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# MILITARY LAW REVIEW VOL. 75

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AGAINST THE ARMY

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## MILITARY LAW REVIEW

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

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# MEDICAL MALPRACTICE CLAIMS AGAINST THE ARMY\*

Colonel Frank W. Kiel \*\*

## I. INTRODUCTION

Claims against the Government are an indicator of the quality of medical care.<sup>1</sup> This measure is a crude one, but it does represent the unsatisfied patient, sufficiently disturbed to go through the effort involved in actually filing a claim. Thus, it goes beyond the restive patient suffering in silence, or writing letters to the commander, or seeking out the ombudsman.<sup>2</sup> On the other hand, it also excludes the injured patient who assumes the injury as a risk of the system, suffering silently or assuaged by good doctor-patient rapport.

In 1973 a report published by the U.S. Department of Health, Education, and Welfare (HEW)<sup>3</sup> showed that malpractice claims in

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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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<sup>1</sup> See Cosman, *Medieval Medical Malpractice — The Dicta and the Dockets*, 49 BULL. N.Y. ACAD. MED. 22-47 (1973). The author examines 14 recorded malpractice cases of the 14th and 15th centuries to demonstrate the nature of medieval medical and surgical practice. The cases permit disease and treatment to be examined from three separate vantage points: that of the patient, the practitioner, and the professional peers of the guild who sat in judgment. By studying the negative, malpractice, the author is able to define the positive, good medical practice.

<sup>2</sup> In order to provide the patient with assistance in obtaining answers to his inquiries or complaints about medical treatment or services rendered. Patient Assistance Offices have been established at many medical treatment facilities. As part of the high priority Ambulatory Patient Care Program, a model Patient Assistance Officer has been recommended. See U.S. Army Health Services Command, APC Model #23, July 1974. Three significant functions of the patient assistance officer or ombudsman, the term more often used in civilian hospitals, are: (1) resolution of patient questions and complaints by direct intercession with the medical staff elements involved; (2) identification of problem areas by analysis of the questions and complaints received; and (3) provision to the commander of timely information on patient-perceived difficulties. The Patient Assistance Officer, therefore, is an alternative to the malpractice claim.

<sup>3</sup> U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, MEDICAL MALPRACTICE—REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973) [hereinafter cited as HEW MALPRACTICE REPORT].

the federal sector had increased 255 percent between 1968 and 1971.<sup>4</sup> Military medical facilities were not immune from this phenomenon, experiencing a similar increase in malpractice claims.<sup>5</sup> The Army cases form a variegated group and many are characterized by cryptic histories and unknown outcomes. The statistics showed increasing numbers of claims which evidenced a problem that required correction. Incomplete case files complicated the situation by preventing adequate follow-up and corrective procedures at the local facility.

An attempt to correct the malpractice trend was needed. Although the *HEW Report* recommended nine ways to reduce medical malpractice claims,<sup>6</sup> none was of the direct, problem-oriented, corrective-action type. Using a case list produced by the Legal Medicine Section of the Armed Forces Institute of Pathology (AFIP)<sup>7</sup> as a start, the author made malpractice claims a subject of

<sup>4</sup> Civilian experience in the same period also indicated an increasing frequency of claims. The National Planning Association Survey of Malpractice Insurers (dealing with practitioner experience) showed claims opened increased from 18,200 in 1966 to 32,900 in 1970, an 81% increase. The American Hospital Association reported the number of malpractice claims filed against hospitals increased from 4,395 in 1967 to 7,738 in 1970, a 76% increase. *HEW MALPRACTICE REPORT*, *supra* note 3, app. at 29, 511, 610.

<sup>5</sup> Claims Received by Army Claims Service

1967	1
1968	18
1969	37
1970	45
1971	46
1972	45
1973	67
1974	68
	327

Malpractice Claims—1967 to Present, a study prepared by the U.S. Army Claims Service, Fort Meade, Maryland in February 1975. The year represents the date the claim was received at the Fort Meade Central Office, not the time of the incident or the time of the local filing. Duplicate claims arising from the same incident have been eliminated. Two claims transferred to other services are also subtracted. There are 20 cases within this listing (Puerto Rico 4, Germany 2, Sandia Base 4, Army-Navy Hospital 1, CHAMPUS incident 1, AFEEs 8) which are unrelated to U.S. Army Health Services Command activities, and which will not be further considered in this article.

<sup>6</sup> These recommendations to reduce malpractice claims were: (1) Establish good rapport with patient; (2) Physicians' continuing education; (3) Seek consultation when diagnosis is doubtful; (4) Transfer patient if facility is inadequate; (5) Good records on accidents, suicides, drug problems; (6) Hospital injury prevention program; (7) Accurate, legible medical records; (8) Informed consent on chart; (9) Attend medico-legal seminars. *HEW MALPRACTICE REPORT*, *supra* note 3, app. at 37.

<sup>7</sup> This listing was developed in conjunction with other preparations for a briefing to the Army Deputy Surgeon General in December 1975.



inquiry during consultant staff visits to Army medical facilities in 1974. The purpose of the study was to determine what problems had arisen at each medical treatment facility and how each commander was dealing with current cases.<sup>8</sup>

## II. DESIGN OF STUDY

The cases pertaining to each command were extracted and given to the commander of each medical treatment facility of the U.S. Army Health Services Command (HSC) prior to the consultant's visit.<sup>9</sup> Answers to the following questions were sought: (1) Is the information in the extract correct? (2) Is more information on the cases available locally? (3) Are there other claims cases not on the list? (4) What was the outcome of the claim? (5) Was corrective action forthcoming as a result of the incident? During the consultant's visit, the cases were discussed with the individual whom the commander considered to be most knowledgeable with respect to each case and the consultant was apprised of the extent to which the hospital command group was kept informed about claims. The use of information filed with the Army Claims Service was intentionally avoided in the first year of the study because the main effort was to discover what the local commander knew and did about claims.

## III. KNOWLEDGE OF MALPRACTICE CLAIMS AT LOCAL MEDICAL FACILITIES

All subordinate units of the HSC were contacted during 1974 with the exception of Valley Forge General Hospital which was in the process of closing. Interest in the subject of malpractice claims varied from extensive to none, although the increasing magnitude of the malpractice claim problem was well known to all.

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\* Previous articles dealing directly with Army experiences with malpractice cases include *Professional Liability Involving Physicians in Federal Government Service*, 165 J. AM. MED. ASS'N 363 (1957); Cumming, *The Staff Judge Advocate as Legal Adviser to the Post Surgeon—Malpractice, Hospital Negligence and Related Matters*, 49 MIL. L. REV. 109 (1970); Levin, *The Army Surgeon General's Office and Malpractice Litigation under the Federal Tort Claims Act*, 128 MIL. MED. 1071 (1963).

<sup>9</sup> The U.S. Army Health Services Command (HSC) in 1974 was an operating headquarters for health care delivery for the Army Medical Department, having eight medical centers and 38 medical activities (most with inpatient facilities) under the Command.

*A. CORRECTNESS OF THE INFORMATION IN AFIP SERIES*

Because the claims had been filed between 1968 and 1973, and some of the incidents antedated 1968, many units had difficulty confirming the extracted cases. Clinical records on file in patient administration sections are retired at two years,<sup>10</sup> and consequently many of the cases were unfamiliar to local hospital personnel. In those instances where records were available, there was a high correlation between the clinical records and the case listings.

*B. ADDITIONAL CASE DETAIL AVAILABLE LOCALLY*

If the clinical record was available, considerable details could be obtained, although frequently there was no suggestion in the written record of any untoward event that would foreshadow the later claim.<sup>11</sup> The transient nature of the professional staff in military hospitals minimized the occasions in which any individual had personal familiarity with the incidents.

*C. OTHER CASES KNOWN LOCALLY*

At those installations with a Staff Judge Advocate Claims Office (particularly where a long-term civilian employee was present) which had maintained records over the years, it was not uncommon to have additional cases added to the series. These included a few claims that had been settled locally which were beneath the mone-

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<sup>10</sup> Clinical record files and outpatient files are sent to the National Personnel Records Center in St. Louis for retention at periods prescribed by Army Regulation. See Army Reg. No. 340-18-9, Maintenance and Disposition of Medical Functional Files, at 25 (C9, 21 Sept. 1976) [hereinafter cited as AR 340-18-9]. Clinical records at medical treatment facilities other than teaching centers are retired one year after the end of the year in which the last medical treatment was given. DD Form 877 (Request for Medical/Dental Records or Information) may be submitted to the Records Center in lieu of the primary record copies, indicating retention at the local level in accordance with paragraph 4-10e(2) of Army Regulation No. 340-1. This procedure will facilitate proper retirement of files in accordance with AR 340-18-9, and at the same time allow for retention of a record on a loan basis for the length of time deemed necessary by the medical treatment facility.

<sup>11</sup> In a claim for urinary tract infection allegedly due to the use of unsterile instruments, review of the clinical record shows a conventional bilateral tubal sterilization operation and the note "her post operative course was completely uncomplicated," with no suggestion of a urinary tract infection. In another case, a claim for a poor result from a leg-shortening operation was filed by a patient who had had childhood poliomyelitis and had developed a leg length discrepancy. She had an operation to remove 5 cm of femur which would permit her to straighten the leg. The clinical record states she did "very well postoperatively" and that the "prognosis of the patient is excellent." There is no indication in the record of anything other than the anticipated improvement.

tary threshold limitation<sup>12</sup> and also included other major cases that had eluded the list. At those installations with transient claims officers and with no retention of clinical records over two years, it was uncommon to gain additional cases.

#### D. OUTCOME OF THE CASES

Because of the time-consuming nature of the claims process, interest in the case wanes, particularly as the medical individuals involved move away. With few exceptions, knowledge about the outcome of claims (or litigation) was unusual. Most units attempted to obtain these answers for the consultant by telephoning the Army Claims Service.

#### E. CORRECTIVE ACTION TAKEN AS RESULT OF INCIDENT

The general lack of knowledge about the claims filed reflects itself in the paucity of cases in which any corrective action was instituted. Procedural manuals and standard operating procedures were occasionally changed to counter defects in the system. In answer to the question "Could the same incident occur tonight?" the response was often affirmative. No instances of disciplinary action were found, and only one physician is known to have had his operating privileges curtailed.<sup>13</sup>

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<sup>12</sup> Authority has been delegated to the commander or the staff judge advocate of any command authorized to exercise general court-martial jurisdiction to settle claims up to \$5,000. Army Reg. No. 27-20, Legal Services—Claims, para. 4-15b(1)(a) (C5, 25 Nov. 1974) [hereinafter cited as AR 27-20]. For example, after the birth of a baby, the mother complained of a malodorous vaginal discharge for several days. Examination after that time revealed a surgical sponge had been left behind in the vagina after delivery. A claim for damages was settled locally for \$1,000. *Cf. Dobbins v. Gardner*, 377 S.W.2d 665 (Tex. Civ. App. 1964). In that case, on the day after gynecologic surgery, a gauze packing was removed from the vagina according to the hospital routine. After a few days, a stench developed which so embarrassed the patient that she avoided her fellow law students as much as possible. Reexamination 16 days after the operation disclosed a second unexpected gauze packing in her vagina. Compensation was deemed appropriate for the humiliation and embarrassment as genuine and significant elements of damage.

<sup>13</sup> At a small hospital, a young surgeon performed a colon transplant for cancer of the esophagus; however, the transplant also had tumor in it, negating its value. Later, this same surgeon did an exploratory thoracotomy for consolidation in a lung; the whole lung was removed but only one ligature was placed on the pulmonary artery (instead of the standard double ligature). Postoperatively, the patient bled to death from the leaking stump of the pulmonary artery. No claim was filed, but the commander discontinued chest surgery at this hospital and restricted the surgeon to certain named procedures considered within his level of skill.

### F. POINT-OF-CONTACT FOR MALPRACTICE CASES

The individual designated as the knowledgeable point-of-contact on medical malpractice cases was found in a number of different administrative positions. Some large medical centers have their own staff judge advocate; more commonly the post judge advocate was the contact. At certain hospitals, the chief of the patient administration section was the point-of-contact, while in other hospitals it was the chief of professional services, the deputy commander or the commander himself. Although the staff judge advocate always had some role in the claims investigation process, he rarely was sufficiently involved in hospital affairs to serve a role in the corrective action process desirable after a claim surfaced.

### G. EXTENT TO WHICH HOSPITAL COMMAND IS INFORMED ABOUT CLAIMS

Claims do not go through medical channels or command channels, but through legal channels. Claims need not even be filed in the locality of the hospital concerned.<sup>14</sup> Although information could usually be found by the local claims office if an inquiry were initiated, information about new cases was infrequently communicated to the hospital command group, and a recurrent report on the progress of the case was rare.<sup>15</sup>

## IV. MEDICAL MALPRACTICE CASES BY SPECIALTY AREAS

Dividing the cases among various categories reveals that a majority of claims originated in the surgical fields,<sup>16</sup> but no category was

<sup>14</sup> The regulation merely provides that a "claim must be presented to an agency or instrumentality of the Army." AR 27-20, para. 3-8b (C5).

<sup>15</sup> The best positive feedback system was found at Walter Reed Army Medical Center where the deputy commander maintained a desk-side notebook containing all cases currently active against the organization, each case having a one-page synopsis (name and social security number of patient; medical service and doctors involved; date and basis of case; date claim submitted; miscellaneous information). Updates on the status of the cases were supplied every two months by the post claims office. The material was used for instructional purposes at the monthly education and training conference for physicians.

<sup>16</sup> Malpractice Cases by Type of Care, 1967-1974

Type of Service	Army Cases	Army Series, %	HEW Series, %*
Surgical . . . . .	157	56.9	57.2
Orthopedic . . . . .	58	11.2	18.0
Cardiovascular . . . . .	3	0.9	1.8
Gastrointestinal . . . . .	18	5.3	11.5
Gynecological . . . . .	36	10.6	10.3
Obstetrical . . . . .	39	7.4	3.1
Other Surgical . . . . .	52	11.5	9.2

immune.<sup>17</sup>

While the monetary aspects of claims are often disparaged, it cannot be denied that the cost to the federal fisc is considerable. Even though initial claim amounts are often inflated to allow leeway for compromise, final claim settlements may also overvalue the claim inasmuch as they reflect the perceived extent of government exposure. A major component of this exposure is the chance that the case might result in a verdict against the Government if it went to litigation. Many other factors, such as nonavailability of defense witnesses or uncertainty of the law concerning the particular subject, also influence the decision to settle a claim.

#### A. SURGICAL TREATMENT<sup>18</sup>

As diagnostic and technical procedures have improved, so also have patient expectations increased. A poor result still occurs occasionally, and if the patient was not sufficiently informed about the operation and its probable results, a disappointed patient may be prone to file a claim against the Government. Failures of the medical system, whether results of inadvertent forgetfulness or overreaching self-confidence, have produced harm for patients and have led to cases. Many of the problems related to surgical treat-

Medical .....	66	19.5	20.5
Psychiatric .....	16	4.7	1.5
Cardiovascular .....	9	2.7	1.4
Other Medical .....	41	12.1	17.6
Radiological .....	25	4.4	5.1
Diagnostic .....	19	5.6	5.2
Other Radiological .....	2	0.6	0.9
Pathological .....	15	4.4	1.6
Anatomic .....	8	0.9	1.1
Other Pathological .....	12	3.5	0.5
All Other Treatment .....	50	14.8	14.6
Emergency .....	9	2.7	3.8
Vaccinations .....	4	1.2	1.2
Other Treatment .....	37	10.9	7.6
Total .....	559	100.0	100.0

\* Source: HEW MALPRACTICE REPORT, *supra* note 3, at 9.

<sup>17</sup> In order to place the claims under discussion in proper perspective, the number of patients treated must be known. The patient care mission of the Army Medical Department in the period under study shows that the average number of beds occupied in Army hospitals (on a daily basis) in the continental United States varied from a high of 15,131 in 1969 to a low of 8,093 in 1973. The average daily dispensary and clinic visits in Army hospitals and clinics in the continental United States varied from 53,328 in 1970 to 46,978 in 1973. U.S. DEP'T OF ARMY, OFFICE OF THE SURGEON GENERAL, ARMY MEDICAL DEPARTMENT ANNUAL CHART BOOK 30, 41 (1973).

<sup>18</sup> The categories adopted in this study are those used by the Secretary's Commission on Medical Malpractice, so that the Army experience may be compared statistically with the civilian experience for the year 1970. See note 16 *supra*.

ments cross sub-specialty lines and will be noted without particular regard to the type of operation.

### 1. Failure to Diagnose

Delayed diagnosis of illness was particularly prevalent among the claims involving orthopedic<sup>19</sup> and gastrointestinal<sup>20</sup> surgery. Although an alleged failure of diagnosis of a patient's illness is a ground for a professional liability claim, the failure to correctly diagnose does not in and of itself constitute negligence. The legal gravamen of any claim is not that a diagnosis is incorrect, but rather that reasonable skill and care were not applied to the particular patient's situation.<sup>21</sup> In the orthopedic sub-specialty, the failure to promptly diagnose spine fractures or herniated disks provoked several claims; and almost half the cases involving gastrointestinal surgery alleged delays in diagnosis. Fortunately the medical facilities involved often instituted corrective procedures and techniques to prevent recurrences of the delays.

In one case, a delay in diagnosing a ruptured Achilles' tendon resulted in the necessity of corrective surgery, and the patient submitted a claim for \$50,000 which was settled for \$5,000. As a result of the incident, the hospital created a pre-operative conference consisting of all the staff orthopedic surgeons. This group meets periodically and reviews all pre-operative patients as well as all problem cases.

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<sup>19</sup> Orthopedic treatment generated 38 cases (11% of Army cases as opposed to 19% in the HEW series) of which 20 were paid for a total of \$345,715; 15 were denied and 3 are pending. These cases involved 11 cases of fracture/disc herniation—failure to diagnose/treat; 2 cases of Achilles' tendon tear—failure to diagnose; 5 cases of fracture treatment—poor result; 1 case of fracture treatment—tight cast injury; 5 cases of congenital deformities—failure to treat; 2 cases of back surgery—operative complications; 3 cases of carpal tunnel surgery—poor results; 2 leg shortening operations—poor results; 3 other orthopedic procedures—poor results; 2 cases of infection after treatment; and 2 cases of operation at wrong site.

<sup>20</sup> Gastrointestinal surgery generated 18 cases (5 1/2% of Army cases as opposed to 11 1/2% in the HEW series) of which 12 were paid for \$280,840; 3 were denied and 3 remain open. The cases can be broken down into the following categories: failure to diagnose appendicitis, 4; failure to diagnose cancer, 2; failure to diagnose bowel obstruction, 1; retained surgical item, 2; puncture of bowel, 2; bowel entrapment with steel suture, 1; liver rupture during laparotomy, 1; other surgical procedures, 5.

<sup>21</sup> See, e.g., *Price v. Neyland*, 320 F.2d 674, 677 (D.C. Cir. 1963): "The law . . . does not impose liability on a physician for mistake in diagnosis or error in judgment except where that mistake or error results from failure to comply with the recognized standard of care exercised by physicians [under similar circumstances in the general geographical area]."

Two cases involving dependent children readily suggest corrective procedures to avoid recurrences. One young girl was seen at a hospital on Saturday and Sunday but obtained no significant diagnosis. On Monday, doctors diagnosed the condition as appendicitis and removed a ruptured appendix. The child died. No weekend clinical records could be found although the laboratory file copy noted an elevated white blood cell count. In this situation a \$100,000 claim was submitted and was eventually settled for \$1,500. Corrective procedures which would upgrade the record-making or filing systems and improve the weekend call procedures readily suggest themselves.

In one case in the eye-ear-nose and throat area, a three-year-old was examined for problems with his vision. Diagnosis was strabismus (cross-eye) and an ophthalmologist saw the boy four times before the family was transferred to Germany with advice to continue treatment. A year later, the boy went blind in one eye and a craniopharyngioma in the pituitary region was discovered and removed. In assessing the claim that was made for \$600,000, there was expert opinion that x-ray studies of the head were indicated and could have revealed the tumor earlier.<sup>22</sup>

## 2. Failure to Treat

Unlike a failure to diagnose, failure to treat is a judgmental decision which rarely leads to liability. Subtle fractures and congenital deformities have led to claims. Some cases are precipitated by another physician's proceeding with treatment which the original military physician had previously declined to use. For example, at the six-week checkup, a baby boy's foot problem was discovered, but definitive treatment was not considered to be indicated at that time. A civilian doctor did treat the infant, however, utilizing a foot brace. A claim for \$65.00 to cover the cost of the brace was submitted and was paid.

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<sup>22</sup> The requirement to take additional x-rays raises the spectre of defensive medicine, with the connotation that actions were motivated primarily by the desire to avoid malpractice liability. This is not true in this case, however, because such x-rays represent good medical practice and should not have been foregone in the first place. If a doctor's primary concern is to provide the best quality of medical care, he is likely to order any test which is indicated. Whether the suspected benefits from a test are sufficient to justify the cost and the discomfort of the test is for the physician to decide, but it is difficult to justify omission of a test on economic grounds alone. Just as defensive driving is appropriate for motorists, similarly defensive medicine is appropriate for physicians if occasionally the result leads to a diagnostic or therapeutic change that is helpful to the patient. Bergen, *Defensive Medicine Is Good Medicine*, 228 J. AM. MED. ASS'N 1188 (1974).

### 3. Mishaps in the Operating Room

#### a. Informed consent

Elective surgical procedures require the patient's informed consent which can only be obtained after full disclosure of the likely results, including the more common adverse sequelae.<sup>23</sup> A thorough discussion of these potentialities, often necessary to counter too sanguine a preoperative proposal, may produce ironic legal consequences. For example, if the particular occurrence is sufficiently unlikely that it need not be discussed in obtaining the patient's informed consent, it is quite possible that the occurrence of such an event may be attributed to negligence.<sup>24</sup>

#### b. Lapse in operating room procedure

Certain errors in the surgical process are completely preventable and can rarely be justified when they occur. One such category of

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<sup>23</sup> Informed consent is evolving from the "standard of practice" as determined by physicians to the "rule of reasonableness" as determined by the courts. The physician still has the exclusive role of making the medical decision on what treatment is recommended to the patient. However, the patient then has the right to make the final determination for himself. The essence of the informed consent doctrine is that the patient has the right of self-determination, he has the right to refuse the doctor's recommendation. See Mills, *Whither Informed Consent?*, 229 J. AM. MED. ASS'N 305 (1974). The extent of the physician-patient discussion on risks of a proposed treatment has been defined by stating that "a risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy." *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972). The *Canterbury* case involved spinal surgery in which a 1% risk (paralysis after laminectomy) was not disclosed to the patient by his surgeon; the court stated it should have been. See also Knapp & Huff, *Emerging Trends in the Physician's Duty to Disclose—An Update of Canterbury v. Spence*, 3 J. LEGAL MED. 41 (1975).

<sup>24</sup> Surgery for lumbar disc herniation has become standardized to the point that operative fatalities are rare. Deaths that do occur are usually unrelated to the disc procedure and involve postoperative myocardial infarction or pulmonary embolism. There are some deaths, however, which are a direct result of surgery, of which great vessel injury represents the largest group. If the rongeur or curet used to cut away the disc material pierces the anterior rim of the disc, it immediately impinges on the blood vessels which lie just anterior to the spine, and massive hemorrhage may occur. One large retrospective questionnaire study discovered 106 such operative accidents, with a 47% mortality. For proper perspective, however, it should be noted that there was only one case in 6000 disc operations in the questioner's own hospital series. DeSaussure, *Vascular Injury Coincident to Disc Surgery*, 16 J. NEUROSURGERY 222 (1959).

The first reported case of ureteral injury during operation on a lumbar disc was reported by Army physicians at Fitzsimons Army Medical Center. The ureter lies adjacent to the 4th lumbar intervertebral disc and is subject to injury by an anteriorly wandering surgical instrument. Borski & Smith, *Ureteral Injury in Lumbar-Disc Operation*, 17 J. NEUROSURGERY 925 (1960).



cases involves operating on the wrong limb or digit,<sup>25</sup> and military medical practice is not immune from such incidents. One patient at a military hospital developed a sesamoid bone in the flexor ligament of the great toe on one foot which was causing irritative symptoms. Surgical removal of the bone was recommended. In the hospital on the night before surgery, the unimpaired foot was "prepped" for the operation, but the patient made no complaint. The next morning the patient hypnotized herself as the anesthesia means, so there was no pre-operative discussion with the surgeon. The operation was performed on the wrong foot and when the mistake was discovered the next day, a second operation on the correct foot was suggested and performed. Postoperative doctor-patient relationship deteriorated and a claim for \$100,000 was filed. The professional advisor in this case, when asked to estimate the damage caused by the mistake, postulated some limitation of locomotion, valued at approximately the cost of a new car in 1970. The claim was settled for \$3,000. Corrective action at the hospital included having x-ray films, labeled left and right, hanging in the operating room during surgery so that the surgeon might confirm the location of the affected part.

In another case, this time involving neurosurgical treatment, a patient obtained no relief after her initial cervical disk surgery. Further x-rays indicated that the surgery had been performed at the C4-C5 level instead of at the planned C6-C7 level. The claim for \$350,000 was settled for \$55,000. Of practical importance in this case was the fact that a letter from the surgeon to the patient admitting the mistake handicapped the government attorney's negotiations for settlement.

Other obvious lapses in surgical techniques included several instances of surgical residue. In both gastrointestinal and thoracic operations a sponge has been left in the patient, and in a gastrointestinal operation a needle was left in tissues after hemorrhoidectomy.

*c. Errors committed by assistants*

Associates at the performance of surgery may be responsible for some incidents, such as the circulating nurse who miscounts sponges, or the retractor holder who leans on the chest or the anes-

<sup>25</sup> Lane v. United States, 225 F. Supp. 850 (E.D. Va. 1964). There the court held that an operation upon the patient's right, rather than left knee constituted actionable negligence under the Federal Tort Claims Act and not an "assault" for the purposes of 28 U.S.C. § 2680(h).

thetist who overmedicates. In one case a patient having an appendectomy received four drugs in combination from the nurse-anesthetist, which accumulatively were excessive and caused the patient to undergo cardiac arrest. Although the patient was resuscitated within two minutes, treatment in the recovery room was marked by overhydration with fluids, which caused increased brain pressure and subsequent convulsions. As a result of these problems the individual eventually died in a nursing home. A claim on his behalf in the amount of \$1,150,000 was settled for \$113,740.

*d. Failure of mechanical devices during operations*

Many specialized surgical techniques, particularly those involving cardiovascular surgery<sup>26</sup> are dependent on complex mechanical equipment. Fortunately most of these operative procedures are characterized by close medical attention and stringent awareness of hazards, but the mechanical equipment may fail or function improperly. During heart surgery on the mitral valve, the electrical system failed, stopping the heart pump. The pump was quickly converted to manual operation, but in the process the tubes were rearranged incorrectly causing a back flow of blood which led to the patient's having a stroke resulting in right-side paralysis. A claim against the manufacturer was instituted<sup>27</sup> and corrective action was taken with the installation of an emergency electrical system so that manual operation would not be necessary.

Even the less sophisticated operating room machinery can cause untoward incidents. In the recovery room after uncomplicated surgery a nurse underwent cardiac arrest. She was resuscitated, but there was permanent brain damage to such an extent that she no longer recognizes her children and must have assistance to walk. Investigation suggested that an ungrounded electrical suction machine may have been at fault. After this incident, which was settled by establishing a \$225,000 trust fund to pay for the patient's nursing home care,<sup>28</sup> safety-grounded electrical outlets were installed to prevent any recurrence.

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<sup>26</sup> Cardiovascular surgery involved only three claims, of which two were paid for a total of \$16,000 and one was denied. The claims evolved from incidents involving pump failures during heart surgery, foreign body reaction to an aortic graft and overly tight bandaging after varicose vein surgery.

<sup>27</sup> No claim was filed against the Government. Prompt investigation of the incident at the hospital disclosed a product liability situation. Information was made available to the patient's attorney, and a claim against the Government was prevented. Concealment of the incident would have resulted in alterations to the machine which would have destroyed product liability evidence.

<sup>28</sup> A trust fund in a Boston bank pays the costs of her care. Upon her death, the

#### 4. *Poor results after treatment*

Poor results after surgical treatment can and do occur, and despite the fact that guaranteed results are not assured with medical treatment, successful claims are common. In the case of a 52-year-old veteran who had broken his lower right leg, surgical reduction was not a suitable treatment because the individual was a chronic alcoholic. Nonsurgical manipulation of the fracture was accomplished, but healing was slow and a 5° malalignment developed. Although the result was considered functionally acceptable by the staff and a civilian consultant, a claim for \$150,000 was made, initially disapproved, and later settled for \$3,000 by the Department of Justice. Because the clinical record contained no indication of a pre-reduction or after-casting x-ray, corrective action was taken to make such films routine in future cases, and official readings were required to detect incipient malalignment.<sup>29</sup>

Another potential post-operative problem is the possibility of infection. Because infection after a surgical procedure is a recognized risk of any such treatment, claims are typically denied. For example, after a hip graft operation, infection supervened, requiring prolonged treatment. A claim for \$1,000,000 was denied because the filing was more than two years after the surgery. When the claim was amended to charge inadequate antibiotic treatment of the infection, consideration of the action was reinstated. This incident illustrates the fact that if claimants can shift the allegation of negligence from the occurrence of the infection to physician errors in the treatment of the infection once it has occurred, another facet of malpractice is invoked.

