did not state that the charge was sustained.[237] Both the FEAA field office and the Appellate Review Board held this error to be fatal to the legality of the action.

The Commission also suggests that the agency should consider whether the proposed action is "for cause that will promote the efficiency of the service" after having considered the employee's response.[238] However, as is the case for the proposed notice, the Commission does not require the agency to refer to the statutory standard in its decision notice. Nonetheless, an employee who was removed for improper soliciting of sexual favors complained that neither the advance notice nor the decision letter stated how the removal would promote the efficiency of the service.[239] The court noted that the agency must be able to show the statutory standard was met, but held there was no requirement to specifically discuss the justification in the notice or decision letters.

Advance notices often contain references to past conduct or disciplinary actions that will be considered in making the agency decision. If such a case arises, the Commission advises that "[w]henever anything about the employee's past record is brought up in the advance notice, it also should be covered in the decision notice as something which is being relied on to support the action or as something which is not not being relied on, as the case may be." [240] Likewise, the right to appeal the agency decision must be clearly explained to the employee in the decision notice.[241]

IX. CONCLUSION

"The only way to get rid of them is to promote them or reassign them." This refrain is too often voiced in the federal civil service by managers frustrated by lack of success in disciplining civilian em-

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[236] 5 C.F.R. § 752.202(f) (1977).
[237] Dec. No. RB 752C50055 (Dec. No. CH 752C50008).
[238] FPM SUPP. 752-1, S6-4.a. (1976).
[239] Nitz v. Civil Service Commission, No. 75-122-C (E.D. Okla. Apr. 2, 1976).
[240] FPM SUPP. 752-1, S7-2.b. (1976).
[241] *Id.* at S7-4.c. (1976).

ployees. This article has explained the procedures that must be followed if actions are to become effective. Discipline is only a small facet of the manager's responsibility, but action that is delayed, inappropriate or improperly processed will have a serious impact on the efficiency of the organization concerned. The published Commission and agency guidance must be understood and followed, but it is also important that management and Civilian Personnel Office officials seek advice from their legal staff. The lawyer's contribution will assure that the decisions of the Commission's appellate authorities and the courts will be interpreted and applied in individual cases.

It is also essential that managers not react emotionally to incidents that may require disciplinary action. Decisions made under the stress of high emotional involvement rarely meet the test of reasonableness that is demanded throughout the process. Ideally, a properly managed work force will require few disciplinary actions, but if such action is appropriate, a process is available that can be administered equitably and effectively.

UNIONIZATION OF THE MILITARY: SOME LEGAL AND PRACTICAL CONSIDERATIONS*

Captain William S. Ostan**

I. INTRODUCTION

Recently, there has been much controversy and public debate over the issue of unionizing the military forces of the United States Government. This discussion can no longer be disregarded or dismissed as a mere fantasy. The American Federation of Government Employees (AFGE), an affiliate of the AFL-CIO, has proposed a sophisticated program for organizing the military. In September 1976, the AFGE convention approved an amendment to its constitution which expanded its jurisdiction to include members of the armed forces and employees of personnel support service contractors.[1]

Although the delegates expanded the AFGE's jurisdiction, they did not at the same time authorize or fund a major organizing program to help sweep these new potential members into the AFGE fold. On March 7, 1977, the American Federation of Government Employees' National Executive Council, the union's governing body between biennial conventions, approved and sent to the membership for its approval or rejection in a referendum, a plan to admit personnel of the armed forces to union membership and to provide them with various types of representation services.[2]

The referendum proposal calls for the membership to be provided with an outline of the military representation issue summarizing the views of the proponents and opponents of unionization. The vote will be conducted within the locals' bargaining units and the results transmitted to AFGE headquarters. The final vote of the membership is to be announced publicly no later than October 1, 1977.[3]

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*The opinions, assertions, and conclusions contained in this article are the private views of the author and are not to be construed as official or as reflecting the views of the Department of the Army, the Department of Defense, or any other governmental agency.

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[1] [1976] GOV'T EMPL. REL. REP. (BNA), No. 677, at A-4.

[2] [1977] GOV'T EMPL. REL. REP. (BNA), No. 699, at 6.

[3] *Id.* at 7. As the type was being set for this article, the AFGE voted, by 151,582

Even if the AFGE decides not to organize the military, this decision will not prevent other unions from taking up the effort to increase their membership by unionizing the two million uniformed personnel. Although the AFGE, the largest federal union, has attracted the most public attention with regard to this subject, other unions, including the National Maritime Union, have also publicly expressed an interest in organizing the military.[4]

This article will examine the legal issues and practical considerations inherent in any attempt to unionize uniformed servicemembers. The article will specifically consider how these issues and considerations relate to an installation commander who is faced with a union's attempt to enroll servicemembers subject to his command. The first part of the article will discuss the effects of military unions in Europe, the evolution of the union movement in the federal sector, and the present Department of Defense policy toward unionization of the military. The second part will analyze three legal issues of particular concern. First, does a servicemember have a constitutional right to join a union? Second, do union organizers have the right to enter a military installation to conduct unionization activities? Third, what, if any, collective bargaining rights does the Constitution guarantee to unions composed of service personnel? The final portion of the article will attempt to assess in a realistic fashion the potential impact of AFGE's plan to organize the military and will consider whether a military union is necessary in light of the present grievance procedures available within the military structure.

II. HISTORICAL BACKGROUND

A. MILITARY UNIONS IN EUROPE

To assess the potential impact of unionization, it may be instructive to review briefly the experience that various European nations have had with unionized armed forces. Military unions are firmly entrenched and an accepted facet of society in six European nations.

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to 38,764, to reject the proposal to attempt to unionize the military services. Washington Post, Sept. 8, 1977, at C2, col. 1.

[4] Teamsters President Frank Fitzsimmons says that U.S. servicemembers will not be carrying IBT union cards now or in the near future, because the union has no desire to organize the armed forces. He stated that unionization of the military is "neither desirable or feasible." "It can be written as an absolute fact," he added, that the union will not attempt to organize the military. [1976] GOV'T EMPL. REL. REP. (BNA), No. 687, at A-12.

Sweden, Norway, Denmark, Belgium, West Germany, and the Netherlands all have some form of a military union.[5]

The demands of the European unions have focused almost exclusively on economic and professional interests.[6] Higher compensation is the most important "bread and butter" issue for all these unions,[7] and the issues of regulated work time and compensation for overtime [8] have also been topics of union concern. In addition, the unions have raised demands about service conditions and professional standards.[9] Some unions, mostly in Sweden and Denmark, are also seeking occupational health and safety guidelines.[10] In ad-

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[5] D. CORTRIGHT, SOLDIERS IN REVOLT (1975). *See also* Cortright, *Unions and Democracy*, 1 AEI DEF. REV. 6 (1977), *reprinted in* 57 MIL. REV. 35 (Aug. 1977). [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 35. Cortright is currently writing a book on military unions. This and the following information discussing military unions in Europe are drawn from his article "Unions and Democracy." Mr. Cortright stated in his article that the actual experience of military unions in Europe shows no damage to military strength. In his view, the evidence from Europe indicates rather compellingly that unionization has had little negative consequence. Mr. Cortright summarized his thoughts on this matter when he wrote:

> In general, all of the European military unions assert that organizing has had no negative impact on national security. On the contrary, most organizations feel that unionism improves internal conditions and creates a more democratic and enlightened form of service. People who are treated with respect and are able to participate in decisions affecting their lives will be more highly motivated than those who are oppressed. In today's highly technical society, with its heightened skepticism toward monolithic authority, traditional forms of rigid military discipline are no longer productive. It follows from this, therefore, that democracy within the ranks is an essential prerequisite for military effectiveness.

Id. at 10. This is a very broad statement, but Mr. Cortright fails to offer any substantial evidence in support of his comments. In fact, his remark that "traditional forms of rigid military discipline are no longer productive" is not completely accurate when one looks at the military forces of the Soviet Union and China and how they are structured. Mr. Cortright would be hard pressed to state that the armed forces of those countries are not efficient.

Senator Strom Thurmond (R–SC) has attacked Mr. Cortright's views on this subject and commented in the *Congressional Record* that "unionization in the armed forces of the Netherlands, Sweden, and Austria has been, to put it mildly, an unhappy experience when viewed in the context of an effective defense force." *Id.* at 10. *See also* S. 3079, 94th Cong., 2d Sess., 122 CONG. REC. S2807 (1976). Senator Thurmond recently expressed his thoughts on this subject when he said:

> Unionization of certain defense forces in Europe has not improved their readiness to defend their countries, which, after all, is the reason for the existence of a military force. The evidence points the other way. The division of authority between the government and the unions has left some European forces less ready and responsive. The all-important question of how a unionized military will perform in battle is yet to be answered. It must not be answered at the risk of American lives and liberties.

See Thurmond, *Military Unions*, [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 45, *reprinted in* 57 MIL. REV. 35 (Aug. 1977).

[6] *Id.* at 7.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

dition, the military organizations have sought improved dining and housing facilities and better recreation and welfare services.[11]

One of the most important models of unionization, one which possesses certain similarities to the AFGE's approach, is the form utilized in Sweden. Three separate professional organizations exist in Sweden and these in turn are affiliated with two larger civilian employee federations (unions).[12] The main result of this arrangement is that the large and powerful public employee unions negotiate and bargain directly on behalf of the military organizations [13] in a wide range of employee controversies, including matters of pay, job safety, promotions, pensions, and job classification. These federations normally conclude a formal labor contract every two years.[14]

B. FEDERAL UNIONS

In the United States, federal sector unionism has grown in a phenomenal manner. For the AFGE in particular, the major growth in membership occurred during the 1960's.[15] The major reason for this expansion, apart from a swelling of the federal bureaucracy during the Johnson presidency, was Executive Order 10988, signed by President Kennedy in January 1962. The Kennedy Order officially authorized federal employee unionism and laid down basic ground rules for labor management within the Government. The original executive order has been replaced and is presently implemented by Executive Order 11491.[16] Executive Order 11491, as amended, clearly sets forth the basic guarantee to all federal employees of their right to form, join and assist a union, and grants the union the right to bargain collectively and secure redress of griev-

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* Cortright, *supra* note 5, at 9. In the decade from 1960 to 1970, AFGE membership more than tripled, jumping from approximately 80,000 to 300,000. However, the overall proportion of union representation of federal employees decreased slightly in 1976, according to the Civil Service Commission. The reported drop in union representation—from 59% of the federal workforce in 1975 to 58% in 1976—is the first such drop since the Commission began keeping statistics 14 years ago. A total of 1,190,478 nonpostal federal workers are represented by unions, compared with 1,200,336 in 1975. The Commission considers the decline minimal and says it is "consistent with the stable situation that has existed in the highly organized federal workforce in recent years." *See* note 2 *supra*, at 4.
[16] 3 C.F.R. 254 (1974), *as amended by* Exec. Order 11838, 40 Fed. Reg. 5743 (1975).

ances on behalf of the employees it represents in the bargaining unit.

The most recent survey conducted by the Civil Service Commission in November 1976 showed that AFGE increased its representation to 678,410 employees.[17] It should be noted that all of these employees represented by the AFGE are not AFGE members. Today the total AFGE membership has been estimated at approximately 265,000 members.[18] Department of Defense employees comprise about 376,000 of the more than 678,410 federal employees which AFGE represents, and the union represents more Defense Department employees than all other unions combined.[19]

The Kennedy Order opened the door for federal unions, and the AFGE, in particular, has been attempting continuously to increase its membership rolls ever since that time. In 1974, at the behest of the then President of the AFGE, Clyde Webber, the union urged active duty service people to support its wage demands. Hundreds of thousands of leaflets were distributed at military bases reminding servicemembers that AFGE's efforts on behalf of federal workers also raised military salaries.[20] Viewing the 1974 initiative as successful, the AFGE leadership began to consider the prospect of soliciting active duty military personnel to become union members.[21] As the erosion of servicemembers' pay continued, the allure of military organizing increased. The AFGE's present plan to organize the military calls upon present members to admit military personnel either to existing locals or to separate military locals, depending upon local choice.[22] In addition, the AFGE has publicly announced that military members would pay the same per capita dues, currently $3.20 per month, that civilian members pay.[23] The move to permit military membership thus represents an attempt by the AFGE to reach for greater economic power and to bolster its union strength and treasury by admitting the two million uniformed personnel as union members.

Some of the major difficulties confronting servicemembers today

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[17] *See* note 2 *supra*, at 4. Eighty-nine percent (1,059,663) of all the 1,190,478 employees under exclusive recognition are covered by negotiated agreements. Of the entire federal workforce, 52% were covered by agreements as of November 1976. *Id.*

[18] *See* note 2 *supra*, at 7.

[19] [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 5.

[20] *See* note 5 *supra*.

[21] *Id.*

[22] [1977] GOV'T EMPL. REL. REP., *supra* note 2, at 6.

[23] *Id.*

are a drastic reduction in economic benefits and a limiting of career opportunities. The pages of service-oriented newspapers expose these harsh realities and contain frequent complaints over such issues as pay limitations, reductions in medical benefits, challenges to retirement pay and reductions in force.[24] In response to the reduction in economic benefits, AFGE National President Kenneth T. Blaylock has committed himself to supporting an active effort by his union to organize the armed forces. A statement prepared by Blaylock, in response to a bill pending in Congress which would prohibit unionization of the military, said in part:

> Whatever distorted perspective leads you to conclude that present military service constitutes the good life, a substantial number of our fellow citizens who actually serve in the armed forces do not share this view. It was they who asked AFGE for help. . . .
>
> AFGE is a free voluntary union chosen in secret ballot elections to represent over 700,000 federal civilian employees. It has been asked by military personnel to assist them in organizing themselves. As a free labor union dedicated to traditional American values, we fully intend to answer that call for help.[25]

The AFGE perceives dissatisfaction and frustration among servicemembers and views the military as being very susceptible and receptive to unionization. Although the AFGE, as a result of the referendum, may decide not to organize the military, other unions may take up the effort. Therefore, the Department of Defense must consider the rhetoric concerning unionization as a real possibility, and the present position of the Department on this matter must be assessed.

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[24] *See* note 5 *supra*, at 4. The Department of Defense has publicly announced that manpower costs must be reduced if the United States is to sustain an adequate defense capability. Assistant Secretary of Defense for Manpower and Reserve Affairs William Brehm outlined this policy in his official statement to the Senate Armed Services Committee at the beginning of hearings on the 1977 defense budget. According to Secretary Brehm: "We must slow the growth of defense manpower costs in order to assure an adequate level of resources for development, procurement, and the operation of our forces." *See Hearings on Department of Defense Appropriation for FY 1977 Before the Subcomm. on the Dep't of Defense of the Senate Comm. on Appropriations*, 94th Cong., 2d Sess., part 2, at 15 (1976). Several alternative programs have been devised and are being considered to implement these goals. Elements of the economy package include: a limiting of pay increases; the elimination of commissary subsidies; cutbacks in CHAMPUS (Civilian Health and Medical Program of the Uniformed Services); a medical program for dependents; and a limitation on the amount of terminal leave payments. *Id.*

[25] [1977] GOV'T EMPL. REL. REP. *supra* note 19, at 4.

C. DEPARTMENT OF DEFENSE POLICY ON UNIONIZATION OF THE MILITARY

On March 18, 1977, Defense Secretary Harold Brown reiterated Department of Defense policy when he told Congress that military unions could play havoc with the command system.[26] In testifying before the Senate Armed Services Committee he said, "The functional role of our armed forces demands absolute certainty of immediate and total responsiveness to lawful orders." [27] He also remarked that collective bargaining in the military is "fundamentally incompatible" with the need for "an unencumbered command and control system" [28] and referred to current regulations which prevent bargaining between the United States and any organization or person representing servicemembers.[29]

However, Secretary Brown cautioned that no regulation prevents servicemembers from joining unions.[30] He suggested that prohibiting members of the armed forces from joining a union might be unconstitutional and violate the first amendment right of free associa-

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[26] *See* The Philadelphia Inquirer, Mar. 19, 1977, at 8-A.

[27] *Id. See also* Eccles, *Military Unionization: The Central Issues*, 30 NAV. WAR C. REV. 18 (Summer 1977).

[28] *Id.*

[29] *See* The Army Times, May 1, 1974, at p. 4; Dep't of Army Circular No. 632-1, Standards of Conduct and Fitness: Guidance on Dissent, para. 5c (1 May 1974) [hereinafter cited as DA Cir. 632-1].

[30] DA Cir. 632-1, para. 5c provides that "Commanders are not authorized to recognize or to bargain with a 'servicemember's union.'" It also provides that:

> In view of the Constitutional right to freedom of association, it is unlikely that mere membership in a "servicemen's union" can constitutionally be prohibited, and current regulations do not prohibit such membership. However, specific actions by individual members of a "servicemen's union" which in themselves constitute offenses under the Uniform Code of Military Justice or Army Regulations may be dealt with appropriately. Collective or individual refusals to obey orders are one example of conduct which may constitute an offense under the Uniform Code.

There is also no provision of law or regulation which prohibits a member of the Army from becoming a member of a labor union with relation to his private employment or pursuits during his off-duty hours. JAGA 1951/5745, 20 Sept. 1951. However, there are general restrictions upon members of the Army in regard to their outside employment. Army Reg. No. 600-50, Personnel—General, Standards of Conduct for Department of the Army Personnel, para. 1-12*a* (C2, 19 Apr. 1973) [hereinafter cited as AR 600-50], provides that Department of the Army personnel shall not engage in outside employment or other outside activity, with or without compensation, which:

1. interferes or is not compatible with the performance of their Government duties;
2. may reasonably be expected to bring discredit upon the Government or the Department of the Army.

AR 600-50, para. 1-12*k* (C2) provides that command responsibility also includes the responsibility that commanders keep fully informed of the off-duty employ-

tion.[31] Consequently, Brown reportedly would not endorse either of the two bills pending before the Senate Armed Services Committee to make it a criminal offense for military personnel to join a union or for others to solicit military personnel to join unions.[32] In fact, his approach could be categorized as "cautious" when considering his quoted remarks to the Senate: "The threat [of military unions] is prospective, not immediate. I don't want to overreact." [33] Furthermore, Brown warned Congress that drastic laws to outlaw unions might do more harm than good and existing regulations were sufficient to prevent unionization.[34] Although no uniform regulation

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ment of military personnel within the command. When a commander determines that an individual's off-duty employment will either impair the unit's ability to accomplish its mission, adversely affect the individual's professional reputation within the unit, or discredit the overall image of the Army, the individual will terminate such employment.

It is interesting to note that in a few Assistant Secretary of Labor decisions the issue of off-duty military personnel being considered "employees" for the purpose of coverage under Executive Order 11491 has been addressed. In Department of the Air Force, McConnell Air Force Base, A/SLMR No. 134 (Feb. 28, 1972) the Assistant Secretary pointed out that off-duty military personnel may be considered to be "employees" as defined by Section 2(b) of the Order. *See also* Department of the Navy, Navy Exchange, Mayport, Florida, A/SLMR No. 24 (Apr. 21, 1971); Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, A/SLMR No. 25 (Apr. 21, 1971). These two cases held that the exclusion of off-duty military personnel, as a class, based solely on their military status, from a bargaining unit is unwarranted. Furthermore, in the Assistant Secretary's view, agency regulations prohibiting off-duty military personnel from being included in employee bargaining units would not be determinative because such regulations contravene the purposes of the Order. Additionally, the record revealed in the Navy case that off-duty military personnel were not prohibited by the Navy from joining, forming or assisting labor organizations.

[31] *See* The Philadelphia Inquirer, Mar. 19, 1977, at 8-A.

[32] *See id.* On March 4, 1976, Senator J. Strom Thurmond, Republican from the State of South Carolina, and 21 co-sponsors from both parties, introduced a bill in Congress, S. 3079, which would make it unlawful for anyone to join a labor organization seeking to bargain with the defense establishment on behalf of military members. This bill would also make it unlawful for anyone to solicit memberships in such an organization or otherwise persuade military members to join. Stiff criminal sanctions would be provided for violations. Penalties would include imprisonment of up to five years for individuals found guilty of violating the law, and fines ranging from $25,000 to $50,000 against labor unions found guilty. [1976] GOV'T EMPL. REL. REP. (BNA), No. 648, at A-10 & A-11. More recently, on January 12, 1977, Thurmond announced that his bill, S. 274, prohibiting the unionization of United States uniformed military forces and the establishment of unions seeking to bargain concerning military wages and other terms and conditions of military service, was being reintroduced for passage by the 95th Congress, because S. 3079 was a victim of the election year and died when the 94th Congress adjourned in 1976. [1977] GOV'T EMPL. REL. REP. (BNA), No. 691, at 5.

[33] *See* note 29 *supra*.