A final caveat is that post-operative care is as important as the surgical procedure itself. Where improper bandaging after a vein-stripping operation impaired blood supply and led to necrosis of tissues, additional surgery was required. Despite this surgery the patient suffered a permanent limp and asserted a claim against the Government for \$500,000. A compromise settlement of \$15,000 terminated this case.

#### 5. *Miscellaneous Surgical Problems*<sup>30</sup>

The survey revealed two claims alleging unnecessary surgery and

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residuum of the trust reverts to the Government. The entire case was handled by the Claims Service without the intervention of any other attorneys.

<sup>29</sup> See note 22 *supra*.

<sup>30</sup> Other surgical treatments generated 39 cases, of which 17 were paid for \$1,015,340; 21 were denied, and 1 is pending. The cases involved the following

one burn incident which represented overreaching of a medical facility's capability. An 11-month baby girl was treated in a medium size hospital for scalding over one-quarter of her body. During the course of her treatment she developed *Pseudomonas* infection at which point she was transferred to the burn center at Brooke Army Medical Center. By that time gangrene had progressed to the extent that amputations of the right arm and right foot were necessary. In order to compensate for the specialized care which will be required for the rest of the child's life, a claim initially asserted for \$1,000,000 was settled for \$175,000. Corrective action at the hospital now calls for referral of a patient to a special center when the physician lacks appropriate expertise or the facility has inadequate equipment.

### B. OBSTETRICS AND GYNECOLOGY

The dependent wife population and the increasing number of active-duty women entitled to care in Army medical facilities generate a heavy gynecologic patient load. Traditional surgical procedures are now linked with an extensive contraception practice, and not unnaturally a large number of claims arise in this area.<sup>31</sup> As with the other surgical classifications, failure to diagnose was alleged in a high percentage of the claims in this field. One such incident involved a hospital's failure to give a pregnancy test, when despite its advertisement of the ready availability of these tests, it turned away a young wife because she was taking birth control pills. Because her soldier-husband did not realize his wife was

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specialty groups: general surgery, 7; urology, 7; anesthesia, 5; neurosurgery, 5; otorhinolaryngology, 7; ophthalmology, 5; and thoracic surgery, 3. Plastic surgery, which has been considered dangerous from a medico-legal point of view, has produced no cases.

<sup>31</sup> Obstetrics generated 59 cases of which 44 were paid for a total of \$4,210,776; and 15 were denied. The cases can be broken down as follows: failure to diagnose impending abortion or delivery, 6; unattended delivery, 2; spinal anesthesia catheter tip broken off, 2; maternal birth trauma or complication, 11; prenatal problems with child, 4; perinatal problems with child, 8; post-natal problems with child, 6; failure to perform Caesarean section, 6; Caesarean section complications, 5; forgotten sponge or instrument, 3; and other 6. These cases accounted for 17% of the Army cases, as compared to 5% in the HEW series. See note 16 *supra*.

Gynecological practice resulted in 36 claims of which 18 were paid for \$791,033; 17 were denied; and 1 is pending. More specifically, the claims involved 15 cases relating to surgical procedures, hysterectomy complications, 4; sterilization complications, 2; other intra-abdominal surgical complications, 4; dilatation and curettage complications, 2; and burns during surgery, 3. Other claims resulted from failure to diagnose cancer of the cervix, 3; failure to give pregnancy test, 1; other diagnostic and treatment problems, 7; contraception complications, 5; and contraceptive failures, 5.

pregnant, he did not re-enlist, thereby losing his previous medical benefits. The wife submitted a claim for \$1,000 which was settled locally for \$700.

Several claims have been submitted for instances involving contraception, with intrauterine devices<sup>32</sup> instigating seven claims and birth control pills three claims. One woman who had requested an IUD for contraceptive purposes had it implaced twelve days after the start of her last menstrual period. Six weeks later, surgery for an ectopic pregnancy was necessary. Her claim for \$77,489 was submitted, later modified to \$2,000, and subsequently disapproved. Because there was a high probability that the woman was pregnant at the time of the insertion of the IUD, the hospital changed its policy to prevent any recurrence of such a situation. Under current policy, IUD's are now inserted only at the time of the menstrual period, thereby giving a high degree of assurance that the woman is not pregnant at the time.

Birth control pills also have led to complications.<sup>33</sup> In one case, a woman who was over thirty-five years of age was given a prescription for estrogen (Premarin) and progesterone (Provera) for relief of gynecological problems. They were warranted by the physician to "also preclude you from getting pregnant." When the woman became pregnant her claim for \$1,000,000 was settled for \$2,500, as compensation for the indiscreet warranty,<sup>34</sup> not for the cost of raising an unwanted child.<sup>35</sup>

In the obstetrics area, the nonavailability of a physician at the crucial moment has resulted in several claims. All six claims involving a failure to diagnose impending labor involved women who had come to the hospital but were sent home. In one case a woman who was five months pregnant was examined in the emergency room by a nurse-assistant. The fact that the woman's cervix was two centimeters dilated was relayed to the obstetrician on call. He did

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<sup>32</sup> Complications with IUD's included one uterus perforation, one instance of abscess and one induced abortion; failures with the IUD's are four pregnancies, including one ectopic case.

<sup>33</sup> One instance of hemiparesis and another instance of skin rash.

<sup>34</sup> The drugs used did not represent standard birth control medication.

<sup>35</sup> Although in the past, courts have held against money recovery for a normal delivery or for the costs of raising a child, California precedent now exists holding that negligently handled contraception which is followed by the birth of a child can be compensable, and at a higher amount than just the expenses connected with the confinement. Compensation should "replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income." *Custodio v. Bauer*, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967).

not come to the hospital, but advised that the patient be observed. She was released from the emergency room to her home where she aborted. Her claim for \$79,000 was settled for \$7,500. The incident provoked the hospital to adopt a short-form admission procedure to hold patients for observation and to preclude them from being sent home until after they had actually been seen by an obstetrician.

In another case, a primigravid woman was admitted to the hospital when she was in labor. During the change in nursing shifts, the woman delivered spontaneously in bed. As a consequence of the unassisted birth, a loop of umbilical cord wrapped around the infant's neck and the child died. The absence of any recorded nursing notes from 0400 to 0800 in part caused the Government to settle a \$1,350,000 claim for \$45,000.

In another case a fetal monitor apparatus was connected to gauge the progress of a woman's labor. Discrepancies between a resident's and a staff physician's interpretation of the fetal monitor readings raised questions of whether an emergency Caesarean section should have been performed. After several hours in which no written observations of any sort appeared on the chart, a Caesarean section was finally performed, but this was three hours after the intern had noted a condition ("late deceleration") which, if correct, would have strongly indicated the necessity for emergency surgery. During this process the child did not breathe for a period of nine minutes and when the doctors were successful in reviving the child they found that there was quadriplegia and mental retardation. A claim was filed for \$2,500,000 alleging the failure to perform the Caesarean section in a timely manner. After administrative settlement of the claim for \$170,000, the fetal monitor tapes were no longer discarded, but were saved so that questionable tracings might be reviewed.

Another case involving the failure to adequately consult involved a difference of opinion between the radiologist and the obstetrics resident over the question of whether a vaginal delivery was feasible. After x-ray pelvimetry had been performed the obstetrics staff resident who had the responsibility of reviewing pelvimetry was not consulted. In a vaginal delivery complicated by breech presentation, Piper forceps were needed for delivery of the baby who weighed nine pounds, three ounces. The child manifested considerable motor ability damage attributed to the anoxia associated with umbilical cord pressure in a difficult breech delivery. In determining the validity of a claim which alleged failure to perform

an indicated Caesarean section, consultants agreed that primigravidity, cephalo-pelvic disproportion, a large baby, and breech presentation added up to indications for a Caesarean section. Settlement of \$650,000 (\$500,000 in trust) was made in order to cover the cost of speech therapy, physical and oral training, special education and vocational training.

Another case of substantial liability resulted from the failure of staff physicians to consult with one another. A diabetic mother had been told that if she had not delivered by 40 weeks, a Caesarean section would be done. When she arrived in labor, the medical officer of the day did not review the record, and did not call in the obstetrician. The next day, after another obstetrician had deferred the programmed Caesarean section for four hours, a brain damaged child was delivered. A further complication in the case was the fact that the pediatrician missed finding a subdural hematoma in the baby. After the case was settled for \$480,000 (\$350,000 in trust), an improved call system was initiated at the hospital.

Other cases in this category involve maternal birth injury.<sup>36</sup> Fistula or retained placenta is not an unexpected complication, but events leading to hysterectomy or widespread infection are not anticipated. In one of the more interesting cases, an expectant mother allegedly fell from the table on which she was placed during delivery. This alleged fall resulted in brain damage to the infant and internal damage to the mother. The claim arising from this incident was settled in 1959, but ten years later, the claimant initiated litigation on the incident again, invoking a conspiracy theory. The new allegations included a charge that a 1967 hysterectomy was performed to hide the injuries sustained in the 1957 fall. The new allegations were not supported and the United States won a verdict in its favor, the 1959 settlement remaining intact as res judicata on all issues.<sup>37</sup>

The final cases considered under this section deal with problems with the baby. In the prenatal period, there were instances of fetal

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<sup>36</sup> Two cases involved complications during Caesarean section in which a surgical implement impinged on the urinary tract. Another case arising from a Caesarean section came to light when the mother developed postoperative ileus and leucocytosis. X-rays showed a retained sponge, which is an argument against the policy that sponges need not be counted at a Caesarean section. One case involved water intoxication in the expectant mother caused by the use of Oxytocin, an agent that can produce normal uterine contractions and is a drug of choice when induction of labor is indicated. Severe water intoxication with convulsions and coma has occurred, probably due to the small but inherent antidiuretic effect of oxytocin.

<sup>37</sup> *Goodman v. United States*, 324 F. Supp 167 (M.D. Fla. 1971).

death caused by the amniocentesis needle and meprobamate toxicity. In the perinatal period, there were forceps injuries and other nonspecific instances of births of dead or brain damaged infants.<sup>38</sup> Other cases have involved injury to the baby during the incision into the uterus during Caesarean section.<sup>39</sup> In the post-natal period, problems are shared with the neonatologists. Among the six post-natal claims, payments have been made in all instances—three cases of erythroblastosis, two cases of retrorenal fibroplasia, and a circumcision without consent. The amount paid has varied from \$500 for the unauthorized circumcision to \$1,600,000 for retrorenal fibroplasia in twins.

### C. MEDICAL TREATMENT

This broad category encompasses nonsurgical treatment. Twenty percent of the cases fall into this area, most fitting into a category of miscellaneous treatments because the psychiatric and cardiovascular treatment categories are necessarily narrow.

#### 1. Neuropsychiatric Treatment<sup>40</sup>

Interestingly, of the claims paid for cases arising in this specialty area, over one-half of the claims representing over three quarters of the dollar amount paid involved cases in which the question of

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<sup>38</sup> A novel rationale was used for recovery in one case of a brain damaged child, for whom the oxygen needed at birth was not available in the delivery room, because the equipment was broken: the child lived six years. A claim was filed, but not until after two years had passed; it was denied on the basis of the statute of limitations. On reconsideration, however, the serviceman father's claim was good, because the Soldiers' and Sailors' Relief Act stops the running of the statute of limitations until the individual leaves the military service, 50 U.S.C. app. 521 (1970). On this basis, \$20,000 was awarded on the claim, and the pending litigation was settled for \$2,000.

<sup>39</sup> A case in which an infant had a finger amputated during delivery by Caesarean section produced an interesting negotiated claim settlement. The finger had been recovered and sewn back on the hand, but became stiff. It was medically recommended that restorative surgery be performed on the finger when the infant was approximately six years old. A claim settlement offer of \$6,000 was made in Hawaii, a reasonable estimate of the cost of future medical care in that locale. The father, a Navy Lieutenant, was returning to civilian life, however, so he declined the offer temporarily until he could investigate costs in his home state of Alabama. After investigation, he wrote that \$4,100 was the cost in Alabama, and such amount was all the claim settlement desired. It was so done.

<sup>40</sup> Neuropsychiatric treatment resulted in 16 claims of which seven were paid for \$504,250; eight were denied; and one is pending. The largest group of cases is composed of suicide attempts, with six incidents; failure to diagnose neurologic disease was alleged in five cases; premature release with subsequent murder, and accidental death of an unattended alcoholic generated one case each. There were also three miscellaneous cases.



liability turned as much on the administrative procedures for supervising patients as on the medical decisions involved. This situation may be common in this area because intentional or accidental violence to himself or others is always a problem for the patient undergoing psychiatric treatment, if increasing freedom or even discharge is part of the therapy.<sup>41</sup>

In one instance a retired military physician who was hospitalized at a state mental hospital because of alcoholism escaped and had an automobile accident. When he complained of chest pain, he was taken from the scene of the accident to a nearby Army hospital. Despite the state mental hospital's request that the patient be returned directly to it upon discharge, no such arrangement was made. After one month's hospitalization, the patient was discharged on his own and went to a downtown hotel where he committed suicide with barbiturates and alcohol. The patient's wife submitted a claim for \$450,000 alleging the Army hospital's failure to discharge her husband to the custody of the state mental hospital as the cause of death. The claim was disapproved, but a pretrial compromise of \$5,000 offered by the U.S. Attorney was accepted.

The facts of another case combined an allegedly premature release of a soldier hospitalized for psychiatric purposes with the retrospective questioning of release<sup>42</sup> that generally follows the commission of murder by one recently released from psychiatric hospitalization. In the one case arising in the Army series, the soldier had been hospitalized by a military psychiatrist because of threatening behavior and child beating. The wife and her brother-in-law (with whom she was temporarily residing) expected the soldier to remain hospitalized for a prolonged period, but instead he was released in eleven days, and furthermore was granted leave to attend to domestic problems. The next day, he murdered his brother-in-law, wounded his wife in an attempt to kill her, and

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<sup>41</sup> There are three levels of nursing attention that can be given to the hospitalized psychiatric patient: (a) constant supervision; (b) periodic scheduled supervision; (c) alerting of staff to devote greater attention to the patient. Constant supervision is indicated only for the patient who has actually attempted suicide, not for the suicide threat. Perr, *Suicide and Civil Litigation*, 19 J. FOR. SCI. 261 (1974). The military series contains six suicides: two while under outpatient treatment; two while hospitalized with psychiatric diagnoses; and two shortly after discharge.

<sup>42</sup> There is a return to the standard of dangerousness as a means of protecting the mentally ill person from being involuntarily committed merely because a physician certifies he is mentally ill and in need of treatment. Such dangerousness must be based on the likelihood of conduct which has a serious effect on the person or others, rather than conduct which is merely repulsive or repugnant. *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973).

then committed suicide. A claim for \$1,000,000 was submitted but was considered frivolous, and thus not forwarded to the Army Claims Service. Two separate trials have ensued, on the same set of circumstances, but with opposite results. In Georgia, the widow of the brother-in-law sued to recover for the death of her husband and received a judgment of \$300,000.<sup>43</sup> In Florida, the widow of the soldier-assailant sued for her injury and for her husband's wrongful death, but no malpractice was found and the Government was not held liable.<sup>44</sup>

The third type of case suggesting better administrative control over psychiatric patients extends beyond suicide prevention measures and includes precautions to prevent the patient from injuring himself accidentally. One individual who was admitted to a hospital for alcoholism was discovered missing from his bed during the night. A search party could not find him, but the next morning his body was found face down in the mud at the bottom of a hole in an area which was being excavated for a new hospital wing. His death was attributed to asphyxiation and a claim for \$250,000 was settled for \$60,000, plus a \$25,000 contribution from the building contractor who had failed to erect a fence around the hole.

## 2. Cardiovascular Treatment <sup>45</sup>

Heart disease in its classic form may be easy to diagnose, but there are variants that have a slow build-up or eccentric location to pain. Seven of the nine cases in this category involve myocardial infarction deaths where the patient had been evaluated by a physician several hours to two days before death.

In one case, the medical facility may have erroneously relied on records prepared outside the hospital. A 52-year-old retired lieutenant with a history of a heart attack three years earlier reported to the emergency room with an episode of chest pain. On

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<sup>43</sup> *Johns v. United States*, Civ. No. 769 (S.D. Ga. Dec. 21, 1973).

<sup>44</sup> *Johnson v. United States*, 409 F. Supp. 1285 (M.D. Fla. 1976).

<sup>45</sup> This treatment area involves nine cases, of which six were paid for a total of \$165,300. Two claims were denied and one remains pending. One myocardial infarction case included in the "paid" category involved the wife of an Air Force sergeant. After her husband's claim was disapproved, a private congressional bill awarded her surviving husband \$18,000. Private relief bill payments from Congress are a long established method of compensation. Servicemen, whose claims have been rejected on the basis of the *Feres* doctrine, have sought such private relief in two cases. One such effort was successful. After her administrative claim had been disapproved, an Air Force officer received \$100,000 from Congress in compensation for the paralysis that she developed as a result of a cerebral angiogram.

examination, he was found to be in no distress, and the EKG that accompanied him was read as normal. He was boarded overnight, released, and died en route to his home. A claim for \$150,000 was filed and was settled for \$30,000. Hospital policy was changed to require that a new EKG be made in such cases and that the physician not rely on an EKG brought by a patient.

In another case, a retired serviceman had been seen in the emergency room because of stomach pain two days before his death. There was no arm pain, his blood pressure was normal, and his outpatient records contained no pertinent entries, so he was sent home. The man suffered a massive myocardial infarction (proved later at autopsy), and his wife telephoned the emergency room and talked for ten minutes without giving her name or address. She called back a few minutes later and provided the address; however, her husband was dead when the ambulance arrived. Her claim for \$150,000 provoked a settlement offer of \$30,000 which was declined. When the case went to trial on the allegations of failure to diagnose the heart attack in the emergency room and slow ambulance response, the physician was not considered negligent and the United States won the jury's verdict.<sup>46</sup> The hospital involved now records all emergency calls for follow-up on information and timing.

### 3. *Other Medical Treatment* <sup>47</sup>

Pediatric cases predominate in this category of miscellaneous medical treatment, with delays in diagnosis, delays in admission, and poisoning treatment failures comprising the majority. Among the adult group of patients, infections account for seven cases, which may be used to illustrate methods for preventing the spread of hospital infections and subsequent claims.

For instance, a woman patient who developed a staph wound infection while she was hospitalized attributed her complication to

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<sup>46</sup> *Bryan v. United States*, Civ. No. 42-73CS (W.D. Wash. 1974).

<sup>47</sup> The miscellaneous category includes 41 cases, of which 25 were paid for \$989,130; 12 were denied and 4 are still pending. The cases can generally be divided into two categories, pediatric problems and adult problems. Among the 25 cases in the pediatric area, six involved the failure to diagnose; there were five incidents of poisoning, four cases involving respiratory disease, three failures to admit, two burns, two IV therapy complications, and three cases of unspecified origin. Among the 16 adult problems, infections counted for the largest single category with seven occurrences. There were two incidents of INH complications, and one incident each alleging diagnostic difficulty, respiratory failure, heat pad burns, Bernstein test aspiration, dermatology ointment burn, heat stroke, and sickle cell crisis.

alleged rampant infection present on the ward and made a claim for \$25,000. The hospital involved had an Infection Control Nurse whose role was to monitor and prevent hospital-acquired infection. At the time of the incident, her records showed only four widely scattered staph infections in the hospital, tending to disprove the claim.

A claim for \$500,000 was generated when a veteran developed the infection melioidosis in the lung after he had been examined with a fiberoptic bronchoscope. The lung had to be surgically removed. Investigation indicated that gas sterilization used with the fiberoptic bronchoscope was not complete, so use of the instrument was curtailed.<sup>48</sup>

Other techniques have long had complications associated with their use, the most notorious of which was streptomycin ototoxicity; however, there are no instances of this particular occurrence in this series. Instead, there are two cases of INH toxicity, which was just recognized in 1973.<sup>49</sup> In one of these cases a woman was treated with INH for a lung density. After five months, her treatment was reevaluated and continued, but three months later she developed acute hepatitis and died. The autopsy report gave acute hepatitis secondary to INH therapy as the cause of death. The claim for \$1,300,000 was settled for \$120,000. This case emphasizes the need for doctors to be particularly aware of newly discovered side effects of various drugs and treatments.

#### D. RADIOLOGICAL TREATMENT<sup>50</sup>

Invasive vascular studies have advanced diagnosis considerably.

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<sup>48</sup> Because the use of the fiberoptic bronchoscope is relatively new and the occurrence of infections from its employment is a limiting factor, further investigation into safe use of this device is necessary. An example of such a study is the Clinical Investigation Service Protocol, An Evaluation of the Occurrence of Bacteremia in Individuals Undergoing Fiberoptic Bronchoscopy, initiated at Fitzsimons Army Medical Center.

<sup>49</sup> Isoniazid hydrazide (INH) is considered the best tolerated drug for treatment of tuberculosis. Hepatitis associated with isoniazid therapy has been reported. Individuals on such therapy should be seen at monthly intervals in order to detect symptoms or signs of hepatic damage, in which case the drug should be discontinued. It has been held, however, that a physician did not breach his duty to inform a patient of possible adverse effects of a treatment during a period of time when physicians were unaware of the INH side effect of hepatitis. *Trogun v. Fruchtman*, 58 Wis. 2d 596, 207 N.W.2d 297 (1973).

<sup>50</sup> In the radiological treatment speciality, nine cases have been paid for a total of \$564,400; four have been denied; and three remain pending. The cases have arisen in the following areas with the indicated frequency: angiography with embolization complications, 4; failure to diagnose fracture or dislocation, 4; overdis-

but there are occasional complications, with several examples appearing in the series.<sup>51</sup>

In one case involving a study of the urinary bladder where a urethral cystogram was done, the radiologist directed that more contrast fluid be added from the liter bottle which was being used. When 850 ml had been given, the bladder was ruptured. A claim for \$250,000 was settled for \$5,500 and after this incident, the radiologist established a standard operating procedure designed to prevent recurrence of such an episode. The safeguards were to stop the inflow if the patient expresses discomfort, or when the bubbles in the bottle cease; to take a film at the 400 ml stage to evaluate degree of fill; and to use only 500 ml bottles.

Radiation therapy requires programmed calculations for dose-time relationships in order to obtain maximum therapeutic benefit with minimal damage to tissues. In one case a patient did not tolerate abdominal bath irradiation well, so treatment was shifted to the moving strip technique. The dose that was delivered was 4000 rads in 12 days, which exceeded the established tolerance for this type of treatment by 50 percent. The patient died. A claim for \$250,000 was filed locally, but misplaced in a drawer and never acted upon. Litigation was initiated and an award of \$100,000 was made.

#### E. PATHOLOGY<sup>52</sup>

Laboratory medicine encompasses both anatomic pathology and clinical pathology for the purposes of this study, and also extends to ward procedures related to lab tests. Transfusion transmission of disease (hepatitis and malaria in this series) is a recognized hazard, one which is receiving considerable attention in the development of new tests. Unfortunately, none of these tests is suffi-

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tion of viscus with contrast material, 2; excessive therapeutic radiation, 2; irradiation of fetus, 1; radioisotope reaction from adjuvant substitution, 1; and failure to do arteriogram, 1.

<sup>51</sup> In this series one cerebral angiogram led to leg paralysis; one arteriogram necessitated later amputation of the right leg; a thoracic outlet angiographic study using the femoral approach for the catheter led to eventual amputation of the leg, and a fourth angiographic study led to a patient death. Cerebral arteriography is an important diagnostic procedure, and its risks are relatively small. In a series of 2332 such arteriograms, there were 33 mild transient complications, eight severe permanent complications (e.g., paralysis) and eight deaths (0.3%). Feild, Robertson, & DeSaussure, *Complications of Cerebral Angiography in 2,000 Consecutive Cases*, 19 J. NEUROSURGERY 775 (1962).

<sup>52</sup> Of the 15 claims alleging malpractice which involved the pathology specialty, nine have been paid for \$50,400 and six have been denied. Four other pathology related cases have been considered under the Gynecology and Obstetrics categories.

ciently precise to permit warranting the blood as infection-free. A claim for \$150,000 was filed after a man who had received 13 units of blood, including three borrowed from an Army hospital, developed serum hepatitis and died. After this claim was disapproved, suit was then filed against all the providers of the blood used, including the Army. The suit has been dismissed.

Autopsy authorization documents cover most contingencies, but two cases have resulted in claims which have been paid. One case involved outrage at discovery of the preservation of a baby in a bottle in the laboratory (\$10,000 claim settled for \$1,000). The other case involved a father's reaction to the extent of the autopsy which had been performed on his newborn child. The autopsy permit had no limitations and as was the custom, organs were retained for study after the autopsy. When the father saw the baby at the funeral home, he was dismayed at the absence of the internal organs, particularly the heart.<sup>53</sup> A claim for \$30,000 was settled for \$5,000.

Clinical pathology presents a varied picture. In addition to unique cases, improper attention to lab results, entry of wrong results on the lab slip, and delay in delivery of reports have all caused problems. For instance, a 10-month old child was admitted to the hospital because of patchy infiltration in the lung; admission lab work was limited to white blood count with differential and a hemoglobin determination. The hemoglobin value was "3"—extremely low. The child died and an autopsy showed congestive heart failure due to iron deficiency anemia. The hemoglobin should have suggested the diagnosis, but was not noted. After a claim for \$100,000 was settled for \$12,500, the laboratory initiated a plan for posting "panic values" (e.g., hemoglobin less than 5) which alert the lab technicians to telephone possibly significant results to the attending physicians.

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<sup>53</sup> Although Standard Form 525 "Authorization for Autopsy" includes the phrase "removal and retention or use for diagnostic, scientific, or therapeutic purposes of such organs, tissues, and parts as such physicians deem proper," this is counter to the general trend. Permissions for autopsy generally assume that the organs will be returned for burial with the body. Permanent retention of organs is normally not contemplated by the permission granted by the next of kin. *Hendricksen v. Roosevelt Hosp.*, 297 F. Supp. 1142 (S.D.N.Y. 1969). See generally *Zimmerly & Oleniewski, Mental Anguish as an Element of Damages in Malpractice Cases*, 22 MD. ST. MED. J. 37 (1973). The College of American Pathologists-National Funeral Directors Association Agreement of 1974 states that "the organs should be placed in a strong plastic bag and returned to the body cavity upon completion of the examination." *PATHOLOGIST—BULLETIN OF THE COLLEGE OF AMERICAN PATHOLOGISTS*, Mar. 1975, at 90.

*F. ALL OTHER TREATMENT*

This section includes two areas singled out for special attention—emergency room cases and vaccinations, plus a large group of miscellaneous cases which include nonphysician specialties.

*1. Emergency Treatment*<sup>34</sup>

This segment of the study is not as purified as other segments, because certain cases seen in the emergency room are better categorized under specialty areas previously considered, such as failure to diagnose impending labor under Obstetrics, the unadmitted myocardial infarctions under Cardiovascular Treatment, and the childhood poisoning under Pediatrics.<sup>35</sup> In this section are other cases.

Failure to admit generally represents failure to diagnose. The cases in this series involved a cerebral hemorrhage, abruptio placentae following an automobile accident, injuries sustained in automobile accidents, and appendicitis. In one appendicitis case, the patient reported to the emergency room with symptoms, but was turned away by an enlisted corpsman on duty without having seen a physician. When the patient returned to the hospital the next morning, surgery was performed, acute appendicitis was found, and the patient died. The claim for \$250,000 was settled for \$8,500. Corrective action was taken to assure that all emergency patients get appropriate medical attention. Hospital policy was clarified by stating "All patients who present themselves for medical care and who are eligible for care at Armed Forces Medical Facilities will be examined and evaluated by medical personnel and appropriate therapy prescribed on each visit to this medical facility."

Another substantial claim was filed over the failure to admit a young woman for poisoning after she had swallowed 50 of her father's colchicine tablets (treatment for gout) because of problems with a recently dissolved marriage. Though asymptomatic, she was taken to an Army hospital emergency room approximately seven hours after the ingestion. On the basis of the history, she was given ipecac to induce vomiting of the swallowed material and was then

<sup>34</sup> This class of cases involved nine claims of which seven were paid for \$45,237 and two were denied. The claims involved five failures to admit and other miscellaneous incidents.

<sup>35</sup> Accumulating the cases that might be characterized as emergency treatment from all categories permits enumeration of 32 cases.

sent home with advice to her parent that she should return if symptoms developed. The next morning, after an onset of nausea and vomiting she was admitted to the hospital where she subsequently developed bone marrow depression, internal bleeding, kidney failure and pneumonia and died ten days after admission. When a claim for \$200,000 was disapproved, a suit alleging eleven counts of negligence was filed. Of the eleven charges, the court found negligence only in the failure to admit the patient when she was first seen, but also found that such negligence was not a contributing proximate cause of death, in that by the time she was first seen a fatal amount of the drug had already been absorbed. The lower court's decision in favor of the Government was upheld on appeal.<sup>56</sup>

Two cases are known involving inappropriate specialists in emergency room situations. In one instance, a psychiatrist failed to treat a sucking chest wound by covering it, the patient dying in the ambulance. The resulting claim was settled for \$25,000. In another instance, a radiologist talked to a woman patient for an hour relieving her chronic anxiety, but never treating the dog bite for which she had come to the emergency room. The woman accepted \$95.00 in satisfaction of her claim.