[34] *Id.*

prevents unions from soliciting for members on an installation, Brown indicated that commanders can stop organizational activities on their installations if the activities undercut discipline.[35]

Clearly, the Defense Department has adopted an approach toward legislatively forbidding unionization which may accurately be described as a "wait and see" attitude. Brown reportedly told Congress that he had ordered his staff to draw up a directive to "resitrict" [36] military union recruiting on post. The directive will be placed into effect, he said, "if events require it." [37] Whether unionization of the military will come to fruition or merely remain a possibility, the constitutional and legal issues surrounding these issues should be addressed. Commanders and their legal advisors must be prepared to deal with these issues should the need arise.

III. CONSTITUTIONAL AND LEGAL ISSUES

A. FIRST AMENDMENT RIGHT—FREEDOM OF ASSOCIATION

The AFGE claims it possesses a constitutional right to unionize the military. In the summer of 1975, a study prepared for the AFGE leadership by the union's general counsel, L.M. Pellerzi, concluded that a flat ban on military union membership would be unconstitutional.[38] His findings primarily relied on the constitutional right of freedom of association guaranteed by the first amendment. In his opinion, "a comprehensive ban on union membership per se is beyond the constitutional pale" [39] because it would constitute an over-

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[35] *Id.* The standards established by the Department of Defense allow the commander to prohibit any demonstration or activity on the installation which could interfere with or prevent the orderly accomplishment of the installation's mission or which presents a clear danger to the loyalty, discipline or morale of the troops. *See* Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces § III.E. (12 Sept. 1969) [hereinafter cited as DoD Dir. 1325.6].

[36] *Id.* The proposed DoD directive on military unions reportedly will not prohibit servicemembers from joining unions in general. Membership may be prohibited in unions which engage in prohibited conduct of specified types, such as strikes, slowdowns or coercive picketing. However, membership will be prohibited only if a union is determined by an installation commander to pose a clear danger to discipline, to obedience to lawful orders, or to the chain of command of the armed forces.

[37] *Id.*

[38] [1975] GOV'T EMPL. REL. REP. (BNA) No. 620, at A-10.

[39] *Id. See also* Staudohar, *Legal and Constitutional Issues Raised by Organization of the Military*, 28 LAB. L.J. 182 (1977).

broad restriction on the freedom of association protected by the first amendment. A review of the judicial precedent evokes strong support for Mr. Pellerzi's conclusion.

A federal district court ruled in *Atkins v. City of Charlotte*,[40] that a statute which prohibited public employees from joining a labor union abridged the member's freedom of association guaranteed by the first and fourteenth amendments. In *Atkins*, the State of North Carolina by statute prohibited public (government) employees from joining a labor organization and from engaging in collective bargaining agreements between governmental units and labor organizations. The firefighters sought to have the law declared unconstitutional. The federal district court upheld the right of the firefighters to organize and reasoned that:

> The thought of fires raging out of control in Charlotte while firemen, out on strike, Neroically watch the flames, is frightening. We do not question the power of the State to deal with such a contingency. We do question the overbreadth of G.S. Sec. 95-97, which quite unnecessarily, in our opinion, goes far beyond the valid state interest that is suggested to us and strikes down indiscriminately the right of association in a labor union. . . .
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> [T]he firemen of the City of Charlotte are granted the right of free association by the first and fourteenth amendments of [*sic*] the United States Constitution; [and] that right of association includes the right to form and join a labor union—whether local or national. . . .[41]

This decision is particularly relevant to the question of whether servicemembers have any constitutional right to form a union. This relevance stems from the fact that firefighters can be considered "paramilitary" because their profession requires a high degree of discipline and because the public is vitally dependent upon its performance for protection of life and property.

Similarly, in *Vorbeck v. McNeal*,[42] the United States Supreme Court affirmed a district court decision which had held that a state statute and city rule prohibiting police from forming or joining labor

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[40] 296 F. Supp. 1068 (W.D.N.C. 1969).

[41] *Id.* at 1076–1077. The court also noted:

> It is said that fire departments are quasi-military in structure, and that such a structure is necessary because individual firemen must be ready to respond instantly and without question to orders of a superior, and that such military discipline may well mean the difference between saving human life and property and failure. The extension of this argument is, of course, that affiliation with a national labor union might eventuate in a strike against the public interest which could not be tolerated, and the very existence of which would imperil lives and property in the City of Charlotte.

Id. at 1076.

[42] 407 F. Supp. 733 (E.D. Mo.), *aff'd without opinion*, 426 U.S. 943 (1976).

organizations violated first and fourteenth amendment rights of freedom of association. The district court had ruled that the statute was unconstitutional on its face and would significantly infringe upon the policemen's right of freedom of association.[43] The *Vorbeck* court also pointed out that "[t]here is no compelling reason for denying certain persons membership in organizations solely because of their status as policemen where there is no showing that the organizations are detrimental to the sui generis, and paramilitary nature of police departments." [44]

A recent Supreme Court case, *Abood v. Detroit Board of Education*,[45] confirmed in effect that the right of employees to join a labor union is protected by the first amendment and is within this freedom of association. At issue in *Abood* was an attack on an agency-shop clause in a collective bargaining agreement between a union and the board of education. While holding the clause valid insofar as it required petitioners to pay a service charge for various nonideological employee services, the Court noted that its "decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the first and fourteenth amendments." [46]

However, these first amendment rights are not absolute; they may be limited by Congress if the national interest requires such action. The legal justification enunciated by Congress for the pending legislation which would prohibit military personnel from unionizing is derived from Article I, section 8, clause 14 of the Constitution, which grants Congress the power "to make rules for the government and regulation of the land and naval forces." [47] Nonetheless, as the Supreme Court recognized in *United States v. Robel*,[48] "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." [49]

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[43] *Id.* at 738.

[44] *Id.* Similar restraints upon the first and fourteenth amendment rights of policemen and firemen have been held unconstitutional by other three-judge courts. *See, e.g.*, Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); Police Officers Guild v. Washington, 369 F. Supp. 543 (D.D.C. 1973).

[45] 45 U.S.L.W. 4473 (U.S. May 23, 1977) (No. 75-1153).

[46] *Id.* at 4480.

[47] *See* [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 45.

[48] 389 U.S. 258 (1967).

[49] *Id.* at 264.

Congress may rely upon the "separate society" doctrine established by the Supreme Court in *Parker v. Levy* [50] to support legislation which would limit the extent of servicemembers' first amendment rights. In *Levy*, the Court upheld the power of the Congress to legislate with greater breadth and flexibility in military matters than would be permissible when dealing with civilian interests:

> This Court has long since recognized that the military is, by necessity, a specialized society separate from civilian society. . . .[51]
>
> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[52]

Moreover, the Court's holding in *Gilligan v. Morgan* [53] could provide further support for the constitutionality of this legislation. The following language in the Court's opinion evidences the deference given congressional judgment exercised in military affairs:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[54]

On June 23, 1977, the Supreme Court announced its decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[55] which considered the tension between freedom of association and the specialized needs of a penal institution. The *Prisoners' Labor Union* case dealt with questions of soliciting prison inmates to become union members, conducting union meetings inside the prison, and delivering packets of union literature which had been mailed in bulk to several inmates. Mr. Justice Rehnquist delivered the opinion of the Court in this 7–2 decision [56] and began by reasoning that "the needs of the penal institution impose limitations on constitutional

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[50] 417 U.S. 733 (1974).
[51] *Id.* at 743.
[52] *Id.* at 758.
[53] 413 U.S. 1 (1973).
[54] *Id.* at 10 (emphasis in original).
[55] 45 U.S.L.W. 4820 (U.S. June 23, 1977) (No. 75–1874).
[56] Mr. Justice Marshall filed a dissenting opinion, in which Mr. Justice Brennan joined. *Id.* at 4825.

rights, including those derived from the First Amendment." [57]

He continued by noting that despite the fact that the state had permitted the prisoners to become union "members," the state had never permitted the union to engage in group associational activities. Indeed, such associational rights

> may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.[58]

Chief Justice Burger concurred in the majority opinion and summarized the attitude of the Court when he stated:

> The issue here, of course, is not whether prisoner "unions" are "good" or "bad" but rather whether the Federal Constitution prohibits state prison officials from deciding to exclude such organizations of inmates from prison society in their efforts to carry out one of the most vexing of all state responsibilities—that of operating a penological institution. In determining that it does not we do not suggest that prison officials could not or should not permit such inmate organizations, but only that the Constitution does not require them to do so.[59]

In *Prisoners' Labor Union* the Court took into consideration the peculiar nature of the penal system, the necessity for discipline and order in a prison, and the appropriate deference that should be accorded the decisions of prison administrators. An analogy can clearly be drawn from that holding to the military situation because some similarities do exist. The Court has recognized through the "separate society" doctrine the peculiar nature of the military community. The Court has also noted the fundamental necessity for obedience and discipline within the military structure and the deference to be given to the judgment exercised by a commander or by Congress in the field of military affairs. The Court pointed out in its recent case that the "case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials, surely would rank on anyone's list of potential trouble spots." [60] The Court's "separate society" doctrine and its recent decision in *Prisoners' Labor Union* are strong indicators that the Court would hold a statute prohibiting

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[57] *Id.* at 4822.
[58] *Id.* at 4823.
[59] *Id.* at 4825.
[60] *Id.* at 4824.

military unionization to be constitutional. While it is always dangerous to predict the future direction of any court, several factors support this conclusion. First, the Court has focused on the particular needs of two unique segments of society, each of which has important, but particularized goals. Second, in both of these segments the need for order and discipline is crucial, and decision makers will be permitted broad, discretionary authority which would not generally be allowed. Finally, in *Prisoners' Labor Union* the Court cited *Greer v. Spock* [61] at some length and explicitly noted certain similarities between military and prison society.

On final area which is integrally related to the membership issue must be addressed. In the event the courts should uphold the right of military personnel to join a labor organization, then the possibility of barring servicemembers who occupy a supervisory capacity from joining the same union as those whom they supervise should be explored. In *Elk Grove Firefighters Local No. 2340 v. Willis*,[62] the district court ruled that a prohibition against captains and lieutenants belonging to any union which also had as members rank and file firefighters was constitutional. An analogy can also be drawn to the Supreme Court's holding in *Beasley v. Food Fair* [63] which approved the public policy expressed in section 14(a) of the Taft-Hartley Act.[64] Section 14(a) provides that no employer subject to the Act can be compelled under any law, federal, state or local, to deal with supervisors as members of collective bargaining units. This provision reflects a strong congressional judgment that the membership of supervisors in unions is inimical to efficiency. Furthermore, the objective of the Taft-Hartley Act was to "assure the employer of a loyal and efficient cadre of supervisors and managers independent from the rank and file." [65] Thus, Congress or the Department of Defense would seem to be on firm constitutional ground in prohibiting those in supervisory positions from joining a union or at least in prohibiting them from joining a union that includes the rank and file members. Such a restriction on officers and NCO's could be justified on the ground that it would preserve the efficiency of the armed forces.

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[61] 424 U.S. 828 (1976).
[62] 400 F. Supp. 1097 (N.D. Ill. 1975), *aff'd without opinion*, 539 F.2d 714 (7th Cir. 1976).
[63] 416 U.S. 653 (1975).
[64] 29 U.S.C. § 164(a) (1970).
[65] Shelofsky v. Helsby, 32 N.Y.2d 54, 59–60, 295 N.E.2d 774, 775, 343 N.Y.S.2d 98, 101 (1973).

B. UNION ORGANIZERS—ACCESS TO MILITARY INSTALLATIONS

Although military personnel may have the constitutional right to join a labor organizaton, it does not necessarily follow that union organizers have an absolute constitutional right to be granted access to military installations for the purposes of soliciting servicemembers to join a union or distributing union literature.[66] The views of the union organizers and the installation commander are likely to be in conflict. The union organizers will probably contend that their first amendment right of free expression permits them the access to a military installation for unionization activities. The installation commander, in contrast, may assert that the special needs of the military permit him to control expression in ways that would be unacceptable and unconstitutional in a civilian context.

Any attempt to resolve this conflict can only be accomplished by reviewing the court decisions which have addressed the issue of command control of the exercise of first amendment rights by civilians on a military installation. In addition, the regulations and directives promulgated by the Department of Defense in this area will shed some light on how an installation commander should respond to any requests by union organizers for access to the installation. No reported cases have considered the issue of a union representative's right of access to military installations for the purpose of soliciting servicemembers to join a union. However, several cases provide an installation commander and his staff judge advocate with guidelines to assist in solving such problems.

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[66] Dep't of Defense Directive 1426.1, Labor-Management Relations in the Department of Defense, para. E(1)(c) (9 Oct. 1974), provides that labor organization representatives who are not employees of the activity may be permitted, upon request, at the discretion of the head of the activity, to distribute literature or to solicit membership or support on activity premises in nonwork areas and during the nonwork time of the federal civilian employees involved. Permission may be withdrawn, however, with respect to any such activities which interfere with the work of the installation, or with respect to any representative who has engaged in conduct prejudicial to good order or discipline on activity premises.

The installation commander may authorize labor representatives to enter the installation for the purpose of distributing organizational literature and authorization cards to private contractors' employees provided such distribution does not:

1. Occur in working areas or during working time;
2. Interfere with contract performance;
3. Interfere with the efficient operation of the installation; or
4. Violate pertinent safety or security considerations.

Army Reg. No. 210–10, Installations, Administration, para. 4–6(5) (30 Sept. 1968) [hereinafter cited as AR 210–10].

The Supreme Court in *Cafeteria & Restaurant Workers v. McElroy*,[67] reaffirmed a commander's broad power to exclude civilians from military bases.

> It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline.[68]

The Department of Defense has issued a directive which reinforces this broad grant of authority:

> The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in *interference* with or prevention of orderly accomplishment of the *mission* of the installation, or present a *clear danger* to loyalty, discipline or morale of the troops. It is a crime for any person to enter a military reservation for any purpose, prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the commander.[69]

The Supreme Court's decision in *Flower v. United States* [70] limited the exercise of this power by the installation commander. In *Flower*, the Supreme Court in a per curiam decision reversed appellant's conviction for reentering Fort Sam Houston in violation of a bar order. Flower had originally been barred for distributing leaflets on New Braunfels Avenue, at a point within Fort Sam Houston. New Braunfels Avenue was a thoroughfare and main artery in San Antonio, Texas which was used by civilians and military personnel alike as it traversed the military reservation. When Flower reentered and again began distributing leaflets, he was apprehended and subsequently convicted. The Supreme Court held that because New Braunfels Avenue was a main traffic artery of the community and a public street, the military "had abandoned any claim that it has special interests" [71] in determining who walked, talked or leafleted on the Avenue.

Subsequent to the *Flower* case, the "limited access" or "open-closed" [72] doctrine has been utilized by the courts. Generally, the courts have held that if a base is "closed" to the public, then a commander retains his broad authority under *McElroy*; but if any por-

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[67] 367 U.S. 886 (1961).
[68] *Id.* at 893, quoting J.A.G. 680.44, 6 Oct. 1925.
[69] DoD Dir. 1325.6, § III.E. (emphasis added). *See* 18 U.S.C. § 1382 (1970).
[70] 407 U.S. 197 (1972), *rev'g* 452 F.2d 80 (5th Cir. 1971).
[71] *Id.* at 198.
[72] *Id.*

tion of an installation is "open" to the public, then under *Flower*, civilians have a constitutionally protected right to exercise their freedom of expression in those areas.[73]

The Supreme Court's theory of abandonment of control was made even more confusing as a result of its recent decision, *Greer v. Spock*.[74] In that case, candidates for the offices of President and Vice-President of the United States had been denied permission to enter the Fort Dix, New Jersey, Military Reservation, for the purpose of distributing campaign literature and discussing election issues with service personnel. Furthermore, a group of other persons had been evicted from the military reservation on several occasions for distributing literature.

These complainants asserted violations of their first and fifth amendment rights and sought an injunction against enforcement of post regulations which the commander had relied on to bar their activities on the post. The first challenged regulation prohibited demonstrations, picketing, sit-ins, protest marches, political speeches, and similar activities on the post. The second challenged regulation prohibited the distribution or posting of any publication on the post without the prior written consent of a specified military authority.

The Court upheld the constitutionality of the regulations themselves, which incorporated the "clear danger" and "mission interference" tests, and found that the regulations had not been improperly applied. Mr. Justice Stewart delivered the opinion of the Court in *Spock* and stated in forceful language that:

> A necessary concomitant of the basic function of a military installation has been the historically unquestioned power of (its) commanding

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[73] United States v. Gourley, 502 F.2d 785 (10th Cir. 1973) (protest activities carried on at areas of Air Force Academy open to the public held not subject to bar letters and subsequent 18 U.S.C. § 1382 conviction); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973) (leafleting permissable on public highway and adjacent areas at Fort Bragg); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973) (commander may deny use of camp chapel for a Vietnam protest/memorial srvice, when chapel had been used exclusively for religious services conducted under the supervision of camp chaplains for the sole benefit of military personnel); New Mexico *ex rel.* Norvell v. Callaway, 389 F. Supp. 821 (D.N.M. 1975) (commander of White Sands Missile Range, a "closed base," may deny a state-sponsored group permission to enter the range to search for treasure trove); CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Cal. 1972) (leafleting not subject to a bar order on the public portions of San Francisco Presidio). DA Cir. 632-1 does not reflect this inroad which civilian courts have made into base access. Paragraph 5e, dealing with on-post demonstrations by civilians, asserts only that a commander may not "arbitrarily" deny access to public areas.

[74] 424 U.S. 828 (1976).

> officer summarily to exclude civilians from the area of his command . . .[75]
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> There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline or morale of troops on the base under his command.[76]

Although the language appears to justify tighter restrictions on access to military installations, the Court did not overrule *Flower* and reasoned that the Fort Dix commander had not abandoned control of any portion of Fort Dix. There does not appear to be any factual basis for this conclusion because very few physical characteristics differentiated the two posts. Whatever the reason, the failure to overrule *Flower* means that the factual question of "abandonment" will be an issue in any future dispute over base access, distribution of literature, or other on-base first amendment activity. A fuller understanding of when "abandonment" occurs must await elucidation in future cases.

An installation commander may, in some circumstances, prohibit union representatives who are seeking to organize servicemembers from entering the installation. However, there are limits on the commander's authority [77] and an installation commander may only exercise this power after he determines that it is reasonably possible that the union literature or union organizers' activities may present a clear danger to the loyalty, discipline or morale of the troops or interfere with the mission.[78] This decision cannot be made

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[75] *Id.* at 838.

[76] *Id.* at 840.

[77] In general, union representatives should be granted permission to enter military installations provided:

1. No conflicting security restrictions exist;
2. No significant mission interference would reasonably be expected to result;
3. The solicited employees are eligible to be represented, and no other union has a preferred status to represent them;
4. Servicemembers who have authorization to work and are working during off-duty hours, may be contacted for representational purposes, but only with respect to off-duty employment, not *qua* servicemembers.

AR 210–10, para. 4–6 (30 Sept. 1968)

[78] The principal guidance on command control of civilian activities on a military installation is contained in DoD Directive 1325.6 and Army Reg. No. 600–20, Army Command Policy and Procedure (28 Apr. 1971); AR 210–10 and DA Cir. 632–1. For an excellent overview of the exercise of first amendment rights on military installations by civilian and military personnel, *see* Corrigan & Rose, *The First Amendment–Revisited*, THE ARMY LAWYER, Jan. 1976, at 7; Corrigan, *The Lovely Flowers: Command Control of Civilian Activities at Military Installations after Greer v. Spock*, THE ARMY LAWYER, June 1976, at 1; and Stine, *Base Access and the First Amendment: The Rights of Civilians on Military Installations*, 18 A.F.L. REV. 18 (Fall 1976).

in an arbitrary or capricious manner. Thus, the power must be exercised in a reasonable fashion and on a case-by-case basis. The commander must have "cogent reasons with supporting evidence, for any denial of distribution privileges" [78] or access to the installation for solicitation purposes. The staff judge advocate can best serve his commander by ensuring that the facts are fully articulated and documented and that they support the commander's decision.

Exactly what constitutes "mission interference" or a "clear danger" in a particular situation is largely left to the commander's judgment, although the courts stand ready to review the reasonableness of his decision.[80] In light of *Spock*, the courts may now be more willing to defer to a commander's decision as to whether a particular writing or activity presents a "clear danger" to loyalty, discipline or morale or threatens to interfere with the mission of the installation or those under his command.

With regard to the commander's authority to regulate distribution of literature, under Army regulations, a commander may not actually prohibit the distribution of literature. He may *delay* the dissemination of any publication that, in his opinion, poses a "clear danger" or interferes with his military mission.[81] He must then

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[78] DA Cir. 632-1, para. 5a(3) (1974).

[80] *See, e.g.*, Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), *aff'd mem.*, 429 F.2d 427 (5th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). In *Dash*, servicemembers stationed at an Army post claimed their constitutional rights were violated when the base commander restricted distribution of published materials and refused to grant their request for a meeting on the base for free discussion of the Vietnam War. The *Dash* court ruled that the post commander's denial to servicemembers of the right to distribute literature and to hold on-post meetings open to the public for discussion of the propriety of the political decision to participate in the Vietnam War was justified by the peculiar circumstances of military life, and did not infringe the constitutional rights of servicemembers. However, the court cautioned that this power must be exercised only where it is reasonably possible that the distribution of literature or the meeting might present a clear danger to military loyalty, discipline, or morale of personnel or post. The court scrutinized with great care all the facts and circumstances surrounding the commander's decision. The court balanced the rights of the individuals against the needs of the military and upheld the authority of the commander to deny this group the right to distribute literature and hold a public meeting on the installation.

[81] DoD Dir. 1325.6, § III.A.1., discusses the distribution of printed materials on an installation and provides that:

> A commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as the post exchange and military libraries. In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained . . . in order that he may determine whether there is a *clear danger* to the loyalty, discipline or morale of military personnel, or if the distribution of the publication would *materially interfere* with the accomplishment of a military mission.

notify the next major commander and Headquarters, Department of the Army, and request approval to prohibit distribution of the publication in question.[82] This procedure has the effect of shifting the final decision from the installation commander to higher headquarters. Thus, any future confrontation with a union organizer requesting permission to distribute union literature on an installation will ultimately have to be dealt with by higher headquarters.

As part of his notification to HQDA, the commander must submit a written recommendation requesting delay which provides the factual basis for his determination that the "clear danger" or "mission interference" test is met.[83] In this specific area, the staff judge advocate can render invaluable assistance to the commander by ensuring an impartial and prudent application of the standards. The installation commander and his staff judge advocate can jointly provide a firm legal and factual foundation for delaying any union request by strictly complying with the standards set forth by the courts and the Department of Defense guidance. Only if these standards are met will the commander's decision be sustained by the courts if they are called upon to review the reasonableness of his judgment and his decision-making process.

The Court's *Prisoners' Labor Union* ruling may also give some guidance concerning the Court's views about the distribution and access issue and its relationship to union activity on a military installation. In that case, the Prisoners' Labor Union claimed that its first amendment and equal protection rights had been violated by regulations of the North Carolina Department of Corrections that prohibited prisoners from soliciting other inmates to join the union and barred union meetings and barred distribution of bulk mailings received from outside sources. The United States District Court for the Eastern District of North Carolina found merit in the constitu-

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Id. (emphasis added). AR 210–10, para. 5–5d (1974) provides the following:

> If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, *deny* the distribution of any such publication on property subject to his control.

Id. (emphasis added). Only the "clear danger" test appears in AR 210–10, but the current circular on dissent also includes the "material mission interference" test. *See* DA Cir. 632–1, para. 5a(3) (1974). The circular lists interference with training or a troop formation as situations where a commander could invoke this test. A Department of the Army letter, dated 23 June 1969, entitled Guidance on Dissent, gives as examples of materials which a commander need not allow to be distributed, "publications which are obscene or otherwise unlawful (e.g., counseling disloyalty, mutiny or refusal of duty)."

[82] AR 210–10, para. 5–5*d*.

[83] *Id.* para. 5–5*d*(2)(b).

tional claims of the inmates [84] and held that because the prison officials had permitted the inmates to join the union, prohibiting inmate-to-inmate solicitation "bordered on the irrational." [85] The court further ruled that because bulk mailings to and meetings with the Jaycees, Alcoholics Anonymous, and in one institution the Boy Scouts had been permitted, the prison officials, absent a showing of detriment to penological objectives, "may not pick and choose depending on [their] approval or disapproval of the message or purposes of the group." [86] Accordingly, the court granted the inmates the substantial injunctive relief requested and enjoined the prison officials from enforcing the regulations. [87]

The Supreme Court reversed the district court's ruling and reasoned that the court "got off on the wrong foot in this case by not giving appropriate deference to the decision of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of confinement." [88] The prison officials had concluded that the presence and the objectives of a prisoners' labor union would be detrimental to order and security in the prisons.[89] The Court reasoned that the "necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this." [90] Thus, the

[84] 409 F. Supp. 937 (E.D.N.C. 1976).
[85] *Id.* at 943.
[86] *Id.* at 944.
[87] *Id.* at 946. The prison officials were enjoined as follows:

1. Inmates and all other persons shall be permitted to solicit and invite other inmates to join the union orally or by written or printed communication; provided, however, that access to inmates by outsiders for the purpose of furthering the interest of the union and soliciting membership may be denied.
2. The union shall be accorded the privilege of bulk mailing to the extent and only to the extent, that such a privilege is accorded other organizations.
3. The union and its inmate members shall be accorded the privilege of holding meetings under such limitations and control as are neutrally applied to all inmate organizations, and to the extent, and only to the extent, that other meetings of prisoners are permitted.

[88] 45 U.S.L.W. 4820, 4821–22 (U.S. June 23, 1977) (No. 75–1874).
[89] *Id.* at 4822. The Court pointed out that

> the burden was not on [the prison officials] to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security or order." Rather "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id. citing Pell v. Procunier, 417 U.S. 817, 827 (1974).
[90] 45 U.S.L.W. at 4822.

Court ruled that because the prison officials believed that concerted group activity or solicitation would pose additional and unwarranted problems and frictions in the operation of the state's penal institution, the ban on inmate solicitation and group meetings was rationally related to the reasonable objectives of prison administration.[91]

The Court also relied upon and cited the *Spock* decision in handling the inmates' equal protection argument. The inmates asserted that the regulatory prohibitions concerning distribution of bulk mail and union meetings constituted a denial of equal protection because bulk mailing and meeting rights had been extended to the Jaycees, Alcoholics Anonymous, and the Boy Scouts. In *Spock* the Court upheld the ban on political meetings at Fort Dix by holding that a "government enclave such as a military base was not a public forum." [92] The Court in *Prisoners' Labor Union* quoted the following language from *Spock* as the rationale for its ruling:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.[93]

The Court decided that a prison was also not a public forum and that only a rational basis for the distinctions between organized groups need be demonstrated.[94] The Alcoholics Anonymous and the Jaycees were allowed to operate within the prison because both were seen as serving a rehabilitative purpose and did not pose any threat to the order or security of the institution; [95] however, the administrators' view of the union was that its purposes would compromise the order and security of the correctional system.[96] The Court found that because a prison was not a public forum, these reasonable beliefs of the prison officials were sufficient and stated that "[t]he District Court's further requirement of a demonstrable

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[91] *Id.* at 4823.
[92] 424 U.S. 828, 838 n.10 (1976).
[93] 45 U.S.L.W. at 4824, *citing* 424 U.S. 828, 838 n.10 (1976).
[94] *Id. See also* City of Charlotte v. Local 660, International Ass'n of Firefighters, 426 U.S. 283 (1976).
[95] 45 U.S.L.W. at 4824.
[96] *Id.* at 4824 n.11.

showing that the union was in fact harmful is inconsistent with the deference federal courts should pay to the informed discretion of prison officials." [97] Therefore, the Court ruled that the state regulations offended neither the first nor the fourteenth amendment and reversed the lower court's decision.[98]

The Court's holding in *Prisoners' Labor Union* may have some significance in determining the constitutional validity of congressional legislation or departmental regulations concerning union activity on a military installation. Chief Justice Burger in his opinion concurring with the majority in *Prisoners' Labor Union*, stated that "we do not pass today on the 'social utility' of inmate organizations, whether they be characterized as 'unions' or otherwise, but only on whether the Constitution requires prison officials to permit their operation." [99] Thus, this decision should give Congress, the Department of Defense and installation commanders some indication that the Court will defer to their reasonable judgment exercised in the field of military affairs, especially decisions which control the access of union organizers to a military installation.

There is one final, novel argument which can be propounded as a result of the recent Supreme Court ruling in *Abood*,[100] the agency-shop case. Mr. Justice Stewart delivered the opinion for the Court and stated that "there can be no quarrel with the truism that because public employee unions attempt to influence governmental policy making, their activities—and the views of the members who disagree with them—may properly be termed political." [101] This comment must be compared with the Court's holding in *Spock* that the military must be "insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." [102] The Court found that such a policy was consistent with the American constitutional tradition of a politically neutral military establishment and ruled that the "public interest in insuring the political neutrality of the military justifies the limited infringement on first amendment rights imposed by Fort Dix authorities." [103]

All public employee unions and their activities can be charac-

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[97] *Id.* at 4824.
[98] *Id.* at 4825.
[99] *Id.*
[100] 45 U.S.L.W. 4473 (U.S. May 23, 1977) (No. 75-1153).
[101] *Id.* at 4474.
[102] 424 U.S. 828, 839 (1976).
[103] *Id.* at 848.

terized as political in that they attempt to influence governmental policy making which affects federal employees. At present such influence is exerted on behalf of civilian employees. Relying upon the *Abood* and *Spock* holdings, a viable argument can be made that permitting union organizers access to a military installation to recruit military personnel as members would destroy the political neutrality of the military establishment and give the impression that the military supports the union's partisan political cause. Thus, based upon the *Spock* ruling, a court could hold that the public interest in ensuring the political neutrality of the military would justify the denial of access by a union organizer to an installation and a limitation on the organizer's first amendment rights.

The union may assert that prohibiting union organizers from entering military installations would prevent communication with military personnel. In *Spock* the Court dealt with this argument and pointed out that there were alternative means to communicate to the servicemembers, namely: television, radio, newspapers, magazines and direct mail. The Court rejected Spock's argument and held that partisan political organizing and soliciting of soldiers on a military installation could be prohibited.[104]

C. SCOPE OF COLLECTIVE BARGAINING

When a union is designated the exclusive bargaining representative for a group of employees (normally called the "bargaining unit"), this status grants the union representatives the right to engage in collective negotiations with management concerning benefits for the bargaining unit. The present Department of Defense position is that commanders are not authorized to recognize, bargain or negotiate with a servicemembers' union.[105] If unionization becomes a reality, unions will probably assert their rights as the exclusive bargaining representatives of servicemembers in order to engage in collective bargaining for their benefit. Some courts have addressed the issue of whether a constitutional right to collective bargaining exists. These decisions illuminate the validity and strength of the Defense Department's position, which is not to engage in collective bargaining with any servicemembers' union.

In *Atkins v. City of Charlotte*, a North Carolina statute prohibited collective bargaining agreements between the government and the labor organization representing the firefighters. The

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[104] *Id.* at 847.

[105] *See* note 29 *supra*.

firefighters sought to have the law declared unconstitutional. The court ruled that the prohibition of collective bargaining agreements was not unconstitutional:

> There is nothing in the United States Constitution which entitles one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalities. The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution. The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution. The State is within the powers reserved to it to refuse to enter into such agreements and so to declare by statute.[106]

Similarly, in *Vorbeck v. McNeal*, the court ruled that there was no constitutional right to collective bargaining and that the exclusion of police officers from collective bargaining did not abridge their constitutional rights.[107] These two decisions can be applied to the concept of a military union because fire and police departments are quasi-military in structure. No constitutional right to collective bargaining exists and no national legislation or Executive Order specifically recognizes the right of a servicemembers' union to engage in collective bargaining. Therefore, the Defense Department appears to be on firm constitutional ground in prohibiting commanders from bargaining with any servicemembers' union.

A large portion of the public debate on the advantages and disadvantages of collective bargaining in the military has involved the scope of representation, in other words, what issues are subject to negotiation at the bargaining table. In order for a union to be effective in its role as the exclusive representative of a group of employees and to justify its existence, collective bargaining is essential. If servicemembers are permitted to unionize, it is highly probable that their union will use its resources to obtain legislation or an Executive Order which will recognize the right of a servicemembers' union to engage in collective bargaining with the installation commander. A detailed examination of the military unions in Europe reveals that economic benefits have been obtained for union members as a result of collective bargaining.[108] The scope of bargaining in Europe is limited to economic and welfare matters, whereas training, military

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[106] 296 F. Supp. at 1077.
[107] *See* note 44 *supra*.
[108] *See* authorities cited in note 5 *supra*.

justice and personnel assignments are not negotiable. If a unionized military were to become a reality, certain constraints would have to be imposed upon the scope of collective bargaining. The union's representation services at the bargaining table would have to be limited to purely economic matters to avoid any disruption of the command structure.[109]

Collective bargaining by an installation commander with a union does not fit within the traditional American military structure. The possibility of negotiating through collective bargaining a contract which could limit the ability of a commander to accomplish his mission poses a definite threat to national security.[110] The fundamental need for obedience, discipline and an unencumbered command structure makes it impossible for collective bargaining to operate in the American military structure without having a detrimental effect.

Another consideration is the fact that a union's bargaining power is contingent upon its right to strike. AFGE has declared that its representation plan "could and should strengthen the military command and control structure" [111] but in time of war or emergency, union recognition would be suspended. These positions appear to be totally inconsistent. If the command structure will be improved as a result of unionization, then why should there be any suspension of union activities in time of war? Obviously, the union recognizes that this is a false and weak proposition. At best, it is a tactical gambit to allay the fears of those opposed to unionization. The central problem with unionization in the military is that the union cannot guarantee control of a unionized military with respect to strikes. Former AFGE President Clyde Webber has stated: "The thing about it is that you cannot control individual elements of an organization, whether it happens to be the U.S. Army, . . . or the AFGE. People take into their own hands what they think they have to." [112]

The right to strike has been asserted successfully by public employees against various agencies of city, state and federal govern-

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[109] Clyde Summers, a recognized labor law specialist, aptly observed the inherent complexities of collective bargaining in the military when he wrote: "Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental process; the problems of the public employer accommodating its collective bargaining function to government structures and processes is what makes public sector bargaining unique. Summers, *Public Sector Bargaining: Problems of Governmental Decision-making*, 44 CIN. L. REV. 669, 670 (1976).

[110] Under Executive Order 11491, an agency may but is not required, to negotiate its mission. Exec. Order 11491, para. 11(b), 3 C.F.R. 260 (1974).

[111] *See* note 19 *supra*, at 48.

[112] *Id.*

ments often enough to demonstrate that, regardless of its lawfulness, it is a useful and powerful economic weapon. The post office strike in 1969 and the strike of federal air traffic controllers in 1970 were the first major strikes by federal employees.[113] The conclusion which can be drawn from both these work stoppages is that the federal law which makes such a strike a felony [114] is unenforceable when violated on a large scale and on an organized basis.

Arguably, no member of the armed forces can divide his allegiance between his commander and a union leader who may issue an order to strike or otherwise take part in a job action. Collective bargaining and military discipline may be incompatible in view of a military member's obligation, under principles of military discipline, to obey any lawful order of a superior.

Unionism, with its companion collective bargaining, arguably presents a threat to the commander and the successful functioning of his unit. The present policy of the Defense Department, which prohibits collective bargaining in the military, should be continued. Otherwise, the effects of collective bargaining and job actions could weaken the power and authority of the chain of command, ultimately affecting national security.

The emotionalism surrounding this subject causes the substantive aspects of unionization to become lost in rhetoric. The AFGE's or-

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[113] [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 48. In September 1976 the members of AFGE voted to remove the no-strike clause from its constitution. As reported in The Washington Post, Sept. 25, 1976, at ___, col. ___, "the fact that strikes or slowdowns against government are illegal did not seem to faze delegates here. There were constant reminders that nothing happened a few years back when 220,000 postal workers walked off the job."

[114] 5 U.S.C. § 7311 (1970) provides that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he:

1. advocates the overthrow of our constitutional form of government;
2. is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
3. participates in a strike, or asserts the right to strike against the Government of the United States or the government of the District of Columbia;
4. is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

18 U.S.C. § 1918 (1970) provides that whoever violates the provisions of section 7311 of title 5 shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

ganizational plan must be examined objectively in order to appraise realistically the potential, practical effects of unionization.

IV. AN APPRAISAL OF AFGE'S PLAN TO ORGANIZE THE MILITARY

A. AFGE'S REPRESENTATIONAL APPROACH

AFGE has devised a "detailed, specific, and orderly" [115] program for accepting and recruiting members of the armed forces. This program, according to the AFGE, is in response to "inquiries from military personnel concerned with Pentagon policies which would erode their pay and benefit structure." [116] Prior to making an organizational commitment to military personnel, AFGE is conducting a referendum among the civilian membership to determine their reaction before proceeding.[117] In view of the fact that this plan will be the basis for any formal action initiated by AFGE, the recommendations contained in this plan should be reviewed and assessed.

The program emphasizes the point that "in time of war or congressionally declared National Defense emergency, the union's recognition would be suspended." [118] However, the key selling point of the plan is that, "Properly managed and represented, the unionization of the military, focused upon peacetime living and working conditions outside combat command channels, could and should strengthen the military command and control structure." [119]

The AFGE anticipates that there will be three areas of representation. First, steward or national representation would be provided to military members. According to AFGE, the union would stay out of "tactical operations" [120] and instead concentrate its representa-

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[115] [1976] GOV'T EMPL. REL. REP. (BNA), No. 687, at A-11.
[116] *Id.*
[117] *See* note 2 *supra*. The AFGE is conducting a referendum of its Locals to see if they concur or do not concur in directing the National President to proceed with organization of the uniformed military services. The membership shall be provided with a total outline of the proposed program. Prior to this poll, in the May 1977 edition of the union's newspaper, *The Government Standard*, equal space would be given the proponents and opponents of such a program. The results of the membership referendum or poll shall be announced publicly no later than October 1, 1977. *Id.* at 33.
[118] *Id.* at 32. According to the AFGE, it is imperative that the "steward in the foxhole" image projected by those in opposition to organization of the military be dispelled.
[119] *Id.*
[120] *Id.*

tion efforts on matters relating to service life and duty assignments "not of a direct combat nature." [121] Some examples of areas of interest include "housing, temporary duty assignments (TDY), commissary and post exchange privileges, dress and hair codes, medical care, promotions and efficiency ratings and reprimands or discipline under Article 15." [122]

Second, legal representation would be provided in connection with administrative boards and procedures under the Uniform Code of Military Justice.[123] Military members may also be eligible for representation before boards of inquiry and investigation, fitness for duty and correction of military records. AFGE acknowledges that although military law is a rather specialized area of legal practice, "we have numerous contacts in the specialized bar and foresee no problem retaining assistance as needed." [124]

The final area of representation would be legislative and policy representation.[125] Group representation, principally lobbying in Congress and the executive branch agencies, would be provided out of the AFGE national office under the overall direction of National President Kenneth T. Blaylock. The lobbying work, conducted from the national office, would attempt to enhance and protect military pay, retirement, health care, insurance, commissary privileges and other benefits.[126] The proposal also recommends that the staff position of "military coordinator" [127] be created within the national office to direct the military representation program.

B. A CONTRAST OF AFGE'S PLAN WITH PRESIDENT MILITARY PROCEDURES

AFGE's plan has placed considerable emphasis on representation in the first step of the grievance procedure, but implies that no legal representation is presently provided by the military in connection with administrative discharge boards, or for Article 15's that may be imposed. A review of the existing military procedures discloses

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[121] *Id.*
[122] *Id.* The other subjects included were foreign service, leave, education and training, travel allowances, recreational facilities, day care, parking, political rights and their exercise, police, fire and traffic regulations, EEO matters (women's rights); and safety.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 33.

that the plan does not accurately reflect the structure of military society.

An Army regulation delineates the procedures for eliminating enlisted personnel from the military service for misconduct or unsuitability.[128] The regulation provides that at a board proceeding to eliminate a servicemember for misconduct, the servicemember is guaranteed the right of military legal counsel of his own choice.[129] A corresponding regulation prescribes the procedures that must be followed to eliminate officers from the Army for substandard performance of duty, for moral or professional dereliction or in the interest of national security.[130] This regulation also provides for the right to military legal counsel [131] who is an officer of The Judge Advocate General's Corps. Similarly, a servicemember who receives an Article 15 is given the right to consult with legal counsel concerning the proposed disciplinary action,[132] and requires that he be informed of the location of such counsel. These military procedures discussed above negate the necessity for a military union in this representational context because legal representation or consultation is required to be made available by regulation.

The House Armed Services Military Personnel Subcommittee recently decided to examine the grievance procedure available to military personnel in an effort to improve service life and relieve pressures for unions.[133] The salient deficiency which was cited by the committee members was that they found that military personnel often were unaware of the avenues available for solving their problems.[134]

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[128] Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 13 (C42, 14 Dec. 1973).

[129] *Id.* para. 13-22*b*(1). Apparently, the counsel for an individual being processed for separation which could result in issuance of an undesirable discharge for misconduct, under the provisions of Chapter 13, is a lawyer within the meaning of the Uniform Code of Military Justice. *See* AR 635-200, para. 1-3*d*(1).