## 2. *Vaccination Treatment*

Immunizations are a high volume activity in the Army because of the great numbers of military and dependent travelers, but few claims are recorded, and none due to complications of the immunization itself. The four cases placed in this group are all pregnancy related. One pregnant woman was given a smallpox vaccination prior to departure for Europe, even though pregnancy was a contraindication.<sup>57</sup> The other three cases involved rubella—a disease for which there now exists preventive immunization.<sup>58</sup>

In one of the more significant claims arising in this area, a woman whose pregnancy test was reported as positive was not seen by a physician, but instead was told to go to the military hospital at her next duty station. The memory of the skin rash which had occurred in her early pregnancy had dimmed by the time she came

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<sup>56</sup> *Webb v. United States*, 446 F.2d 760 (5th Cir. 1971).

<sup>57</sup> Smallpox vaccination should not be performed on any woman who is pregnant, unless there is a special situation requiring protection, in which case it should be done under cover of vaccinia immune globulin.

<sup>58</sup> The effectiveness of rubella virus vaccines has been demonstrated, with 96% to 98% of vaccinees developing antibodies. Long term protection is likely.



under obstetric care at the next station, and was not mentioned during the history taking. A rubella-syndrome baby was born. A claim was made on the "wrongful life" basis,<sup>59</sup> alleging that had the mother been properly studied at the first station and informed of the significance of the early pregnancy rash (that there was a high likelihood of a deformed baby) the pregnancy could have been interrupted. To not so inform the mother was considered negligent. A claim for \$3,000,000 was made and an administrative settlement of \$200,000 was offered to the parents to compensate for their loss, but not for the child's "wrongful life." The offer was declined and at litigation a compromise settlement of \$15,000 was made.

### 3. *Other Treatment*<sup>60</sup>

There are a number of cases which do not fit the categories previously mentioned, some representing discrete specialties such as dentistry and pharmacy, some representing functional areas not restricted to one specialty, such as hospital falls or tissue-damaging injections, and other cases with insufficient information available to categorize them.

Failure to diagnose breast cancer is an issue aiming directly at the clinical judgment of physicians. The conservative approach of evaluating a lump in the breast by palpation, with reexamination by palpation at a later time is encountering the emphasis on early diagnosis employing mammography and early surgical biopsy. There have been five cases of claims for failure to diagnose breast cancer in a timely manner.

Dentistry is not immune to claims. Three of the four claims involved operative procedures—tooth roots left after extraction, a drill bit left in the gum after removal of the molar, and a swallowed endodontic file. The fourth case related to teeth, although not necessarily to dentistry, involved teeth discoloration following tetracycline therapy.

The pharmaceutical area, with its great potential for damage, has produced only two cases, homatropine prescription made too strong by misreading the decimal point, and a disease attributed to

<sup>59</sup> Claim was filed in the name of the baby, not for the active-duty WAC, whose claim would have been barred by the incident-to-service rule.

<sup>60</sup> This miscellaneous grouping involves 37 cases, of which 19 have been paid for \$1,313,911; 17 have been denied, and one is pending. This group includes ten cases alleging the failure to diagnose cancer; seven cases stemming from falls in the hospital; six cases alleging damage caused by injections; four cases involving dental problems; two involving pharmacy problems; and eight of miscellaneous origin.

the drug in a rewritten prescription. In this latter case, a civilian physician wrote a prescription for contraceptive pills. The dispensary did not stock that kind, so an Army doctor rewrote the prescription for a stocked brand. The patient developed cholestatic hepatitis and filed a claim for \$500,000. When a military physician rewrites a prescription, he also takes over the treatment, and liability ensues. It is better procedure to call the civilian physician and discuss substitution; the prescription modified by telephone is legal.<sup>61</sup>

## V. ANALYSIS OF THE CASES

Of the 339 cases in the eight year period under study, 39 percent had claims approved for the claimant, 36 percent were not favorably considered, and 5 percent were still pending as of November 1976. It bears repeating that the payment of some claims is not necessarily related to the medico-legal merits of the case, but rather is based on the economic reality of saving time and money for the Government when the effort and cost necessary to defend against a claim outweigh the settlement price.

Of the claims disapproved, 80 progressed to litigation.<sup>62</sup> Of those, the plaintiff won in seven cases, the Government in 36, and compromise settlements concluded 37 cases.<sup>63</sup> Two additional disapproved claims were resolved through compensation by congressional private bills.

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<sup>61</sup> Prescriptions written by civilian physicians will be honored at Army medical treatment facilities subject to the availability of pharmaceuticals. Filling a prescription written by a civilian practitioner does not imply responsibility for the patient's medical condition. Under no circumstances should civilian prescriptions be countersigned by military practitioners. Prescriptions written by civilian practitioners for a brand name drug are not filled with a generic drug without prior approval of the prescriber. Army Reg. No. 40-2, Army Medical Treatment Facilities—General Administration, para. 7.7b (2 June 1975).

<sup>62</sup> Cases which are not settled by the Army Claims Service and which result in litigation are referred to the Torts Branch of the Litigation Division of the Office of The Judge Advocate General of the Army. This Office defends suits on behalf of both the United States and, on occasion, physicians who are sued in their individual capacities.

<sup>63</sup> Litigated Army malpractice cases involving these 1968-1974 incidents produced the following results: Referred to Army Claims Service, 4; Voluntary dismissal by plaintiff, 9; Motion to dismiss in favor of U.S., 17; Motion for summary judgment in favor of U.S., 5; Compromise settlement, 37; Judgment in favor of U.S., 14; Judgment against U.S., 7; thirteen cases remain open. Survey prepared by Tort Branch, Litigation Division, Office of The Judge Advocate General of the Army in May 1975, plus subsequent developments to November 1976. Inclusion of cases which did not receive attention at the Army Claims Service, including many dismissed for failure to file an administrative claim first, raises numbers here above those in the text.

By adding the claims paid, the amounts awarded in court cases won by the plaintiff, the compromise settlements, and the disbursements in congressional private bills, it is found that 199 cases resulted in payments of \$10,313,532. If the 62 percent settlement average in favor of the claimants prevails in the pending cases, it extrapolates into an expenditure of over \$11,000,000 for the eight years.

Fifty-seven of the 199 paid cases were closed for less than \$5,000 (29 percent). In addition, there were twelve cases settled for \$5,000. This means that 35 percent of the cases were settled for amounts within the monetary jurisdiction of the local staff judge advocate.<sup>64</sup>

The distribution of cases between the eight medical centers and the other medical activities shows 44 percent of the cases have occurred in the medical centers, although in 1974 the medical centers had the majority of cases with 56 percent.

## VI. RECOMMENDATIONS

Claims against the Army for errant medical care have increased, generating unrest among the providers of health services and fiscal concern on the part of the Government. The reason for this trend is more likely a greater consciousness of a patient's legal rights than any deterioration of the medical care.

The claims are a diverse group. That many are in the obstetric and pediatric groups reflects the population served at risk, once

<sup>64</sup> See note 12 *supra*. Administrative and litigation-inspired settlements produced a similar spread of payments:

Total Cost (in dollars)	ACS Settle- ment No.	Lit. Settle- ment No.	Lit. Adver- Verdict No.	Cong. Priv. Bill No.	Total No.	Army Series		HEW Series	
						%	Cum. %	%	Cum. %
1-499	5				5	2.5	2.5	21.1	21.1
500-999	3	1			4	2.0	4.5	16.0	37.1
1,000-1,999	13	1			14	7.0	11.5	12.9	49.4
2,000-2,999	13	2			15	7.5	19.0	10.1	59.5
3,000-3,999	11	5			16	8.0	27.0	3.0	62.5
4,000-4,999	2	1			3	1.5	28.5	2.7	65.2
5,000-9,999	34	5	1		40	20.0	48.5	13.4	78.6
10,000-19,999	21	10	1	1	33	17.0	65.5	10.0	88.6
20,000-39,999	19	5	1		24	12.0	77.5	5.3	93.9
40,000-59,999	6	1			7	3.5	81.0	1.3	95.2
60,000-79,999	7		1		8	4.0	85.0	1.0	96.2
80,000-99,999	5				5	2.5	87.5	0.8	97.0
100,000 and up	13	6	2	1	24	12.0	100.0	3.0	100.0
	155	37	7	2	199				

The highest amount paid was \$1,600,000 (largely in reversionary trusts).

the active-duty service members who are not proper claimants are deducted.<sup>65</sup>

The trend is not good. The sophistic advice to give good care, keep good records and avoid improper remarks to patients is not achieving a reversal of the trend. There must be a fundamental change in the way malpractice claims are handled. To continue the passive role of waiting for the civilian attorney to initiate the action forfeits the leadership role: an aggressive interest and effort by the Army in finding potential claimants and alleviating (or recompensing) their dissatisfaction may produce the desired effect.

In addition to the recommendations in the *HEW Report* on reducing malpractice claims, certain other procedures should be used:

1. In instances of claims or threats to file a claim, or recognized culpable incidents, the clinical records should be flagged and kept on site. They should not be sent to the Records Center for storage, although notice of the retention should be forwarded.

2. A single point of contact who will monitor malpractice claims or potential claims, gather records and evidence, mark administrative and legal milestones, and coordinate the malpractice preven-

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<sup>65</sup> The option of suing individual military physicians has been open to the claimant, even though the advantage of suing the federal government with its greater resources is usually more attractive.

Active duty members of the Army, however, are immune from recovery in suits brought by fellow members of the military service for service connected injuries caused by negligent acts, whether ministerial or discretionary in nature, performed in the line of duty. *Feres v. United States*, 340 U.S. 135 (1950). See also *Martinez v. Schrock*, 537 F.2d 765 (3d Cir. 1976). Thus, military physicians cannot be sued for their patient care activities performed for active duty patients in military medical treatment facilities.

Nor can military health care personnel be held personally liable for damages caused by errors or omissions which occur in the course of their duties. The Federal Tort Claims Act is now a plaintiff's exclusive remedy. Act of Oct. 8, 1976, Pub. L. No. 94-464, § 1(c), 90 Stat. 1985, adding a new section 1089 to title 10, United States Code. Under certain circumstances the agency head may purchase liability insurance for a health care professional or may hold him harmless if suit is brought against him personally. Pub. L. No. 94-464, § 1(a)(f).

Physicians in their off-duty activities are of course not protected by governmental immunity, and must meet all standards of the community and assume the risks. In a recent case, a military psychiatrist also worked for the Commonwealth of Virginia evaluating the competence of certain accused persons to stand trial. In one case of incestual rape, he found the accused incompetent because of paranoid schizophrenia and alcoholism, and the man was hospitalized at a state institution where he remained for three years. On release, the patient sued the Commonwealth, the initial examining psychiatrist (the military officer), two court-appointed defense attorneys, the prosecutor and the hospital psychiatrist for conspiracy to deprive him of his constitutional rights. See generally Beller, *Malpractice Suits Against the United States and Government Employed Physicians*, 1978 LEGAL MED. ANN. 301.

tion program should be identified. Possible candidates are the hospital staff judge advocate, the patient administration section director, the chief of professional services, or the commander himself.

3. The medical unit commander should have positive and current information on malpractice cases, with a means to be told about cases at the earliest moment, and a periodic update on the progress of the cases (at least quarterly), in order to avoid embarrassment and in order to enhance the quality of medical care.

4. Corrective action should be promptly instituted in order to improve the situation that produced the claim. This corrective action may be either procedural or disciplinary. Alterations should not be discouraged on the basis that they might compromise the legal defense of the case; if a change is indicated professionally, it should be made.

5. The command group should closely examine daily reports, such as the chief nurse's report and the operating room schedule, in order to detect problems and to prevent overreaching. The Credentials Committee must approve the scope of practice of each physician initially, and must limit the privileges of any physician whose performance is not satisfactory.

6. Confidence and mutual respect should be fostered among the medical staff. Grievances among physicians and the staff should be addressed, and not permitted to create a situation where patient care might suffer. Instances of therapeutic misadventure should not be concealed from the commander, who should be available to provide support and advice in such situations. The commander should present his position clearly to all incoming physicians soon after their arrival.

7. If a problem occurs, obtain the opinion of a consultant, preferably civilian, and have that individual write a consultant note in the chart.

8. Monthly dissemination of synopses of the incidents generating claims and corrective action taken, if any, should be instituted by major commands. This information, available from the Army Claims Service, would be a means of alerting medical commanders to potential malpractice situations.

9. Greater effort should be made to settle claims at the local level. Despite the many preposterous initial claims, over a third of the cases are suitable for settlements of \$5,000 or less, and thus within the settlement capability of the local staff judge advocate.

10. Informed consent notes should be written in the clinical record by the attending physician, indicating that such a physician-

patient discussion did take place, and outlining the risks delineated to the patient. The hospital medical audit committee should have the accomplishment of such a discussion as one of its criteria of good medical care, and the extent of risks to be covered should be subjected to review.

11. An attorney (either military or civilian) at each medical center should be assigned the chief task of monitoring what is happening in the hospital from the claims point of view, identifying potential malpractice problems, and rectifying them at the time they occur. Each medical center commander has the option of establishing such a claims officer. By exercising this option, the commander would gain legal expertise and would be in a better position to make timely, controllable settlements up to \$5,000 or properly researched recommendations on claims of higher amounts. Specialized training should be required of all such attorneys.

12. The medical center claims officer should be a member of significant hospital committees (*e.g.*—Tissue Committee, Audit Committee) and should hear the commander's morning report, attempt to detect that incident likely to lead to future liability, and alert the commander and advise him when a claim investigation should be undertaken. This claims officer should be available to other medical activities in the health service region also.

13. Claim investigations should be undertaken promptly. The investigation report should be submitted to the alleged malpracticing physician for comment. The hospital commander should see the investigation report and comment. If no claim is forthcoming, the investigation report can be filed. If the patient has been harmed, but lacks knowledge of his legal rights, it is appropriate for the commander to suggest to the patient that he visit the claims officer for advice and assistance.

14. A malpractice advisory board (with both civilian and military consultants) should be established at the major command headquarters to meet on call to advise a local commander and his claims officer on the merits of a particular case, so that local settlement may be accomplished or denied, with the aim of avoiding the escalating costs in time and money involved in forwarding a claim. Guidelines would be needed to inform local officials of the extent of advice available from different sources (major command headquarters, Army Claims Service, Health Services Region Coordinator, Armed Forces Institute of Pathology).

15. Physicians on duty should be reassured about the availability of government lawyers and resources in the unlikely event of litiga-

tion against an individual for past actions. Military physicians should no longer be concerned with the prospect of suits being initiated against them personally, and consequently there appears to be no necessity for them to purchase malpractice insurance.<sup>66</sup>

16. Emergency medicine is developing its own standard of care. The provider of such emergency medical care must have the requisite clinical aptitude and skills, and should be so certified by the Credentials Committee as qualified. The practice of rotating different physicians, of varying specialties and interests, through the emergency room no longer represents good medical care to the emergency patient. Regular assignments of physicians, of at least three months in length, are indicated.

17. In some situations of less than optimal care, known to both the patient and the hospital, the claim-inciting moment is when the hospital bill is received. Commanders should have the power to excuse part or all of the payment for certain patients if the situation is such that a retaliatory claim is likely. Patients need to be told the situation will be corrected, with no charge for extra hospitalization. As a designee of the Secretary of the Army, a patient can be granted treatment for an indefinite period, even after loss of eligibility as a dependent, and all charges (including those for subsistence) can be waived.

18. Congressional inquiries deserve prompt and full reply, except in the circumstances where an administrative claim has been filed against the Government. Contact with the Army Claims Service representative should be routinely obtained for all congressional inquiries. If a claim has already been filed, the inquirer should not be supplied with information through the congressional route.

## VII. CONCLUSION

The direct cost of paying medical malpractice claims against the Army is in excess of one million dollars per year. As in the civilian sector, medical malpractice claims are on the rise, and the costs of settlement are ever increasing. Generalized, sophistic answers are no solution to the problems presently posed by this type of claim against the Government. Only if the Army thoroughly evaluates the situation can it properly address, and hopefully improve, the current situation. This study has presented typical malpractice cases which have provoked claims against the Army and offered

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<sup>66</sup> Act of Oct. 8, 1976, Pub. L. No. 94-464, 90 Stat. 1985. See also note 65 *supra*.

some specific suggestions to prevent recurrence of such events. Hopefully, however, the analysis of the cases as a whole and the recommendations derived from that analysis will serve as a stimulus for the providers of medical care to reevaluate the manner in which the Army deals with the problem of medical malpractice to the ultimate benefit of patients, health care professionals and the Army.



## DISRUPTION IN THE COURTROOM: THE TROUBLESOME DEFENDANT \*

Captain Steven F. Lancaster \*\*

### I. INTRODUCTION

Disruption in the courtroom is neither a new nor a modern phenomenon. Incidents of courtroom misconduct have taken place in American courts since the founding of the nation.<sup>1</sup> There is currently a greater awareness of the problem, perhaps because in recent years news media coverage of trials<sup>2</sup> such as the "Chicago Conspiracy Trials" of 1969-70<sup>3</sup> and, more recently, the trial of Lynette "Squeaky" Fromme,<sup>4</sup> has brought this issue to the public's attention.

Courtroom disruption is not limited to conduct by the defendant. Prosecutors, defense counsel, witnesses, spectators, and newsmen can all create disruption in the courtroom. However, the scope of this article is limited to that behavior of a criminal defendant which interferes with the orderly process of his trial and which must be controlled by affirmative action of the trial judge.<sup>5</sup>

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<sup>1</sup>REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON COURTROOM CONDUCT, DISORDER IN THE COURT 3 (1978) [hereinafter cited as DISORDER IN THE COURT].

<sup>2</sup>*Id.* at 56.

<sup>3</sup>*See, e.g., In re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States v. Seale*, 461 F.2d 843 (7th Cir. 1972).

<sup>4</sup>*See United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975).

<sup>5</sup>The American Bar Association recognizes that two of the primary functions of the trial judge are to maintain the desired atmosphere in a judicial proceeding and to control the participants. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE FUNCTION OF THE TRIAL JUDGE § 1.1(a) commentary, at 2 (Approved Draft 1972) [hereinafter cited as FUNCTION OF THE TRIAL JUDGE]. *See also id.* § 6.8 commentary, at 88-90. For this reason the role of the trial judge in controlling the disruptive defendant will be analyzed in this article, and that of counsel, bailiff, or other court personnel will not be covered.

In deciding how to control an obstreperous defendant, the trial judge must balance the interest of society in the expedient, orderly process of justice with the right of the defendant to a fair trial.<sup>6</sup> In order for the trial judge to balance these interests, he must be familiar with what constitutes disruptive behavior; what permissible, constitutional methods are available to control the behavior; and what rights of the accused he must consider.

This article will provide the trial judge with an analysis of the interests he must balance and practical suggestions to aid him in performing this difficult and challenging task.

## II. DISRUPTION: WHAT IS IT?

Most disruption, as discussed here, takes place within the confines of the courtroom. However, the accused's conduct before trial or during trial recesses can play havoc with the normal process of a trial and will be treated as a form of courtroom disruption.

It is much easier to point to certain activity and say that it is disruptive of the criminal process than it is to precisely and formally define disruption. Few would disagree that a defendant who refused to put on his clothes, who tried to leave the courtroom, and who shouted obscenities while in court did in fact disrupt his trial.<sup>7</sup> It is even easier to say that disruption has taken place when a defendant walks inside the jury box and shoves a juror and when another defendant in the same trial huris a chair at an assistant United States Attorney.<sup>8</sup> Likewise, when the defendant threatens the judge and later throws papers on the courtroom floor,<sup>9</sup> when a soldier threatens to remove his clothes in court if forced to stand trial in a military uniform<sup>10</sup> or when the defendant tears an exhibit admitted into evidence to shreds,<sup>11</sup> the trial has been disrupted. When a defendant knocks over a chair and talks loudly to the jurors<sup>12</sup> or when a defendant uses obscene words, refuses to come to court, strikes his defense counsel in the face during a recess, attacks the prosecutor, and throws a book at his defense counsel during trial,<sup>13</sup> it is also easy to say disruption has taken place.

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<sup>6</sup>United States v. Ives, 504 F.2d 935 (2d Cir. 1974).

<sup>7</sup>People v. Kerridge, 20 Mich. App. 184, 173 N.W.2d 789 (1969).

<sup>8</sup>United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963).

<sup>9</sup>Illinois v. Allen, 397 U.S. 337 (1970).

<sup>10</sup>United States v. Gentile, 23 C.M.A. 462, 50 C.M.R. 481 (1975).

<sup>11</sup>People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

<sup>12</sup>Morris v. State, 249 Ark. 1005, 462 S.W.2d 842 (1971).

<sup>13</sup>United States v. Ives, 504 F.2d 935 (2d Cir. 1974).

In *Illinois v. Allen*,<sup>14</sup> the leading case in this area, the Supreme Court delineated constitutionally permissible methods to be used in controlling a disruptive defendant, but it did not specifically define disruption. It did, however, describe such conduct as that which is "so disorderly, disruptive, and disrespectful of the court that [the] trial cannot be carried on with [the defendant] in the courtroom."<sup>15</sup> This description of a defendant's conduct at least outlines a general standard and focuses on behavior which prevents a trial from continuing in an orderly manner.<sup>16</sup>

In its report on disruption in the courtroom, the Bar of the City of New York found no formal definition of disruption. It did propose the following as a definition: "[A]ny intentional conduct by any person in the courtroom that substantially interferes with the dignity, order, and decorum of judicial proceedings."<sup>17</sup> This definition, like the phraseology in *Illinois v. Allen*, places heavy emphasis on how the particular conduct affects the judicial process.

Ultimately, the trial judge must determine what is or is not disruptive behavior. This responsibility falls on the trial judge because it is his job to control what takes place in the courtroom and to assure the orderly administration of criminal justice.<sup>18</sup> Obviously, decisions on what constitutes disruptive behavior will have to be made on a case by case basis because it would be impossible to forecast what a defendant may or may not do once he reaches the courtroom. In determining whether or not the behavior of the defendant is disruptive, the trial judge should consider the following questions:

1. Is the defendant acting as he is because of the trial itself or is he only upset about one particular aspect of it?<sup>19</sup>
2. Is the defendant likely to continue to behave in the same manner?<sup>20</sup>
3. Is the case being tried by a judge alone or by a jury?<sup>21</sup>
4. Does the defendant's behavior place anyone in physical danger or is his misconduct only verbal?

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<sup>14</sup>397 U.S. 337 (1970).

<sup>15</sup>*Id.* at 345.

<sup>16</sup>Note, *Illinois v. Allen: The Unruly Defendant's Right to a Fair Trial*, 46 N.Y.U. L. REV. 120 (1971) [hereinafter cited as *Right to a Fair Trial*].

<sup>17</sup>DISORDER IN THE COURT, *supra* note 1, at 91.

<sup>18</sup>FUNCTION OF THE TRIAL JUDGE, *supra* note 5, at § 1.1(a) commentary at 27.

<sup>19</sup>Current Developments, 42 U. COLO. L. REV. 485, 490 (1971) [hereinafter cited as *Current Developments*].

<sup>20</sup>Note, *Guidelines for Controlling the Disruptive Defendant*, 56 MINN. L. REV. 699, 711 (1972) [hereinafter cited as *Guidelines*].

<sup>21</sup>Current Developments, *supra* note 19, at 490.

5. Can the trial continue or must some action be taken to permit it to proceed in an orderly manner?
6. Is the defendant capable of controlling his behavior?<sup>22</sup>
7. How bizarre is his behavior?
8. Has the defendant acted the same way previously?<sup>23</sup>
9. Is the defendant representing himself?<sup>24</sup>

The answers to these questions will aid the judge in deciding whether or not the conduct of the defendant is disruptive.

It is important that the judge himself thoroughly analyze the defendant's behavior and then decide if the conduct is disruptive. If he decides it is disruptive, he must balance the rights of the accused and the interests of society in deciding how to control such behavior.

### III. THE JUDGE'S ROLE

#### A. RESPONSIBILITY FOR CONTROLLING CONDUCT IN THE COURTROOM

The responsibility of the trial judge for controlling what takes place in the courtroom has been explicitly recognized by the American Bar Association:

[Standard 1.1(a) concerning the function of the trial judge] recognizes that it is ultimately the authority and responsibility of the trial judge to maintain the atmosphere appropriate for a fair, rational and civilized determination of the issues, and to govern the conduct of all persons in the courtroom, including the attorneys. . . . [T]he judge possesses the power and authority to maintain order, and. . . this function is best performed in the interest of the proper administration of criminal justice when judicial powers are used impartially in a firm and dignified manner.<sup>25</sup>

In the military criminal justice system the judge's role is similar:

The military judge shall preside over each open session of the court-martial to which he has been detailed. He takes appropriate action in the open sessions of the court in order that the proceedings may be conducted

<sup>22</sup>*Id.*

<sup>23</sup>*Right to a Fair Trial*, *supra* note 16, at 137.

<sup>24</sup>*Id.* at 156.

<sup>25</sup>FUNCTION OF THE TRIAL JUDGE, *supra* note 3, at 27 (commentary on Standard 1.1(a)). Standard 1.1(a) itself reads:

1.1 General responsibility of the trial judge.

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecutor has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.

in a dignified, military manner. He is responsible for the fair and orderly conduct of the proceedings in accordance with law.<sup>26</sup>

In deciding what action is needed to maintain order and to control the disruptive defendant, the judge must rely on his own discretion.<sup>27</sup> Although a judge may need to know about the defendant's activities which have taken place outside of his presence in order to make a sound decision as to what action to take, the final decision is his alone. For him to rely entirely on another's judgment would be reversible error.<sup>28</sup>

### B. BALANCING THE RIGHTS OF THE ACCUSED AND THE INTEREST OF SOCIETY

In making his decision as to what action to take, the judge must delicately balance the rights of the accused with the interest of society in the expedient, orderly process of justice.<sup>29</sup> This is not an easy task, nor one which should be approached with less than total awareness of the interests involved. The methods available to control the disruptive defendant, by their very nature, conflict with some of the basic rights our criminal justice system provides for the accused.<sup>30</sup>

The judge should initially evaluate the situation and determine whether the behavior of the defendant is of a violent or nonviolent character.<sup>31</sup> Violent behavior must be dealt with firmly and expeditiously to avoid harm to all those present, including the accused.<sup>32</sup> The nature of violent conduct itself limits the alternatives available to the judge. Conversely, when he is dealing with nonviolent behavior such as verbal outbursts, the judge has more time to decide which of a broader group of actions is appropriate.<sup>33</sup>

<sup>26</sup>MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 396(1) [hereinafter cited as Manual in text and MCM, 1969 in footnotes].

<sup>27</sup>United States v. Gentile, 29 C.M.A. 462, 463, 50 C.M.R. 481, 482 (1975).

<sup>28</sup>State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (1965). In this case the trial judge kept the defendant handcuffed during trial on the basis of the jailor's statement that it was "routine custodial supervision" to handcuff those persons in custody. The case was overturned on the grounds that there were no sound reasons in the record to support restraining the accused, and that the judge had, therefore, abused his discretion.

<sup>29</sup>United States v. Ives, 504 F.2d 935, 942 (2d Cir. 1974).

<sup>30</sup>The methods available to the judge and their effects on the described balancing will be discussed in Section VI. *infra*.

<sup>31</sup>United States v. Ives, 504 F.2d 935, 942 (2d Cir. 1974).

<sup>32</sup>Note, *Disruption in the Courtroom*, 23 U. FLA. L. REV. 560, 561 (1971) [hereinafter cited as *Disruption in the Courtroom*].

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

Once he has determined the character of the disruption, the judge should attempt to identify the reason for the disruption as a first step in determining how to handle it.<sup>34</sup> If the conduct is extreme and bizarre and suggests that the accused may not be mentally competent to stand trial, the judge should consider recessing the trial and ordering a psychiatric evaluation of the accused.<sup>35</sup> Looking for the cause of the conduct is an aid in determining how to handle it. Aside from those cases where the accused appears to be mentally incompetent, the methods available to control disruptive conduct are the same whether the conduct is the result of meanness, political philosophy, alcohol, drugs, or a character and behavior disorder.

The judge should also consider whether the conduct with which he is confronted is an isolated incident or part of a course of conduct calculated to disrupt the proceedings.<sup>36</sup> A minor disruption of a nonviolent character, such as a single profane word or gesture may prompt the judge to delay taking action against the defendant and wait to see if he persists in such conduct.<sup>37</sup> On the other hand, a judge can warn the defendant concerning his conduct at the time it takes place, with the hope that such a warning will inhibit any future misconduct. Such a warning is more appropriate if it is clear that the conduct of the defendant was nothing more than an emotional outburst. If the disruption is, or appears to be, an obvious attempt to disrupt the proceedings, the judge must act quickly and forcefully to quash such conduct.<sup>38</sup> If the disruption is nonviolent, a strict warning should be given to the defendant outlining what will happen if he continues to be disruptive. If it is a violent disruption the judge may be required to use more aggressive measures such as binding the defendant or removing him from the courtroom because the interest of society in the orderly, timely process of justice outweighs the defendant's rights to be free of shackles and present at trial.