[130] Army Reg. No. 635-100, Personnel Separations—Officer Personnel (C20, 14 Jan. 1975).

[131] *Id.* para. 5-20*c*.

[132] Army Reg. No. 27-10, Legal Services—Military Justice, para. 3-12*a* (26 Nov. 1968) [hereinafter cited as AR 27-10]. The term "counsel" in AR 27-10 means the following: a judge advocate, a Department of the Army civilian attorney, or an officer who is a member of the bar of a federal court or of the highest court of a state, provided that counsel within the last two categories are acting under the supervision of a staff judge advocate. AR 27-10 permits the service member to be accompanied by a person to speak on his or her behalf at an Article 15 informal hearing. The spokesman need not be a lawyer.

[133] The Army Times, 23 May 1977; *id.*, 25 May 1977; at 1.

[134] *Id.* at 20.

Under the provisions of another regulation, the Inspector General (IG) action request system has been established for the basic purpose of rendering assistance, correcting injustices affecting individuals, and eliminating conditions detrimental to the efficiency or reputation of the Army.[135] The IG system operates on the theory that the IG must render a judgment which is fair and objective, and "must always keep in mind the welfare of both the individual and the Army." [136]

According to a study conducted by Kramer Associates, Inc., a Washington consulting firm specializing in labor relations matters, government workers join public employee unions less to improve their pay, benefits and working conditions than to secure protection against arbitrary management actions, whether these concern pay and benefits or job security and advancement.[137] The study suggested that there is every reason to believe that military personnel seeking to form or join a union will be motivated by the same concerns.[138] AFGE's proposed organizational effort intends to take advantage of these attitudes by offering representational services and attempting to improve the responsiveness of the grievance system to the servicemember's needs.

Other remedial measures exist which can be utilized by the individual servicemember for a redress of grievances. The Article 138 complaint procedure allows any servicemember to make a written complaint against his superior commanding officer.[139] This complaint is then forwarded to the officer exercising general court-martial authority over the alleged offender, for investigation and evaluation. If the application is not granted, it must be forwarded to the Department of Army for review and determination.[140] A soldier also has a statutory right to petition Congress for redress of a grievance.[141] This procedure begins with the receipt of a letter by a Congressman. He attaches a referral slip to the letter and sends it through the military chain of command and makes inquiry of the

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[135] Army Reg. No. 20-1, Inspections and Investigations, Inspector General Activities and Procedures (25 Oct. 1974) [hereinafter cited as AR 20-1].
[136] *Id.* para 3-1.
[137] [1977] GOV'T EMPL. REL. REP. (BNA), No. 697, at 5.
[138] *Id.*
[139] 10 U.S.C. § 938 (1970); Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1970).
[140] Army Reg. No. 27-14, Legal Services, Receipt and Processing of Complaints under Article 138 UCMJ (10 Dec. 1973) [hereinafter cited as AR 27-14].
[141] 10 U.S.C. § 1034 (1970).

military department concerned in order to obtain information necessary to resolve the grievance.

The present Department of Defense grievance machinery must be considered a viable alternative to unionism. No other grievance procedure is needed because a responsive grievance procedure is already provided in the military by a sound command and inspection structure. Unions may attempt to challenge and revise this grievance structure but the Supreme Court acknowledged in *Orloff v. Willoughby* [142] that: "The responsibility for setting up channels through which grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian." [143]

If there is as much discontent throughout the service as is indicated by the AFGE's position statements, then this grievance machinery must be made to operate in an efficient manner and to respond to the servicemember's individual needs. Otherwise, the frustrated and disillusioned servicemember will become susceptible to the call of federal or private sector unions for new members.

A renewed emphasis should be given by the Defense Department to the existing grievance machinery to ensure that lower-ranking personnel are informed of and clearly understand the chain of command and IG function. Heads of HQDA staff elements and commanders of Army commands, agencies, activities, centers, and installations should become more aware of their responsibility for ensuring that all personnel under their jurisdiction are informed of the operation of the grievance system and their rights in conjunction with the chain of command and the IG office.[144]

The grievance system is only one aspect of this multifaceted issue. It is evident that there are other problems which are causing unions to take an interest in organizing the military. Only an effective operation of the grievance machinery within the Department of Defense will help to extinguish interest in unionization and to reduce the chances of any union success in organizing uniformed members of the military establishment.

V. CONCLUSION

As the erosion of economic benefits continues, the allure of military organizing will increase. A legal confrontation in the courts

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[142] 345 U.S. 83 (1953).
[143] *Id.* at 93–94.
[144] AR 20–1, para. 3–2*a*.

may occur in the near future between the unions and the military establishment as a result of the controversial constitutional issues involved in unionizing military forces. Any attempt by Congress or the Department of Defense to prohibit military personnel from joining a servicemembers' union will probably be found to be constitutionally permissible. However, there is no absolute guarantee that this type of legislation or regulation would be upheld by the courts. Therefore, Congress would be well advised also to consider prohibiting commanders from engaging in collective bargaining with any servicemembers' union. Such a prohibition would be constitutionally valid because no constitutional right to collective bargaining exists. Another option is for the President to issue an Executive Order which would specifically deny military personnel the right to engage in collective bargaining with the commander.

Union organizers may attempt to enter a military installation for the purposes of soliciting servicemembers to become union members or distributing union literature. If this situation does arise, the commander with the help of his staff judge advocate must scrupulously apply the "clear danger" and/or the "mission interference" tests in resolving whether this form of union activity may be allowed on a military installation. After this determination has been made, the commander must follow the appropriate procedures discussed in this article. Command decisions must be reasonable, well documented and supported by sound legal advice. Otherwise, the commander's power in this area may be limited by a court's review of the commander's exercise of his broad authority. On the positive side, the Supreme Court's ruling in *Prisoners' Labor Union* may be a harbinger of the Court's attitude towards military control of union activity on an installation and the deference to be accorded a commander's decision.

The AFGE has promulgated a detailed representation plan for the servicemember; however, this plan faces considerable opposition within the AFGE itself. A general criticism is that the AFGE is not able to provide its own civilian members with all the services they need, much less take on new representation obligations.

The military service associations may provide a viable alternative to unionization. Existing service organizations, such as the Association of the United States Army (AUSA), can pursue servicemembers' legitimate interests more effectively than any union can. The justification for this statement is the fact that service organizations have greater expertise in military affairs, and more acceptance in the defense community and on Capitol Hill where the

lobbying efforts for the protection of servicemembers' benefits must be concentrated. These organizations also perform these services without disrupting the chain of command or undermining in any way existing military authority.

The armed services must meet the needs of all their members if they are to withstand the union challenge. The noncommissioned officer (NCO) will be crucial in any effort to defuse pro-union support among low-ranking enlisted personnel. An NCO is like a foreman in industrial organizations—part of management, yet the first point of contact with the ranks. The armed services must undertake programs to enhance the status, professionalism, and career opportunities for NCO's.

Objective analysis suggests that AFGE's representational approach within the military structure does not present a definite threat to national security. But a union, regardless of its intentions, is an organization designed for political and economic power, and all such organizations must continue to acquire this power or decline. Collective bargaining in the military, with the implied threat of a strike or other job action, is incompatible with the principles of military organization and discipline. Moreover, having the right to engage in collective bargaining is crucial to the union's continuing acquisition of power. The AFGE may not publicly acknowledge any interest in collective bargaining in the military, but that goal cannot be too far down the road. In addition, other unions are not precluded from using their resources to organize the military and push for collective bargaining.

The Congress, the courts and the military services will be facing the legal questions and practical effects of efforts to unionize the military in the next few years. The success of these efforts will be contingent upon how the three branches of government resolve the problems which are stimulating the interest in military unionization. Failure to succeed in attacking the root causes of these problems may have dire consequences for the future defense of our country.

COMMENT: THE RIGHTS OF MERCENARIES AS PRISONERS OF WAR *

Captain John Robert Cotton **

I. INTRODUCTION

In June 1976 thirteen mercenaries who had been captured while participating in the civil war in Angola were placed on trial. The tribunal trying them assumed that the mercenaries were war criminals, and proceeded to determine an appropriate sentence for each individual. Three of the mercenaries were sentenced to death and were subsequently executed.[1] These and other recent events have raised significant questions about the way captured mercenaries are to be treated under international law.[2]

Resolving the present confusion concerning the treatment to be accorded mercenaries has become increasingly necessary, if only because mercenaries' involvement in unconventional wars and "wars of national liberation" has proliferated since World War II. These ill-defined conflicts often take place against a backdrop of extreme political instability, and are accompanied by revolutionary rhetoric disclaiming allegiance to the norms traditionally applied during armed conflicts.[3] With this combination of elements, the risk that

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

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[1] N.Y. Times, June 14, 1976, at 1, col. 4.

[2] Concern has arisen over the question of whether mercenaries should be accorded the status of combatants under the Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter cited as GPW Convention], or whether at least in "colonial and racist" wars they should be regarded as criminals and subject to the criminal laws of the detaining state.

[3] Mercenary participation in unconventional wars and wars of national liberation creates special problems due to the intranational character of many of these conflicts. Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT'L & COMP. L. 345 (1973). The status of mercenaries, guerrillas, and terrorists is in doubt in such conflicts and it is questionable whether a combatant captured under these circumstances can expect any protection at all. INSTITUTE OF WORLD POLICY, PRISONERS OF WAR 12 (1949). *See also* A. BARKER, PRISONERS OF WAR 18 (1975); R. HINGORANI, PRISONERS OF WAR 54 (1963). Efforts to deal with the problems created by unconventional wars and unconventional participants are currently underway. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts is currently in its Fourth Session at Geneva. The Conference is dealing with these

combatants captured in such conflicts will be mistreated is much greater than in conventional wars.[4]

The primary rules of international law which determine the rights and status to be accorded combatants who are captured by an opposing military force are stated in the Third Geneva Convention of 1949 which deals specifically with prisoners of war. This Convention, drafted shortly after the Second World War, sought to ameliorate legislatively many of the problems which had occurred in that and prior wars. Perhaps because the more recent conflicts have been of a different character than the Second World War, numerous problems concerning the scope of the Third Convention have arisen. In particular, the treatment to be accorded mercenaries and other unconventional combatants, such as guerillas and terrorists, is unclear.[5] The United Nations has shown interest in remedying these deficiencies,[6] as have many of the individual member nations,[7] but to date little agreement has been reached and the legal status of mercenaries remains unclear.[8]

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and other questions through draft protocols. *See* Solf & Grandison, *International Humanitarian Law Applicable in Armed Conflict*, 10 J. INT'L L. & ECON. 567 (1976); Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts–Third Session 1 (1976) [hereinafter cited as Report of U.S. Delegation]. Since World War II, mercenaries have been used in the Congo, Nigeria (Biafra), Yemen, Kuwait, Algeria, Malaysia, Indo-China, and Angola, to name a few areas. R. HINGORANI, *id.* at 31; *see* Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 857 (1967) [hereinafter cited as *The Geneva Convention*].

[4] *See* A. BARKER, *supra* note 3, at 18; INSTITUTE OF WORLD POLITY, *supra* note 3, at 11–12.

[5] Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 28 (1975). For a good discussion of the present treatment of guerrillas and rebels *see* Bond, *supra* note 3, at 367 (1973); Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y.B. INT'L L. 184 (1971).

[6] The United Nations General Assembly has on three occasions called upon the nations of the world to outlaw mercenaries. G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1974); G.A. Res. 2708, 25 U.N. GAOR, Supp. (No. 28) 7, U.N. Doc A/8028 (1971); G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30) 5, U.N. Doc. A/7630 (1970). The 1974 Diplomatic Conference on the Law of War also extensively discussed "freedom fighters" and "wars of national liberation." Graham, *supra* note 5, at 25.

[7] For a discussion of United States policy towards mercenaries, *see Mercenaries in Africa: Hearing Before the Special Subcomm. on Investigations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 4 (1976) (statement of Robert L. Keuch) [hereinafter cited as *1976 Hearings*].

[8] Agreement has not been reached during the first three sessions of the current Geneva Conference on either the definition of the term "mercenary" or on the treatment of mercenaries. Report of U.S. Delegation, *supra* note 3, at 124–27. *See also* Van Deventer, *Mercenaries at Geneva*, 70 AM. J. INT'L L. 811 (1976).

This comment seeks to define the term "mercenary" and looks at the historical role of the mercenary and his treatment when taken prisoner during a conflict. It will analyze how mercenaries are to be treated under the present Geneva Convention and will determine how the United Nations, certain individual governments, and the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts propose that mercenaries be treated in future conflicts. Finally, the note will propose recommendations on how the law should be clarified and expanded to cope with problems peculiar to mercenaries.

II. WHO ARE MERCENARIES?

One of the major problems involved with any discussion of mercenaries is defining exactly what a mercenary is. This concern becomes especially important when determining whether mercenaries qualify for protection under the Third Geneva Convention. Because very little has been written about mercenaries,[9] confusion has resulted over what rights belligerents must accord such combatants and what duties the mercenaries' native states have to protect them.[10]

A mercenary has been variously characterized as:

1. One who serves merely for wages.[11]
2. A soldier serving in the army of a country other than his own.[12]

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[9] The *Harvard Catalog of International Law and Relations* lists only three books on mercenaries, none of which is printed in the English language and the most recent of which was published in 1917. This indicates at best a dearth of knowledge, and at worst a lack of interest in this subject. 13 HARVARD LAW SCHOOL LIBRARY, CATALOG OF INTERNATIONAL LAW & RELATIONS 258 (1965).

[10] [T]o what extent his own neutral state is entitled to protest against his maltreatment is not clear. . . . This principle, however, does not permit the capturing state to assume the position which was suggested in a letter to President Davis: the author urged that, in view of the proclamation of European states placing their citizens volunteering in the American Civil War beyond the protection of their own governments, the South consider them interlopers and subject to the death penalty.

W. FLORY, PRISONERS OF WAR 34 (1924). American attitudes towards protecting native mercenaries have varied. In the past the Department of State has sought the release of captured American mercenaries. Borchard, *The Power to Punish Neutral Volunteers in Enemy Armies*, 32 AM. J. INT'L L. 536–37 (1938). More recently the attitude has been to take a neutral stance and let the mercenary take care of his own problem. Telephonic interview with William Wilson, attorney for executed mercenary Daniel Gearhard in Angola (Sept. 8, 1976) [hereinafter cited as Wilson interview].

[11] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1412 (unabr. 1961).

[12] *Id.*

3. A person paid for his work, especially a soldier hired into foreign service.[13]

None of these definitions is entirely adequate for the purposes of analyzing who mercenaries are and how they should be treated when they are captured. As with any label used in today's multipolar world, the term "mercenary" is subject to various interpretations by parties seeking to justify their own actions.[14] As such, the use of the term is fraught with enormous practical consequences and its meaning is complicated by significant political, diplomatic and even moral overtones.[15] Thus, several questions should be answered in order to reach a standardized working definition of the term "mercenary."

First, must a mercenary be a foreigner? If this criterion is a prerequisite, may the soldiers of a former colonial power be deemed to be foreigners? Historically, those categorized as mercenaries have always been of a different nationality than their hosts. A problem arises, however, when an individual, for some reason, feels himself to be a member of a "people" which is participating in an armed conflict, even though his national affiliation is not identical with that of the "people" with whom he fights. It is also difficult to discern distinctions in nationality in separatist struggles where a geographic or ethnic subgroup attempts to break away from a mother country (*i.e.*, Ukrainians from the U.S.S.R.) or where a colony seeks to secure its independence from ethnically distinct descendants of colonizers who nonetheless share common nativity with the separatists.[16] Perhaps in light of these analytical difficulties, the

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[13] *Id.*

[14] It is easy for the capturing party to characterize as "mercenaries" those foreigners captured fighting for the enemy, while considering those fighting on its side to be "freedom fighters" or "volunteers." "[E]veryone considers as 'just' the war he wages and as 'legitimate' the weapons he uses." Freymond, *Confronting Total War: A "Global" Humanitarian Policy*, 67 AM. J. INT'L L. 674 (1973). "[R]ecognition of a state of belligerency has become a partisan affair due to the prevailing bipolar system. . . ." R. HINGORANI, *supra* note 3, at 17 (1963).

[15] Television interview by Geraldo Rivera, ABC Good Morning America (Sept. 13, 1976) [hereinafter cited as Rivera interview]. Also, recent United Nations resolutions have indicated a feeling by a majority of the "third world" nations that mercenaries should be treated as criminals. *See* note 6 *supra*. Finally, there seems to be a general consensus at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that mercenaries are criminals of some sort. *See* Report of U.S. Delegation, *supra* note 3, at 125 (1976).

[16] Mr. William Wilson, attorney for executed mercenary Daniel Gearhard in Angola, spoke of an example of this problem in the recent Angolan conflict. Angola, a former Portugese colony, placed a Portugese soldier on trial for being a merce-

only viable test for determining who is "foreign" is a determination of how the contracting party viewed the status of the hired soldier at the time of contract.

A related issue is the determination of the party to whom the mercenary owes allegiance. Although he may be a national of a country which is neutral with respect to the conflict in which he is participating, his first duty is to the state with which he has contracted.[17]

Secondly, must mercenaries be volunteers? This question appears simple, and should be answered in the affirmative. However, the question becomes more complex when it involves individuals who have been coerced by their government into "volunteering." [18] As volunteers, mercenaries should be free to contract to serve for any set period of time, or for no specified period. Thus they should be able to terminate their employment at a specified time, or at will, depending upon the agreement.[19]

Third, must mercenaries be paid at a higher rate than indigenous troops? This question arises because most view mercenaries as individuals induced by promises of high pay; indeed, the term "soldier of fortune" is considered by many to be synonomous with the term "mercenary." In fact, mercenaries need not be highly paid professional warriors.[20] A mercenary may fight for any compensation he desires.[21] Likewise, there is no requirement that a mercenary be

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nary. When questioned why Portugese fighting for the MPLA were not considered mercenaries, the government replied that the Portugese fighting for them were Angolans. Wilson interview, *supra* note 10. The parties at the Geneva Conference seem in agreement that a mercenary is someone "not a national of a party to the conflict" but this still does not solve the question of what a "national" is. Report of U.S. Delegation, *supra* note 3, at 125; *see* Van Deventer, *supra* note 8, at 813–14.

[17] A mercenary is not one who fights at the behest of a "third party" sovereign to whom he owes allegiance as the Cubans did in Angola. *See* note 18 *infra*.

[18] Mercenaries must be "volunteers" in the true sense of the word. This definition will exclude troops sent by their home country to fight as volunteers. Thus, the Chinese "volunteers" in Korea and the Cuban "volunteers" in Angola should not be considered mercenaries. In like manner, even though the North Vietnamese characterized the American troops in Vietnam as mercenaries and criminals, the Americans in Vietnam were not mercenaries by this definition.

[19] Individuals joining the French Foreign Legion had to agree to serve for fixed terms, while in the Congo and more recently in Angola a month-to-month contract was commonly used.

[20] Many Americans fought as mercenaries in Spain during the Spanish Civil War out of conviction for the cause, for little or no compensation. Borchard, *supra* note 10, at 535.

[21] Mercenary Lobo Del Sol reports that he fights for the excitement and for political reasons (against communists), while Mercenary Baskin states that he fights for the money. Motives are often mixed and, even if money is the primary incentive, mercenaries, like Baskin, often draw the line at fighting against their home coun-

paid more than a regular soldier of comparable rank in the army for which he is fighting.[22]

The fourth and final question is whether a mercenary may fill only specified roles for his employer. Historically, mercenaries have fought in separate units, as individuals, and as leaders and men in native units.[23] In addition, they have performed many functions both on and off the battlefield, serving as combatants, advisors and guards.[24] In short, the particular military role the mercenary fills is irrelevant to his status as a mercenary.

At the conclusion of a conflict, mercenaries serving with the victorious faction are "heroes," while those captured during hostilities or after the defeat of their army are subject to punishment in their special status.[25] This note will apply the same standards to mercenaries employed by both "winning" and "losing" factions.

An analysis of the issues posed above leads to the definition of mercenary which will be used throughout the remainder of this comment:

> A mercenary is a volunteer, owing and claiming no national allegiance to the party for whom he is fighting, who acts in a military role for whatever motive and whatever remuneration by his own free will on a contract basis.[26]

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try. Rivera interview, *supra* note 15. It should be noted that one may fight for a political cause without necessarily owing allegiance to any particular nation.

[22] Although under current conditions a mercenary may demand more pay than normal troops, this is not always necessarily the case. J. Baskin, a mercenary in Angola, reported that he was paid $2,000 per month for his services while in Angola. Rivera interview, *supra* note 15. On the other hand, many Americans joined and fought for the British before American entry into World War II for the same pay as British citizens. The Diplomatic Conference at Geneva believes that the definition of a mercenary is linked to a motivation to fight for monetary gain. Unfortunately the establishment of a person's motivation poses "problems of proof." Report of U.S. Delegation, *supra* note 3, at 125.