If the defendant is acting as his own counsel, the judge should take into account all the factors described above and additionally consider whether the defendant's conduct is the result of a good

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

<sup>35</sup>A full discussion of the handling of a defendant who is not mentally competent to stand trial is beyond the scope of this article, but there is no doubt that a military judge can initiate an inquiry concerning the accused's sanity. MCM, 1969, para. 122b(2).

<sup>36</sup>*Guidelines, supra note 20*, at 711; see *United States v. Ives*, 504 F.2d 955, 942 (2d Cir. 1974).

<sup>37</sup>*Guidelines, supra note 20*, at 711.

<sup>38</sup>*Morris v. State*, 249 Ark. 1005, 462 S.W.2d 842 (1971); see *Guidelines, supra note 20*, at 711.

faith effort to pursue a legal question.<sup>39</sup> While the fact that a defendant is representing himself gives him no right to act contrary to the behavior expected of all criminal defendants, a judge should be prepared to separate the conduct of the defendant as a defendant, and the conduct of the defendant as counsel pursuing what he believes to be a valid legal issue.<sup>40</sup>

### C. AFFIRMATIVE STEPS TO AVOID DISRUPTION

To avoid the type of disruptive behavior described above, it is recommended that, at the beginning of the trial, the judge set out ground rules all parties must follow.<sup>41</sup> As a result, all will understand what is expected of them. The defendant should know from the start what behavior the judge expects of him and what will happen if he does not abide by those norms. For example, the judge should ensure that the defendant knows when and how he should address the judge and the jury.<sup>42</sup> All parties to the trial should be familiar with all local court rules, including the procedures for entering, leaving, standing, and sitting. In addition to the above, the military judge should satisfy himself that the counsel are familiar with the Uniform Rules of Practice before Army Courts-Martial.<sup>43</sup>

<sup>39</sup> *Right to a Fair Trial*, *supra* note 16, at 156.

<sup>40</sup> *Id.*

<sup>41</sup> *Disruption in the Courtroom*, *supra* note 32, at 568.

<sup>42</sup> A preferable technique to ensure that the defendant does not prejudice himself by a verbal statement against his own interest is to have the defendant consult with his counsel prior to addressing the judge, unless he is answering a question directed to him by the judge. This same procedure should be used if he desires to speak to the jury, with his counsel requesting permission from the judge to do so.

<sup>43</sup> U.S. DEP'T OF ARMY, PAMPHLET No. 27-9, MILITARY JUDGES' GUIDE, Appendix H (C4 1973). The judge should ensure that the counsel are aware of the rules immediately after he states that counsel for both sides have the requisite qualifications. Although the exact nature of the instruction will depend on the judge's personal preferences, the following is proposed as a legally sufficient instruction:

- MJ: At this time it is my desire to ensure that counsel and the accused are familiar with the rules of this court and the Uniform Rules of Practice before Army Courts-Martial.  
 Captain (*Trial Counsel*) and Captain (*Defense Counsel*) have you read and are you familiar with the Uniform Rules of Practice?
- TC&DC: (*Answer Yes or No Sir*)  
 (If either counsel answers no the court should be recessed and counsel directed to so familiarize himself)
- MJ: Captain (*Defense Counsel*) have you explained to (*Name of Accused*) the local court rules, including when he should or

If a trial judge believes that a particular defendant is going to be disruptive, he must be prepared to handle such anticipated conduct. He should familiarize himself with the procedures available to control the defendant's behavior and make any material preparations that appear warranted.<sup>44</sup> The various options available to the judge will be outlined in the following sections of this article.

#### IV. DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL

##### A. HISTORICAL BASIS AND DEVELOPMENT OF RIGHT

In deciding how to handle the disruptive defendant, the judge must first consider the defendant's right to be present at his own trial. Under early Anglo-American legal procedures, guilt or innocence was determined through trial by fire or water ordeal,<sup>45</sup> the verdict depending upon the defendant's physical reaction to the test.<sup>46</sup> Consequently, the defendant had to be present at his own

should not stand and how he goes about addressing me and the court members, if they are present?

DC: *(Answer Yes or No Sir)*

*(If answer is no, judge should outline all local rules)*

MJ: *(Name of Accused) did you understand this explanation? Do you have any questions?*

<sup>44</sup> The Second Circuit approved such a procedure in the case of *United States v. Ives*, 504 F.2d 935 (2d Cir. 1974). There the trial judge was aware that the defendant's first trial for murder on an Indian Reservation ended in a mistrial because of the defendant's continuous disruption of the proceedings. In preparing for the second trial the judge had a cell built below the courtroom which was connected to the courtroom with special sound equipment, so that everything that went on in the courtroom could be heard in the cell. He also connected the cell to the defense counsel table with a telephone system, using lights instead of bells, so a person could call the defense counsel table from the cell and talk to the counsel without disturbing the court proceedings. During the trial the judge had the defendant removed from the courtroom and placed in the cell. The use of the preconstructed facilities aided the judge in restraining the defendant and in keeping the defendant informed of the progress of his trial. Since these facilities were already prepared, minimal time was lost upon the defendant's removal.

<sup>45</sup> 4 W. BLACKSTONE, COMMENTARIES 342 (12th ed. E. Christian ed. 1793).

<sup>46</sup> *Id.* In a trial by fire, those of higher rank were required to take a red hot iron, weighing 2 or 3 pounds, in their hand, and others were blindfolded and directed to walk barefooted over red hot plowshares. If the defendant was not burned, he was considered to be innocent. In a trial by water, those of higher rank had to place their bare arm in boiling water and were considered innocent if they received no burn. In another type of trial by water the defendant was thrown into a river or lake and, if he sunk, he was found innocent.



trial. Another form of early trial, trial by combat,<sup>47</sup> required that the defendant be present to physically battle an opposing party. As trial by ordeal was replaced by proceedings calculated to determine facts in a more rational fashion, the defendant was still required to be present. Because he was not allowed counsel and was required to represent himself, the courts required his presence during all proceedings relating to his case.<sup>48</sup>

In the United States, the Constitution does not expressly assure the accused the right to be present at his own trial, although it does provide for a "public trial"<sup>49</sup> and that the accused has the right "to be confronted with the witnesses against him."<sup>50</sup> Despite the absence of an explicit constitutional guarantee, the right of a defendant to be present at his trial has developed in American case law, both as a due process right and on the basis of the specific sixth amendment rights.

The United States Supreme Court first considered the defendant's right to be present at his trial in *Hopt v. Utah*<sup>51</sup> when it reviewed the defendant's state murder conviction. At the time of Hopt's trial, a Utah statute required that the defendant be present at all felony trials. Another state statute regulated the jury selection process by providing that if a potential juror was challenged for actual bias and denied such bias, the trial judge would appoint three triers, not on the jury panel, to decide whether the juror was biased. The three triers were to hear evidence on the issue in open court, be instructed by the judge, and then deliberate in private. During Hopt's trial, six jurors were challenged under this procedure. Three triers were appointed by the judge, instructed by him, and then permitted to leave the courtroom to hear the evidence out of the presence of the judge, counsel, and defendant. The Supreme Court overturned the conviction and in so doing suggested that a defendant's presence at his own trial was required by the Constitution stating, "If he be deprived of his liberty without being so present, such deprivation would be without that due process of law required by the Constitution."<sup>52</sup>

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<sup>47</sup> *Id.* at 346. In a trial by combat the winner of the hand to hand combat was determined to be innocent.

<sup>48</sup> *Id.* at 355; see *Commonwealth v. Millen*, 289 Mass. 441, 194 N.E. 463 (1935).

<sup>49</sup> U.S. CONST. amend. VI.

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

<sup>51</sup> 110 U.S. 574 (1884).

<sup>52</sup> *Id.* at 579. See also *Cohen, Trial In Absentia Re-Examined*, 40 TENN. L. REV. 155, 169 (1973) [hereinafter cited as *Trial In Absentia*].

Eight years later the Supreme Court reinforced the principles of the *Hopt* decision in *Lewis v. United States*,<sup>55</sup> a case involving jury challenges out of the presence of the defendant:

A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing should be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.<sup>54</sup>

Later still, in *Snyder v. Massachusetts*,<sup>55</sup> the Court held that the due process clause of the fourteenth amendment gave the defendant the right to be present at his trial in a felony prosecution "whenever his presence [has] a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."<sup>56</sup> Writing for the Court, Mr. Justice Cardozo made it clear that this right was not absolute, but one that exists only "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."<sup>57</sup>

In addition to the judicially created due process right to be present at one's own trial, the sixth amendment grants the accused the right "to be confronted with the witnesses against him."<sup>58</sup> This constitutional guarantee relates to rights during trial and consequently the defendant must be present at trial to exercise it. As the Supreme Court noted in *Illinois v. Allen*,<sup>59</sup> "One of the most basic of the rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial."<sup>60</sup> This statement does not, however, recognize the subtle difference between the right of presence at trial guaranteed as an element of due process and the right of confrontation, which applies only with respect to witnesses against the defendant. Justice Cardozo stressed this distinction in *Snyder*.<sup>61</sup>

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<sup>55</sup> 146 U.S. 370 (1892).

<sup>54</sup> *Id.* at 372.

<sup>55</sup> 291 U.S. 97 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>56</sup> *Id.* at 103-06.

<sup>57</sup> *Id.* at 108. The case involved a murder trial where the judge refused to let the defendant attend a viewing of the crime scene attended by the judge, jury, prosecutor, and defendant's counsel. The court held this denial was not a violation of due process under the fourteenth amendment inasmuch as the defendant's presence would have had no effect on a "fair and just hearing." *Id.*

<sup>58</sup> U.S. CONST. amend. VI.

<sup>59</sup> 397 U.S. 337 (1970).

<sup>60</sup> *Id.* at 356.

<sup>61</sup> *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). Justice Cardozo stressed the distinction in this way: "Con-

Whether on due process or confrontation grounds, it is clear that criminal defendants in federal courts have the right to be present during all phases of their trials. The Supreme Court has also applied this right to state criminal proceedings.<sup>62</sup> Accordingly, a federal constitutional right guarantees each criminal defendant the right to be present at his trial.

In some state criminal proceedings, defendants may have an additional basis upon which to claim their right of presence during trial. Some state constitutional<sup>63</sup> or statutory<sup>64</sup> provisions explicitly provide that criminal defendants have the right to be present at their trials, and in these jurisdictions the federal tests decline in importance. However, in states without such expanded guarantees or where the state tests are not as expansive as the federal one, defense counsel must resort to the sixth and fourteenth amendments.

The Federal Rules of Criminal Procedure<sup>65</sup> provide another

fusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned." *Id.* at 107.

<sup>62</sup> *Pointer v. Texas*, 380 U.S. 400 (1965). In 1984 in the *Snyder* case, Mr. Justice Cardozo assumed that the fourteenth amendment made the sixth amendment applicable to state criminal proceedings, but the Court did not so hold until its 1965 decision in *Pointer v. Texas*.

<sup>63</sup> See, e.g., ILL. CONST. art. I, § 8.

<sup>64</sup> See, e.g., *People v. Kerridge*, 20 Mich. App. 184, 173 N.W.2d 789 (1969) (interpreting MICH. COMP. LAWS § 768.3 (1954)).

<sup>65</sup> Presence of the Defendant.

(a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) **Presence Not Required.** A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

ground upon which to base a defendant's right to be present at his trial in a federal prosecution. In fact, his presence is required, with certain exceptions, during all felony prosecutions. Likewise, the defendant's right to be present at his court-martial is recognized and guaranteed in military law by statute,<sup>66</sup> Executive Order<sup>67</sup> and case law.<sup>68</sup>

### B. INTERESTS SERVED BY THE DEFENDANT'S PRESENCE AT TRIAL

Permitting or requiring a defendant to be present at his trial serves a number of interests. Initially, his presence upholds the "importance of a criminal trial" and preserves the "dignity" of the court.<sup>69</sup> It places all interested parties in the courtroom and gives the proceeding an aura of fairness and orderliness.<sup>70</sup> In addition, the defendant's presence prohibits the jury from drawing any prejudicial inference that his absence might provoke.<sup>71</sup> It would be natural for a jury to infer that a defendant's absence is based on some unlawful conduct on his part, if only because most defendants attend their own trials.

The fact that a defendant is present in the courtroom also furthers several of the goals of the trial itself. First, the trier of facts' task of determining guilt or innocence and then sentence, if appropriate, is more personal when he is face to face with the defendant and able to observe the accused's demeanor. Moreover, when the

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FED. R. CRIM. P. 43. The notes of the Advisory Committee state that the Rule was amended to reflect the Supreme Court's opinion in *Illinois v. Allen*.

<sup>66</sup> When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

UNIFORM CODE OF MILITARY JUSTICE art. 39(b), 10 U.S.C. § 839(b) (1970) [hereinafter cited as U.C.M.J.].

<sup>67</sup> "The presence of the accused throughout proceedings in open court is, unless otherwise stated, essential." MCM, 1969, para. 60.

<sup>68</sup> *United States v. Staten*, 21 C.M.A. 493, 45 C.M.R. 267 (1972); *United States v. Cook*, 20 C.M.A. 304, 43 C.M.R. 344 (1971); *United States v. Oliphant*, 50 C.M.R. 29 (N.C.M.R. 1974); *United States v. Holly*, 48 C.M.R. 990 (A.F.C.M.R. 1974); *United States v. Allison*, 47 C.M.R. 968 (A.C.M.R. 1973); *United States v. Norsian*, 47 C.M.R. 209 (N.C.M.R. 1973).

<sup>69</sup> *Trial In Absentia*, *supra* note 32, at 177.

<sup>70</sup> Being present for his own trial can be the first step toward rehabilitation, because it eliminates any doubts the defendant may have as to the fairness of the trial. *United States v. Lopez*, 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971).

<sup>71</sup> *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971).

defendant is present the testimony is likely to be more reliable because witnesses may be less prone to lie<sup>72</sup> when face to face with the accused. Finally, the judge or jury is more likely to temper their decision if the defendant is present.<sup>73</sup>

Another practical benefit is that the defendant's presence enables him to aid his counsel in his own defense.<sup>74</sup> He is present to interpret for his counsel the evidence against him and to assist his counsel during cross-examination.<sup>75</sup>

### C. DEFENDANT'S PRIVILEGE TO WAIVE HIS RIGHT TO BE PRESENT AT HIS TRIAL

Once it was established that a defendant had a right to be present at his trial, it became important to consider the effect of the defendant's voluntary absence from his trial. In *Howard v. Kentucky*<sup>76</sup> the Supreme Court held that an accused could voluntarily absent himself from portions of his felony prosecution, thus recognizing that an accused not only had a right to be present at his trial, but also, under certain circumstances, the ability to waive this right. This right was further defined in *Diaz v. United States*<sup>77</sup> when the Court ruled that a defendant's voluntary absence from trial after it had begun in his presence constituted a waiver of his right to be present. However, the Court qualified its decision by stating in dictum that a defendant could not waive presence if he were charged with a capital offense or was in custody.

The *Diaz* waiver rules have been applied by the courts<sup>78</sup> and im-

<sup>72</sup> *State v. Lanergan*, 201 Ore. 165, 269 P.2d 491 (1954).

<sup>73</sup> See *Lewis v. United States*, 146 U.S. 370 (1892); *Temple v. Commonwealth*, 77 Ky. (14 Bush) 796 (1879).

<sup>74</sup> *Schwab v. Berggren*, 143 U.S. 442, 448 (1891); *Bustamonte v. Eyman*, 456 F.2d 269 (9th Cir. 1972); *Temple v. Commonwealth*, 77 Ky. (14 Bush) 796 (1879).

<sup>75</sup> On the other hand, he may be a hindrance if he continually asks his counsel questions and interrupts his counsel's concentration.

<sup>76</sup> 200 U.S. 164 (1906). The Court, in its decision, recognized that the state law of Kentucky permitted a defendant to occasionally waive his presence from trial, so long as no injury resulted to his substantial rights as a result. In this case the defendant, being tried for murder, consented, with advice of counsel, to the court's questioning a juror out of his and his counsel's presence about a challenge for cause made by the prosecution. The Court held that this waiver did not deprive the defendant "of due process of law within the meaning of the [fourteenth amendment]." *Id.* at 175.

<sup>77</sup> 223 U.S. 442 (1912).

<sup>78</sup> See *Snyder v. Massachusetts*, 291 U.S. 97, 138 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *United States v. Partlow*, 428 F.2d 814 (1970).

plemented and expanded in the Federal Rules.<sup>79</sup> A defendant can waive his right to be present at his federal trial if, after initially being present, he voluntarily absents himself or after being warned about his disruptive conduct, continues such conduct.<sup>80</sup>

The ability to waive one's presence prevents the defendant from delaying his trial by voluntarily absenting himself.<sup>81</sup> Despite the fact that under federal law such a waiver is permissible, some states still strictly prohibit the defendant from waiving presence in a felony prosecution.<sup>82</sup>

The Manual for Courts-Martial recognizes the defendant's right to waive his presence at his court-martial:

The accused's voluntary and unauthorized absence after the trial has commenced in his presence and he has been arraigned does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.<sup>83</sup>

This provision is similar to Federal Rule 43 in that it requires the defendant to be present for the start of the trial before he can waive his presence, but it differs from the Rule in that it makes no distinction between felony and misdemeanor offenses and does not permit the defendant to waive his presence for the entire trial. Several military cases have considered this provision and recognized the accused's right to voluntarily waive his presence at trial.<sup>84</sup>

Military criminal procedure makes no distinction between capital and noncapital cases.<sup>85</sup> A defendant can voluntarily waive his pres-

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<sup>79</sup> FED. R. CRIM. P. 43; see note 65 *supra*.

<sup>80</sup> FED. R. CRIM. P. 43 makes no distinction between capital and noncapital cases in its two provisions for waiver of presence. It also permits the defendant to waive his presence entirely if he is being prosecuted for offenses punishable by fine or by imprisonment for not more than one year or both. See note 65 *supra*.

<sup>81</sup> *Trial In Absentia*, *supra* note 52, at 159. But see FED. R. CRIM. P. 43, *supra* note 65, which permits a defendant to waive his right to be present entirely if he is being prosecuted for a misdemeanor.

<sup>82</sup> See, e.g., *People v. Kerridge*, 20 Mich. App. 184, 173 N.W.2d 789 (1969); *Noell v. Commonwealth*, 135 Va. 600, 115 S.E. 679 (1923).

<sup>83</sup> MCM, 1969, para. 11c.

<sup>84</sup> See, e.g., *United States v. Staten*, 21 C.M.A. 493, 45 C.M.R. 267 (1972); *United States v. Cook*, 20 C.M.A. 504, 43 C.M.R. 344 (1971); *United States v. Walters*, 4 C.M.A. 617, 16 C.M.R. 191 (1954).

<sup>85</sup> *United States v. Houghtaling*, 2 C.M.A. 280, 8 C.M.R. 30 (1953). In holding that an accused could waive his right to presence by voluntarily absenting himself from his trial the court specifically discussed the capital, noncapital provision of prior Federal Rule 43. It concluded that the drafters of the 1949 and 1951 Manuals were aware of Rule 43 and specifically rejected the capital, noncapital distinction the rule made.

ence at his court-martial, regardless of the offense he is charged with, so long as he is present at the beginning of his trial and until his arraignment has been concluded. The Court of Military Appeals expressly considered the *Diaz* dictum when it decided to treat capital and noncapital cases similarly, but found the distinction inappropriate where a defendant had escaped from custody.<sup>86</sup> Nonetheless it remains essential that the defendant's waiver of this right be voluntary.<sup>87</sup>

#### D. CONSTRUCTIVE WAIVER OF DEFENDANT'S RIGHT TO BE PRESENT AT HIS TRIAL

The theory which permits the defendant to waive his right to be present at his trial has also been applied to cases where the defendant's conduct has required that he be removed from the courtroom to permit his trial to continue. Justice Cardozo recognized the possibility in dictum in *Snyder* when he stated, "No doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct."<sup>88</sup> In essence, the defendant's disruptive behavior is considered voluntary and thus a waiver of his right to be present. The cases equate voluntary disruption with voluntary waiver, and on that basis find removal of the defendant from his own trial constitutionally permissible.<sup>89</sup> The United States Court of Appeals for the Second Circuit applied the same rationale in *United States v. Ives*<sup>90</sup> and held that a defendant had waived his right to testify by his disruptive behavior in court.

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<sup>86</sup> There is, it is true, a dictum reference to this effect in [*Diaz*], where it is said that one accused of a capital crime is regarded as incapable of waiving his right to be present at his trial because he is "usually in custody," and because he "is deemed to suffer the constraint naturally to apprehension of the awful penalty that would follow conviction." However, these reasons would not appear to be applicable to one who forceably escapes from confinement, for he is certainly not in custody, and can hardly be "deemed" to have been greatly restrained by "apprehension of the awful penalty that would follow conviction."

United States v. Houghtaling, 2 C.M.A. 230, 233, 8 C.M.R. 30, 33 (1953).

<sup>87</sup> United States v. Cook, 20 C.M.A. 504, 48 C.M.R. 344 (1971). The Court of Military Appeals reversed the conviction and ordered a rehearing in this case on the grounds that the military judge failed to properly inquire as to the issue of the voluntariness of the accused's absence.

<sup>88</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>89</sup> *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *People v. DeSimone*, 9 Ill. 2d 522, 533, 138 N.E.2d 556, 562 (1956). The court in *DeSimone* described constructive waiver in this manner: "It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was, in turn, effective as a waiver of the defendant's right to be present." *Id.* at 533, 138 N.E.2d at 562.

<sup>90</sup> 504 F.2d 933 (2d Cir. 1974).

There are no reported military cases in which a defendant has been removed from his trial because of his misbehavior in court; however, the waiver theory could apply to military trials and would find support in a number of decisions of the Court of Military Appeals. Absence without leave during a court-martial has been considered a voluntary waiver of the right to be present,<sup>91</sup> and it is a logical step to reason that voluntary disruption is a waiver of the same right.

## V. DEFENDANT'S RIGHT TO BE PRESENT FREE OF SHACKLES

### A. HISTORICAL BASIS AND DEVELOPMENT OF RIGHT

At common law the general rule was that a defendant should appear before the court free of shackles or other restraints unless there was evidence that he might escape.<sup>92</sup> This rule was recognized early in American military jurisprudence and was commented on by Colonel Winthrop: "In order that he may not be embarrassed in making his defense, the accused party on trial before a court martial should be subjected to no restraint other than such as may be necessary to enforce his presence or prevent disorderly conduct on his part."<sup>93</sup>

The historical justifications for the defendant's right to appear at his trial free of shackles or other restraints were twofold. First, it was a well established principle that only the guilty were to be punished.<sup>94</sup> Shackling and restraining a defendant for no reason other than the fact that he was on trial amounted to punishing him before determining his guilt. Second, shackling a defendant might affect his reasoning and free will.<sup>95</sup> Many feared that a man restrained by heavy chains and shackles would be more concerned with the shackling than the trial itself.

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<sup>91</sup> *United States v. Staten*, 21 C.M.A. 492, 45 C.M.R. 267 (1972).

<sup>92</sup> 4 W. BLACKSTONE, *supra* note 45, at 322. "The prisoner must be brought to the bar without irons or in any manner of shackles, or bonds, unless there be evident danger of escape, and then he may be secured with irons." *Id.*

<sup>93</sup> W. WINTHROP, *A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY* 334 (1895).

<sup>94</sup> See Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U.L.J. 351, 351 (1971) [hereinafter cited as *Physical Restraint in the Courtroom*].

<sup>95</sup> *Id.*



The right to be free of shackles at trial was recognized as emanating from the federal Constitution by the Supreme Court of California in *People v. Harrington*.<sup>98</sup> That court, in reversing the conviction of a defendant who was chained during his entire trial commented:

[A]ny order or action of the Court, which without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental facilities, and thereby materially to abridge and prejudicially affect his constitutional rights of defense and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.<sup>97</sup>

In addition to these theories underlying a defendant's right to appear at trial free of shackles or restraints, modern case law has recognized three additional grounds. First, shackling a defendant hinders his ability to aid in his own defense. When manacled, it is difficult for the defendant to communicate with his counsel by writing notes and to help his counsel by handling papers at the defense counsel's table.<sup>98</sup> Second, there is a possibility that jurors viewing a shackled or restrained defendant might infer that he was a dangerous person or at least a person who could not be trusted,<sup>99</sup> and thus become prejudiced against him.<sup>100</sup> A shackled defendant loses his "indicia of innocence"<sup>101</sup> and shackling makes the presumption of innocence more difficult to maintain. Third, shackling detracts from the dignity and decorum of the courtroom.<sup>102</sup>

A soldier's right to be free from shackles at his court-martial is set out clearly in the Manual for Courts-Martial: "[P]hysical restraint will not be imposed upon the accused during open sessions of the court unless prescribed by the military judge or the president of a special court-martial without a military judge."<sup>103</sup>

Several of the reasons which underlie a defendant's right to be

<sup>98</sup> 42 Cal. 165, 10 Am. R. 269 (1871).

<sup>97</sup> *Id.* at 168, 10 Am. R. at 271.

<sup>99</sup> *Illinois v. Allen*, 397 U.S. 337, 344 (1970). The Supreme Court recognized this basis for not shackling in the following manner: "Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." *Id.*

<sup>100</sup> "[It is] possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant. . . ." *Id.*

<sup>101</sup> *State v. Kring*, 1 Mo. App. 438 (1876), *aff'd*, 64 Mo. 591 (1877); *Physical Restraint in the Courtroom*, *supra* note 94, at 359.

<sup>102</sup> *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970).

<sup>103</sup> *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

<sup>104</sup> MCM, 1969, para. 60.

present free of shackles apply equally to his right to appear in court in the "garb of innocence."<sup>104</sup> In *Eddy v. People*<sup>105</sup> the Colorado Supreme Court reversed a murder conviction because the defendant, a soldier, was refused permission to wear his uniform and was required to wear striped coveralls with the words "County Jail" written in large letters across the back. The court stated:

The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the Court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the Court may otherwise require.<sup>106</sup>

In military law, these same concerns are reflected in the Manual for Courts-Martial which provides that a defendant in a court-martial "will be properly attired in the class of dress or uniform prescribed by the military judge or president for the court."<sup>107</sup>

The United States Court of Military Appeals considered the rationale for this provision in *United States v. West*<sup>108</sup> when it held that the failure to provide the defendant an appropriate uniform and grooming facilities materially prejudiced him and contributed to the denial of a fair and impartial trial.<sup>109</sup> In a later case, the court

<sup>104</sup> Comment, *Criminal Defendants: Maintaining the Appearance of Innocence*, 37 Mo. L. Rev. 660 (1972) [hereinafter cited as *The Appearance of Innocence*].

<sup>105</sup> 113 Colo. 488, 174 P.2d 717 (1946).

<sup>106</sup> *Id.* at 492, 174 P.2d at 718-19.

<sup>107</sup> MCM, 1969, para 60.

<sup>108</sup> 12 C.M.A. 670, 31 C.M.R. 256 (1962).

<sup>109</sup> *Id.* The defendant in *West* was charged, in January 1961, with conspiracy, absence without leave, offering violence to a superior officer, escape from custody, resisting apprehension, wrongful sale of government property, larceny, and aggravated assault. During parts of his pretrial confinement he was placed in a cell five feet wide, seven feet long, six and one-half feet in height, known colloquially as the "box." The walls and floor were made of concrete and the door was a solid steel construction. Two small hooded ventilators admitted air. It had no light or furniture. During the trial the defendant was transported to and from court in a box mounted on the rear of a truck. He was required to appear in a prisoner's uniform marked with yellow paint for the first three days of his trial, and thereafter, permitted to dress in utility clothing. He was not allowed to shave before attending court.

In addressing the issue of the defendant's dress during trial, the court cited the Manual for Courts-Martial, United States, 1951, at page 84, which read substantially the same in pertinent parts as paragraph 60 of the present Manual. In referring to the above mentioned section, the court made the following statement which graphically outlines the right to the "garb of Innocence":

The purpose of the foregoing provision is plain. It enables an accused to present himself physically as an innocent and decent member of military society until the court-martial has found to the contrary and sentenced him. It does not require citation of authority to note the difference in the impression made upon the court members by a clean-shaven, well-dressed young Marine wearing his decorations and the insignia of his grade and that created by a whiskered defendant clad in an ill-pressed prison garment decorated only with splotches of yellow paint.