[23] Mercenaries in the past have usually formed units separate from those of the host army (*i.e.*, the French Foreign Legion or the Hessians fighting for the British in the American Revolution). H. FOOKS, PRISONERS OF WAR 28 (1924); however, more recently in the Congo mercenaries commanded native troops.

[24] Mercenaries may perform a variety of missions, *i.e.*, as guards, advisors, or combatants. Von Steuben and Lafayette were advisors in the American Revolution, British mercenaries guard Arab oil fields in Kuwait, and mercenaries were combatants in Angola. The question of how to handle "military advisors" has proven to be a major stumbling block thus far in Geneva. Report of U.S. Delegation, *supra* note 3, at 126.

[25] Because the winning party is usually the one to decide who are mercenaries and who are not, usually only those who have contracted with the loser are punished. *See* note 16 *supra*. International law should treat the victorious as it treats the vanquished; however, perhaps only an international tribunal or the Protecting Power can do this.

[26] This definition specifically excludes soldiers of "neutral" countries such as the Cubans in Angola.

This definition is certainly not free of all problems and ambiguities, but it will aid in determining what posture the international community should take towards mercenaries.

III. HISTORICAL BACKGROUND

A. TREATMENT OF MERCENARIES AND POW's PRIOR TO 1900

The historical background of the concepts "mercenary" and "prisoner of war" must be considered before one can adequately determine how mercenaries should be treated today. Mercenaries and prisoners of war have both existed since the earliest recorded armed conflict. The status accorded mercenaries and POW's has, however, become reversed over the centuries. In ancient times, mercenaries were respected professionals; prisoners of war, if they survived, were ill regarded.[27] In the modern era, however, mercenaries are typically looked upon with scorn, while POW's have become the objects of increasing international concern.

Chroniclers tell of the ancient Carthaginians' use of Numidian mercenary soldiers.[28] The city states of ancient Greece often imported Macedonians to fight in their armies and Phoenicians to man their warships.[29] The Roman Empire made extensive use of mercenaries, especially after the first century A.D. It was not at all uncommon for Rome to use one Germanic tribe to man the border to ward off other Germanic tribes.[30] Mercenaries in these early wars faced the same treatment as nearly all vanquished foes: "[V]ictory vested in the conqueror the right of property in the captive, and prisoners were put to death, enslaved, or sold into slavery." [31] Caesar, during his second campaign in Gaul, personally sold 33,000 Belgian captives.[32] It was also not uncommon to sacrifice enemy

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[27] A. BARKER, *supra* note 3, at 5.
[28] 17 THE NEW INTERNATIONAL ENCYCLOPEDIA 295 (1916).
[29] 17 ENCYCLOPEDIA BRITANNICA 767 (1965).
[30] 18 ENCYCLOPEDIA AMERICANA 655 (1969); 18 ENCYCLOPEDIA BRITANNICA 507 (1965).
[31] W. FLORY, *supra* note 10, at 12. "Prisoners were killed when they became an encumbrance, or when their slaughter would terrify the enemy and glorify the conqueror." *Id.* "Moderation was regarded as an offense among the most religious nations." H. FOOKS, *supra* note 23, at 7.
[32] H. FOOKS, *supra* note 23, at 10. Such practices were not at all uncommon. "According to Tacitus the conqueror was permitted to destroy the vanquished without pity." *Id.* at 8. In fact, failure to act in this manner was often seriously frowned upon. "The Syracusan general Hemocrates was condemned to exile for having pre-

captives to the gods or to practice systematic tortures upon them.[33] Exceptions to this harsh treatment did exist, and mercenaries perhaps benefited from these exceptions more than enemy nationals because they were not viewed as cultural as well as military enemies.[34] Even during these early wars, though, mercenaries sometimes suffered because they were not citizens of the enemy state. Barbarians fighting for Greece or Rome did not have the rights of citizens and thus could be killed with impunity.[35]

Christianity had little ameliorative effect on the harsh treatment suffered by prisoners of war:[36] "Unbelievers were usually killed while captured Christians were made slaves" [37] or held for ransom. In the Christian society mercenaries could be found serving as knights and retainers and they became an integral part of the social system.[38] The mercenary was an accepted member of society and was treated no differently than other men-at-arms even when captured.

By the 1700's, "the older idea of knights, men-at-arms and mercenaries 'avowed' by a prince changed to that of armed forces in the service of a territorial, secular state." [39] At the same time, the treatment of prisoners of war began to improve as nations started to realize that captured soldiers were victims of war. With the advent of large conscript armies, mercenaries became very important as elite fighting units, cadre for training large units, and strategic ad-

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scribed that his troops treat the Athenian Armies, which were in disorder, with moderation." *Id.* at 7–8.

[33] W. FLORY, *supra* note 31, at 11.

[34] "Sun Tzu thought it was better to capture troops than to destroy them. Tamerlane likewise is said to have instructed his commanders to avoid needless cruelty after the battle was over, ordering that prisoners be spared because 'a living dog is of more use than a dead lion.'" *Id.* "The Aryans of India respected the ancient code of Manu, the legislator of India, who prescribed that a warrior neither injure the enemy who joined his hands to ask mercy nor the defenseless." H. FOOKS, *supra* note 23, at 8.

[35] "Plato recommended moderation in their mutual relations, he recognized no such obligation toward barbarians." W. FLORY, *supra* note 10, at 11.

[36] "The admonition of the Lateran Council of 1179 against the enslavement of prisoners apparently had little immediate effect, since the institution of slavery was firmly entrenched in the economic and social fabric of the time." *Id.* at 13.

[37] *Id.* It might also be noted that "Grotius, the father of international law, stated that enemies captured in war became slaves and also their descendants in perpetuity." H. FOOKS, *supra* note 23, at 10.

[38] Mercenaries were accepted and legal participants on the battlefield. They should not be confused with the marauder or freebooter who was outside the "faith and law of nations and was an early form of war criminal." Draper, *supra* note 5, at 175.

[39] *Id.*

visors to commanders. They were treated with respect as experts in warfare and were generally treated with cordiality when captured because often hirelings from the same native land were employed by both sides to a conflict.

Although the wholesale murder of POW's continued well into the 19th century [40] and their mistreatment continues even today, their fortune has generally improved. Starting with the Treaty of Westphalia which ended the Thirty Years War in 1648, prisoners were exchanged on a one-for-one basis without ransom; [41] mercenaries were treated no differently than other prisoners. As this trend coalesced with the development of philosophical justifications and proposals advocating humanitarian treatment for prisoners of war,[42] the idea gained strength and more and more nations entered into treaties for the protection of POW's.[43] At no time were mercenaries treated differently from enemy nationals.[44] During the American Revolution even the Hessian mercenaries who fought against the American colonists were treated as prisoners of war when captured.[45] Later, captured members of the French Foreign

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[40] Prisoners of war were sold as late as the 17th Century. H. FOOKS, *supra* note 23, at 10. "As late as 1877 the ancient custom of making trophies of the heads of enemy soldiers was still in use in Japan, and was also employed by the Chinese in the War of 1894." W. FLORY, *supra* note 10, at 11.

[41] A. BARKER, *supra* note 3, at 7; W. FLORY, *supra* note 10, at 15.

[42] Rousseau said the right to kill remains in force only so long as the soldiers are armed. "Montesquieu believed in truly humane rule compatible with civilization, . . ." H. FOOKS, *supra* note 23, at 11. On the other hand, Hume felt that if one were at war with barbarians who did not obey the laws of war then the laws of war could be suspended with regard to the treatment of prisoners. W. FLORY, *supra* note 10, at 16.

[43] "The German General Staff (in World War I) gave credit to Frederick the Great and Benjamin Franklin for the proper conception of prisoners of war, ..." H. FOOKS, *supra* note 23, at 11; *see* Treaty of Amity and Commerce, July 9–Sept. 10, 1785, United States-Prussia, art. XXIV, 8 Stat. 84. *See also* Treaty of Peace and Amity, June 4, 1805, United States-Tripoli, art. 16, 8 Stat. 214; Treaty of Peace, Sept. 16, 1836, United States-Morocco, art. XVI, 8 Stat. 484; Geneva Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940; Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Geneva Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, July 6, 1906, 35 Stat. 1885; Declaration of Paris, Apr. 16, 1856, *in* 7 J. MOORE, DIGEST OF INTERNATIONAL LAW 561 (1906); Brussels Declaration Concerning the Laws and Customs of War, 27 Aug. 1874, *discussed in* A. HIGGINS, THE HAGUE PEACE CONFERENCES 273 (1909).

[44] H. FOOKS, *supra* note 23, at 29. R. HINGORANI, *supra* note 3, at 72. In fact at times mercenaries have been treated better than enemy nationals, as in the Boer War when Americans fighting for the Boers against England were not sent to the inhospitable climate of Ceylon as other prisoners were.

[45] H. FOOKS, *supra* note 28, at 28. "The American States during the Revolution apparently tried to live up to the rules of customary international law. However,

Legion were accorded the same privileges as prisoners of war,[46] and foreign volunteers fighting for the Boers were treated as POW's when captured.[47]

B. THE TWENTIETH CENTURY

Since the end of the Second World War a certain disdain for soldiers of fortune has developed. Perhaps this attitude has developed because utilization of mercenaries has become less common, and has often been restricted to small, "third world" colonial wars where political judgments concerning legitimacy of the colonists' cause infect outsiders' perception of the hired soldiers.[48] In addition, mercenaries are often viewed by outsiders as professional killers whose only allegiance is to money. Indeed, their employers often view them as a disfavored, but necessary, evil. Certainly these characterizations are not likely to breed sympathy or compassion for mercenary soldiers.

While the perception of mercenaries has deteriorated, prisoners of war have in general benefited greatly by treaties signed during the 20th century which categorize them as a class of individuals in need of protection.[49] Unfortunately, though, the changes in modern warfare have created new classes of combatants and new types of wars making treaty definitions obsolete and difficult to apply. Guerrillas, commandos, mercenaries and terrorists acting in "wars of liberation" and in internal conflicts with international consequences have greatly taxed the ability of parties to provide protection to prisoners of war.[50] The legality of such forces and the applicability of the Geneva Convention to such conflicts have been hotly debated. The current Conference at Geneva [51] is the first concrete effort to

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the British usages appear to have vacillated between the practices observed in international law and the usages permissible in quelling domestic disturbances." W. FLORY, *supra* note 10, at 17.

[46] H. FOOKS, *supra* note 23, at 28.

[47] *Id.* at 29; *see* note 45 *supra*.

[48] One of the largest uses of mercenaries in this century was in Spain during the Spanish Civil War. Borchard, *supra* note 10, at 535. Since World War II the largest uses have been in the Congo, and by the French Foreign Legion in such areas as Algeria and Indo-China. The most recent uses have been in Angola and Zaire.

[49] The 1949 GPW Convention is the most comprehensive treatment of prisoners of war ever undertaken. Nevertheless, profound changes in the methods of warfare have left the Convention woefully inadequate to deal with new classes of combatants and with the potential for mass destruction posed by nuclear forces. INSTITUTE OF WORLD POLITY, *supra* note 3, at 11; Graham, *supra* note 5, at 27.

[50] Bond, *supra* note 3, at 367.

[51] The Diplomatic Conference on the Reaffirmation and Development of Interna-

deal with this problem. While significant progress has been made, especially by imparting an international character to "wars of liberation" and by ensuring POW status to guerrillas and commandos,[52] much remains to be done. The status of mercenaries has proved to be a major stumbling block to agreement.[53]

As a result of changing world opinion and partially because of the unstable social situations in which mercenaries are now fighting, their status as POW's is uncertain, and their treatment when captured has seriously deteriorated. In the Congolese Civil War, mercenaries were used extensively by all sides. It was generally accepted that if captured they would be accorded prisoner-of-war

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tional Humanitarian Law Applicable in Armed Conflicts grew out of two Conferences of Experts convened by the International Red Cross in 1971 and 1972. The Conference is currently in its Fourth Session, having first convened in 1974. One hundred and twenty-five nations have sent delegations as have several national liberation movements. The Conference is divided into three main working committees. Committee I deals "with the general provisions of Protocol I (International Armed Conflict) and Protocol II (Noninternational Armed Conflict); Committee II with wounded, sick and shipwrecked persons, civil defense, and relief; and Committee III with the protection of the civilian population, methods and means of combat, and new categories of prisoners of war." Solf & Grandison, *supra* note 3, at 575–76. It is Committee III that has attempted to deal with the status of mercenaries.

[52] Although final drafting is not yet completed and the new protocols have not yet been formally ratified, substantial agreement has been reached in several areas. During the first Session, Committee I adopted Article 1 of Protocol I which gives participants in wars of national liberation the protections afforded to combatants in international conflicts. Report of U.S. Delegation, *supra* note 3, at 3. Articles 41 and 42 of Protocol I which have created new categories of prisoners of war have been dealt with by Committee III. "The aim of [these] new provision[s] is to liberalize the conditions that must be met in order to obtain prisoner of war status, currently set forth in paragraph A(2) of Article 4, of the Third Convention, in particular, for the benefit of guerrilla forces." The issue has not yet been fully resolved because of conflict over the requirement for guerrillas to disclose their combatant status, but agreement seems certain. *Id.* at 16, 17.

[53] *Id.* at 17. The delegation of Nigeria proposed a *quater* to Article 42 concerning mercenaries:

> a. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the conventions and the present Protocol.
> b. A mercenary includes any person not a member of the armed forces of a Party to the conflict who is specially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain.

Id. at 124, *citing* Diplomatic Conference Doc. CDDH/III/GT/82 (1976). This proposal generated extensive debate. There seemed to be general agreement on the notion of denying applicability of the Conventions and Protocols to mercenaries, but there is no agreement on the definition of mercenaries or on the mandatory nature of denying POW status.

status.[54] As the war intensified, however, atrocities increased; and many of the black nationalists treated the white mercenaries as criminals interfering in internal matters.[55] In Angola the MPLA placed thirteen mercenaries on trial for the status crime of being mercenaries and eventually executed three of them. Angola refused to accord these men any rights as prisoners of war and the trial was in reality only a "sentencing hearing." [56] Angola is typical of many developing nations which feel that they are not bound by international standards they had no part in creating. Thus, Angola chose to make the status of mercenary a "war crime" [57] and to treat individuals in this category differently than regular detainees. Angola's unilateral action brought both praise and cries of outrage from the rest of the world, and it has left the true legal status of mercenaries in complete confusion. How current international law views the problem will next be examined.

IV. CURRENT TRENDS IN THE TREATMENT OF CAPTIVE MERCENARIES

A. THE GENEVA CONVENTION OF 1949

As of 1974, 140 nations had become signatories to the Geneva Convention Relative to the Treatment of Prisoners of War.[58] The Convention binds those nations to its provisions. Moreover, it is

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[54] Bond, *supra* note 3, at 369.

[55] "Congolese soldiers arrested thirteen Italian airmen, shot them, dismembered their bodies, and passed the pieces out to onlookers." *Id.* at 371.

[56] Angola refused to grant POW status on the grounds that the mercenaries were war criminals. Their guilt was assumed and the only question for the tribunal to decide was what the appropriate punishment should be. One American was executed and two others received lengthy jail terms. Daniel Gearhard may have been executed for being "too honest." He admitted that under certain circumstances he might, if given the chance, become a mercenary again. Wilson interview, *supra* note 10. Such treatment after "show trials" does not comport with the "due process" requirements envisioned by Article 3 of the GPW Convention or Article 10(2) of Protocol II adopted by the main committees at the current Geneva Conference. Article 10 on Penal Prosecutions provides a long list of due process safeguards which comply basically with American standards. Under these proposed standards the Angolan "trial" of the thirteen mercenaries may be construed as a grave breach of the Convention and Protocol by having denied the presumption of innocence. *See* GPW Convention art. 3, *infra* note 73; Report of U.S. Delegation, *supra* note 3, at 95–96.

[57] The mercenaries were charged with the status of being mercenaries which Angola said was a "crime against peace." N.Y. Times, June 14, 1976, at 1, col. 4.

[58] Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1 (1975).

possible that its provisions have become "customary international law" and thus binding on nonsignatories as well.[59]

Mercenaries are not specifically mentioned anywhere in the Convention. Further, there is no indication in the Commentary on the Convention that the subject of treatment of mercenaries was ever specifically addressed. This fact may be interpreted in two ways. It is possible that the lack of specific consideration or mention was intentional, and that as a result, mercenaries are specifically excluded from the class of individuals protected by the Convention. On the other hand, it is possible that the Convention was intended to be general in character and that in light of historical precedent at the time of the drafting of the Convention, mercenaries were assumed to fall within one of the protected categories. The latter interpretation would appear to be supported by history because the provisions of the Convention have traditionally been considered general in nature and to be inclusive unless specifically exclusive in character.

Article 4 [60] of the Convention is the key to determining what

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[59] *The Geneva Convention*, *supra* note 3, at 858.

[60] The GPW Convention art. 4, reads as follows:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organized resistance movements fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

groups qualify for prisoner of war status. Members of the armed forces qualify as do members of militias, volunteer corps, armed forces of countries not recognized by the Detaining Power, persons accompanying the armed forces, and levees *en masse*.[61] In addition, any members of resistance movements or other partisans will qualify for POW status if they:

1. are commanded by a person responsible for his subordinates;
2. have a fixed, distinctive sign recognizable at a distance;
3. carry arms openly;
4. conduct their operations in accordance with the laws and customs of war.[62]

This Article is general in nature. Its purpose is to identify lawful combatants for protection under the Convention. It requires that

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(6) Inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or nonbelligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58–67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains provided for in Article 33 of the present Convention.

[61] *Id.*

[62] *Id.* art. 4(a)(2)(a)–(d). Draft Protocol I, in its Articles 41 and 42, also attempts to further clarify the requirements partisans and guerrillas must satisfy in order to qualify as combatants.

any combatant seeking the Convention's protections against mistreatment identify himself with a party to the conflict in such a manner that he can unequivocally be recognized by the enemy.[63] This choice having been made, the combatant is, if captured, afforded protection as a POW. Nothing more is required. The general nature of Article 4 becomes more obvious in light of recent attempts to broaden its applicability. It is now generally accepted that commandos and paratroops are protected as lawful belligerents, although this fact was unclear at one time.[64]

There is general agreement that in the past mercenaries have been accorded prisoner of war status.[65] Mercenaries are nearly always performing military duties at the time of their detention and thus should usually qualify under Article 4(a)(1) or (2). As required by Article 4, they are habitually uniformed, serving under a commander, carrying arms openly and normally conducting their operations in accordance with the laws and customs of war.[66] Because mercenaries consistently qualify as combatants under these traditional standards and more particularly because the draft Protocols [67] have attempted to ease the qualification standards, mercenaries should be treated as qualified combatants. But, even if their status under Article 4 is questionable, they are to be treated as POW's until their status has been determined by a competent tribunal.[68]

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[63] One cannot be allowed to kill the enemy and then claim that one is a peaceful civilian. "It is one of the purposes of the law of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both." Draper, *supra* note 5, at 188.

[64] *See* INSTITUTE OF WORLD POLITY, *supra* note 3, at 24. "The Nazi commanders who ordered all Commandos slaughtered were condemned as war criminals" R. HINGORANI, *supra* note 3, at 26.

[65] "A subject of a neutral state who has enlisted in a belligerent force is entitled to the same rights as a native citizen, and if captured must be treated as any other prisoner of war." W. FLORY, *supra* note 10, at 33. *See also* H. FOOKS, *supra* note 23, at 29. Thus, merely being a foreigner does not automatically disqualify one from POW status. Further, motive for fighting is difficult to prove, and as indicated in the definitional section, should not be determinative of mercenary status. *See* note 22 *supra*.

[66] In the recent trials in Angola at least two of the mercenary defendants admitted having committed acts which would be punishable as war crimes regardless of whether they were committed by mercenaries. They were involved in the murder of several British mercenaries who refused to fight. The other mercenaries on trial were guilty of no war crimes, however, and should have been accorded POW status. Wilson interview, *supra* note 10.

[67] *See* note 53 *supra*.

[68] GPW Convention art. 5, para. 2. The Convention does not specify what is a "competent" tribunal.

There is further support in the Convention for the position that mercenaries are to be protected as POW's. Presumably, a distinction in treatment of mercenaries based on their different nationality would be prohibited by Article 16. This Article requires equal treatment by the detaining power "without any adverse distinction based on race, *nationality*, religious belief or political opinions, . . ." [69] In addition, parties employing mercenaries may not bargain away the rights of mercenaries to prisoner of war status: Article 6 prohibits agreements in derogation of the Convention.[70]

One potential problem for determining whether mercenaries are to be accorded POW status is that they are often employed in what may be considered internal struggles or civil wars.[71] In such circumstances the Conventions are limited in their effect.[72] Article 3 applies in these situations and would, nonetheless, appear to protect mercenaries, at least to the limited extent of guaranteeing humane treatment and judicial safeguards.[73]

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[69] Emphasis added. This Article could mean that it is prohibited, for example, to segregate Jewish Americans, as was attempted in World War II. All-American and all-British camps were used during World War II, but this appears to have been at the request of the detainees.

[70] It appears that, in like manner, the mercenary in his employment contract cannot bargain away his right to POW treatment, although he might be tempted to do so for higher pay. Such bargaining has not been a problem thus far.

[71] This problem has probably become de minimus at least in regards to wars of national liberation. There has been an increasing tendency to treat such wars as international in character. The third world has sought to have "wars of liberation" construed as international conflicts because they involve one "people" fighting against another. Graham, *supra* note 5, at 40; *see* Bond, *supra* note 3, at 345. The trend has culminated in a draft article (Article I) of Protocol I at the current Geneva Conference. This provision endows wars of liberation with an international character and thus brings the Geneva Conventions to bear on the problem. Thus, true civil wars will probably become more rare in the future. Report of U.S. Delegation, *supra* note 3 at 3.

[72] GPW Convention art. 2, para. 1 states that the Convention applies in international conflicts with respect to signatories who are parties to the conflict.

[73] The GPW Convention art. 3, states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment

If granted POW status, the mercenary taken captive during an international armed conflict is entitled to all the protections the Convention affords.[74] As a POW, the mercenary cannot be charged with committing acts that are legal under the laws of land warfare.[75] Further, he is guaranteed many procedural safeguards. These include rights against coercion; notification of proceedings; assistance of an advocate or counsel and an interpreter; communication of the charge and relevant documents, and humane treatment while the penalty is being served.[76] In addition, the death penalty may not be imposed except for crimes specified at the outbreak of hostilities.[77]

Article 85 deals with offenses committed before capture. It specifies that POW's who are prosecuted for acts committed prior to capture shall retain POW status, even if convicted. Thus, even if the status of being mercenary were a crime,[78] it would be a crime committed before capture, and the mercenary could not be deprived of his POW status.[79]

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pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[74] The basic protections afforded, including due process and judicial safeguards, are contained in Articles 99 through 108. *See also* note 52 *supra* for discussion of Draft Protocol provisions.

[75] GPW Convention art. 99, para. 1. For example, if an unlawful combatant shot an enemy soldier, he would be guilty of murder; but if a lawful combatant engages in the same act he is protected by the law of land warfare and cannot be prosecuted.

[76] *See* GPW Convention arts. 99–108. These articles prescribe a minimum standard of treatment, adherence to which would be monitored through the International Red Cross or other designated Protecting Party.

[77] GPW Convention art. 100.

[78] Angola stated that mercenaries were war criminals, guilty of crimes against peace. Crimes against peace are "any act of aggression, including the employment by authorities of a state of armed force against another state for any purpose other than national or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations." Question of Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity, E/ON. 4/906, 15 Feb. 1966, at 30. This definition has been interpreted to mean that only "high state officials" are capable of its commission as only they are capable of "waging a war of aggression." V. MAUGHAM, U.N.O. AND WAR CRIMES 33–34 (1951). Thus, there is serious question whether a mercenary fighting "on the line" is capable of committing a crime against peace.

[79] The Soviet Union and several of the Communist bloc countires have interposed

A "grave breach" as described in Article 130 [80] occurs when a country fails to give POW status to an individual when required to do so under Article 4 and as a result fails to give him a fair trial as prescribed by the Convention. When such a breach occurs, the High Contracting Parties are required to take any action necessary to bring to justice those individuals responsible for the breach.[81] Such actions may include legislation, searching for the individual, and trial.[82] In practice, it may be unrealistic to believe that disinterested nations will prosecute officials of other countries for failing to give POW status to certain individuals or even to classes of individuals. It is more likely that victorious nations will subject the officials of the defeated nations to punishment for such breaches. Enforcement of the Convention thus poses a severe problem which must be dealt with if mercenaries or any other classes of questionably protected combatants are to be provided any real safeguards.

B. THE UNITED NATIONS

There are developments outside the Geneva Conventions which reflect the view that mercenaries should be treated differently than regular combatants. Perhaps most indicative of this sentiment are three recent resolutions of the United Nations General Assembly. The first declares that mercenaries are "outlaws" and that using mercenaries is criminal.[83] Both the first and second resolutions "call upon all states to take the necessary measures to prevent the recruitment, financing and training of mercenaries in their territory and to prohibit their nationals from serving as mercenaries." [84] Fi-

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a reservation to Article 85 and refuse to recognize war criminals as being entitled to POW status. *The Geneva Convention*, *supra* note 3, at 861. Reservation by the U.S.S.R. to Art. 85 of the Geneva Convention, Prisoners of War, 6 U.S.T. 3506, at 3508, T.I.A.S. No. 3364, at 172, 174. In the Angolan trial the Angolans were supposedly acting under the Conventions, but apparently they followed this reservation. Article 42 *bis* of Protocol I would presume that an individual is entitled to prisoner of war status until proven otherwise. Report of U.S. Delegation, *supra* note 3, at 67.

[80] GPW Convention art. 130 reads as follows:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling prisoners of war to serve in the forces of the hostile Power, or wilfully depriving prisoners of war of the rights of fair and regular trial prescribed in this Convention.

[81] GPW Convention art. 129.

[82] *Id.*

[83] G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30) 5, U.N. Doc. A/7630 (1970).

[84] G.A. Res. 2708, 25 U.N. GAOR, Supp. (No. 28) 7, U.N. Doc. A/8028 (1971).

nally, the most recent resolution declares: "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals." [85] While such inflammatory rhetoric is not commendable in any attempt to develop a well reasoned and practical solution to the mercenary question,[86] it does at least show some sentiment that mercenaries should be denied prisoner of war status and should be treated as brigands.

C. THE UNITED STATES

Many individual governments have undertaken to prevent the recruitment and use of mercenaries. The United States has made it a crime to hire or recruit mercenaries within the United States.[87] Another section of the Code prohibits United States citizens from accepting and exercising a commission in a foreign service in a war against a foreign nation with which the United States is at peace,[88] and another statute provides that one who enters the armed forces of a foreign state without the written authorization of the Secretaries of State and Defense will lose his citizenship.[89] It is thus clear that the United States frowns on its citizens becoming mercenaries.

It must be noted, however, that it is not unlawful for a citizen to leave the United States intending to enlist abroad in a foreign service,[90] and in fact the United States has in the past not only failed to prosecute American mercenaries but has aided in their repatriation.[91] Furthermore, unlike the United Nations resolutions, the

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[85] G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1974).
[86] The effects of use of mercenaries in conventional wars and by "freedom fighting" forces is left unclear by this resolution.
[87] 18 U.S.C. § 959(a) (1970) provides, in pertinent part, that: "Whoever, within the United States . . . hires or retains another to enlist . . . in the service of any foreign . . . state, . . . as a soldier . . . shall be fined not more than $1,000 or imprisoned not more than three years, or both."
[88] 18 U.S.C. § 958 (1970).
[89] 8 U.S.C. § 148(a)(4) (1970). After Afroyim v. Rusk, 387 U.S. 253 (1967) though, it appears that "a declaration of intent clearer than mere enlistment in a foreign army is required for an effective renunciation of citizenship, . . ." *Id.*
[90] *See id.*; Wiborg v. United States, 163 U.S. 632 (1896).
[91] The Department of State sought the release of Orton W. Hoover, an American aviator, arrested in 1930 and 1932 while aiding Brazilian forces against the Vargas revolution. It also attempted to prevent the death penalty from being carried out against Harold B. Dahl, an aviator, arrested by Franco forces in 1937. Borchard, *supra* note 10, at 536. More recently, no attempts to arrest mercenaries who

United States statutes are aimed at preventing individuals from becoming mercenaries, and are in no way inconsistent with treating mercenaries as POW's in the event they are captured.

D. THE DIPLOMATIC CONFERENCE AT GENEVA

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts is currently meeting in its Fourth Session at Geneva.[92] This Conference represents the best hope for redrafting the Geneva POW Convention to better conform to present global needs. The issue of mercenaries has been raised by the Nigerian delegation in its proposal which would amend the Draft Protocol so as to deny POW status to mercenaries captured in wars of national liberation.[93] The Conference seems to reflect a wide, though not unanimous, consensus that the use of mercenaries should not be condoned and that they should not be protected when they are captured.[94]

The problem of defining the term "mercenary," though, has proved insoluable thus far.[95] Compounding the problem is the fact that several states want to retain the option of treating captured mercenaries as POW's while others want to exclude them entirely from the definition of prisoner of war.[96] The Conference, while moving to expand the definition of legal combatants under Article 4 of the Convention, is nonetheless attempting to contract the definition with regard to mercenaries. This situation, coupled with a growing realization that overbroad definitions and over-inclusive categories may one day be construed against the interests of a state in a manner not now foreseeable, has made agreement difficult. The Conference holds promise because at least the issue of mercenaries is being discussed. However, final agreement at the Conference and subsequent adoption of any proposal by the world community remain only possibilities for the future.

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fought in Angola have been reported, although the FBI is investigating. *1976 Hearings*, *supra* note 7, at 4 (testimony of Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division).

[92] The Conference reconvened for the Fourth Session on March 17, 1977. Report of U.S. Delegation, *supra* note 8, at 24.

[93] *See* notes 53 and 54 *supra*.

[94] Report of U.S. Delegation, *supra* note 8, at 124. *See also* Van Deventer, *supra* note 8, at 811.

[95] Report of U.S. Delegation, *supra* note 3, at 124–26.

[96] *Id.*

V. RECOMMENDATIONS

It is clear that there is conflict between the current sentiment of a large portion of the global community and the provisions of the Geneva POW Convention which ostensibly protect mercenaries. This situation has resulted in breaches of the Convention which not only leave mercenaries in a highly uncertain position, but which also threaten the viability of the Convention itself. In light of this situation several recommendations are in order:

1. A consensus of world opinion must be reached with respect to the legal status of mercenaries. Such a consensus, when considered in light of the differing political goals of the Western, Communist, and developing countries, is most difficult to attain. The current trend of opinion leads to a finding that mercenary status is (or should be) illegal [97] but, beyond this core idea, there is no consensus. The definition of the term mercenary and the solution to the question of how mercenaries are to be treated remain elusive at best. Nevertheless, a common ground in the desire for peace and the protection of the world's inhabitants does exist and a solution should be attainable.

2. A protocol to the 1949 Geneva POW Convention is currently being negotiated. This protocol should, at the very least, either *specifically* include or exclude mercenaries from coverage under the Convention. Furthermore, the protocol should define the term "mercenary" in a manner free from all inflammatory rhetoric.[98] It would, of course, be possible to specify those entitled to protected status by enumerating limited roles which mercenaries could lawfully perform or by permitting them to participate in only certain types of conflicts. Possible examples of such compromise solutions would be to allow them to function only as advisors or to fight only in wars other than "wars of national liberation." Intermediate solutions of this nature would complicate further an already complex Convention, however, and if possible should be avoided. Such a solution would only create greater latitude for creative interpretation

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[97] *Id.*

[98] The danger of such expressions as "fighting against colonial domination and alien occupation and against racist regimes" is that they could be applied to a wide range of conflicts going far beyond what was contemplated by those states which have led the campaign for application of the whole of the law of war in wars of national liberation.

Baxter, *supra* note 58, at 16. "The temptation to establish privileged categories of combatants who are fighting for a cause regarded as the only just cause, or as being more just than another, must be resisted." Freymond, *supra* note 14, at 687. "A new rule of international law should not be accepted if it will operate only for the strong against the weak." V. MAUGHAM, *supra* note 78, at 77.

by self-serving parties. A further consideration is that consistency of treatment should be sought. This final consideration leads to the conclusion that if guerrillas and other classes of unconventional combatants are to be included in the Convention's protections through the Protocols, then mercenaries should also be included.[99]

3. In practice mercenaries should be treated as POW's when captured. This status should continue at least until their actual status can be clarified under Article 4 or until Article 85 criminal proceedings can be initiated.

4. A further statement in the protocols should be added, specifying whether or not mercenaries should be punished for "crimes against peace." [100] As currently interpreted, crimes against peace may only be committed by the highest ranking civilian officials and military personnel of a nation. The inclusion of "crimes against peace" as war crimes was designed as a basis for prosecuting the planners of aggressive wars, and not those who are mere participants. Nonetheless, violation of this particular article was the criminal conduct for which the mercenaries in Angola stood trial.

5. An impartial tribunal should be charged with determining the status of POW's and with the trial of "status" crimes. Such a tribunal could be of a permanent nature, such as the International Commission of Jurists, or it could be convened as the need arose through the coordinative auspices of the Protecting Power,[101] at least during the initial stages of its existence. It will be difficult to force nations to submit to the jurisdiction of such a tribunal, especially in the emotionally charged atmosphere which surrounds most war time situations. The tribunal would, therefore, have to be of the highest caliber and as free from political interests as possible. If the tribunal is to be of a permanent nature, then through treaties par-

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[99] While the element of indigenousness could be a possible basis for distinguishing between mercenaries and guerrillas or other irregular combatants, it is clear that the native/foreign distinction often becomes very blurred in colonial wars. Thus, this distinction should not be used. Further, if the interest involved in the protection of prisoners is humanitarian, then efforts to expand the scope of the Conventions should be encouraged.

[100] This recommendation assumes that it is determined that mercenaries are not to be protected as lawful combatants. The definition of crimes against peace must be changed by way of clarification if they are to be indisputably included. *See* note 79 *supra*.

[101] The current Conference at Geneva seems to envision a larger role for the Protecting Power than it has been accorded in the past. This Power may be a neutral country or an organization such as the International Red Cross. Its basic purpose is to see that the obligations of the Conventions are carried out by all parties to the conflict. Report of U.S. Delegation, *supra* note 3, at 37–39.

ties could agree to submit disputes to the tribunal prior to the actual occurrence of any hostilities. If the Protecting Power provides the impetus for the formation of the tribunal, which is the most facile solution, reciprocity would presumably attach, and the adversaries would find it mutually advantageous to submit to the jurisdiction of the tribunal.

6. Provisions must be adopted which provide for enforcement of the Geneva Conventions and for punishment of breaches of the Conventions. It is unrealistic to expect signatories to remedy infractions of their own accord. A strengthening of the Protecting Power system, authorizing and requiring the Protecting Power to conduct unannounced inspections and to punish violations, would be the most propitious method of achieving enforcement. In lieu of this, an impartial international commission should be appointed permanently to investigate possible infractions which it perceives, or which are reported to it.[102] This commission should be able to try violators and impose sanctions against both individuals and states. Its findings would of necessity require the support of all signatories.[103] These recommendations should help in resolving the current confusion over the legal status of mercenaries.

VI. CONCLUSION

The questionable status of mercenaries as lawful combatants is a matter of grave concern not only to the individuals involved but, because of the possibly disruptive effects the problem may have on world peace, to the international community as well. The problem arises first from the inadequacy of current definitions of the term "mercenary." Second, it occurs because of the inexactness of the Geneva Convention and as a result of the self-seeking interpretations various nations give to it. Third, the problem is accentuated by the disparity between current world attitudes toward mercenaries and their apparent protection under the Geneva Convention. The Diplomatic Conference at Geneva is only now confronting this issue squarely. Finally, the whole situation is exacerbated by the current lack of enforcement machinery to redress breaches of

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[102] The Conference is considering such a commission in relation to Article 79 *bis*. This would be an International Enquiry Secretariat consisting of three members. *Id.* at 136.

[103] Countries may be reluctant to give power to a commission, but it is only through such an international body that situations such as occurred in Angola, where a country chose to ignore current international law and to interpret it as it chose, can be avoided.

the Convention. By amending and clarifying the Geneva Convention through the Protocols and by strengthening the Protecting Power System or creating an international commission to make determinations of POW status and to investigate and punish breaches, the uncertainty currently facing mercenaries can be alleviated and the potential crisis in the international community can be averted.

COMMENT: EVIDENTIARY USE OF THE VOICE SPECTROGRAPH IN CRIMINAL PROCEEDINGS *

Major Delroy J. Gorecki**

A sophisticated method of identifying the speaker of a voice exemplar through analysis of voice patterns has evolved since World War II. This technique, known as speech spectrography, is essentially the transformation of speech into a graphic display or spectrogram by means of an instrument known as a spectrograph. Identification of a speaker is made by a trained examiner's comparison of the spectrograms of known and unknown voice samples, as well as by aural comparison of the samples. Depending upon the number of points of similarity or dissimilarity found, the examiner will announce either that the samples were or were not made by the same person, or that he is unable to state whether the two voice samples were created by the same individual. This comment explores the varied theories courts have used to determine whether evidence involving voice spectrography should be admitted in criminal proceedings.[1]

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

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[1] The development and technical description of the process is beyond the scope of this comment. Reduced to its basics, the sound spectrograph consists of a voice recording device, a variable electronic filter, a paper-carrying drum coupled to the recording device, and an electronic stylus that marks the paper on the drum as it revolves. The magnetic recording device is used to record a short sample of speech. The duration of the speech sample corresponds to the time required for one revolution of the drum. Then the speech sample is played repeatedly in order to analyze its spectral contents. For each revolution of the drum, the variable electronic filter passes only a certain band of frequencies, and the energy in the frequency band activates the electric stylus so that a straight line of varying darkness is produced across the paper. The degree of darkness represents the varying amplitude of the speech signal at the specified time within the given frequency band. As the drum revolves, the variable electronic filter moves to higher and higher frequencies, and the electric stylus moves parallel to the axis of the drum. Thus a pattern of closely-spaced lines is generated on the paper. This pattern, which is the spectrogram, has the dimensions of frequency, time, and amplitude. Of these three dimensions, time is measured horizontally, frequency is measured vertically and amplitude is measured by the darkness of the lines ac-

Because of the anonymous criminal conduct [2] which is typically attributed to the creator of an unknown voice exemplar, there are understandably few constitutional attacks directed at the process of obtaining or the actual use of an unknown voice exemplar in the voice spectrograph identification process. Also, it appears well settled that either obtaining or using the known voice exemplar of a defendant does not violate the fourth [3] or the fifth [4] amendments to the United States Constitution. The Supreme Court of Minnesota in *State ex rel. Trimble v. Hedman* [5] and the Florida Court of Appeals in *Alea v. State* [6] have held that the tape recording and evidentiary use of an anonymous or an uncompelled phone conversation with a defendant violates neither the Constitution nor a state privacy of communication law, despite the fact that surreptitious means were used to obtain the known exemplar of the defendant's voice. A search warrant or court ordered wiretap can also be used to obtain a defendant's voice exemplar, whether or not the individual is in custody.[7] Indeed, where the defendant is in custody or under the jur-

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cording to the pressure of the stylus. The interested reader is referred to the following materials which delve into the technical intricacies of this process: Hecker, Speaker Recognition: An Interpretive Survey of the Literature (Am. Speech & Hearing Ass'n Monograph No. 16, 1971); Michigan Department of State Police, Voice Identification Research 9 (1971); Bolt, *Identification of a Speaker by Spectrograms: A Scientist's View of its Reliability for Legal Purposes*, 47 J. ACOUSTICAL SOC'Y OF AM. 597 (1970); Cedarbaums, *Voiceprint Identification: A Scientific and Legal Dilemma*, 5 CRIM. L. BULL. 323 (1969); Hennessy & Romig, *A Review of Experiments Involving Voice Identification*, 16 J. FOR. SCI. 183 (1971); Jones, *Danger—Voiceprints Ahead*, 11 AM. CRIM. L. REV. 549 (1973); Kamine, *The Voiceprint Technigues: Its Structure and Identification by Voiceprints*, 40 CONN. B.J. 586 (1966); Kersta, *Voiceprint Identification*, 196 NATURE 1253 (1962); Presti, *High Speed Sound Spectrograph*, 40 J. ACOUSTICAL SOC'Y AM. 628 (1966); Tosi, *Voice Identification Research*, 10 NAT. INST. OF L. ENFORCEMENT & CRIM. J. (1972); Tosi, *Experiment on Voice Identification*, 51 J. ACOUSTICAL SOC'Y AM. 2030 (1970).

[2] *E.g.*, bomb threats; kidnapping ransom demands.

[3] Schmerber v. California, 384 U.S. 757 (1966). While rejecting a fourth amendment search and seizure claim in *Schmerber*, the Supreme Court said, the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, . . ." *Id.* at 764.

[4] United States v. Wade, 388 U.S. 218 (1967). In disposing of the fifth amendment self-incrimination claim, the Court stated that ". . .compelling Wade to speak within hearing distance of the witness, even to utter words purportedly uttered by the robber was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.* at 222, 223.

[5] 291 Minn. 442, 192 N.W.2d 432 (1971).