12. C.M.A. at 674, 31 C.M.R. at 260.

further commented on the attire of participants in court-martial proceedings.<sup>110</sup> The Manual's language leaves little doubt that the accused will be tried in a military uniform,<sup>111</sup> but it does leave up to the military judge, when sitting alone, or the president of the court, if a court with members, the choice as to the type of uniform to be worn.<sup>112</sup>

Other conditions related to the defendant's freedom from restraint or his attire may tend to detract from the presumption of his innocence. One such situation is where a large number of individuals readily identifiable as guards are stationed in and around the courtroom. Armed guards standing near the defendant or located in the courtroom could create the impression in the minds of the jurors that the accused is dangerous, untrustworthy, and, therefore, probably guilty of the offenses charged against him.<sup>113</sup> The prejudicial effect on the defendant of the presence of armed guards in the courtroom has been recognized in military cases and their use discouraged, except where required to avert a possible escape by the accused or to prevent violent conduct on his part.<sup>114</sup>

#### *B. THE RIGHT TO BE FREE OF SHACKLES IS NOT AN ABSOLUTE RIGHT*

The English common law recognized the defendant's right to be present at his trial free of shackles, and at the same time conceded that there were exceptions to this right where there was a real possi-

<sup>110</sup> One final matter bears mention in connection with the subject before us. Courts-martial are, and have always been, judicial proceedings. They should be conducted as such. We believe that, except in unusual circumstances, they should be convened with the members, counsel, law officer, and accused appearing in dress suitable to the occasion. One need hark back only briefly in military history to recall the assembly of a general court-martial with its participants clothed in their lines; raiment and armed—perhaps symbolically—with dress swords. The use of fatigue uniforms detracts from the dignity of the court, and, while time marches on and the sword has largely disappeared, we dare suggest that some attention to tradition will add much to the awe and respect which should surround every court-martial as a part of the military judicial system.

United States v. Scholes, 14 C.M.A. 14, 18, 33 C.M.R. 226, 230 (1963).

<sup>111</sup> MCM, 1969, para. 60.

<sup>112</sup> The phrase "class of dress" or uniform used in paragraph 60 implies that the military judge or president of the court could prescribe attire for a court-martial other than a military uniform. However, an alternative other than a military uniform would not meet the criteria of the next sentence of paragraph 60: "An accused officer, warrant officer, or enlisted person will wear the insignia of his rank or grade and may wear any decorations, emblems, or ribbons to which he is entitled." (emphasis added.) To wear insignia of rank the accused must be wearing a military uniform.

<sup>113</sup> *The Appearance of Innocence*, *supra* note 104, at 672-73.

<sup>114</sup> United States v. West, 12 C.M.A. 670, 874, 31 C.M.R. 256, 260 (1962); United States v. Steare, 32 C.M.R. 615, 516 (A.B.R. 1962).

bility that the defendant might escape.<sup>115</sup> Colonel Winthrop recognized a similar exception to the right:

Except, therefore, in an extreme case, as where, the accused being charged with an aggravated and heinous offense, there is reasonable ground to believe that he will attempt to escape or to commit acts of violence, the keeping or placing of irons upon him while before the court will not be justified.<sup>116</sup>

These early exceptions to the right of presence free of shackles were directed at the possibility that the accused might escape or commit violent acts. Current case law recognizes these exceptions<sup>117</sup> and expands them by including courtroom disruption by the defendant as an additional exception to the right to be present free of shackles.<sup>118</sup> Military case law has also accepted this proposition by noting that the "general rule must yield where an individual disrupts or evidences an intention to disrupt the orderly proceedings of the court."<sup>119</sup>

### C. WHEN A DEFENDANT MAY BE SHACKLED

Before a trial judge may shackle, gag, or otherwise restrain an accused in the courtroom he must possess sound evidence that such action is required.<sup>120</sup> The evidence must support his decision to restrain the accused and justify the type of restraint used. It must establish that the interest of society in the timely, orderly administration of justice outweighs the defendant's right to be present free of shackles. In reviewing the issue of shackling a defendant with handcuffs during his murder trial, the Court of Military Appeals set out the military standard by stating: "[R]ather, the issue is whether there were reasonable grounds to believe the restraint necessary."<sup>121</sup>

In deciding whether or not to limit an accused's right to be present at his trial free of shackles, the judge must consider a variety of factors. Some states limit the judge's consideration to the conduct of

<sup>115</sup> 4 W. BLACKSTONE, *supra* note 45, at 322.

<sup>116</sup> W. WINTHROP, *supra* note 93, at 334.

<sup>117</sup> *Loux v. United States*, 389 F.2d 911, 919 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968). The court recognized an early exception when it declared: "But it is equally well established that, when the facts warrant, it is within the discretion of the court to require that they be shackled for the protection of everyone in the courtroom and its vicinity." *Id.* at 919.

<sup>118</sup> *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970).

<sup>119</sup> *United States v. Gentile*, 23 C.M.A. 462, 463, 30 C.M.R. 481, 482 (1975).

<sup>120</sup> *United States v. Samuel*, 431 F.2d 610, 613 (4th Cir. 1970); *State v. Kring*, 64 Mo. 591, 593 (1877); *State v. Roberts*, 86 N.J. Super. 159, 162, 206 A.2d 200, 203 (1965).

<sup>121</sup> *United States v. Henderson*, 11 C.M.A. 556, 29 C.M.R. 372 (1960).

the accused which takes place in the courtroom,<sup>122</sup> but this is the exception rather than the rule. In *Loux v. United States*<sup>123</sup> information came to the trial judge before trial that indicated the defendants, who were charged with escape from confinement and kidnapping, might attempt to escape during their trial. Based on this information the judge held a hearing to determine whether or not to shackle the defendants during trial. At the hearing it was established that the defendants had lengthy escape records, prior convictions for violent crimes, and had made some preparations for escape. It was further established that the courtroom was not as secure as most and that there was no holding cell adjacent to it. Evidence was also presented that several individuals to be called as witnesses had criminal records for violent crimes. Based on these facts the trial judge decided to shackle the defendants during the trial with leg irons, handcuffs, and a belt to which the shackles were attached by chains. On appeal the defendants argued that the judge's decision to shackle them had to be based on their conduct at trial, and in this case the judge had made his decision prior to the trial. The Ninth Circuit ruled that the judge's decision to shackle did not have to be based on the accused's conduct at trial.<sup>124</sup> In so deciding it observed that "to require a dangerous act at trial before shackling the prisoner would seriously impair the court's security."<sup>125</sup>

Aside from the accused's in-court conduct and criminal record, the trial judge may consider his reputation, character, and the nature of the charges pending against him.<sup>126</sup> He may also consider the defendant's verbal refusal to obey the rules of court,<sup>127</sup> statements by the accused that he is going to attempt to escape,<sup>128</sup> and

<sup>122</sup> *E.g.*, *State v. Coursolle*, 255 Minn. 384, 97 N.W.2d 472 (1959).

<sup>123</sup> 389 F.2d 911 (9th Cir. 1968).

<sup>124</sup> *Id.*; accord, *Hall v. State*, 199 Ind. 592, 159 N.E. 420 (1928).

<sup>125</sup> *Loux v. United States*, 389 F.2d 911, 919 (9th Cir. 1968).

<sup>126</sup> *State v. Roberts*, 86 N.J. Super. 159, 165, 206 A.2d 200, 204 (1965).

<sup>127</sup> *Morris v. State*, 249 Ark. 1005, 462 S.W.2d 842 (1971). This case involved the removal of the defendant from his trial, rather than shackling, but it does recognize what conduct can be considered by the judge in deciding how to handle an obstreperous defendant. After the jury was selected the defendant told the deputy sheriff that "He was going to pull a Bobby Seale." He then created a commotion in the courtroom by kicking over a chair and talking to the jurors loudly. The judge then recessed the court and talked to the accused in chambers. The judge explained to the defendant that he had to abide by the ordinary rules of conduct and decency if he wished to remain in the courtroom during his trial. The defendant verbally stated he would not abide by the rules and the judge then had the sheriff return the defendant to jail. On appeal the Arkansas Supreme Court ruled that the defendant's oral refusal to abide by the court rules was sufficient reason for the trial judge to bar the defendant from the courtroom.

<sup>128</sup> *People v. Kimball*, 5 Cal. 2d 608, 55 P.2d 483 (1936). The defendant

any attempts to escape.<sup>129</sup> The defendant's conduct during his pre-trial confinement may also be considered by the judge in deciding whether to shackle him.<sup>130</sup>

In summary, a trial judge may consider any evidence which sheds light on how the defendant may conduct himself during trial and all in-court conduct in deciding whether or not to shackle or restrain the defendant.

The majority rule which permits the judge to consider any relevant evidence is followed in the military. The Court of Military Appeals has stated: "It begs the question to argue that accused did not misbehave in court; rather, the issue is whether there were reasonable grounds to believe the restraint necessary. It is not necessary to allow violence before taking preventive measures."<sup>131</sup>

## VI. METHODS OF HANDLING A DISRUPTIVE DEFENDANT

### A. INITIAL CONSIDERATIONS

A judge who fails to spot disruption at its early stages or treats all minor irregularities as courtroom disruption exhibits an inability to fulfill his role as a trial judge in a professional manner. Balancing the rights of the accused with the interest of society in a timely, orderly judicial process is not an easy task. It is a task which must be approached with judicial maturity and flexibility to ensure that both the defendant and society as a whole have the opportunity to obtain justice under the law.

Within the military criminal judicial system, instances of trial disruption are not so numerous that judges deal with the disruptive defendant on a regular basis. Nonetheless, the trial judge should be

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threatened to escape, and to injure or kill three or four witnesses. A piece of lead pipe was also found on his person on the first day of trial. Based on these facts the trial judge had the defendant handcuffed to a police officer throughout his murder trial. On appeal the California Supreme Court upheld the shackling.

<sup>129</sup> *Commonwealth v. Chase*, 350 Mass. 738, 217 N.E.2d 195, cert. denied, 385 U.S. 906 (1966). The trial judge was aware of the fact that the 15-year-old defendant had tried to escape twice before his trial for second degree murder. On this basis he had the accused shackled during trial. Shackling was upheld on appeal.

<sup>130</sup> *United States v. Henderson*, 11 C.M.A. 556, 563, 29 C.M.R. 372, 379 (1960).

<sup>131</sup> *Id.*; accord, *United States v. Gentile*, 23 C.M.A. 462, 50 C.M.R. 481 (1975):

We also reject the suggestion of appellate defense counsel that the accused was entitled to stand trial without handcuffs until he once disrupted the proceedings. When an individual has announced on six separate occasions his intention to disrupt the trial, we perceive no rational basis for concluding that the military judge must "take the dare," running the risk that the accused will further inflame the jury to his own detriment.

*Id.* at 463, 50 C.M.R. at 482 (emphasis added).

familiar with the interests he must balance and the methods available to control disruption. He should have a plan in mind to control the disruptive defendant because during the course of a trial he will have little opportunity to research the permissible methods of controlling an obstreperous defendant.

The necessity for prompt action is particularly important if the trial involves a court with members. The military judge's initial action can set the tone for the remainder of the trial. The defendant immediately notes and interprets the manner in which the judge reacts to misconduct and then gauges his own future conduct accordingly. Likewise, the members of the court-martial view and construe his actions, and for this reason the trial judge must be careful not to exhibit an emotional or intemperate reaction to the defendant's conduct. The military judge should treat courtroom disruption in the same firm, judicious manner as he treats objections by either counsel during the course of the trial.

The judge should keep in mind that what he does in the courtroom affects not only the accused, but also society as a whole. Through the news media, the community is aware of what takes place at criminal trials, and their perception of the fairness and orderliness of trials can influence the public's overall faith and reliance on the criminal justice system, whether it be civilian or military.

As soon as the defendant acts in any manner out of the ordinary, the trial judge must evaluate the conduct and decide if it is disruptive. Once he has decided that the conduct is disruptive, he must balance the rights of the accused with the interests of society in deciding how to control it.

The military judge has available to him the use of an article 39(a)<sup>132</sup> hearing<sup>133</sup> to aid him in controlling disruptive behavior. If he receives information prior to trial that the defendant intends to be unruly, he should direct the trial counsel to have the defendant restrained at this 39(a) hearing. The restraint used should be appropriate for the type of misconduct expected. Whether the accused will remain shackled for future court appearances depends on the evidence presented at the article 39(a) hearing and the accused's conduct.

At the hearing, the judge should explain to the accused what disruptive conduct is and that if the accused is disruptive he will recess the court and take appropriate action to stop such behavior.

<sup>132</sup> U.C.M.J. art. 39(a).

<sup>133</sup> MCM, 1969, para. 57g.

If, prior to trial, the trial judge has not received information concerning possible courtroom disruption and the issue arises during the course of the trial, as soon as he determines that the defendant's conduct is disruptive he should stop the proceedings and conduct an article 39(a) hearing. After the hearing he should take the steps he believes are necessary to control the disruption, based on all the evidence available to him.

During the article 39(a) hearing the judge should ensure that the record of trial includes all the factors on which he bases his action. This will enable an appellate court to quickly and thoroughly evaluate the legality of whatever action is taken.<sup>134</sup> While most records will include the defendant's statements during the trial, the judge should be sure that any nonverbal conduct of the accused during trial is also reflected in the record. In addition, the judge should include a description of any relevant out of court conduct of the defendant. Finally, the judge should ensure that any other evidence bearing on his decision on how to control the defendant is included in the transcript of the trial. In fairness to the accused, the judge should give the defense counsel an opportunity to state his client's position on whether or not courtroom disruption has taken place, whether there is a possibility of further courtroom disruption, and on the method used by the trial judge to control the disruption.

Such a hearing is not required and few jurisdictions set out exactly what the judge must include in the record. However, the United States Court of Appeals for the Fourth Circuit requires that the record contain all reasons, facts, and matters on which the decision of the trial judge to restrain the defendant is based. In *United States v. Samuel*<sup>135</sup> the court returned the case to the district court in order that the trial judge could support the record "with a succinct statement of all the reasons and facts and matters from which he concluded to require defendant to be tried before a jury while wearing handcuffs."<sup>136</sup> In returning the case the court set out the following criteria to be followed by the district court judges:

Whenever unusual visible security measures in jury cases are to be employed, we will require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary.<sup>137</sup>

The court did not require a formal hearing and the taking of evi-

<sup>134</sup> See *Physical Restraint in the Courtroom*, *supra* note 94, at 371.

<sup>135</sup> 431 F.2d 610 (4th Cir. 1970).

<sup>136</sup> *Id.* at 616.

<sup>137</sup> *Id.* at 615.



dence on the issue of disruption, but did suggest that such a procedure be used. Such a procedure makes it possible for all participants in the trial to center their attention on the issue of disruption and makes available to the trial and appellate judges all evidence bearing on the issue.

### B. TECHNIQUES

The trial judge has available to him a number of acceptable methods to control the disruptive behavior of the defendant. The order in which they appear in this article is not intended to suggest that the judge must utilize each method in his attempt to control courtroom disruption. The description does, however, start with the least severe method and concludes with the most extreme method. The order is intended to provide the trial judge with a workable, step-by-step methodology and analysis of the available techniques.

#### 1. Warning

As soon as the judge determines that the defendant's conduct during trial is disruptive he should excuse the court members, if the trial is to a court with members, and then inform the defendant that his behavior is improper and not permissible in the courtroom. The trial judge should advise the defendant that if he continues to behave in the same manner the court will take affirmative action against him to prevent his behavior from disrupting the trial; that such action could include citing him for contempt, shackling or gagging him, and removing him from the courtroom; that if he is shackled, gagged or removed, the shackles or gag will not be removed nor will he be readmitted to the courtroom until he indicates for the record that he will stop his disruptive behavior; and that if he is removed the trial will proceed in his absence.<sup>138</sup> This warning should be on the record and be given in a firm and clear manner in order that the defendant understands what specific behavior the judge is addressing and what will happen if the defendant persists in his conduct. The warning should be given in a manner that requires the defendant to respond to it. The defendant's responses should then appear in the record of trial.<sup>139</sup> The judge should also ensure

<sup>138</sup> Flaum & Thompson, *The Case of the Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L.C. & P.S. 327, 334 (1970) [hereinafter cited as *The Case of the Disruptive Defendant*].

<sup>139</sup> For example, a warning of the following type should be used:

Earlier in this trial I observed that you (*describe the disruptive conduct committed by the defendant*). Your conduct, as just described, will not be permitted

at this time that the record contains all the facts concerning the defendant's behavior. In a court-martial with members the military judge should use an article 39(a) hearing for the purpose of giving the warning.

If the disruption is significant or appears to be of a nature intended to disrupt the proceedings, the judge should be especially careful to give the warning described above. Such a warning is required before the trial judge may remove the defendant from the courtroom because of his misbehavior.<sup>140</sup> There is no requirement that a warning be given before a defendant is cited for contempt, shackled, or gagged. However, as a matter of practice, the trial judge should always warn the defendant prior to taking any action against him because of his disruptive conduct during trial.<sup>141</sup> When

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in this courtroom. It violates the guidelines I set out for your behavior at the beginning of this trial and shows a disregard on your part for the timely and orderly process of this trial. Further conduct of this type during the course of this trial may result in my citing you for contempt, having you shackled, or having you removed from the courtroom.

Regardless of what action I take against you, your trial will continue. This is true even if I have you removed from the courtroom. If removed you will lose your right to see and hear the witnesses against you and to observe the proceedings of the trial. You will remain shackled or removed from the courtroom until you agree to cease your disruptive behavior.

Do you have any questions?

Do you promise to cease your disruptive behavior and conduct yourself according to the rules of this court?

<sup>140</sup> *Illinois v. Allen*, 397 U.S. 337 (1970). Mr. Justice Black, writing for the Court, outlined the requirement that a defendant be warned prior to being removed from the court: "[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior. . . ." *Id.* at 343 (emphasis added). In the remainder of the opinion he did not address the issue of whether or not a warning is required before a defendant can be cited for contempt, shackled or gagged.

<sup>141</sup> *Id.* In his concurring opinion, Mr. Justice Brennan stated that a warning is required before any action may be taken against a defendant: "Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior." *Id.* at 350.

Justice Brennan's concurring opinion was cited and heavily relied on in *Jones v. State*, 262 Md. 61, 276 A.2d 665 (1971), when the Supreme Court of Maryland reversed a felony conviction because there was no warning given before the defendant was shackled and gagged and there was no disruptive conduct during trial. The defendant was charged and convicted of rape, assault with intent to rape, and three charges of assault with intent to maim. On the way to the courtroom the trial judge saw the accused involved in an altercation with four deputy sheriffs. Without a hearing or warning the judge had the accused shackled and gagged when the trial began. The accused was kept in this state in front of the jury during the entire morning session. By the afternoon session the judge had the shackles and gag removed. See also 8 AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS 18 (1970).

the judge takes action against the defendant on the basis of facts established before trial, such as the defendant's character or criminal record, threats or attempts to escape and the nature of the offense, no warning is required because the defendant's in-court conduct is not one of the bases for the action taken.<sup>142</sup>

### 2. *Recess or Cooling Off Period*

After giving the warning the judge should recess the trial for approximately ten to twenty minutes.<sup>143</sup> This action gives the defendant an opportunity to think about the judge's warning and decide how he plans to conduct himself in future courtroom appearances. It gives the defense counsel a chance to talk with the accused and advise him concerning his future conduct. In many cases the combination of the initial warning and the recess should be sufficient to control those defendants whose disorderly conduct is the result of ignorance concerning the behavior expected of them or the result of an emotional outburst. This is especially true in those cases where the defendant is acting as his own counsel. It is doubtful, however, that such procedures will have any effect on the conduct of those defendants who are purposely trying to disrupt their trial because of meanness, disrespect for the judicial process or political reasons.

### 3. *Armed Guards*

When a trial judge has evidence prior to trial that the defendant may try to disrupt the proceedings by attempting to escape, a method of prohibiting such conduct is the use of armed guards. As noted above,<sup>144</sup> the judge should conduct a hearing on the necessity for using armed guards before requesting their presence in the courtroom. While the use of guards may discourage some disruptive conduct, in most instances their only function will be to restrain the accused while he is being shackled and gagged or to physically remove him from the courtroom. To lessen the prejudicial atmosphere that the presence of armed guards might create, the judge should use guards dressed in civilian clothes rather than uniforms.

### 4. *Contempt*

When a warning, as described above, does not stop the defend-

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<sup>142</sup> See text accompanying notes 122-125 *supra*.

<sup>143</sup> *Disruption in the Courtroom*, *supra* note 52, at 583.

<sup>144</sup> See text accompanying notes 132-136 *supra*.

ant's disruptive behavior, the trial judge can consider using his contempt power. Civilian trial judges have the power to summarily cite defendants who are disruptive in their presence for contempt at the time such disruption takes place.<sup>145</sup> If the judge is not personally aware of the contemptuous behavior, he must have a hearing before he may cite an accused for contempt.<sup>146</sup> Further, if he desires that the defendant be sentenced for more than six months, he cannot use his summary contempt power because the defendant is then entitled to a jury trial.<sup>147</sup> In addition, if the defendant's contemptuous behavior is directed at the trial judge, he must arrange for the contempt citation to be tried by another judge.<sup>148</sup> The major point in favor of using the contempt power is that it does not interfere with the defendant's right to a fair trial because it does not create the possibility of prejudicing the jurors toward the defendant. However, if the case involves crimes which carry lengthy sentences, the defendant's improper conduct is unlikely to be deterred by the additional sentence a contempt citation would carry.

The contempt power available to the military judge varies significantly from that available to the civilian judge.<sup>149</sup> The basic authority for criminal contempt in courts-martial is found in the Uniform Code of Military Justice<sup>150</sup> and implemented in the Manual for Courts-Martial.<sup>151</sup> Menacing or disruptive conduct during a court-martial can be punished by confinement or fine.<sup>152</sup>

When a defendant is cited for contempt, the regular proceedings of the court-martial should be suspended and a hearing held during which the defendant is directed to show cause why he should not be held in contempt.<sup>153</sup> If the military judge is hearing the case alone, he determines if the defendant is in contempt. If he makes an affirmative finding, he then decides an appropriate sentence for the conduct.<sup>154</sup> If the trial involves a court with members, the court

<sup>145</sup> *Disruption in the Courtroom*, *supra* note 143, at 573.

<sup>146</sup> *Johnson v. Mississippi*, 403 U.S. 212 (1971).

<sup>147</sup> *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Bloom v. Illinois*, 391 U.S. 194 (1968).

<sup>148</sup> *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

<sup>149</sup> For a comprehensive treatment of the military judge's contempt power, see McHardy, *Military Contempt Law and Procedure*, 55 MIL. L. REV. 131 (1972).

<sup>150</sup> "Any person who uses any menacing word, sign, or gesture" in the presence of a court-martial or "who disturbs its proceedings by any riots or disorder" can be punished for contempt and sentenced to 30 days' confinement and or be fined \$100.00. U.C.M.J. art. 48.

<sup>151</sup> MCM, 1969, para. 118.

<sup>152</sup> U.C.M.J. art. 48.

<sup>153</sup> MCM, 1969, para. 118b.

<sup>154</sup> *Id.*

determines if the conduct is contemptuous and sentences the defendant for his contempt.<sup>155</sup> It is theoretically possible for the trial judge to decide that a defendant is not in contempt and then have the court members overrule this decision and find him in contempt;<sup>156</sup> and the court may also find that the defendant is not in contempt after the judge has cited him for contempt.<sup>157</sup> In all cases a record of the contempt proceedings must be kept and the convening authority must approve any sentence for contempt before it becomes effective.<sup>158</sup> As an alternative to this procedure, a defendant can be charged and tried at another, subsequent court-martial for his contemptuous conduct.<sup>159</sup>

Because the convening authority must approve all sentences for contempt and when there is a court with members, the members must decide if the behavior of the defendant is contemptuous and determine the sentence for contempt, the use of the contempt power by the military judge to control a disruptive defendant is not practical. It would have little or no effect on the defendant who purposefully tries to disrupt his trial or one who faces a severe sentence. The possibility that court members will be prejudiced against a defendant they have found in contempt is so great that it is unlikely that any instruction by the military judge would erase the potential prejudice.

In view of the current limitations on the use of the contempt power in the military, the only time the judge should consider its use is when he desires to warn the defendant about conduct which is minor in nature. The Manual specifically provides for such a warning.<sup>160</sup>

### 5. *Shackling*

When warning a defendant about his conduct and threatening him with contempt fail to control his disruptive behavior, the judge should consider binding and gagging the defendant. The use of binding and gagging has been discouraged by the Supreme Court<sup>161</sup> and the American Bar Association,<sup>162</sup> but has not been prohibited.

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<sup>155</sup> *Id.*

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

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

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

<sup>160</sup> MCM, 1969, para. 118a.

<sup>161</sup> *Illinois v. Allen*, 397 U.S. 337, 544 (1970).

<sup>162</sup> FUNCTION OF THE TRIAL JUDGE, *supra* note 3, § 6.8, at 88.

In *United States v. Gentile*<sup>163</sup> the Court of Military Appeals recognized and approved handcuffing a defendant during his trial.

The sight of a defendant bound and gagged in the courtroom is surely "at odds with our sense of human dignity and fair play."<sup>164</sup> When bound and gagged the defendant loses his ability to communicate with his attorney<sup>165</sup> and it is likely that jurors will be prejudiced against a defendant who is bound and gagged.<sup>166</sup> Moreover, there is no doubt that a defendant who is handcuffed, tied to a chair and gagged detracts from the very dignity of the court which the judge is trying to preserve.<sup>167</sup>

Because shackling can have such a prejudicial effect on the defendant, it should be used sparingly and preferably only when the case is being tried by judge alone. Its use when there are court members should be limited to unusual factual circumstances such as found in the *Gentile*<sup>168</sup> case, where the judge had a defendant who threatened to remove his uniform handcuffed. If shackling would prompt the defendant to struggle against the shackles, it should be avoided because it will only create more disorder. Gagging should never be used because in most cases a defendant will remain able to make enough noise to disrupt the trial, the gag can physically harm the accused and it is impossible to limit the prejudicial effects its use generates. Whenever shackling is used the judge must be sure to instruct the jury to disregard the defendant's restraints in an attempt to avoid its potential prejudice.<sup>169</sup>

<sup>163</sup> 23 C.M.A. 462, 50 C.M.R. 481 (1975).

<sup>164</sup> J. COOR, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS 24 (1974).

<sup>165</sup> *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* During the Chicago Conspiracy Trial, Bobby Seale, one of the defendants, was ordered bound and gagged by the trial judge because of his disruptive behavior in the courtroom. One gets a feel for the impact of such an order when he considers Mr. Kunstler's description of Bobby Seale when he was returned to the courtroom bound and gagged:

Mr. Kunstler: I wanted to say the record should indicate that Mr. Seale is seated on a metal chair, each hand handcuffed to the leg of the chair on both the right and left sides so he cannot raise his hands, and a gag is tightly pressed into his mouth and tied at the rear, and that when he attempts to speak, a muffled sound comes out.

DISORDER IN THE COURT, *supra* note 1, at 59; see *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

<sup>168</sup> *United States v. Gentile*, 23 C.M.A. 462, 50 C.M.R. 481 (1975).

<sup>169</sup> The following instruction may be used for this purpose:

During the course of this trial you may have noticed that the defendant was (describe the type of shackling). It is important for you to realize that the defendant was not (describe the type of shackling) because of the charge(s) and specifications(s) before this court. You are not to consider this in any way in determining the defendant's guilt or innocence. Your decision must be based on the evidence properly brought before this court and nothing else.

6. *Removal*

The last means available to the trial judge to control a disruptive defendant is to have him removed from the courtroom. The removal of a defendant from his trial deprives him of his constitutional right to be present<sup>170</sup> and should be used only when it is impossible to continue the trial in his presence.<sup>171</sup> Removal is recognized by the Supreme Court as a constitutionally permissible method of handling a disruptive defendant.<sup>172</sup> Although there are no reported cases in the military where the issue of removal has been addressed, removing an accused who has been present for the opening of the trial and his arraignment is permissible under the provisions of the Manual.<sup>173</sup>

When an accused is removed from the courtroom he not only loses his right to be present but he also is deprived of his right to confront the witnesses against him.<sup>174</sup> His absence may prejudice the court members against him. However, the effect the removal of the defendant would have on the court members would tend to lessen as the trial proceeded, whereas a defendant who is shackled or gagged would be a constant reminder of his misconduct. Removal, as opposed to shackling or gagging, is preferred by the American Bar Association as a method of controlling the defendant's disruptive behavior.<sup>175</sup> Whenever removal is used the judge should instruct the court members to disregard the defendant's absence.<sup>176</sup>

Several procedures have been suggested as alternatives to removing the defendant entirely from his trial. It has been suggested that a soundproof box be installed in the courtroom<sup>177</sup> and con-

<sup>170</sup> See Section IV. *supra*.

<sup>171</sup> *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

<sup>172</sup> *Id.* at 344.

<sup>173</sup> MCM, 1969, para. 11c.

<sup>174</sup> See text accompanying notes 51 to 62 *supra*.

<sup>175</sup> FUNCTION OF THE TRIAL JUDGE, *supra* note 5, § 6.8, at 88. "Removal is preferable to gagging or shackling the disruptive defendant." *Id.*

<sup>176</sup> *United States v. Prowell*, 51 C.M.R. 155 (A.C.M.R. 1975). A judge may use the following sample instruction for this purpose:

As you are all aware, I had the defendant removed from the courtroom during the course of this trial because of his behavior. That behavior and his subsequent removal may not be considered by you in determining his guilt or innocence of the charge(s) and specification(s) before you. He was not removed because of the charge(s) and specification(s). His removal must be put out of your minds when you are determining the defendant's guilt or innocence. Your decision as to guilt or innocence must be based on the evidence properly brought before this court and nothing else.

<sup>177</sup> Note, *Three Constitutionally Permissible Ways for Trial Judges to Handle Unruly Defendants*, 19 KAN. L. REV. 305 (1971).

structed in such a way that the defendant could see and be seen by the judge and witnesses, but not by the jury. This would enable the defendant to remain in the courtroom and at the same time keep his behavior from being heard or seen by the court members. However, the possibility that the jury will be prejudiced against the defendant is just as great when they are prevented from seeing him as when he is removed from the courtroom. Such a box would also be expensive and very impractical to install in many courtrooms.

Connecting the courtroom to a separate cell with closed circuit television and a communications system has been suggested as another alternative.<sup>178</sup> The defendant may then be removed to the specially equipped cell if he disrupts the proceedings. Use of such a device would limit the impact of the defendant's disruptive behavior and provide the judge with a ready means to keep the defendant informed of the progress of the trial. In the military, the cost would be relatively low inasmuch as most military installations have the facilities to establish a closed circuit television and communications system. This approach would require no major construction because any room near the courtroom could be used as a holding cell for the defendant so long as it could be secured.

In *State v. Maryott*<sup>179</sup> a disruptive defendant's conduct was controlled by sedating the defendant with tranquilizers. The appellate court disapproved of this method and compared it with shackling, saying it affected the defendant's mind at the time of trial and prevented him from having the exclusive control of his mental processes. Because such a procedure would have to be closely monitored by a physician and its potential for abuse is so great, it is not a workable method to be used in controlling a defendant's disruptive behavior.

### C. WHAT THE JUDGE MUST DO

If the trial judge has the defendant shackled he must give the defendant ample opportunities to promise to behave and to then have the shackles removed.<sup>180</sup> He must also ensure that the restraints used do not injure the defendant in any way. In order to reduce the prejudice toward the defendant the judge should attempt to limit the visibility of the shackles by methods such as directing the defendant to remain seated and to keep his hands

<sup>178</sup> *Id.*

<sup>179</sup> 6 Wash. App. 96, 492 P.2d 239 (1971).

<sup>180</sup> *United States v. Gentile*, 23 C.M.A. 462, 50 C.M.R. 481 (1975).



and arms below the table.<sup>181</sup> Bringing the shackled defendant into the courtroom prior to the arrival of the jury is another means to reduce the prejudice.<sup>182</sup>

When the trial judge has the defendant removed from the courtroom he has a duty to allow the defendant to confer with his counsel and to keep the defendant informed of the progress of the trial.<sup>183</sup> This can be accomplished through the use of closed circuit television and a communications system between the courtroom and defendant's cell, or by giving the defendant a copy of the daily transcript of the trial.<sup>184</sup> If none of these options is available to the judge, he can accomplish the same goal by making sure the defendant meets regularly with counsel during the course of the trial and that the counsel has sufficient time to keep the defendant apprised of what is taking place in the courtroom.<sup>185</sup> This process is facilitated by keeping the defendant in close proximity to the courtroom. A mid-morning and mid-afternoon recess of at least thirty minutes and a lunch recess of at least one hour will give the defense counsel the opportunity to consult with the defendant and keep him informed of the trial proceedings.

The trial judge is not required to allow the defendant to return to the courtroom once he has been removed,<sup>186</sup> but in most cases every attempt should be made to allow the defendant to return.<sup>187</sup> At the beginning of each trial day the trial judge should give the accused the opportunity to promise to behave and to be permitted to return to the courtroom.

The trial judge should keep in mind that whenever there is courtroom disruption he immediately has a duty to reduce the extent of the prejudice the jury may feel toward the defendant. Even if the disruption is minor he should consider whether an instruction is required. If the disruptive conduct is apparent to the jury, the judge should instruct them to disregard it.<sup>188</sup>

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<sup>181</sup> *Id.* at 463, 50 C.M.R. at 482.

<sup>182</sup> *Loux v. United States*, 389 F.2d 911, 919 (9th Cir. 1968).

<sup>183</sup> *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Brennan, J. concurring).

<sup>184</sup> *The Case of the Disruptive Defendant*, *supra* note 138, at 336-37.

<sup>185</sup> FUNCTION OF THE TRIAL JUDGE, *supra* note 5, § 6.8 commentary at 89.

<sup>186</sup> *United States v. Ives*, 504 F.2d 935 (2d Cir. 1974).

<sup>187</sup> FUNCTION OF THE TRIAL JUDGE, *supra* note 5, § 6.8, at 88.

<sup>188</sup> *Guidelines*, *supra* note 20, at 716. An instruction similar in form and content to the following statement may be used unless the one reproduced at note 169 or note 176 is more appropriate:

During the course of this trial you may have observed the defendant  
(describe the conduct). In determining the defendant's guilt or innocence you

## VII. CONCLUSION

The military judge must continually remember that it is his duty to control the disruptive defendant. To accomplish this mission he must know what disruption is and the techniques available to him to control it. To effectively control courtroom disruption he must establish a plan and follow it in each case. By following the same procedure he will ensure that he is handling the situation properly and at the same time will put other defendants on notice as to what to expect if they are disruptive.

As soon as the judge determines the defendant is being disruptive he should stop the proceedings, excuse the court members, and hold an article 39(a) hearing. At the hearing he should inform the accused and his counsel that the accused's behavior is disruptive and if it continues that the accused will be removed from the courtroom. He should give the defense attorney an opportunity to be heard on the issue and at the same time ensure that all the relevant evidence concerning the defendant's conduct is included in the record of trial. It is important that the accused know what part of his behavior is disruptive and is aware of the consequences if it continues. The court should then be recessed to give the defendant an opportunity to consult with counsel and consider the judge's warning.

If the defendant refuses to cooperate or vows to continue his disruptive behavior he should be removed from the courtroom if he has been arraigned. If he has not been arraigned, he should be restrained in the courtroom until after arraignment. If the defendant indicates he intends to behave, then the trial should be resumed in his presence. However, if he again becomes disruptive he should be removed from the courtroom, assuming he has been arraigned. In all cases, when the defendant is removed, the judge must instruct the court members to disregard the removal in their process of determining the defendant's guilt or innocence. Once the defendant is removed the court should proceed in his absence until such time as the judge is convinced that the accused will behave.

After removing the defendant the judge must keep him informed as to the status of the trial and give him ample opportunity to consult with his counsel. To aid the judge in accomplishing this,

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must not consider that conduct. Your decision as to guilt or innocence must be based on the evidence properly brought before this court and nothing else.

all military courtrooms should have a suitable room located near them in which to secure the defendant. This room should be connected with the courtroom by closed circuit television. In addition, there should be a telephone, equipped with a light rather than a bell, at the defendant's counsel's table which connects the detention room with the courtroom. This will enable the defendant to communicate with his counsel during the trial without creating a disturbance.

The military judge should be concerned not only with controlling the defendant's behavior by having him removed from the courtroom, but also with obtaining the defendant's agreement that he will behave and conform to proper courtroom behavior without being removed from his trial. To accomplish this the military judge must apply the techniques described in this article in a firm and fair manner. By so doing he ensures that both the defendant and the public properly perceive the issues involved.



**THE AMENDED FIRST ARTICLE TO THE FIRST  
DRAFT  
PROTOCOL ADDITIONAL TO THE GENEVA  
CONVENTIONS OF 1949 — ITS IMPACT UPON  
HUMANITARIAN CONSTRAINTS GOVERNING  
ARMED CONFLICT\***

Captain John F. DePue \*\*

*It is a much discussed question whether the sovereign must observe the ordinary laws of war in dealing with rebellious subjects who have openly taken up arms against him.<sup>1</sup>*

**I. INTRODUCTION**

Wrought in the embers of the Second World War and adopted in contemplation of ensuing conflicts of a similar character, the four Geneva Conventions of 1949<sup>2</sup> have witnessed a phenomenon whose frequency and pervasiveness could not have been envisioned by their formulators. This phenomenon is a shift in the nature of armed conflicts from those characterized by the employment of trained and uniformed armies, fixed battle lines, and segregated

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<sup>1</sup> DeVattel, *Civil War*, in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 17 (A. Falk ed. 1968).

<sup>2</sup> Geneva Convention for the Protection of War Victims (Armed Forces in the Field), Aug. 12, 1949, 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as GWS (Field) Convention]; Geneva Convention for the Protection of War Victims (Armed Forces at Sea), Aug. 12, 1949, 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as GWS (Sea) Convention]; Geneva Convention for the Protection of War Victims (Prisoners of War), Aug. 12, 1949, 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as GPW Convention]; Geneva Convention for the Protection of War Victims (Civilian Persons), Aug. 12, 1949, 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Civilian Convention].

civilian populations, to a heterogeneous succession of internal struggles of varying intensity and purpose which have generally possessed none of the foregoing attributes. Although conflicts over the past two decades falling within the traditional model can practically be counted on the fingers of a single hand, those of the latter type, by one estimate, have numbered well over a thousand.<sup>3</sup> Cursorily reference to newspaper accounts of such struggles indicates that they typically involve clashes between the military forces of an incumbent government and domestic factions bent upon eliminating what they characterize as colonialism, racism or the repression of a quest for self-determination. The recurrence of such conflicts, their frequently brutal nature, and the widespread sympathy that is often extended to insurgent movements have prompted two discrete developments in the international community.

The first, of an essentially humanitarian cast, is the product of a recognition that extant norms governing the conduct of such conflicts are now woefully inadequate to minimize the brutality of such conflicts and adequately protect noncombatants. The formulation of a more closely defined scheme is imperative. Serious efforts in this direction were undertaken as early as 1953 by a commission of experts convened by the International Committee of the Red Cross (ICRC).<sup>4</sup> This movement was stimulated by the passage of resolutions by both the Twentieth and Twenty-first International Conferences of the Red Cross.<sup>5</sup> A Draft Additional Protocol to the Geneva Conventions of 1949 dealing exclusively with the protection of victims of noninternational conflicts was ultimately formulated.<sup>6</sup> This

<sup>3</sup> See H. ERSTEIN, *INTERNAL WAR* 3 (1963). Such a statistic is, of course, predicated upon the criteria established by the surveyor to define what constitutes an "internal conflict."

<sup>4</sup> For a comprehensive recapitulation of measures undertaken by the International Committee of the Red Cross since 1949 for the purpose of assuring protections to the victims of non-international conflicts, see 5 CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, PROTECTION OF VICTIMS OF NON-INTERNATIONAL CONFLICTS 6-9 (1971) [hereinafter cited as 5 CONFERENCE OF GOVERNMENT EXPERTS].

<sup>5</sup> XXth International Red Cross Conference Res. No. 31 (Vienna, 1965) (urging continuance of efforts to strengthen means of rendering assistance to victims of internal conflicts); XXIst International Red Cross Conference Res. No. 17 (Istanbul, 1969) (urging study of measures to augment Common Article 3); XXIst International Red Cross Conference Res. 18 (Istanbul, 1969) (urging study of legal status of participants in non-international conflicts).

<sup>6</sup> Draft Protocol Additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts in INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 33 (1973) [hereinafter cited as Draft Protocol II].

document is but a portion of a comprehensive program by the ICRC to augment the Conventions in a manner that will permit them more adequately to ameliorate the conditions caused by current methods of warfare.

The second development is of an essentially political bent and recognizes the legality of certain insurgent movements whose ostensible objectives include emancipation from alien, colonialist or racist domination. This result is manifested in the statements of various inter-governmental coalitions<sup>7</sup> and several resolutions of the United Nations General Assembly which collectively appear to recognize the right of such movements to employ armed force in pursuit of these objectives<sup>8</sup> despite proscriptions contained in the United Nations Charter.<sup>9</sup> Furthermore, these sources would ascribe to such conflicts an international character and accord the insurgents the full protections and safeguards of the Geneva Conventions.<sup>10</sup> Although such assertions may be primarily motivated by ideological or political considerations, it is indisputable that they have lent strength to the movement to extend the protections of international law to conflicts of a noninternational scope.

These two developments coalesced in a dramatic manner in the presentation of an amendment during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts. Convened by the Swiss Government at Geneva during February and March 1974, the Dip-

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<sup>7</sup> For example, the 1966 Cairo Conference of States or Governments of forty-seven nonaligned countries declared that "Colonized People may legitimately resort to arms to secure the full exercise of their rights to self-determination and independence if the colonial powers persist in opposing their national aspirations. . . ." Falk, *The International Regulation of Internal Violence in the Developing Countries*, [1966] PROC. AM. SOC'Y INT'L L. 58, 60.

<sup>8</sup> See, e.g., Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3108, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1974); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970); Declaration on the Granting of Independence to Colonial Countries and Peoples art. 2, G.A. Res. 1514, 15 GAOR, Supp. (No. 16) 66, U.N. Doc. A/4604 (1960). For a thorough appraisal of the impact of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States upon the developing international right to self-determination, see Note, *Toward Self-Determination—A Reappraisal As Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145 (1975).

<sup>9</sup> E.g., U.N. CHARTER art. 2 (4).

<sup>10</sup> Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3108, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1974).

lomatic Conference was to study the two Draft Protocols prepared by the staff of the ICRC. The first of the two Draft Protocols dealt with international armed conflicts;<sup>11</sup> the second, which has previously been mentioned, concerned those of a noninternational character.<sup>12</sup> The subject matter of both had been considered in detail by two Conferences of Government Experts, and the Protocols themselves were formulated and subsequently revised on the basis of those conferences.<sup>13</sup> The committee assigned by the Diplomatic Conference to study the general provisions of both the First and Second Protocols<sup>14</sup> devoted its almost exclusive attention during the 1974 session to the manner in which wars of national liberation should be treated.<sup>15</sup> It ultimately adopted the startling proposal that the first article of Draft Protocol I be amended to read:

1. The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions.
2. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial and alien occupation and racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of The United Nations and the Declaration on

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<sup>11</sup> Draft Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict in INTERNATIONAL COMMITTEE OF THE RED CROSS, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 3 (1973) [hereinafter cited as Draft Protocol I].

<sup>12</sup> Draft Protocol II, *supra* note 6.

<sup>13</sup> The first of these Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened by the ICRC in Geneva in May and June of 1971. Experts from 39 states, including the United States, attended and considered various proposals put before them by the ICRC. Because of the necessity for further consultation and because of complaints that there had not been sufficient representation from developing states, a second Conference was convened in Geneva from May to June 1972. Invitations were extended to all signatories of the Geneva Conventions and representatives of 77 governments attended. At this Conference the two Protocols formulated by the ICRC staff during the interim were considered in detail. Subsequently they were further revised by the ICRC Staff and a commentary was prepared on the proposed texts in anticipation of the 1974 Diplomatic Conference. Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts-First Session 1-2, June 10, 1974 [hereinafter cited as Report of the U.S. Delegation-First Session].

<sup>14</sup> Upon the recommendation of the Swiss Government, the Diplomatic Conference divided itself into three main committees and an *ad hoc* committee on weapons. Committee I [also referred to as the First Committee] was to deal with the general provisions of Protocols I and II. Committee II considered provisions pertaining to wounded, sick and shipwrecked persons, civil defense and relief. Committee III dealt with civilian populations, methods and means of combat and a new category of prisoners of war. *Id.* at 2.

<sup>15</sup> *Id.* at 6.



Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>16</sup>

The objective of the second paragraph of this article is selectively to extend certain safeguards pertaining to international conflicts to those of an essentially internal character. The determination as to when such protections shall be accorded the members of insurgent movements is, under this formulation, exclusively a function of the movement's ostensible political or ideological aspirations.

This article will first provide a brief contextual framework from which this proposal can be evaluated. It will then examine the proposal's conceptual impact upon the extant norms governing warfare and assess the extent to which it succeeds in expanding the protections accorded the participants and victims of the newly recognized class of conflicts. Where appropriate, it will also consider methods to ameliorate the textual ambiguities, incongruities, and applicational limitations which are noted.

## II. A BRIEF RECAPITULATION OF THE DRAFT AMENDMENT'S CONTEXTUAL HERITAGE

### A. PRINCIPLES UNDERLYING PRESENT NORMS GOVERNING INTERNATIONAL CONFLICTS

It is beyond the scope of this article to engage in a detailed account of the development of the law of land warfare. However, it is essential to this analysis of the amended Draft Article I to recall several fundamental assumptions underlying the four Geneva Conventions of 1949. First, because the proposed amendment is contained in a protocol which purports to augment the Conventions, its departure from their conceptual basis could weaken the Conventions themselves. Second, because the draft amendment can be con-

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<sup>16</sup> Amendment to draft additional Protocol I, Article 1, Diplomatic Conference Doc. CDDH/1/81, at 7 (1974) [hereinafter cited as the amended First Article to Protocol I.] The text of the second paragraph was submitted by Argentina, Honduras, Mexico, Panama and Peru as Diplomatic Conference Document CDDH/1/71 (1974). The amendment was ultimately adopted by the First Committee by 70 votes in favor to 21 against with 13 abstentions. Report of the U.S. Delegation, *supra* note 13, at 7-8. The First Article of Draft Protocol I, as it was initially submitted to Committee I by the ICRC, contained only the first paragraph of the amended first article. Draft Protocol I, art. 1. It should also be noted that third and fourth paragraphs, not relevant to this study, were also added to it by Committee I.

strued to extend the application of the extant provisions of the four Conventions, it must be determined whether such an extension is conceptually and practically feasible.

*1. The Obligations Contained in the Four Geneva Conventions of 1949 Are Absolute*

The first two articles common to the Conventions clearly enunciate the philosophy that was intended to pervade their application. Common Article I provides that "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances."<sup>17</sup> Common Article II then asserts:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them.

The Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>18</sup>

Considered together, these two provisions indicate the absolute nature of a signatory state's obligation to comply with the Conventions during international hostilities. Unlike the construction ascribed to its precursors, this requirement is not contingent upon a declaration of war by either party or the willingness of one of them to recognize the existence of a state of war.<sup>19</sup> The use of the phrase "armed conflict" in Common Article 2 makes it clear that the Conventions are intended to cover any situation in which a difference between two states leads to the employment of armed forces.<sup>20</sup> Furthermore, the obligations cannot be abrogated by either party in the event of overriding military necessity. But most important to this study, these Articles make it clear that the Conventions are to be applied to all international conflicts despite the fact that one or the other of the

<sup>17</sup> GWS (Field) Convention art. 1; GWS (Sea) Convention art. 1; GPW Convention art. 1; Civilian Convention art. 1.

<sup>18</sup> GWS (Field) Convention art. 2; GWS (Sea) Convention art. 2; GPW Convention art. 2; Civilian Convention art. 2.

<sup>19</sup> The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1906 and 1929 did not define the situations in which they applied. However, according to Jean Pictet, their titles made it clear that they were intended to be used in wartime, which was construed to mean a war declared in the manner prescribed by the Hague Convention Relative to the Opening of Hostilities. 4 J. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 17 (1958).

<sup>20</sup> G. DRAPER, THE RED CROSS CONVENTIONS 11 (1958).

parties will have resorted to armed force in violation of the United Nations Charter,<sup>21</sup> subsequent pronouncements of its organs denouncing aggression,<sup>22</sup> or other international norms.

The benefits and responsibilities of the Conventions apply equally to the aggressor and to the victims of aggression without reference to any determination concerning the justice of either's cause.<sup>23</sup> The injection of such considerations would merge two traditionally discrete bodies of international law, that applicable in determining the lawfulness of the use of force in pursuit of national objectives and that regulating the manner in which such force may be applied. Consideration of such issues would render the application of humanitarian safeguards contingent upon a recognition of legitimacy and would almost certainly result in *de facto* abandonment because no state would recognize the legality of its opponent's cause and concede the illegality of its own. In any event, even if an objective determination of this nature must be made, it would undercut the humanitarian purposes of the four Geneva Conventions by denying protection to broad categories of combatants and entire civilian populations simply because their national leadership was engaging in aggressive or other unlawful conduct. Such a result would mark a monumental retrogression in the development of the law of armed conflict.<sup>24</sup> Accordingly, it would appear that any contemporary effort to expand the Conventions or to extend their scope should likewise be unqualified by considerations of legitimacy in the employment of military force.

*2. Although These Obligations Are Unilaterally Assumed They Presuppose a Degree of Reciprocity in Application*

The language of the Common Articles also dictates that a signatory nation cannot unilaterally qualify its application of the Conventions if a signatory opponent fails to comply with their terms.<sup>25</sup> This constraint minimizes the opportunities for a belligerent to predicate its adherence upon subjective and probably self-serving assessments. It also minimizes the consequences of inadvertent or isolated breaches. Indeed, in his commentary on the Conventions, Pictet

<sup>21</sup> *E.g.*, U.N. CHARTER art. 2 (4).

<sup>22</sup> *E.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970).

<sup>23</sup> G. DRAPER, *supra* note 20, at 8-9; 4 J. PICTET, *supra* note 19, at 16-17; *cf.* 2 OPPENHEIM'S INTERNATIONAL LAW 218 (7th H. Lauterpacht ed. 1952) [hereinafter cited as LAUTERPACHT].

<sup>24</sup> G. DRAPER, *supra* note 20, at 9.

<sup>25</sup> *Id.* at 8.

argues that this restriction springs from the character of the Conventions themselves, and an evolving attitude among states that ratification constituted a legislative affirmance of their lofty humanitarian ideals rather than a mere contractual effort to secure protections on the basis of reciprocity.<sup>26</sup>

Although these considerations eliminate a *quid pro quo* approach to actual application, it is submitted that the concept of reciprocity still underpins the Conventions and usually motivates the initial assumption of their obligations. Accordingly, reciprocity must be reckoned with in assessing any effort to extend the Conventions.<sup>27</sup> Pictet himself intimates that the primary incentive for states to sign and obey the Conventions is the hope that such measures will induce potential opponents to act in a similar manner.<sup>28</sup> Further support is lent to this proposition by the Second Common Article which employs such an assumption in dealing with armed conflicts between signatories and nonsignatories. It makes the Conventions binding on the former if the latter accept and apply their provisions. It has been deemed preferable to require the provisional extension of the Conventions' protection to a nonsignatory pending some indication of its intention.<sup>29</sup> However, reference to diplomatic history makes it clear that the provision was intended to make sustained compliance obligatory only upon some indication of reciprocity through the nonsignatory's words or actions.<sup>30</sup>

Thus, the conditional nature of the obligation provides an incentive for a nonsignatory's adherence, and affords the signatory a

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<sup>26</sup> 4 J. PICTET, *supra* note 19, at 15, 18.

<sup>27</sup> Lauterpacht asserts that reciprocity is an essential and just condition for the observance of the rules of war by the belligerent. In this vein, he recognizes the right of a party, which is subject to patent and deliberate violations of the Conventions, selectively to apply reprisals to the offender, subject however, to overriding principles of humanity. LAUTERPACHT, *supra* note 23, at 236.

<sup>28</sup> 4 J. PICTET, *supra* note 19, at 15.

<sup>29</sup> *Id.* at 22-23.

<sup>30</sup> The framers of the 1949 Convention considered three proposals on this question. Two submitted respectively by the ICRC and by the Canadian Delegation would have automatically extended the Conventions to a nonsignatory unless, after a reasonable time, the latter asserted its refusal to apply them. The third, suggested by the Belgian Delegation, conditioned application upon acceptance by the nonsigner of an invitation to accept the terms of the Conventions. *Id.* at 19-20. The extant provision is a compromise between these two positions and leaves the posture of the signatory unclear during the interim between commencement of hostilities and a signification of intent by the nonsigner. Pictet argues that although a strict legal interpretation would not demand compliance during this interim as contemplated by the ICRC and Canadian proposals, the spirit and character of the Conventions suggest this result. *Id.* at 23. See text accompanying note 29 *supra*.

reasonable expectation that it will be accorded the benefits of the Conventions. It would seem that, in a similar vein, any liberalization of the Conventions' scope or application should recognize the need for such reciprocal assurances between signatory and nonsignatory parties in conflict, and provide an analogous device for inducing their compliance. It contravenes human nature and common sense to expect any state to obligate itself to extend humanitarian protections to an adversary which fails to acknowledge reciprocal obligations.

### 3. *The Conventions Contemplate Conflicts Between States*

A cursory perusal of the four Conventions of 1949 impels the conclusion that they were designed with a view toward regulating conflicts of the nature yet fresh in the minds of their drafters. Of greatest consequence to this article, the drafters contemplated that the participants in such conflicts would possess the characteristics ascribed to states.<sup>31</sup> First, the use of the phrase "High Contracting Parties" and the term "power" in the First and Second Common Articles signifies not only an apparent affirmation that states alone are the proper subjects of international agreements,<sup>32</sup> but also a recognition that the implementation of several of the Conventions' substantive provisions requires capabilities possessed exclusively by international juristic persons. These encompass, for example, the appointment and utilization of a protecting power<sup>33</sup> and the extradition of war criminals for trial.<sup>34</sup> The Conventions also presuppose that contracting parties possess the municipal attributes of statehood. These include the legislative competence to provide effective penal sanctions for violations of the Conventions; the judicial apparatus to try such offenses;<sup>35</sup> and the administrative capabilities of collecting and disseminating data regarding captives<sup>36</sup> and civilian detainees,<sup>37</sup> and of administering adequate facilities for their maintenance.<sup>38</sup> In addition, the Conventions contemplate that such parties will employ military forces which are amenable to discipline

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<sup>31</sup> This discussion of course, excludes consideration of Article 3 common to the four Conventions, see note 2 *supra*, which applies only to conflicts not of an international character.

<sup>32</sup> G. DRAPER, *supra* note 20, at 16.

<sup>33</sup> E.g., GPW Convention arts. 8-11; Civilian Convention arts. 9-12.

<sup>34</sup> E.g., GPW Convention art. 129; Civilian Convention art. 146.

<sup>35</sup> See note 34 *supra*.

<sup>36</sup> GPW Convention arts. 122-125.

<sup>37</sup> Civilian Convention arts. 136-141.

<sup>38</sup> E.g., GPW Convention arts. 25-32; Civilian Convention arts. 83-98.

and training in the Conventions' obligations,<sup>39</sup> and are readily distinguishable from civilian noncombatants.<sup>40</sup>

In dealing with the treatment to be accorded civilians, the Fourth Convention predicates the extension of humanitarian safeguards principally upon a distinction in nationality from the party into whose hands the civilians fall.<sup>41</sup> Similarly, the obligations regulating military occupations<sup>42</sup> are activated by reference to territorial boundaries.<sup>43</sup> Thus, the concept of statehood and its constituent attributes—the existence of a governmental structure, identifiable population and fixed territory—assume an essential role in the implementation of the four Conventions' humanitarian objectives. As a result, complicating the implementation of the Conventions by including unanticipated entities within their purview would not only impede the entities' ability to apply or to enjoy the Conventions but could also grossly distort the established mechanisms.

### *B. PRINCIPLES GOVERNING THE REGULATION OF CONFLICTS OF A NONINTERNATIONAL SCOPE*

The draft amendment to the First Article of Protocol I was formulated during the 1974 session of the Geneva Diplomatic Conference, an assembly convoked by the ICRC to consider proposals for the augmentation and amplification of the laws of war. One of the Conference's objectives was to consider the adoption of a protocol designed to clarify and enhance extant international constraints governing noninternational conflicts. Because this author believes that the draft amendment is potentially counterproductive to this objective, the content of the present constraints merits some comment and evaluation in order to provide a foundation for analysis of the amendment in light of currently recognized principles of international law.

#### *1. Perspective*

Perhaps the most innovative feature of the 1949 Geneva Conventions was the inclusion of a provision dealing exclusively with nonin-

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<sup>39</sup> GWS (Field) Convention art. 49; GWS (Sea) Convention art. 48; GPW Convention art. 127; Civilian Convention art. 149.

<sup>40</sup> GPW Convention art. 4.

<sup>41</sup> Civilian Convention art. 4. Part II of the Fourth Convention (arts. 13-26) extends certain protections to the whole populations of the countries in conflict without regard to nationality.

<sup>42</sup> *E.g.*, Civilian Convention arts. 47-78.

<sup>43</sup> *E.g.*, *id.* art. 2.

ternational conflicts and designed to afford participants in such conflicts basic humanitarian protections. The underlying problem was not new nor was the effort to formulate a solution unique. During the mid-eighteenth century Emmerich de Vattel pondered the question of what principles of humanitarian law should regulate civil war. He concluded that civil wars should be regarded as international conflicts and conducted in accordance with the norms governing such conflicts.<sup>44</sup> The American Civil War provided the occasion for the promulgation of the Lieber Code, the first effort by a government to enunciate detailed humanitarian constraints governing its armed forces in the time of war.<sup>45</sup> This Code also indicated that wars of rebellion should fall within the purview of such constraints.<sup>46</sup>

However, the initiative to regulate internal conflicts through an international instrument was provided by the International Committee of the Red Cross. During the interim between the First and Second World Wars it adopted a resolution affirming the ability of Red Cross societies to provide relief to victims of civil wars or revolutionary disturbances<sup>47</sup> and subsequently adopted another resolution authorizing the societies to seek the application of the humanitarian principles formulated in the Geneva Convention of 1929 and the Tenth Hague Convention of 1907 to such conflicts.<sup>48</sup> Heartened by the success of such efforts, the ICRC sought during the Geneva Diplomatic Conference of 1949 to include within the Geneva Conventions a provision that would obligate the parties to an internal conflict to apply the Conventions' principles.<sup>49</sup>

Although the concept of regulating such conflicts through an international agreement was revolutionary, the idea itself did not meet the summary rejection that might have been expected. There was, however, almost universal opposition by the delegations to the unqualified application of the Conventions' principles to internal conflicts. It was argued that such action would give even common

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<sup>44</sup> DeVattel, *supra* note 1, at 20.