[6] 265 So. 2d 96 (Fla. Ct. App. 1972).

[7] Commonwealth v. Vitello, ... Mass. ....., 327 N.E.2d 819 (1975); State *ex rel.* Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971).

isdiction of a court, the preferred procedure is to secure a court order compelling him to give an exemplar.[8]

If and when the unknown voice is found to be among the known exemplars through the voice spectrograph identification process, and the constitutional issues have been resolved, the crucial question becomes whether or not the particular court will permit the evidentiary use of the voice spectrograph. Materiality or relevancy problems aside, all courts require the satisfaction of certain legal standards before allowing the introduction or use of scientific evidence.[9] The standard most frequently utilized by courts in considering the admissibility of scientific evidence is found in the following language from *Frye v. United States:* [10]

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting the expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[11]

Criticism has been leveled at the rigidity of the *Frye* scientific standard both generally and with respect to its application to the voice spectrograph technique.[12] When faced with the choice of either modifying the *Frye* standard or excluding what is viewed as important probative evidence, several courts have ignored *Frye*, others have applied it in modified form, and others have utilized the strict test, only to arrive at opposite conclusions. An emerging trend in the federal courts is to adopt an early view of the United States Court of Military Appeals and the Florida District Courts of Appeal and admit the spectrograph related material into evidence. However, this trend is not universal, and the California Supreme Court and the United States Court of Appeals for the District of Columbia Circuit have ignored these cases. More recently, the Su-

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[8] United States v. Raymond, 337 F. Supp. 641 (D.D.C. 1972) *aff'd on other grounds*, 498 F.2d 741 (D.C. Cir. 1974). State v. Andretta, 61 N.J. 544, 296 A.2d 644 (1972).

[9] C. MCCORMICK, LAW OF EVIDENCE § 203, at 489-90 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE § 414 (3d ed. 1940).

[10] 293 F. 1013 (D.C. Cir. 1923).

[11] *Id.* at 1014.

[12] Bricker, *The Voiceprint Technique: A Problem in Scientific Evidence*, 18 WAYNE L. REV. 1365, 1383 (1972); Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1 (1970); Note, *Evolving Methods of Scientific Proof*, 13 N.Y.L.F. 679 (1968).

preme Court has held voice spectrograph evidence inadmissable.

The first criminal case of record in which voiceprint evidence was admitted was *People v. Straehle* [13] which relied upon a rule originating in *People v. Davidson*.[14] The *Davidson* court, confronted with the issue of admissibility of results of a Harger Drunkometer sobriety test, held that "until it can be said that legally the accuracy and reliability of this device has become established and recognized, a reasonable and proper foundation for the use of its proof must be furnished." [15] A proper foundation might consist of proof that the principle underlying the test was scientifically accurate, and of testimony by an expert witness trained in the operation of the machine and knowledgeable of the scientific principles involved. Both of these foundation requirements were met to the *Straehle* court's satisfaction by the testimony of the expert witness who had developed the device and administered the test in question. The court ruled the evidence admissible, leaving its weight to be determined by the jury. The indictment was eventually dismissed on other grounds and the admissibility of the voice spectrograph has therefore not yet been finally decided by the New York appellate courts.

The first decisions of permanent significance on the issue of voiceprint admissibility were the United States Air Force Board of Review [16] and Court of Military Appeals [17] opinions in *United States v. Wright*. In that case, a victim testified that obscene and threatening calls sounded like the voice of the accused. An Air Force investigator also stated that tape recordings of the obscene calls and his actual conversation with the accused sounded the same. With the consent of the accused a control tape of a telephone conversation between him and the victim was made in which he was directed to affect a slower and hoarser manner of speech. According to the voiceprint comparison made by the spectrography expert, the taped unknown calls and the taped controlled call were made by the same person.

The board and the court found no error in the manner in which the controlled call was obtained, acknowledged that voice identification by ear was a commonplace evidentiary phenomenon, and held that the testimony concerning the voiceprint was properly admitted

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[13] Crim. No. 9323/64 (Westchester County Ct. N.Y. 1966).
[14] 5 Misc. 2d 699, 152 N.Y.S.2d 762 (Monroe County Ct. 1956).
[15] *Id.* at 702, 152 N.Y.S.2d at 765.
[16] 37 C.M.R. 835 (A.F.B.R. 1966).
[17] 17 C.M.A. 183, 37 C.M.R. 447 (1967).

into evidence. The admissibility was not judged by the *Frye* standard of "general scientific acceptance in the field"; rather the board upheld the admission of the expert testimony concerning the voiceprint on the basis of "the well-established rule which gives the trial judge in a criminal case wide discretion in determining the qualifications and competency of an expert witness." [18] Indeed, the board noted that it "hesitate[d] to conclude . . . that [the technique had] gained 'general acceptance'. . . .",[19] and noted that its decision was not meant to signal a departure from the *Frye* rule with respect to lie detector tests.[20]

The Court of Military Appeals affirmed, stating "Courts have consistently recognized the admissibility of the testimony of experts in areas where there is neither infallibility of result nor unanimity of opinion. . . ." [21] and that the provision of the Manual for Courts-Martial which dealt with expert witnesses had been complied with:

> The Manual for Courts-Martial, United States, 1951, indicates a witness may testify as an expert and express an opinion on a state of facts within his specialty if he is skilled in some art, trade, profession, or science, or . . . has knowledge and experience in relation to matters which are not generally within the knowledge of men of common education and experience.[22]

Although two expert witnesses in the field of speech transmission and voice recordings had expressed reservations about the reliability of the voiceprint technique followed in this case, and dissenting Judge Ferguson pointed out the failure of the technique to satisfy the *Frye* scientific standard, the court said it is only necessary to show that the scientific principle is valid and demonstrates a high degree of accuracy:

> [The expert's] testimony established that his system of voice identification had, experimentally and in practical application, demonstrated a high degree of accuracy and, further, that he was personally qualified to testify as an expert on comparisons of sound patterns made by human voices.[23]

This rule which justified the admissibility of the voice spectrograph technique and other expert testimony still prevails in the military, and is retained in the current Manual for Courts-Martial:

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[18] 37 C.M.R. at 840.
[19] *Id.*
[20] *Id.*
[21] 17 C.M.A. at 189, 37 C.M.R. at 453.
[22] *Id.* at 188, 37 C.M.R. at 452.
[23] *Id.* at 189, 37 C.M.R. at 453.

> An expert witness—that is, one who is skilled in some art, trade, profession, or science or who has had specialized training or experience in relation to matters which are not generally within the knowledge of men of common education and experience—may express an opinion on a matter which is within his specialty and which is involved in the inquiry. Before being permitted to express his opinion, it should be shown that he is an expert in the specialty.[24]

The significance of the *Wright* decision is that the voice spectrograph process was used to corroborate voice identification made by ear. That basis of voice spectrograph admissibility is established by the cases that follow in which the process was used in conjunction with other evidence bearing on the identification of an accused. For it is identification, and not necessarily innocence or guilt, that is at issue in the voice spectrograph identification process.

The next criminal cases to consider admissibility of the "voiceprint" process were *State v. Cary*,[25] and *People v. King*.[26] The *Cary* case made several trips through the New Jersey courts before the issue of voiceprint admissibility was finally decided. At trial, Cary had refused to supply a requested voice exemplar so that a voiceprint of his voice could be compared with a recording of an incriminating telephone call. An order to compel him to do so had been granted. On an interlocutory appeal, the Supreme Court of New Jersey ruled that his fourth amendment right to privacy required a preliminary showing that admissible voiceprint evidence would be produced before he could be compelled to furnish an exemplar.

On remand to determine the evidentiary issue, the Superior Court determined that voiceprint evidence was not admissible because "this technique has not . . . as of this date attained such degree of scientific acceptance and reliability as to be acceptable as evidence."[27] Without citing *Frye v. United States*, the court applied the same standard of admissibility:

> Just when a scientific principle or discovery passes from the experimental to the demonstrable stage is hard to define. There is a twilight zone beyond which the principle involved in the discovery must reach before it can be acceptable to the courts, but it can be said that it

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[24] MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (Rev. ed.), para. 138*e* [hereinafter cited as MCM, 1969]. *See also* U.S. DEP'T OF ARMY, PAMPHLET No. 27-22, EVIDENCE, ¶ 12-4 (1973) [hereinafter cited as DA PAM 27-22].

[25] 49 N.J. 343, 230 A.2d 384 (1967). *See also* State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (1968).

[26] 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968).

[27] 99 N.J. Super. at 333, 239 A.2d at 685.

> must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[28]

In the case of *People v. King*,[29] a California court of appeals reviewed the trial court's admission of a positive voiceprint comparison of the defendant's voice and the voice of a person making incriminating statements regarding his role in the Watts riots during a television interview. This evidence was, in the opinion of the trial judge, the primary reason that the jury had found the defendant guilty of arson. The only other identification evidence in the case was a business paper and card bearing the name of two television network employees, and a watch and ring, later claimed to be identifiable in the film, found in the defendant's possession when he was booked on a narcotics charge more than three months after the television interview. The network neither revealed the interviewee's identity nor showed the person interviewed on that film.

The California court of appeals found the admission of the voiceprint comparison testimony to be reversible error because of the failure of the examiner to qualify as an expert, and because of the lack of general acceptance of voiceprint identification even within its own field. Alluding to the scientific standard in *Frye*, the court stated that:

> [The examiner's] admission that his process is entirely subjective and founded on his opinion alone without general acceptance within the scientific community compels us to rule [that the] "voiceprint identification process has not reached a sufficient level of scientific certainty to be accepted as identification evidence in cases where the life or liberty of a defendant may be at stake."[30]

The *King* case was followed by *State ex rel. Trimble v. Hedman*.[31] Late one night in 1970, a telephone call was made to the St. Paul, Minnesota police department by a woman who requested transportation and assistance for a pregnant sister who was in labor at a certain address. One of the two responding officers was shot and killed from ambush as he knocked on the front door. The shot did not come from within the house and none of the inhabitants was pregnant or had called for police assistance.

During the ensuing investigation, informants occasionally told police of persons they believed to have placed the call, but this information was not legally sufficient to justify arrest. To avoid any

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[28] *Id.* at 333, 239 A.2d at 685.
[29] 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968).
[30] *Id.* at 460, 72 Cal. Rptr. at 493.
[31] 291 Minn. 442, 192 N.W.2d 432 (1971).

publication of police efforts to secure a court ordered exemplar from suspects, the procedure followed in the *King* case [32] was adopted and police began taking voice exemplars from all those suspected of complicity in the case.

During the course of the investigation, tape recordings of thirteen female voices were submitted to the Michigan State Police Voice Identification Unit at Lansing, Michigan. These voices were matched by voice spectrograph with the unknown voice of the caller to the St. Paul Police Department on May 22, 1970. The spectrograph examiner reported that the voice of Constance Trimble and the voice of the unknown caller were the same. Until this time there was no other evidence to connect Constance Trimble with the crime.

A strategy was then devised to secure a more satisfactory exemplar of Trimble's voice. Because she was receiving aid for dependant children, a policewoman interviewed her under the guise of being a welfare worker making a redetermination of her eligibility status. Approval for the use of this procedure was first obtained from a district judge. This interview was actually a court sanctioned follow-up to the original uncontrolled call during which Miss Trimble's voice had been recorded for submission to the examiner for comparison. Again the voice spectrograph comparison resulted in a positive correlation. An aural comparison between the known Trimble voice and the voice of the caller by the police officer who had received it the night of the incident produced the same positive identification. A similar comparison by the writer indicated that the two voices sounded unmistakably alike.

On the basis of this information, an arrest warrant was obtained and Trimble was apprehended and summoned for questioning. During the interrogation, Miss Trimble initially denied making the call, then admitted making it as part of a hoax. She said she had received an unsigned letter telling her how she could get even with an unfriendly acquaintance by making the call at a certain time so the police could raid a marihuana party at which the unfriendly acquaintance would be present.

Miss Trimble was indicted for first degree murder. She made a special appearance and objected to the jurisdiction of the court on the grounds that the arrest warrant was illegally obtained and that as a result her arrest was illegal. She then applied to the district court for a writ of habeas corpus, and a hearing was scheduled. Dur-

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[32] In *King* a voice exemplar was surreptitiously taken from the defendant while he was in jail awaiting trial.

ing that hearing, evidence was received on the propriety of using the voice spectrograph identification process together with the policeman's aural voice identification to provide probable cause to obtain the warrant for her arrest.

A prosecution expert on the reliability of the voice identification process termed it "extremely reliable" if the examiner is responsible and allowed the option of saying "Well, I don't know, I cannot produce in this case an identification," [33] if he is unsure of his findings. The voice spectrogram examiner explained how he made no identification on the first twelve voice comparisons, but on number thirteen found the unknown voice and the known voice of Constance Trimble to be ". . .one and the same and could be no other," a conclusion he was certain of "beyond any doubt." [34]

A defense expert witness said "there is no scientifically-accepted basis for terming the voice spectrograph identification process reliable," [35] and applied this theory to the comparison of voices made in this case. He conceded, however, that the voice spectrograph identification process coupled with audible voice identification was more reliable and accurate than audible voice identification alone, and that the two systems complement each other.[36]

The district court denied the writ and the case was appealed to the Minnesota Supreme Court on the ground, among others, that use of the voice spectrograph results did not justify issuance of the arrest warrant. Tacitly acknowledging that *Frye v. United States* is accepted as the standard for admitting scientific evidence in Minnesota,[37] the court found that because positive aural identification is admissible, and the voice spectrogram serves to corroborate such aural identification, both are admissible, and it is up to the fact finder to determine their weight and credibility.

> In view of the fact that identification by aural voice comparison, either respecting telephone conversations or words spoken at a lineup, or recorded by other mechanical means is admissible, and the admission that voice comparisons by spectrograms corroborate identification by means of ear, we are convinced that spectrograms ought

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[33] State v. Trimble Transcript, Ramsey Cty. Gen. D.C. File No. 24049, at 44 (Dec. 15, 1970); 291 Minn. at 454, 192 N.W.2d at 439.

[34] State v. Trimble Transcript, *supra* note 33, at 156; 291 Minn. at 454, 192 N.W.2d at 439.

[35] State v. Trimble Transcript, *supra* note 33, at 100.

[36] *Id.* at 120, 121; 291 Minn. at 455, 192 N.W.2d at 439.

[37] *See* State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952).

> to be admissible at least for the purpose of corroborating opinions as to identification by means of ear alone. They ought also to be admissible for the purpose of impeachment. The weight and credibility of such evidence lie with the finder of facts, but that does not involve the question of admissibility.[38]

Instead of contesting the admissibility of the voice spectrograph evidence at trial (and simultaneously the issue of identification), during voir dire, Trimble's counsel conceded that she had made the telephone call which summoned the police officers. Her counsel emphasized, however, that she was not on trial for making a phone call but for her knowing, intentional and premeditated involvement in the killing of a police officer who responded to that call. Trimble testified she did not know her phone call was setting up an ambush and that she was merely following the suggestion in the letter she received on how to get even with an unfriendly acquaintance. The approach worked and Trimble was found not guilty. This case refutes those critics who claim that the admissibility of the voice spectrograph identification process will usurp the functions of the fact finder.[39] The *Trimble* case also illustrates the accuracy of the voice spectrograph process in the identification of female voices, an area not theretofore studied by students of the process.

The United States District Court for the District of Columbia considered the admissibility of the voice spectrograph identification process in *United States v. Raymond*,[40] a case similar to *Trimble*. A telephone call to the police station was used to lure police officers to an ambush site. After comparing the voice spectrograms of the two defendants, Albert Raymond and Roland Addison, to the voice spectrogram of the unknown caller, the examiner concluded that the unknown caller was defendant Raymond.[41]

During the hearing on whether or not the voice spectrograms were admissible as evidence, two experts testified without opposition from any others that the voice spectrograph identification process was a scientifically reliable aid in the identification of people's

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[38] 291 Minn. at 457, 192 N.W.2d at 441.

[39] *E.g.*, Brinker, *The Voiceprint Technique: A Problem in Scientific Evidence*, 18 WAYNE L. REV. 1365, 1383 (1972); Jones, *Danger—Voiceprints Ahead*, 11 AM. CRIM. L. REV. 549 (1973).

[40] 337 F. Supp. 641 (D.D.C. 1972) *aff'd on other grounds*, 498 F.2d 741 (D.C. Cir. 1974). *See also* United States v. Phoenix, No. IP 70-CR-429 (S.D. Ind. April 15, 1971). There, positive aural voice identification of five witnesses was corroborated by expert testimony utilizing the voice spectrograph process to identify the defendant as the maker of a false bomb report. He was convicted and did not appeal.

[41] Record at 130, United States v. Raymond, 337 F. Supp. 641 (D.D.C. 1972).

voices and that the possibility of making an erroneous identification was negligible.[42]

Considering the voice spectrograph identification technique, the previous case law on the subject, the testimony of the experts and the examiner, the *Raymond* court ruled the spectrographic identification of the defendant reliable enough to be admitted into evidence for whatever credence the jury chose to give it along with the other facts in the case.[43] Both Raymond and Addison were subsequently convicted of assault and appealed to the United States Court of Appeals for the District of Columbia. The court of appeals held that the district court had erred in admitting the voice spectrograph identification of Raymond into evidence, notwithstanding its corroborative use in the case.[44] In reaching this conclusion, the Court of Appeals relied on the *Frye* standard of admissibility for scientific evidence and said that identification by voice spectrogram comparison does not meet that standard:

> . . .[T]echniques of speaker identification by spectrogram comparison have not attained the general acceptance of the scientific community to the degree required in this jurisdiction by *Frye*. Whatever its promise may be for the future, voiceprint identification is not now sufficiently accepted by the scientific community as a whole to form a basis for a jury's determination of guilt or innocence. We hold that the District Court erred in determining that this type of evidence is admissible in criminal trials.[45]

Affirming the convictions on other grounds, the Court of Appeals found that voice spectrograph identification evidence is inadmissible even when used to corroborate aural voice identification and other independent facts. Indeed, the District of Columbia Court has recently reaffirmed this holding.[46]

Before the *Addison* decision was rendered by the court of appeals, the District of Columbia Superior Court had occasion in *United States v. Brown* [47] to rule on the admissibility of the voice spectrograph identification process in a case involving threats against the life of the former president of Federal City College. The voice from tape recordings of the threatening calls and the known voice of the defendant were compared by voice spectrograph and found to be the same. After hearings involving testimony of an ex-

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[42] *Id.* 52, 97.
[43] 337 F. Supp. at 645.
[44] United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974).
[45] *Id.* at 745.
[46] United States v. McDaniel, 538 F.2d 408 (D.C. Cir 1976).
[47] 13 Cr. L. Rptr. 2203 (D.C. Super. Ct. May 1, 1973).

pert and the examiner, the Superior Court ruled that the voice spectrograph identification by the examiner was admissible.[48]

The approach of the court in *Brown* is noteworthy. It recognized that the scientific standard on voiceprint admissibility used by the district court in *Raymond* was "reliability" and not the *Frye* standard of general scientific acceptability. Contrary to the district court's opinion in *Brown* the superior court rejected the "reliability" standard. Then the superior court found that the voice spectrograph identification technique satisfied the *Frye* standard of general scientific acceptability (a conclusion which the District of Columbia Circuit would later deny), concluding:

> 1. The technique has become sufficiently established to have gained general acceptance; and
>
> 2. The technique appears to have the requisite reliability which underlies this general acceptance.***
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> The Court's finding as to the acceptance of the technique in the scientific community is also founded on [the prosecution's expert's] testimony. The defense did not call one witness to rebut in any way the claims proposed by [that expert].
>
> While it is indeed difficult to gauge the degree of acceptance in the scientific community when only one of its members has testified, the Court does not believe that the Government need produce any particular number of scientists. [The expert's] testimony, being essentially uncontroverted, is deemed sufficient evidence of the general acceptance of this technique by the segment of the scientific establishment in a position to understand, appreciate and pass judgment on voice identifications made using spectrograph analysis.[49]

More recently two Circuit Courts of Appeals have found voiceprint analyses admissible as evidence in criminal prosecutions. The first of these decisions, *United States v. Franks*,[50] like that of the Court of Military Appeals in *Wright*, noted the differences of scientific opinion surrounding the use of voiceprints but concluded that admissibility of expert opinion testimony was well within the trial judge's discretion. This court further noted that the defense was free to contest the admissibility of the evidence (which it had failed to do) and the weight to be given the testimony.[51]

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[48] *Id.* at 2204.

[49] *Id. See also* United States v. Sample, 378 F. Supp. 44 (E.D. Pa. 1974), a United States District Court probation violation hearing, where a voice spectrograph identification was admitted to prove the defendant's probation violation and to justify the probation revocation. Because the standard of proof at that hearing was the preponderance of the evidence, the court concluded there was no need for demanding the *Frye* standard for admissibility of evidence in a noncriminal proceeding. 378 F. Supp. at 53.