<sup>45</sup> Gen. Orders No. 100, War Dep't (Apr. 24, 1863) (Instructions for the Government of Armies of the United States in the Field).

<sup>46</sup> *Id.* art. 152.

<sup>47</sup> Xth International Red Cross Conference Res. XIV (1921) in 5 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 013-14. Although this resolution lacked the effect of a Convention, it enabled the ICRC during both the civil wars in Upper Silesia and Spain to induce the combatants to respect the principles of humanitarian law. *Id.* at 2.

<sup>48</sup> XIVth International Red Cross Conference Res. XIV (1938) in 5 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 015-16.

<sup>49</sup> *Id.* at 3-4; 4 J. PICTET, *supra* note 19, at 28-30.

brigands a qualified legal status and seriously handicap a state's legitimate ability to preserve itself.<sup>50</sup> The question was referred to a committee which ultimately recommended the adoption of an article enumerating the safeguards applicable to internal conflicts and confining them to fundamental protections rather than extending the Conventions or their principles *in toto*.<sup>51</sup> Such an approach would not impede a *de jure* government's ability to repress acts which violated its laws or endangered its internal security. The substance of the proposal was adopted by the Diplomatic Conference in the form now commonly known as Common Article 3 or the "Convention in Miniature."<sup>52</sup>

## 2. Analysis and Comment

The obligations of Article 3, unlike those of Common Article 2 which extend the Conventions to conflicts between signatory and nonsignatory states, are not qualified by principles of reciprocity. Rather, they are unilateral and absolute. This is, perhaps, the result of an attitude that the constraints are so basic to human decency that reciprocity is neither appropriate nor necessary to their effective implementation.

Despite these characteristics, the Article itself contains an ambiguity which tends to qualify its universal and unconditional application by providing an escape mechanism for those who might choose to disregard it. The activating condition, the outbreak of an "armed conflict not of an international character," fails to provide any suggestion as to what sorts of municipal disruption fall within its

<sup>50</sup> 4 J. PICTET, *supra* note 19, at 30-31.

<sup>51</sup> *Id.* at 32-33.

<sup>52</sup> Common Article 3 provides:

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 pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(e) 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 endeavour 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.



ambit. Is it intended to be limited to conflicts that have acquired the status of full-fledged belligerencies or civil wars? Does it contemplate riots, attacks on police stations by anarchists or bands of organized criminals? Or, does its application commence somewhere between these two extremes? Both its minimum and maximum scope appear to have been in doubt since the time of its enunciation. Although Pictet suggests that this Article be given a liberal application due to its limited content,<sup>53</sup> a list of objective criteria gathered from various antecedent proposals and enumerated in the *Final Record Of The [1949] Diplomatic Conference of Geneva* suggests that the framers were simply alluding to classic forms of belligerency.<sup>54</sup> The similarity of the factors enumerated to those traditionally employed to identify a belligerency certainly impels such a conclusion. They include: the existence of an organized insurgent military force acting within defined territory; the acquisition of some international status by the insurgent movement; the possession by the insurgent of a governmental organization; a willingness by the insurgent authority to be bound by the Conventions; and recourse by the de jure government to some form of military force.<sup>55</sup> In this regard, a state wishing to avoid applying Common Article 3 need simply declare that the requisite conditions do not exist and that it is therefore under no obligation to abide by the Article.

This narrow construction also suggests a political motivation for nonapplication. Despite the admonition of the final sentence of this Article that application shall not affect the legal status of parties to the conflict, adherence to a provision deemed mandatory only with respect to belligerents could be viewed as tantamount to recognizing that the conflict has acquired the status of a belligerency. It is probable that the British failure to apply Article 3 in Malaysia, Kenya,<sup>56</sup> and more recently, in Northern Ireland,<sup>57</sup> as well as the initial reluctance of the French expressly to recognize its applicability in

<sup>53</sup> J. PICTET, *supra* note 19, at 36.

<sup>54</sup> See J. BOND, *THE RULES OF RIOT* 35 (1974); Bartelle, *Counterinsurgency and Civil War*, 40 N.D.L. REV. 254, 268 (1964).

<sup>55</sup> 2 B *Final Record of the Diplomatic Conference of Geneva* 121 (1949) cited in 4 J. PICTET, *supra* note 19, at 35-36. Pictet admits that such criteria are "useful" as a means of distinguishing a genuine armed conflict from a short-lived insurrection. 4 J. PICTET, *supra* note 19, at 36. For purposes of comparison, Lauterpacht enumerates the following five criteria for a belligerency: (1) existence of a responsible government; (2) possession of territory; (3) existence of an army adhering to the laws of war; (4) recognition by third states of belligerency; (5) existence of general hostilities. LAUTERPACHT, *supra* note 23, at 249.

<sup>56</sup> G. DRAPER, *supra* note 20, at 15 n.47.

<sup>57</sup> See remarks of George H. Aldrich, [1973] *PROC. AM. SOC'Y INT'L L.* 143, 145.

Algeria<sup>58</sup> was prompted by such concern.<sup>59</sup> On the other hand, a noted authority has argued that once an adversary is recognized as a belligerent, Common Article 3 no longer applies and the conflict becomes international in scope.<sup>60</sup> Such a result would tend to put the conflict in a juridical limbo because, as another authority argues, it is improbable that the third paragraph of Common Article 2 contemplates such an entity's ability to ratify or accede to the Conventions.<sup>61</sup> As a result, the conflict would be governed only by the amorphous residual body of norms termed "custom." This is an improbable consequence in view of the drafters' intention to give the specific protections of Article 3 as broad an application as possible.<sup>62</sup> This ambiguity seriously diminishes the ability of Article 3 to perform its intended function. Accordingly, if an instrument governing noninternational armed conflicts is effectively to serve the intended purposes, its scope must be enunciated with sufficient precision to preclude self-serving interpretations of ill-defined criteria, and with a threshold that is low enough to extend humanitarian safeguards as broadly as possible to armed conflicts involving organized combatants.

A second potential defect of Article 3 is the absence of an incentive to assure continuing adherence by the insurgent. Although there is a unilateral obligation to apply the Article, and the *de jure* government is theoretically bound as a signatory, an insurgent group has made no such antecedent commitment. Moreover, it has little to lose by nonadherence, except perhaps ostracism, because the nature of its opponent's obligation cannot be limited by considerations of reciprocity.

Several theories have been advanced as to why the nonsigning insurgent organization is equally bound. These include the argu-

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<sup>58</sup> See R. FALK, *THE INTERNATIONAL LAW OF CIVIL WAR* 194-96 (1971).

<sup>59</sup> Other recent examples of instances where incumbent governments either did not admit a legal obligation to comply with Common Article 3 or refused to apply it for undisclosed reasons include the civil war between Nigeria and Biafra (where the ICRC was permitted to provide humanitarian relief), the colonial war between Portugal and Angola, and internal conflicts in Pakistan, Ceylon and Greece. J. BOND, *supra* note 54, at 59-60; cf. Remarks of George Aldrich, *supra* note 57, at 143-44.

<sup>60</sup> LAUTERPACHT, *supra* note 23, at 370 n.1.

<sup>61</sup> G. DRAPER, *supra* note 20, at 16. Colonel Draper rejects Lauterpacht's position arguing that the *travaux préparatoires* of the Diplomatic Conference make it clear that civil wars in which the rebels have received recognition as belligerents were intended to fall within the scope of Common Article 3.

<sup>62</sup> A well developed argument for such a broad interpretation of Common Article 3 based upon its diplomatic history is contained in J. BOND, *supra* note 54, at 52-55.

ment that because the movement claims to represent the government or in fact controls some of its territory, it inherits the treaty obligations of its predecessor.<sup>63</sup> This position would seemingly be of little value in dealing with insurgent groups that have not acquired such a well-established status. A second explanation is that states, in becoming signatories to the Conventions, accord a limited legal personality to those within their territory who might engage in future insurgency. Such antecedent recognition is sufficient to confer upon the movement legal rights under Article 3 and impose its obligations as well.<sup>64</sup> Although this argument might be sufficient to dictate compliance by the *de jure* government, it is difficult to conceive that its force would alone impel adherence by an organization bent upon destroying the incumbent government.

In any event, insurgent groups have not universally appreciated the conceptual niceties of such legalistic arguments. The International Committee of the Red Cross, for example, reported at its Twenty-first Conference that insurgents have occasionally refused to consider themselves bound by Article 3 and have been unwilling to apply some or any of its provisions, particularly when they interfered with the employment of terror as a weapon.<sup>65</sup> It is apparent that some inducement other than the somewhat strained, logical appeals of international lawyers will be necessary if consistent acceptance and application by insurgent organizations is to be expected.

Undoubtedly the most frequent criticisms leveled at Article 3 concern not its obligatory force but its substantive content. The humanitarian protections it accords victims of internal conflicts are limited in scope and vague in substance.<sup>66</sup> They provide only a mandatory minimum standard of conduct which the parties to the conflict are exhorted to flesh out through special agreements adopting other

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<sup>63</sup> 4 J. PICTET, *supra* note 19, at 37. Pictet seems to intimate that the desire by an insurgent movement to be characterized as something more than a collection of anarchists or brigands will induce it to apply these fundamental humanitarian safeguards. Such a position is certainly subject to question in view of the recurring resort to indiscriminate terrorist tactics by such movements.

<sup>64</sup> G. DRAFER, *supra* note 20, at 102-03. Lauterpacht argues that in keeping with other developments in international law, the Conventions impose obligations and confer rights not only upon the contracting parties but directly upon persons and other entities as subjects of international rights and obligations. LAUTERPACHT, *supra* note 23, at 211 n.1.

<sup>65</sup> XXI<sup>ST</sup> INTERNATIONAL CONFERENCE OF THE RED CROSS, PROTECTION OF VICTIMS OF NON-INTERNATIONAL CONFLICTS 3 (1960).

<sup>66</sup> See, e.g., 5 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 50; remarks of George H. Aldrich, *supra* note 37, at 145.

appropriate provisions of the Conventions.<sup>67</sup> These deficiencies are in part the result of the drafters' recognition that many of the substantive provisions of the Conventions are literally inapplicable to civil wars,<sup>68</sup> and the result of an apparent effort to permit flexibility in dealing with diverse situations.

However, subsequent practice indicates a reluctance by the parties to such conflicts to enter into the envisioned agreements. Perhaps this reluctance is motivated by the fear that despite assurances to the contrary, such agreements might confer some sort of legal status upon the insurgent.<sup>69</sup> In any event, this result makes it clear that if the victims of noninternational conflicts are to be protected adequately, the safeguards will have to stem either from Article 3 itself or from an augmentation of the Article. It is not sufficient to consign such additional measures to the good will or the caprice of the parties.

It is beyond the scope of this article to provide a detailed examination of the substantive protections afforded by Common Article 3.<sup>70</sup> However, because this article assesses amended Article 1 as a qualified effort to augment Common Article 3, several cursory observations regarding this Common Article's protective deficiencies are appropriate. First, this Article encompasses only persons who are taking no part in actual hostilities, including those placed *hors de combat*. Precisely who is covered by this Article is unclear because during insurgency activities, distinctions between combatants and noncombatants are often meaningless: fighters by night frequently become farmers by day, and the civilian population often actively affords logistical or intelligence support to one side or the other.<sup>71</sup>

As to combatants, the Common Article limits neither the weaponry nor the tactics that may be employed during hostilities. Moreover, it imposes only the generalized requirement of humane treatment for combatants, specifically prohibiting personal violence,

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<sup>67</sup> 4 J. PICTET, *supra* note 19, at 42-43.

<sup>68</sup> *Id.* at 43.

<sup>69</sup> *Cf.* remarks of George H. Aldrich, *supra* note 57, at 143.

<sup>70</sup> For detailed examinations of the substantive nature of the obligations contained in Common Article 3 in light of contemporary practices of both insurgent movements and incumbent governments, see J. BOND, *supra* note 54, at 80-136; Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT'L & COMP. L. 345 (1973).

<sup>71</sup> See J. BOND, *supra* note 54, at 151. *But see* PAUST, *Law in A Guerrilla Conflict: Myths, Norms and Human Rights*, 3 ISRAEL Y.B. ON HUMAN RIGHTS 39, 68 (1973); asserting that partisan civilian populations are more frequently the exception than the rule in guerrilla conflicts and that such movements can thrive in an apathetic environment as well as in one of a partisan nature.

cruel treatment and torture, humiliating and degrading treatment, the taking of hostages and the passing of sentences without judicial process. Although, as indicated by Professor Bond, these general standards provide some guidance for regulating the treatment and detention of such persons,<sup>72</sup> they are no substitute for the precise rules contained in the Conventions proper.

Despite the fact that the civilian population is usually the main victim of internal conflict, no special measures, similar to those contained in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, afford it special protection or humanitarian relief. For example, in governing international conflicts, the Convention provides for the establishment of safety zones,<sup>73</sup> prohibits the unnecessary destruction of civilian property<sup>74</sup> and authorizes the movement of relief shipments to civilians.<sup>75</sup> In addition, it regulates the detention of civilians by prohibiting arbitrary resettlement or internment<sup>76</sup> and by specifying minimum standards regarding food, sanitation, housing, and medical care in the event of detention.<sup>77</sup>

A similar observation can be made with respect to combatants taken prisoner. Again, no precise criteria similar to those now contained in the Geneva Convention Relative to the Treatment of Prisoners of War<sup>78</sup> govern the conditions of their captivity or the extent to which they can be subjected to disciplinary sanctions.<sup>79</sup> In addition, although it is unrealistic to suggest that such persons should be absolved from criminal responsibility for having participated in an armed rebellion against the government or granted amnesty at the termination of hostilities,<sup>80</sup> it would seem that the consequences of mere participation should be limited and some formula as to termi-

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<sup>72</sup> J. BOND, *supra* note 54, at 124.

<sup>73</sup> Civilian Convention art. 14.

<sup>74</sup> *Id.* art. 53.

<sup>75</sup> *Id.* art. 23.

<sup>76</sup> *Id.* arts. 42 & 43.

<sup>77</sup> *Id.* arts. 83-106.

<sup>78</sup> *E.g.*, GPW Convention arts. 25-42.

<sup>79</sup> *Id.* arts. 69-98.

<sup>80</sup> It appears that the International Committee of the Red Cross proposed to the 1971 Conference of Government Experts that it consider a provision that would grant immunity to persons who have committed no offense other than taking part in organized and sustained hostilities against the incumbent government. The experts, although favorable to such a provision in principle, felt that such a measure should be limited to asking states to stipulate that such participation, alone, shall not be punishable by death. 5 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 56-57.

nation of captivity asserted.<sup>81</sup> In this regard, Common Article 3 only prohibits summary executions and the imposition of punitive sanctions without the minimal standards of judicial ceremony universally recognized by civilized people.

As will be recalled from the introduction to this article, deficiencies such as these prompted the initiation of efforts by the ICRC to extend the protections of the Geneva Conventions to the victims of internal conflicts. The effect of the amended First Article to Protocol I upon this effort will be considered in conjunction with a comprehensive analysis of its impact upon the Geneva Conventions themselves. However, these gaps were also the subject of corrective efforts within the United Nations and an appreciation of these and other developments within the international community is essential to an appreciation of the ICRC's efforts.

### C. INITIATIVES OF THE UNITED NATIONS REGARDING WARS OF NATIONAL LIBERATION

Almost contemporaneously with the Red Cross efforts to augment the international constraints governing internal conflicts, the United Nations General Assembly undertook two separate initiatives affecting this problem area. The first consisted of a series of measures designed to encourage the application of the portions of the Geneva Conventions relating to international conflicts to selected internal struggles. For example, in 1969 the General Assembly included the following provision concerning the conflict in Southern Africa, in a resolution on the Human Rights Year: "[The General Assembly] . . . confirms the decision of the Teheran Conference to recognize the right of freedom fighters in southern Africa and in colonial Territories, when captured to be treated as Prisoners of War Under the Geneva Conventions of 1949."<sup>82</sup> In the same year in its resolution on apartheid, the General Assembly declared "that freedom fighters should be treated as prisoners of war under international law, particularly the Geneva Convention Relative to the Treatment of Prisoners of War. . . ."<sup>83</sup> In resolutions involving Rhodesia and Angola, this assimilative language yielded to

<sup>81</sup> See 3 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 53-54; J. BOND, *supra* note 54, 129-30.

<sup>82</sup> G.A. Res. 2446 (1968) (emphasis added), reprinted in pertinent part in XXI<sup>ST</sup> INTERNATIONAL CONFERENCE OF THE RED CROSS, PROTECTION OF VICTIMS OF NON-INTERNATIONAL CONFLICTS 8 (1969).

<sup>83</sup> G.A. Res. 2396 (1968), reprinted in pertinent part in XXI<sup>ST</sup> INTERNATIONAL CONFERENCE OF THE RED CROSS, *supra* note 82, at 6.

phraseology which intimated that the nature of the conflicts warranted full prisoner of war treatment and that the Prisoner of War Convention was fully applicable.<sup>84</sup>

It was unclear whether these resolutions were intended to intimate that the conflicts involved were to be accorded an international character. Indeed, the Secretary General of the United Nations asserted, in a study on human rights in time of armed conflict, that the party states to the Geneva Conventions ought to consider whether these pronouncements were sufficient to render the conflicts "international" for purposes of the Conventions or whether they were merely intended to stress the strong concern of the international community for adequate measures for the combatants and civilians involved.<sup>85</sup> They do, however, indicate a developing attitude among at least a minority of states that there should be some relationship between the motives or aspirations of a combatant and the nature and scope of the legal norms protecting him. Under such a test, the Conventions' traditional distinctions between internal and international conflicts must give way to a more flexible and necessarily subjective characterization which would extend full protection to combatants struggling against colonialists (Portugal), racists (Rhodesia), or other less clearly defined categories of oppressors.

The second development concerns the transformation of the principle of self-determination as enunciated in the United Nations Charter<sup>86</sup> into a right which, at least in some instances, may legitimately be exercised through the use of force. While it is beyond the scope of this article to examine the evolution of this doctrine in depth, several of the more important pronouncements of the General Assembly merit comment, particularly because one of them is utilized in the amended First Article to Protocol I.

Self-determination was first recognized as a principle to be extended to peoples, rather than merely an assurance accorded states, in the 1960 Declaration on the Granting of Independence to Colo-

<sup>84</sup> In each resolution, the General Assembly

calls upon the (appropriate government), in view of the armed conflict prevailing in the Territories and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention Relative to the Treatment of Prisoners of War. . .

G.A. Res. 2395 (1968) (emphasis added); G.A. Res. 2383 (1968) (emphasis added), reprinted in pertinent part in XXI<sup>ST</sup> INTERNATIONAL CONFERENCE OF THE RED CROSS, *supra* note 82, at 6.

<sup>85</sup> CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 26.

<sup>86</sup> U.N. CHARTER arts. 1(2), 55. The Charter provisions alluding to self-determination were primarily intended by the participants at the 1945 San Francisco Conference as mechanisms to assure the national integrity of states rather than as measures to secure rights or privileges to peoples. Note, *supra* note 8, at 157 n.73.

nial Countries and Peoples.<sup>87</sup> This Declaration construed the Charter provisions as mandates requiring states to refrain from involving themselves in the social and political destinies of not only others but also those peoples over whom they exercised external dominion. Conversely, it declared that such peoples possess the right freely to determine their political status and pursue their own social and cultural development. However, the exercise of this principle was made contingent upon the peaceful transfer of power to such peoples.

The Declaration on Friendly Relations,<sup>88</sup> the resolution to which the amended First Article alludes in expanding the definition of international armed conflicts, transformed self-determination into a self-executing right to be exercised through the establishment of freely-determined political institutions. Although the Declaration seems ambiguous as to the intended recipients of this right, it appears to be directed to persons suffering from alien subjugation, domination or other externally imposed interference<sup>89</sup> and to offer no benefit to the subjects of domestic mistreatment.<sup>90</sup> Subsequent actions of the United Nations tend to support such a construction because, although struggles against racial oppression have received endorsement,<sup>91</sup> secessionist movements not fitting into the traditional anticolonialist mold have received little support.<sup>92</sup> The Declaration also fails to enumerate the permissible means for exercising the right of self-determination. Although it forbids the employment of force in depriving people of this right and intimates that forcible action can be used in self-defense,<sup>93</sup> it does not acknowledge that armed violence is a permissible vehicle for the attainment of this end.

This ambiguity appears to have been resolved in a more recent General Assembly pronouncement, one which combines the phenomenon of *ad hoc* application of the Conventions to selected

<sup>87</sup> G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4604 (1960).

<sup>88</sup> Declaration of Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration Concerning Friendly Relations].

<sup>89</sup> See Note, *supra* note 8, at 148, arguing that the Declaration can also be construed to permit the exercise of self-determination by persons, who, due to racial or religious or other distinctions, are unrepresented by the government.

<sup>90</sup> Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 464-65 (1971).

<sup>91</sup> *Id.* at 467.

<sup>92</sup> See Nanda, *Self-Determination in International Law—The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321, 327 (1972). Separatist claims for self-determination have been ignored by the United Nations in Chad, Sudan, Ethiopia, Tibet, Kurdistan and Formosa. *Id.* at 327.

<sup>93</sup> Declaration Concerning Friendly Relations, *supra* note 88, at para. 5.



internal conflicts with the recognition of the right of peoples to self-determination. The 1973 Resolution concerning Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes<sup>94</sup> enunciates a series of startling pronouncements adopted by 83 states. It first asserts that inasmuch as colonialism is a crime, colonial peoples *have the right to struggle by all means at their disposal* against alien or colonial domination or racist regimes in pursuit of their right of self-determination.<sup>95</sup>

Thus, the ambiguities of the Declaration on Friendly Relations were somewhat clarified. The right of self-determination encompasses freedom both from external domination and from at least a single form of domestic oppression as well—racism. In addition, for the first time the use of armed force is recognized as a legitimate instrument for attaining self-determination. Second, when armed force is applied to obtain this goal, the conflict acquires an "international" character in the sense of the 1949 Geneva Conventions.<sup>96</sup> As a result, captured combatants struggling for their freedom are to be accorded the status of prisoners of war. Third, the employment of mercenaries by the colonial or racist government is considered a criminal act and accordingly, the mercenaries are to be treated as war criminals.<sup>97</sup>

These assertions are indeed revolutionary and suggest grave implications. The use of force is, for the first time, recognized as a positive right to be utilized for purposes other than self-defense. The right to self-determination is expanded beyond its familiar anticolonialist setting. The Geneva Conventions are extended *in toto* to a context for which they were not intended. Finally, the justice of a combatant's cause governs the rights to which he is entitled in the event of capture. In the context of a single General Assembly resolution such pronouncements might be dismissed as merely irresponsible and ephemeral political proselytizations. However, the Draft Amendment to the First Article of Protocol I touches on each of these assertions and, if enacted as a portion of an international convention, would superimpose them upon the international legal system resulting, the author submits, in serious distortions. Such potential ramifications can be appreciated only by evaluating the

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<sup>94</sup> G.A. Res. 3103, U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (1974) [hereinafter cited as *Legal Status of Combatants*].

<sup>95</sup> See *Legal Status of Combatants*, *supra* note 94, at paras. 1, 2.

<sup>96</sup> *Id.* at para. 3.

<sup>97</sup> *Id.* at para. 5.

amendment in the context of the proposition enunciated in the preceding portion of this article.

### III. AN ANALYSIS OF THE SIGNIFICANCE AND EFFECT OF THE PROPOSED AMENDMENT

#### A. INTRODUCTION

In its initial form, Protocol I was intended to supplement the four Geneva Conventions of 1949 insofar as they applied to conflicts enumerated in Common Article 2 of the Geneva Conventions. All matters governing noninternational conflicts were relegated to Protocol II. In arriving at this formulation, the ICRC apparently disregarded the position of several government experts that selected wars of national liberation merited treatment as international conflicts.<sup>98</sup> Yet from the initial plenary session of the Diplomatic Conference, the question of the status to be accorded movements struggling for self-determination was of utmost importance. Representatives of the newly proclaimed government of Guinea-Bissau (Portuguese Guinea), African and Palestinian liberation movements, as well as the Provisional Revolutionary Government of Vietnam (PRG) sought to participate in the Conference and were supported by many third world powers,<sup>99</sup> as well as by a recent United Nations Resolution.<sup>100</sup> After a week of deliberation, Guinea-Bissau was seated as a full participant and the African and Arab liberation movements were invited to participate fully in the deliberations of the Conference but without vote.<sup>101</sup> The PRG's bid for a seat, however, was defeated by a single vote.<sup>102</sup> Thus, the substantive portion of the Conference began in an atmosphere favoring the treatment of national liberation movements as international entities.<sup>103</sup> This atmosphere pervaded the deliberations of the

<sup>98</sup> See, e.g., I [1972] CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, REPORT ON THE WORK OF THE CONFERENCE 74-75.

<sup>99</sup> See Report of the U.S. Delegation, *supra* note 13 at 4.

<sup>100</sup> G.A. Res. 3102, U.N. GAOR, Supp. (No. 30) U.N. Doc. A/9030 (1974).

<sup>101</sup> Report of the U.S. Delegation, *supra* note 13, at 4-5. These entities were seated on the basis of their recognition by either the Organization of African Unity or the League of Arab States.

<sup>102</sup> *Id.* at 5.

<sup>103</sup> See Address by Major General George S. Prugh, Alternate United States Representative to the Diplomatic Conference, Commonwealth Club of San Francisco,

First Committee which considered the introductory articles of both Protocols during the 1974 session.

Almost immediately after the submission of the Red Cross draft, Communist bloc and third world states<sup>104</sup> submitted counter proposals that proposed that wars of national liberation be treated as international conflicts.<sup>105</sup> The statements of the proponents and supporters of these proposals left no doubt that their primary motivation was to establish the principle that such conflicts were international in stature, and that humanitarian considerations were of only minimal importance.<sup>106</sup> Perhaps as a consequence of this situation, the western delegates' concerns over the conceptual and practical difficulties of superimposing such conflicts upon the Conventions' existing structure were largely ignored. One representative of an African liberation movement simply responded that such problems could be ironed out later by international jurists and diplomats.<sup>107</sup>

The proponents also appear to have focused their interest upon conflict types which have been accorded some international recognition by the United Nations. Thus the various amendments were frequently spoken of in the contexts of Portuguese Africa, Palestine, South Africa and Rhodesia.<sup>108</sup> Although the ostensible reason for this limitation was to confine the right to wage wars of national liberation to its internationally recognized limits,<sup>109</sup> it is probable that the interested states were equally sensitive to the possibility that they might become the objects of separatist struggles.<sup>110</sup> As a result, the text Committee I ultimately adopted<sup>111</sup> incorporated verbatim the three conflict categories expressly recognized in the 1973 Res-

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July 23, 1974 (text available at The Judge Advocate General's School, U.S. Army) [hereinafter cited as Prugh speech].

<sup>104</sup> Diplomatic Conference Doc. CDDH/I/SR. 1-16, at 8 (Fr. 1974) (introduction of Doc. CDDH/I/11 and addendum 1 at 2d session by Egyptian delegate) (author's transl.).

<sup>105</sup> Report of the U.S. Delegation, *supra* note 13, at 7. Three proposals were initially introduced with respect to wars of national liberation. They included: CDDH/I/5 proposed by the Soviet Bloc; CDDH/I/11, proposed by Algeria and fourteen other states; and CDDH/I/13, proposed by Romania. Each was subsequently withdrawn in favor of CDDH/I/41, an amplification sponsored by 31 states, which, in modified form, was ultimately adopted as CDDH/I/71. *Id.*

<sup>106</sup> See, e.g., Diplomatic Conference Doc., *supra* note 104, at 10 (statement of Yugoslav delegate).

<sup>107</sup> *Id.* at 51 (statement of the delegate of the Panafricanist Conference).

<sup>108</sup> E.g., *id.* at 48-49, 51.

<sup>109</sup> In commenting upon the various proposals, many delegates appeared extremely concerned with the extent to which they comported with the General Assembly Resolutions from which the right to self-determination emanated. See, e.g., *id.* at 19, 33, 45.

<sup>110</sup> Cf. Prugh speech, *supra* note 103.