[50] 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

[51] 511 F.2d at 33 n.12.

The Fourth Circuit Court of Appeals read the *Franks* decision as indicating that the voice spectrograph technique had attained the "general acceptance" required by *Frye* and concluded that similar evidence was admissible in a case involving telephoned bomb threats.[52] The court's decision also relied on the state court cases which have allowed spectrographic evidence to be admitted, and on the wide discretion of the trial judge to admit evidence which is relevant to the case. Also important to the court's conclusion on admissibility were the precautions taken to guard against the prejudicial effects of scientific evidence; the ability of the defense to attack the evidence on cross-examination, the existence of other significant evidence and the use of carefully worded jury instructions.[53]

The state appellate courts which have considered the admissibility of voice spectrograph identification evidence in criminal proceedings after the Minnesota decision in *State ex rel Trimble v. Hedman* are those of New Jersey, Florida, Massachusetts and California. In *State v. Andretta*,[54] the New Jersey Supreme Court was again confronted with the problem of whether to order the defendants to submit voice exemplars pursuant to the unique procedure in that state requiring establishment of "general scientific acceptance of the voiceprint method" [55] *before* obtaining a defendant's voice exemplar. Without deciding whether the voice spectrograph technique satisfied the *Frye* standard, the court ordered voice exemplars from the defendants and directed the trial court to hold another hearing on that issue only if it were made necessary by positive voice spectrograph comparisons.

In *Andretta* the court discussed the evolution of the spectrograph process since the *Cary* case and concluded without commitment that:

> Certainly the voiceprint method today has much more support for its admissibility as evidence than at the time of *Cary*. . . . [A]nd the admission into evidence of . . . identifications in *Trimble* and *Raymond* demonstrates growing judicial acceptance. However, we need not decide at this time whether results of voiceprint analysis will be routinely admissible at trial.[56]

Two Florida cases illustrate use of the non-*Frye* standard of sci-

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[52] United States v. Baller, 519 F.2d 463 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).
[53] 519 F.2d at 466–67.
[54] 61 N.J. 544, 296 A.2d 644 (1972).
[55] *Id.* at 546, 296 A.2d at 645.
[56] *Id.* at 551, 296 A.2d at 648.

entific reliability, at least for the purpose of corroborating other evidence and identification. In *Worley v. State*,[57] the court reviewed the trial court's admission of a voice spectrograph identification labeling the defendant's voice as that of an unknown caller making false bomb threats over the telephone. This evidence corroborated aural voice identification, and the defendant's fingerprint on, and his presence near, the telephone booth from which one of the calls was made. In explaining that the Florida standard of scientific reliability had been properly followed by the court below, the appellate court deferred to the ". . .considerable discretion in the admittance of novel or experimental evidence, if they feel certain standards of scientific reliability have been attained," with which trial courts in the state are imbued.[58] However, it chose not to take a stand on whether this evidence standing alone would be sufficient to sustain a conviction.

> In our case the evidence against defendant was already ample to sustain his conviction, even without the use of voiceprints. Therefore, this decision must be limited by our facts. We hold voiceprints were properly admitted to corroborate defendant's identification by other means.
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> The issues not being before us, we do not decide if voiceprint identification may be employed only for corroboration, or, if voiceprint identification, standing alone, would be sufficient to sustain the identification and conviction of the defendant.[59]

While a concurring opinion in *Worley* argued for the admissibility of voice spectrograph evidence even without independent factual corroboration, a dissent considered such evidence a dangerous and unsafe mode of proof in any criminal trial.[60] In any event, approximately two months after *Worley*, another Florida court held in *Alea v. State*,[61] an extortion case, that voice spectrograph identification evidence was properly admitted by the trial court to corroborate aural identification and other facts. That decision expressly followed *Worley* and represents the current state of the law in Florida on the admissibility of voice spectrograph evidence in criminal proceedings.

Two recent Massachusetts decisions hold voice spectrograph identification evidence is admissible for corroborating other identifica-

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[57] 263 So. 2d 613 (Fla. App. 1972).
[58] *Id.* at 614.
[59] *Id.* at 614 (citation omitted).
[60] *Id.* at 615, 618.
[61] 265 So. 2d 96 (Fla. App. 1972).

tion evidence under the *Frye v. United States* standard of general scientific acceptance. The first and truly dispositive case is *Commonwealth v. Lykus*,[62] a kidnapping-murder-extortion situation where six aural voice identifications and other independent evidence were corroborated at trial by the examiner's positive voice spectrograph comparison between the defendant's voice and the voice making the taped extortion calls. That testimony was preceded by a voir dire hearing on the admissibility of the voice spectrograph technique. Two experts testified, one for, the other against the reliability of that technique.[63]

In approving the trial court's admission of a voice spectrograph comparison, the court discussed the history of voiceprint identification from its inception through the most recent periodicals critical of the technique. While approving the *Frye* standard of general scientific acceptability, the court pointed out that the standard applies only to those expected to be familiar with the scientific process involved, and that with the voice spectrograph identification process there was such general scientific acceptance among the experts in that field.

> Limited in number though the experts may be, the requirement of the *Frye* rule of general acceptability is satisfied, in our opinion, if the principle is generally accepted by those who would be expected to be familiar with its use.
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> . . . . . .
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> Examination of (1) the evidence as to admissibility presented before the judge, (2) judicial opinions from other jurisdictions, and (3) relevant scientific writings provides convincing proof to justify admission of the evidence. The considerable reliability proved by the [spectrography] experiment, the greatly added reliability induced by the application of further skills by the experienced examiner working under forensic conditions, and the totality of the evidence received at the voir dire hearing which tended to minimize the importance and weight of adverse or skeptical writings all serve to support a conclusion of general acceptability as required. . . .[64]

Another problem confronting the Massachusetts court in *Lykus* was its recent decision rejecting the admissibility of polygraph evidence in criminal proceedings,[65] the suggestion being that the subjective decisions of the voiceprint examiner make that process more

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[62] 75 Mass. Adv. Sh. 719, 327 N.E.2d 671 (1975).
[63] *Id.* at ___, 327 N.E.2d at 674.
[64] *Id.* ___, 327 N.E.2d at 677, 678.
[65] Commonwealth v. A Juvenile (No. 1), 74 Mass. Adv. Sh. 907, 313 N.E. 2d 120 (1974).

closely resemble polygraphy than fingerprint and handwriting analysis. In response, the court noted the voice spectrogram examiner merely compares voices while the polygraph examiner determines credibility and truth in testimony.

> Most important is the breadth of the inference urged from the reading of the respective machines. Relying in part on voice characteristics demonstrated and measured by the spectrograph, the examiner there seeks to do no more than compare voices. In contrast, from the measurements reflected by the polygraph, the examiner then extrapolates to arrive at a judgment of something not directly measured by the machine, that is, the credibility of the person examined. In so doing, polygraphic evidence, with its purported ability to discern truth in testimony, may constitute in any case, a force which intrudes far into the jury's most important functions of determining credibility of witnesses and finding facts. . . . For the reasons we have cited, that consideration does not lead us to exclude the voice identification opinions here nor to impose so restrictive a standard of admissibility as we applied to polygraphic evidence. . . .[66]

The court did, however, suggest caution in the use of the voice spectrograph identification technique alone to determine identification or an inference of guilt.[67]

The *Lykus* decision was followed rather summarily by *Commonwealth v. Vitello*,[68] a gambling laws violation case in which the spectrogram examiner gave his opinion that the voices of the six defendants were the voices of certain unknown individuals whose voices had been recorded.[69] Again the *Frye* general scientific acceptability standard was deemed satisfied by the testimony of an expert and the examiner. Voice spectrograph identification process for corroborative purposes was allowed.

In *State v. Olderman*,[70] the Ohio Court of Appeals considered whether a trial court's order that a defendant provide voice exemplars violated his constitutional rights. After holding that the order was valid, the court alluded to the *Lykus* decision and noted that "if properly qualified and shown to be reliable," the voice spectrograph

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[66] *Id.* at ___, ___, 327 N.E.2d at 674, 675.

[67] We add that the admission of expert testimony as to spectrographic analysis should be subject to the closest of judicial scrutiny, particularly in any case where there is an absence of evidence of voice identification other than that of the voiceprint of where, but for the voiceprint, there would be insufficient evidence to warrant any inference of the defendant's guilt. And, of course, as is traditional, once the voiceprint is admitted in evidence the jury may give it such weight as they deem proper.

Id. at ___, 327 N.E.2d at 679.

[68] 75 Mass. Adv. Sh. 69, 327 N.E.2d 819 (1975).

[69] *Id.* at ___, 327 N.E.2d at 827.

[70] 44 Ohio App. 2d 130, 336 N.E.2d 442 (1975).

evidence derived from the exemplars would be "admissible [at trial] for identification purposes only." [71] However, the court cautioned that the admission of recorded voice exemplars offered in the form of scientific spectrographic analysis must be corroborated by expert witnesses in order to meet the *Frye* standard.

More recently, in *Reed v. State* [72] the Court of Special Appeals of Maryland used the *Frye* test to "hold that spectrographic analysis evidence, under proper safeguards, is admissible in Maryland." [73] The court added that "spectrograms have now, in the words of *Frye*, . . . 'gained general acceptance in the particular field in which it belongs.' " [74] The Maryland court did, however, indicate that the trial judge should provide the jury with carefully worded instructions. The purpose of these instructions would be to ensure that the jury would not give undue weight to voice spectrographs because of their relative newness in the evidentiary area and that the jury would remember its obligation to accept or reject the expert's opinion and assign it to whatever weight it believes to be merited.

The California courts have had several occasions to consider the admissibility of the voice spectrograph identification process since the 1968 *People v. King* [75] decision rejecting admissibility. The first was *Hodo v. Superior Court*,[76] which denied a writ to prohibit the admissibility and use of voice spectrograph evidence to establish probable cause at a preliminary hearing. The evidence specifically contested was the expert testimony on the reliability and general scientific acceptance of the voice spectrograph identification technique and the opinion by a spectrogram examiner that the known voice of a juror and the recorded voice of the person calling a party litigant in a condemnation trial were that of the same person. The court identified the sole issue in the case as ". . .the admissibility of voice identification by the use of spectrographic recordings known as voiceprints." [77] It explained how the passage of time since *King* had changed the reliability and scientific acceptance of the voice spectrograph identification process:

> During the ensuing four years scientific research in this field has continued and the technique has received recognition in other juris-

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[71] *Id.* at 139, 336 N.E.2d at 448.
[72] 35 Md. App. 472, 372 A.2d 293 (1977).
[73] *Id.* at 483, 372 A.2d at 251.
[74] *Id.* at 483, 372 A.2d at 251.
[75] 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968). *See* text accompanying notes 29–30 *supra*.
[76] 30 Cal. App. 3d 778, 196 Cal. Rptr. 547 (1973).
[77] *Id.* at 781, 196 Cal. Rptr. at 548.

> dictions. Now, the record before this court indicates that the voiceprint identification is scientifically reliable and has gained sufficient acceptance in the scientific community to admit into evidence the opinion of an expert voiceprint reader.
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> . . . . . .
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> Based upon the record before the court in *King*, we would have no hesitancy in agreeing with the result reached in that case. However, four years have elapsed since *King* and further research in the field as related by [the expert witness] persuades us that the time has now come to accept this type of evidence in courts.[78]

The court applied the *Frye* scientific standard of general acceptance and held that the voice spectrograph identification technique is generally accepted by those experts in the field who are familiar with that technique.

> . . . [S]ince *King*, voiceprint identification has received general acceptance by recognized experts in the field who would be expected to be familiar with its use and has therefore reached the standard of scientific acceptance and reliability necessary for its admissibility into evidence. An impressive area of other jurisdictions has so held. Therefore, we hold, based on the record in the court below, that there was no error in receiving into evidence the testimony of [the examiner].[79]

Another California court was called upon in *People v. Law* [80] to review the admissibility of voice spectrograph evidence during a trial involving the use of a disguised voice to make threatening telephone calls. The court was troubled by what it considered the lack of general acceptance of the voice spectrograph technique in the scientific community. But it found it unnecessary to rule on the efficacy of the process as a whole. The court found, and the experts reluctantly agreed, that whatever the validity of spectrography, it had not been proven in the area of mimicked or disguised voices. Accordingly, it reversed that portion of the conviction predicated on

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[78] *Id.* at 783, 786, 106 Cal. Rptr. at 551.

[79] *Id.* at 790–91, 196 Cal. Rptr. at 553. Shortly after the *Hodo* decision, an attempt to introduce voice spectrograph evidence in a criminal proceeding was rejected by a California trial court in People v. Chapter, 13 Cr. L. Rptr. 2479 (Marin Cty. Sup. Ct., July 23, 1973). After reviewing the admission of voice spectrograph evidence by courts in other jurisdictions, the court found "[s]ubstantial lack of agreement within the scientific community that is concerned with audiology, speechhearing sciences and the other disciplines relating to the production, transmission, reception, reproduction of speech, speech analysis, speech recognition and speaker identification as to the usability, reliability and acceptability of 'voiceprints' (spectrography)." *Id.* It also commented upon ". . . a woeful presentation of the scientific evidence by the voiceprint experts in this particular case." *Id.*

[80] 40 Cal. App. 3d 69, 114 Cal. Rptr. 708 (1974).

the use of the voice spectrograph technique to identify the disguised or mimicked voice of the defendant.

In *People v. Kelly*,[81] the court admitted spectrographic identification evidence which was instrumental to the defendant's conviction for extortion. The intermediate appellate court noted that *Kelly* involved no mimicry or disguise and distinguished the *Law* decision on that basis. It then held that whether the technique has attained general scientific community acceptance is a question of fact which will be disturbed on appeal only if not based on substantial evidence.[82]

The California Supreme Court reversed the conviction, indicating that the state's process of proving "scientific acceptance" was deficient in at least three respects.[83] First, the court stated that the use of only one expert to show that the technique was generally accepted was error: "something more than the bare opinion of one man, however qualified, is required." [84] The court suggested that scientists opposed to the technique should have been called to give their opinion. More specifically, the court was concerned with the impartiality of a witness [Lt. Ernest Nash of the Michigan Police Department] who had "built his career" on the validity of the technique, and the use of a technician to testify as both a technician and a scientist. Because Lieutenant Nash was a technician rather than a scientist, and presented testimony on the technical rather than the scientific merits of the spectrograph technique, the state had failed to show acceptance by those who are engaged in the scientific field. The court held the error to have been significant and reversed the conviction because the prosecution failed in its "burden of establishing the reliability of voiceprint evidence." [85] The decision did not foreclose the introduction of voiceprint evidence, but merely limited the admissibility of such evidence until there is demonstrated scientific approval and support. This opinion places yet another gloss on the question of whether voice spectrograph evidence, and indeed any scientific evidence is admissible in court. To establish the "gen-

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[81] 49 Cal. App. 3d 214, 122 Cal. Rptr. 393 (1975).
[82] *Id.* at 219, 229, 122 Cal. Rptr. at 398, 399.
[83] People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).
[84] *Id.* at 37, 549 P.2d at 1248, 130 Cal. Rptr. at 152.
[85] *Id.* at 40, 549 P.2d at 1251, 129 Cal. Rptr. at 155. *See also* Commonwealth v. Topa, ___ Pa. ___, 369 A.2d 1277 (1977), where the Pennsylvania Supreme Court held testimony relating to identification by voice spectrography to be inadmissable. The court held that the technique did not meet the *Frye* standard, and that the testimony of Lieutenant Nash alone was insufficient to permit the introduction of the evidence.

eral scientific acceptance" of such material, not only must the relative merits and demerits of a proposed test be exposed by the party seeking to introduce the evidence, but the expert may fail to substantiate the scientific acceptance of a test if he is too partial an advocate or if he speaks merely as a technician and not as a scientist.

These new tests place a considerably heavier burden on the state when it attempts to have certain material admitted into evidence. Whether the requirement that the state produce witnesses who oppose or question the technique is an appropriate burden in an adversary system is one for other commentators to consider, but the California court's other requirements may be fertile grounds for other counsel to investigate. For example, even where a test had obtained the requisite scientific acceptance to produce admissible evidence, the expert's status as a proponent of the system or his status as a technician rather than a scientist may become grounds upon which counsel may base his motion to exclude the testimony or scientific evidence.[86]

Current case law generally allows the admission of spectrographic voice identifications into evidence during the pretrial stages of criminal proceedings. For example, such evidence may be the sole basis for making the probable cause determination which will result in the issuance of a search or an arrest warrant or the determination that certain material may be admitted into evidence during a preliminary hearing. During the trial itself, however, the precedents lead to no consistent rule. Three separate and distinct trends have emerged.

The first, which dates from the 1966 and 1967 decisions in the military case *United States v. Wright*, concentrates primarily on the qualifications of the witness himself under applicable expert witness rules rather than on the traditional "general acceptance in the [scientific] field" test first enunciated in *Frye v. United States*. The *Wright* test admits the expert's conclusions and permits the fact finder to determine the weight to be given to the testimony.

A second group of cases considers the voice spectrograph technique in light of the *Frye* standard which demands that a scientific

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[86] *But see* United States v. Sanchez, 50 C.M.R. 450, 454 (A.F.C.M.R. 1975):

> We are also satisfied that the evidence sufficiently established that degree of expertise necessary to qualify the OSI agent to express his opinion based upon the test results and his own trained senses of smell and observation as to the nature of the substance. *Although not a trained chemist*, the OSI agent had considerable experience in dealing with marihuana and had received specialized training in the performance of chemical tests to analyze suspected contraband.

Id. (emphasis added).

test have "gained general acceptance in the particular field to which it belongs" before evidence derived from the test is admissible as evidence in a criminal proceeding. An increasing number of state supreme courts and federal district courts have held that the voice spectrograph technique meets this test. In addition two federal circuit courts of appeals have so held.

A third group of cases holds that voice spectrography has not yet met the *Frye* standard. The first of these cases, a decision of the Circuit Court of Appeals for the District of Columbia Circuit, was based on that court's hesitancy to overrule a recently decided case without en banc reconsideration of the issue. The other case, decided by the Supreme Court of California, held that the state had not proven that the test met the *Frye* standard because the testimony of one particular witness was not sufficient to establish the scientific validity of the test, and because that one witness was not properly qualified to give expert testimony concerning the scientific merits of the test.

Despite these three formal distinctions between the cases, the courts are more willing to admit voice spectrograph evidence when it corroborates other circumstantial or direct evidence, than when it forms the sole basis for identifying the alleged perpetrator of the crime. The technique has repeatedly demonstrated a high degree of reliability under controlled conditions, and is of great value in both the investigation and prosecution of criminal offenses. This value is being increasingly recognized by the courts' admission of spectrographic related testimony into evidence, and is a trend that trial attorneys should acquaint themselves with.

BOOKS RECEIVED *

1. Cahn, Theodore, *Forced Integration*. New York, N.Y.: CM Press, 1977. Pp. 27. Cost: $1.00 softbound.

2. Collin, Richard, *The Delorenzo Gambit: The Italian Coup Manque of 1964*. Beverly Hills, California: Sage Publications, Inc., 1976. Pp. 68. Cost: $3.00 softbound.

3. Cortese, Charles F., *Modernization, Threat and the Power of the Military*. Beverly Hills, California: Sage Publications, Inc., 1976. Pp. 64. Cost: $3.00 softbound.

4. Gross, Beatrice and Ronald, *The Children's Rights Movement*. New York: N.Y.: Anchor Press/Doubleday, 1977. Pp. 390 softbound.

5. Gurr, Grabasky & Hula, *The Politics of Crime and Conflict*. Beverly Hills, California: Sage Publications, Inc., 1977. Pp. 792. Cost: $35.00.

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7. Hurst, Walter E. *Copyright*. Hollywood, California: 7 Arts Press, 1977. Pp. 284. Cost: $10.00 softbound.

8. Johnson, L. Gunnar, *Conflicting Concepts of Peace in Contemporary Peace Studies*. Beverly Hills, California: Sage Publications, Inc., 1976. Pp. 63. Cost: $3.00 softbound.

9. Luttwak, Edward N., *Strategic Power: Military Capabilities and Political Utility*. Beverly Hills, California: Sage Publications, Inc., 1976. Pp. 72. Cost: $3.00 softbound.

10. Romero-Maura, *The Spanish Army and Catalonia: The "Cu-Cut! Incident" and the Law of Jurisdictions, 1905–1906*. Beverly Hills, California: Sage Publications, Inc., 1976. Pp. 32. Cost: $3.00.

11. Warren, Earl, Chief Justice, *The Memoirs of Earl Warren*. New York, N.Y.: Doubleday, 1977. Pp. 394. Cost: $12.95.

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* Mention of the work in this section does not preclude later review in the *Military Law Review*.

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