<sup>111</sup> Report of the U.S. Delegation, *supra* note 13, at 9.

olution Concerning the Legal Status of Combatants. These made the First Protocol applicable to

armed conflicts in which peoples are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.<sup>112</sup>

The adoption of this proposal by the First Committee was subsequently "welcomed" by the Diplomatic Conference at its plenary meeting which closed the 1974 session.<sup>113</sup> During its 1975 and 1976 sessions, Committee I did not deal further with its amendment to the First Article of Protocol I.<sup>114</sup> Rather, it concentrated its efforts principally upon problems involving the scope and application of Protocol II, the improvement of the protecting power system, and the definition and repression of grave breaches of the Conventions and Protocols.<sup>115</sup>

It is anticipated that the ultimate fate of the Amended First Article will be resolved during the fourth session's final plenary meetings in the spring of 1977, when it will be presented for adoption to the Diplomatic Conference as a whole. In the interim, however, it is essential that international lawyers and diplomats dispassionately consider the questions so blithely dismissed during the 1974 sessions of the First Committee, particularly the amendment's potential impact upon the structure of humanitarian norms governing armed conflicts. In assessing such long-term consequences, two preliminary questions must be resolved: what movements or struggles does the amendment encompass, and with what effect on international law; and how are the additional responsibilities imposed by the amendment distributed among the parties in conflict? The remainder of this section will consider each of these issues and attempt to

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<sup>112</sup> The amended First Article to Protocol I para. 2 as reported in Conference Doc. CDDH/223 (15 Dec. 1975). Table of Amendments at 6 [hereinafter cited as Table of Amendments].

<sup>113</sup> Summary Records of the (First Session) First to Twenty-Second Meetings. Summary Record of the Twenty-Second (Closing) Plenary Meeting 227 (1974).

<sup>114</sup> See Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts-Second Session 4 (July 18, 1975) [hereinafter cited as Report of the U.S. Delegation-Second Session]; 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 3 (October 15, 1976) [hereinafter cited as Report of the U.S. Delegation-Third Session].

<sup>115</sup> See authorities cited note 114 *supra*.

resolve them in a manner which best reconciles the apparent objectives of the Amended First Article with the philosophy of the Conventions themselves.

*B. SOME PROBLEMS RESULTING FROM THE EMPLOYMENT OF A SELECTIVE DEFINITION*

*1. To Whom Does the Amendment Apply?*

The proposed amendment extracts several categories of nonintergovernmental conflicts from the Common Article 3-Draft Protocol II scheme and superimposes them upon rules which regulate international conflicts. In order to assess the impact of the amendment, it is necessary to identify what classes of individuals it affects. To avoid definitional problems, the draft amendment first enumerates three categories of armed conflict during which the amendment will apply—hostilities against colonial and alien occupation, and those against racist regimes. The amendment then further qualifies the struggles to which the Protocol will apply by limiting it to those which are fought for self-determination in accordance with the United Nations Charter and the Declaration on Friendly Relations. Although the Declaration recognizes a right to self-determination, it does not sanction the use of force for its attainment. Consequently, it would seem the only value possessed by reference to the Declaration is further to limit the applicability of the amended First Article to struggles for self-determination against some form of foreign or external interference. As it is difficult to distort the initial two conflict categories to encompass much else as they relate to colonial and alien occupation, it would seem that, with respect to these categories, the second qualification is superfluous.

Ambiguity arises when one attempts to define precisely what constitutes peoples struggling against "racist regimes." Interpreted from the perspective of the Declaration on Friendly Relations, it would seem that the term "peoples" should be limited to the native inhabitants of a well defined, but externally governed territory. Applying this limited definition to the racist regimes apparently contemplated by the proponents of the amended First Article does no violence to it as such regimes are superimposed upon the inhabitants and govern them in an essentially neocolonialist manner. However, the absence of greater specificity within the proposal itself allows the term "peoples" to acquire infinite permutations which distort its meaning from that seemingly contemplated. Are distinc-

tions of origin, culture, and language essential attributes of a people? Or are racial differences themselves enough to so qualify an ethnic minority? Similarly, is a government "racist" simply because it is predominantly composed of persons possessing different racial characteristics from the "peoples"? Is disproportionate representation or the enactment of potentially discriminatory legislation sufficient? Or must the governing class treat the subjected peoples as vassals in order to qualify? In light of such variations, it is possible both for the Oglala Sioux militants of Wounded Knee, South Dakota to assert that they constitute a people and, therefore, a discrete polity, and for Ian P. Smith to argue that black Rhodesian nationalists are not included in the definition because both they and their present white oppressors generally share Rhodesian nativity.<sup>116</sup> Thus, at least with regard to struggles against racist regimes, the draft amendment permits the same sort of equivocation by the incumbent government as exists with respect to Common Article 3. In addition, it provides a basis for the extravagant claims of dissatisfied ethnic or racial minorities.

Several alternatives immediately come to mind as corrective measures. One potential solution, similar to that proposed by several participants during the 1971 Conference of Government Experts,<sup>117</sup> would be the selection or appointment of an impartial fact-finding body whose function would be to determine whether a

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<sup>116</sup> The presently reported version of the amendment, as it appears in the Table of Amendments, employs the conjunctive "and" between each of the three conflict categories it encompasses. As a result, it is arguable that the amendment applies only to conflicts which simultaneously involve all three conditions. Such phraseology lends strength to an interpretation of the amendment which would make it applicable only to those racist regimes which are also externally imposed in a colonialist manner. So construed, it would arguably be inapplicable to the South African and Rhodesian situations.

This conjunctive phraseology is consistent with the language contained in the U.N. Declaration on the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, a Declaration which lent substantial impetus to the amended First Article. However, that proclamation explicitly treats racist regimes as a form of oppression distinct from foreign occupation, and expressly alludes to preceding resolutions dealing exclusively with apartheid and racial oppression. Consequently, it is apparent that the Declaration's formulators did not intend to qualify the racist regimes falling within its ambit by limiting them to those also involving actual external domination. In view of the separate treatment accorded such regimes in such resolutions, as well as the fact that the proponents of the amended First Article considered the amendment from the perspective of the Rhodesian situation, it is difficult to contend that the amendment's application to racist regimes should be strictly limited to those imposed by an alien suzerain. Rather, it is submitted that the history of the amendment indicates that three distinctive alternative conflict categories were contemplated.

<sup>117</sup> 5 CONFERENCE OF GOVERNMENT EXPERTS, *supra* note 4, at 39-40.

given conflict fulfilled the present criteria. Appropriate candidates might include the United Nations Security Council, a fact-finding body designated by it, the International Committee of the Red Cross or even a regional organization. However, it would seem that several factors, some recognized by the experts themselves,<sup>118</sup> militate against such a resolution. With respect to the United Nations as well as regional organizations, it is doubtful whether a truly objective assessment of such a conflict could be made, particularly when its political connotations are significant to any of the major powers. Such interests could also paralyze the capacity of an international organization to consider the question at all. In addition, such an evaluation would invariably require the cooperation of the involved state and the inability to obtain such aid would frustrate the effort. Involvement without consent of the state would subject the fact-finding agency to accusations of intermeddling in the state's internal affairs. Finally, the use of the Red Cross for such a purpose could diminish its capacity to fulfill its humanitarian role because the fact-finding function would undoubtedly make it unpopular with at least one of the parties to the hostilities.

An alternative solution is to abandon, to the greatest extent possible, all definitions which are readily subject to self-serving assessments and substitute for them objective criteria. Although such criteria would still rely, at least in part, upon the concerned state's good will, the use of clearly ascertainable factors would impel acknowledgement at the price of international reprobation. In addition, such a solution would solve other problems resulting from the present definitional approach. However, in view of the politically-charged nature of the First Committee's present formulation, it is unlikely that such a retrenchment is a viable alternative.

## *2. Some Consequences of Exclusivity—Its Impact Upon the Dynamics of the Laws of War*

The definitional approach utilized by the draft Article contains a conceptual defect that is more serious than the practical problem of identifying protected parties. By singling out combatants engaged in specified wars of national liberation as the recipients of a discrete system of humanitarian safeguards, it confuses principles governing the legality of the use of force with humanitarian norms limiting the effects of the application of such force. As will be recalled, the phi-

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<sup>118</sup> *Id.* at 40-41.

losophy of the first two common articles of the four Conventions is to apply humanitarian safeguards uniformly to all combatants without antecedent reference to moral or legal considerations. The pitfalls of the selective approach envisioned by the Conventions' framers, however, permeate the definitional method adopted by the proponents of the amended First Article to Protocol I. They fall within two general categories.

First, one of the principal objectives of the Conventions was to extend their safeguards as broadly as possible.<sup>119</sup> It would seem that an effort to expand such protection should extend to all conflicts of a given intensity without reference to the reasons underlying the dispute. The draft amendment does nothing to ameliorate the sufferings of the victims of a future East-West Pakistan or other conflict initiated by nonanticolonial separatist movements even though the intensity of such civil wars may be just as brutal as those falling within the favored categories. The foreseeable justification for such discrimination is that such movements have not yet been recognized by any pronouncement of the United Nations as possessing an "international" character. However, such an apologetic is specious, because the purpose of the 1974 Diplomatic Conference and the preceding efforts was to augment the humanitarian protections available to the victims of all forms of armed conflict, not only those of an international complexion. By substituting political for objective criteria, the amended First Article effectively deprives the victims of unpopular noninternational struggles of any added humanitarian protection. As a consequence, these people will not become the beneficiaries of Protocol I. Moreover, it is now improbable that they will be protected by Protocol II. During the 1975 session of the Conference, Committee I adopted a modification to the proposed First Article of Protocol II which appears to raise the intensity threshold of the conflicts encompassed thereunder so as to exclude from its ambit all but full-scale belligerencies. This result effectively frustrates the efforts of the International Committee of the Red Cross and a number of western states to extend as broadly as possible the additional humanitarian constraints contained in draft Protocol II.<sup>120</sup>

<sup>119</sup> Cf. 4 J. PICTET, *supra* note 19, at 37.

<sup>120</sup> At its twenty-ninth meeting, Committee I adopted the following formulation to govern the application of Protocol II.

1. The present Protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a



The second problem resulting from the adoption of a selective definition is that the application of these humanitarian protections is predicated upon judgments of legitimacy or justice. This, in turn, imposes a political cast on the question of whether adherence to such norms is necessary or appropriate. As previously discussed, the vagaries of the present definition, particularly where it involves racism, accord incumbent governments discretion in determining when compliance with the First Protocol is necessary. Because such a determination would be tantamount to an admission of racism or colonialism, the result is obvious: no government would ever voluntarily concede that the operative circumstances of a given conflict were such as to require the application of the First Protocol. As a result, the effort to extend additional safeguards to the victims of the enumerated noninternational conflicts would undoubtedly be futile. Again, the ideal remedy would be totally to divest the operative criteria of political or legal characteristics.

Conversely, the definition under consideration, particularly when construed in the context of pronouncements of the United Nations General Assembly, clothes wars of self-determination with a peculiar sanctity and implicitly condemns those who would resist them. It is foreseeable that such a preference enunciated in a document possessing the dignity of a Protocol to the Geneva Conventions will engender in the newly-protected parties an attitude that they are exempt from the obligations of humanitarian law with respect to their opponents.

Such an attitude has already manifested itself among Communist bloc states. Article 85 of the Geneva Convention Relative to the Treatment of Prisoners of War provides that prisoners of war who are prosecuted for precapture offenses will retain, even if convicted, the status of prisoners of war. It is obvious that the primary intent of this provision was to protect persons convicted of violations of the laws of war.<sup>121</sup> However, all Communist states have interposed reservations to this Article asserting that prisoners of war who have

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part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol.

2. The present Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Table of Amendments, *supra* note 112, at 165.

This proposal is indicative of a trend that has developed to establish extensive and complicated obligations for insurgent groups. It is likely that this development will tend to establish a threshold so high that Protocol II will be unlikely to be applied. Report of the United States Delegation-Second Session, *supra* note 114, at 8.

<sup>121</sup> 3 J. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 417, 421-23 (1960).

been convicted of war crimes or crimes against humanity will retain only those rights accorded such persons under the laws of the prosecuting state while undergoing punishment.<sup>122</sup>

During the Vietnam conflict the Democratic Republic of Vietnam, in response to a letter from the International Committee of the Red Cross reminding it of its obligations as a signatory to the Geneva Prisoner of War Convention, intimated that the Convention was not applicable to captured allied personnel, particularly airmen, because such persons were war criminals caught *in flagrante delictu*. It is apparent from the phraseology of this communication that North Vietnam based this position upon its reservation to Article 85 of the Convention.<sup>123</sup> It is now generally known that the treatment of American airmen was consistent with this attitude and frequently in flagrant violation of the Convention.<sup>124</sup> Thus, a concrete precedent has been established for predicating the application of humanitarian safeguards upon a unilateral determination of the adversary's character and the "rightfulness" of his cause. Such a result is, of course, in direct contravention of the Conventions' present letter and spirit and would appear antithetical to any system of humanitarian constraints governing warfare.

Nevertheless, a similar attitude with respect to national liberation wars appears in the writings of several Soviet legal scholars and tends to lend support to the North Vietnamese position. These writers consider all colonialists aggressors and lionize those who seek to depose them.<sup>125</sup> They assert that while the latter are entitled to

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<sup>122</sup> *Id.* at 423. Reservations of this nature were made by Albania, Bulgaria, the Byelorussian Soviet Socialist Republic, the Peoples' Republic of China, Czechoslovakia, the German Democratic Republic, Hungary, the Democratic Peoples' Republic of Korea, Poland, Rumania, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Peoples' Republic of Vietnam. It should be noted in this regard that although the language differs slightly among the various instruments, the content is virtually identical. *Id.* at 424. The purported accession of the Provisional Revolutionary Government of the Republic of South Vietnam to the Geneva Convention Relative to the Treatment of Prisoners of War contained a similar reservation. Letter from the Swiss Federal Republic to the United States Department of State, Jan. 18, 1974. It should be noted, however, that the Republic of Guinea-Bissau, in acceding to the Conventions, did not interpose such a reservation with respect to Article 85 of the Prisoner of War Convention. Memorandum from U.S. Army Office of The Judge Advocate General, Chief of International Affairs Division to the Deputy Director, Negotiations and Arms Control, Office of Assistant Secretary of Defense, Aug. 13, 1974 [available at The Judge Advocate General's School, U.S. Army].

<sup>123</sup> Freymond, *Confronting Total War: A "Global" Humanitarian Approach*, 67 AM. J. INT'L L. 672, 676-77 (1973).

<sup>124</sup> *Cf. id.* at 678.

<sup>125</sup> See Ginsburg, *Wars of National Liberation and the Modern Law of Nations—The Soviet Thesis*, 29 L. & CONTEMP. PROB. 910, 920 (1964).

treatment as prisoners of war if captured by forces of the incumbent government, members of the colonialist forces are not entitled to such treatment.<sup>126</sup> Rather, say some, they merit only such treatment as is commensurate with the insurgent's degree of civilization, capabilities, or value system.<sup>127</sup> In any event, failure to adhere to the Conventions does not deprive such movements of their legal character.<sup>128</sup>

When such rhetoric and practice are considered in light of the language of the amended First Article and the 1973 General Assembly resolution which inspired it, the danger is readily apparent. It would be both logical and expedient for a national liberation movement, visualizing itself as the opponent of a colonial or racist government and the recipient of the amendment's sanctified status, to adopt eastern-bloc apologetics and refuse to extend the benefits of international humanitarian law to its purported oppressor's military personnel.

Again, these results impel the conclusion that if additional humanitarian safeguards are to be accorded the victims of noninternational conflicts, the criteria for doing so should be totally divested of political or ideological overtones because such considerations can engender excesses more readily than they can secure protections.<sup>129</sup> Rather, the determinant for implementation should be a function of the scope or character of the force employed by the insurgent or the intensity of the incumbent government's response to it.<sup>130</sup>

Although such politically bland criteria cannot assure compliance by either party, they accord uniform protection to all conflicts of a specified intensity, remove self-stigmatization as an ancillary result

<sup>126</sup> Prugh speech, *supra* note 103.

<sup>127</sup> See Ginsburg, *supra* note 125, at 917, 934.

<sup>128</sup> Prugh speech, *supra* note 103.

<sup>129</sup> An additional problem raised by the terminology of the amended First Article is that it tends to reinforce the assertion of the General Assembly resolution on the legal status of combatants struggling against colonial regimes that the unilateral resort to armed force is a legitimate means to attain the objective of self-determination. Such a result is inconsistent with provisions of the United Nations Charter permitting the employment of force only in individual or collective self-defense or in support of Security Council actions pursuant to Article 39 of the United Nations Charter. For an analysis of the Amendment's impact upon international constraints governing the employment of force see 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. 25 (1975). But see Bond, *Article I of the Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrillas*, 32 WASH. & LEE L. REV. 65 (1975).

<sup>130</sup> For a formulation involving such objective criteria see the new proposal of Committee I concerning the application of Protocol II to noninternational conflicts, at note 120 *supra*.

of compliance and, more importantly, deprive insurgent movements of a built-in doctrinal justification to exempt themselves from adherence. This last consequence is of even greater importance when considered from the perspective of the nature of the obligations imposed by the amendment. However, it is presently unrealistic to expect the First Committee to retract a proposal, which for a large part of its membership marks a substantial diplomatic victory, simply because of deficiencies of a conceptual and legalistic nature. Consequently, for purposes of analysis, it is appropriate to consider the amendment a *fait accompli* and to consider the extent to which it is amenable to reconciliation with the extant structure of international humanitarian law.

### C. AN EVALUATION OF THE DISTRIBUTION AND SCOPE OF THE DRAFT AMENDMENT'S RESPONSIBILITIES

In assessing the potential impact of the contention that the amendment's definitional formulation can foster the denial of humanitarian protections by national liberation movements, it is only logical to consider what the amendment appears to require of parties to one of the specified wars of national liberation. It would seem, in this regard, that such definitional defects could be ameliorated by some clear assertion that the amendment contemplates mutual application of whatever protections it purports to extend.

#### 1. *The Draft Amendment's Apparent Obligational Formula*

The second paragraph of the draft amendment declares that the enumerated liberation movements are included in the situations referred to in its first paragraph. This first paragraph, it will be recalled, simply asserts that "The Present Protocol which supplements the Geneva Conventions. . . shall apply in the situations referred to in Article 2, Common to these Conventions." Thus it would seem that the effect of paragraph 2 of the amendment is to include within the current structure of Common Article 2 the favored wars of national liberation. The consequence of such an imposition and its effect with respect to the question of reciprocity is ambiguous. Common Article 2 accomplishes two purposes. It describes the situations which fall within the contemplation of the Conventions proper and it indicates the circumstances under which the Conventions become applicable to the enumerated conflicts. They automatically apply in three enumerated situations: declared wars between high

contracting parties, other armed conflicts between such parties, and occupations by a party of another's territory. The Protocol would presumably adopt these situations and, as to signatories to it, become automatically applicable in the event of such occurrences. The Second Common Article also contemplates a fourth "situation," armed conflicts in which one of the powers in conflict may not be a party to the Conventions. With respect to such conflicts, it provides that parties to the Conventions shall be bound by them in their mutual relations and with the nonsignatory if the nonsignatory accepts and applies the Conventions. It would seem that when this conflict category is transposed to the First Protocol, the unequivocal assertion of the first paragraph of the amended First Article is qualified by the extant second paragraph of Article 84, draft Protocol I. It provides in language similar to the third paragraph of Common Article 2:

Although one of the Parties to the conflict may not be bound by the Present Protocol, the other Parties to the conflict shall remain bound by it in their mutual relations. *They shall, furthermore, be bound by the Present Protocol in relation to the said Party, if the latter accepts and applies the provisions thereof.*<sup>131</sup>

Therefore, the circumstances under which a nonsignatory to the first Protocol acquires its benefits are identical to those governing this situation in the Conventions.

How and with what effect are the wars of national liberation superimposed upon this structure? The first three listed categories apply only to "High Contracting Parties." Because Articles 80 and 82 of this Protocol permit only parties to the Conventions to ratify or accede to it,<sup>132</sup> presumably no national liberation movement which has not at least acquired the status of a *de facto* government will be generally recognized as possessing the capacity to become a party to the Conventions.<sup>133</sup> Likewise, they are not eligible for inclusion in

<sup>131</sup> Draft Protocol I art. 84.2 (emphasis added).

<sup>132</sup> *Id.* arts. 80 & 82.

<sup>133</sup> It should be recalled, however, that in October 1973 the Provisional Revolutionary Government of South Vietnam acceded to the four Geneva Conventions of August 12, 1949 with substantial reservations to the third. Letter from the Swiss Federal Republic to the Department of State, *supra* note 122. The United States took the position that it could not recognize the act of the PRG as an accession because it was not the legitimate government of South Vietnam. It appeared, however, to construe the act as an acknowledgement by the PRG that it would accept and apply the Conventions, subject to the reservations, in the event of hostilities. Memorandum from the Office of the General Counsel, Department of Defense to the Deputy Director, Negotiations and Arms Control, Office of the Assistant Secretary of Defense, Aug. 15, 1974.

any of the first three categories enumerated in Common Article 2. It would, then, seem logical that the enumerated national liberation movements would fall within the fourth situation specified by Common Article 2, where one of the Powers to the conflict is not a signatory. This situation poses two questions. First, if national liberation movements are included in this category, what obligations affect them? Second, does the inclusion of these movements extend only to the Protocol or does it encompass the Conventions as well?

The obligational question should be resolved first. Colonel G.I.A.D. Draper, one of the most prominent commentators on the Conventions, has opined that the term "Power," as contained in the third paragraph of Common Article 2, applies exclusively to states.<sup>134</sup> If this orthodox position were to prevail, the encompassed national liberation movements would be incapable of falling within this fourth situational category either. In addition, if this commentator's interpretive gloss were also applied to the term "Party" in paragraph 2 of Article 84, Protocol I, the movements would also be precluded from acquiring rights and obligations by acceptance and application, and this article would be inoperative with respect to them. More recently Colonel Draper, who was a British delegate to the 1974 Geneva Diplomatic Conference, intimated that the Common Article 2, paragraph 3 "accept and apply" procedure was not applicable to obligational relationships with national liberation movements.<sup>135</sup> Such conflicts are, in his opinion, regulated by paragraph 1 of the amended First Article which simply asserts that the Protocol shall apply to the encompassed situations.<sup>136</sup>

It is unclear whether Colonel Draper arrived at this conclusion as a consequence of his conservative attitude regarding the definition of "Parties" in Common Article 2 and the inability of nonstates to "accept" international obligations, or whether he simply did not consider Article 84 of the First Protocol. In any event, such a construction would, according to him, impose a unilateral obligation upon the signatory "colonialist," "alien" or "racist" regime in relation to its opponent.<sup>137</sup> Although it is difficult to subscribe to Colonel Draper's analysis or conclusion due to their orthodoxy and failure to account for the second paragraph of Article 84, his personal

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<sup>134</sup> G. DRAPER, *supra* note 20, at 15.

<sup>135</sup> Address by Colonel G. I.A.D. Draper, Delegate of the United Kingdom, to the 23d Advanced Class, The Judge Advocate General's School, U.S. Army, Sept. 19, 1974 [available in pertinent part on videotape at The Judge Advocate General's School, U.S. Army].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

stature as well as that of the government which he represents indicates that his interpretation merits some comment.

The argument possesses a logical basis because some ambiguity seems to exist between the conditional portions of the 84th Article of the Red Cross Draft and the unconditional character of the first paragraph of the amendment in question. This ambiguity is heightened if the terms "Party" as employed in the former provision and "Power" as used in Common Article 2 are limited to mean states. The result is, however, repugnant to the concept of mutuality which, it has been established, lies at the heart of the Conventions' structure. It also indicates a failure to cure the obligational deficiency considered in assessing the shortcomings of Common Article 3. On a pragmatic plane, such a construction would strengthen the argument that the Protocol binds only the adversaries of, and not liberation movements themselves. Furthermore, it would discourage further interest in efforts to augment humanitarian law by potential opponents of the encompassed movements and, in the event of a conflict, prompt them to disregard the obligations because the movement would be absolved from compliance. These potential results indicate that if humanitarian safeguards must be extended on the basis of the insurgent's goal rather than on a more objective basis, it is imperative that the ambiguities be eliminated and that a clear provision for reciprocity be included within the operative provisions.

The framers of the amended First Article themselves contemplated reciprocity of application with respect to the national liberation movements. Mr. Georges Abi-Saab, the Egyptian delegate to the 1974 Diplomatic Conference, who was a major proponent of one of the amended First Article's predecessors, has asserted:

If permanent accession is objectionable—as the argument goes—in view of the uncertain future of the liberation movement, at least *ad hoc* accession for the on-going liberation war commends itself on the basis of the spirit and purpose of the Conventions while meeting this objection. Fortunately, the Conventions provide for such *ad hoc* acceptance in Common Article 2, paragraph 3. . . .

This procedure can thus be effectuated by a unilateral declaration by the liberation movement and does not depend, to produce its effects, on the acceptance of the other belligerent—e.g. the colonial government—or for that matter, on any other party to the convention.<sup>138</sup>

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<sup>138</sup> Speech of Georges Abi-Saab to the International NGO Conference Against Apartheid and Colonialism in Africa, Sept. 2-5, 1974, reprinted in pertinent part in Lucerne Informal Working Group, Study of the Implications of Article I, as Amended, for the Rest of the Protocols and for the Conventions 4 (Sept. 1974)

Mr. Abi-Saab is undoubtedly correct in his observation that today most states would be unwilling to accept a provision authorizing accession or ratification of the Protocols by national liberation movements because the capacity to do so might be construed to extend statehood to such movements. A more logical approach, the one which appears to have been rejected or overlooked by Colonel Draper, but which lends itself to easy effectuation, is simply to enable the enumerated movements to avail themselves of the third paragraph of Common Article 2 and the second paragraph of Article 84 of the Protocol, or to establish procedures analogous to them exclusively for the assumption of obligations by national liberation movements.

Before considering the mechanics of such clarifying measures, it is necessary to come to grips with a threshold problem which has been conspicuously avoided by the Amendment's drafters: that of determining what the amendment actually purports to accomplish in applying the new conflict categories to Common Article 2. Its intended purpose must be considered at this point because this intentment will govern the breadth of the necessary clarifying adjustments.

## *2. The Purported Purpose of the Amended First Article*

Considered in its totality, this draft amendment could accomplish either of two objectives. First, if construed literally, it would simply utilize the conflict categories of Common Article 2 to define when the first Protocol applies and include the enumerated wars of national liberation within the Article 2 categories only for this limited purpose. Support is lent to such a construction by the phraseology of the second paragraph of the amendment which intimates that the new conflict category is intended exclusively to be utilized in conjunction with the preceding paragraph which asserts when the First Protocol shall apply. Under this interpretation the sole function of the amended article would be to define the coverage of the Protocol rather than boldly extend the scope of the Conventions themselves.

The second interpretation is that the amended First Article expands the scope of Common Article 2 itself, so as to permit the

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[unpublished document available at The Judge Advocate General's School, U.S. Army]. Identical sentiments were expressed by Dr. Bernhard Graefrath, an East German Delegate to the 1974 Diplomatic Conference, at the Brussels International Symposium on Humanitarian Law, International Symposium Doc. No. Coll. /III/B (1974).



enumerated national liberation movements to enjoy the Conventions' full protections. It appears that this was the result actually contemplated by its framers or at least a substantial number of sympathetic members of the First Committee.<sup>139</sup> This would seem logical in view of the fact that many delegates apparently considered amended Article I as a codification of the 1973 General Assembly resolution on the legal status of combatants struggling against colonial and alien domination and racist regimes which espouses the extension of full Convention protections to them. In addition, this interpretation appears to be dictated by the fact that the First Protocol is simply a vehicle designed to augment the Conventions and would be of limited value as an independent source of humanitarian norms. Nevertheless, this construction is certainly not impelled by the presently ambiguous amended First Article. Accordingly, it should be clarified in conjunction with the effort to formulate provisions which will permit the encompassed national liberation movements to assume the obligations contained in both the Protocol and the Conventions themselves.

### 3. *A Brief Overview of Recent Corrective Proposals*

During the 1975 session of the Diplomatic Conference, a coalition of states within the First Committee proposed an amendment to Article 84 of the First Protocol which, if adopted, would substantially aid in the resolution of the obligational questions which have been previously considered. It will be recalled that the second paragraph of the original Red Cross draft of Article 84 provides a formula under which a Party to the conflict, which is not a signatory to the Protocol, can bind itself in relation to a signatory if it accepts and applies the Protocol's provisions.<sup>140</sup> The most important of the proposed amendment's additions to this Article is a provision permitting the authority representing a "people" engaged in an armed conflict against a contracting party to undertake to apply the Conventions and the Protocol to the conflict by means of a unilateral declaration undertaking to comply with the Conventions and the Protocol.<sup>141</sup> The new provision then provides that, as a consequence

<sup>139</sup> E.g., Diplomatic Conference Doc. CDDH/I/SR. 1-16, *supra* note 104, at 8 (statement of the Egyptian delegate); 10 (statement of the Yugoslavian delegate); 11 (statement of the Norwegian delegate); 13 (statement of the East German delegate); 14 (statement of the Tanzanian delegate). Cf. Draft Report of Committee 1, Diplomatic Conference Doc. No. CDDH/I/81, addendum 1 (1974).

<sup>140</sup> See text accompanying note 130 *supra*.

<sup>141</sup> The text of this proposal provision which amends paragraph 3 of the extant Red Cross draft of Article 84 is as follows:

of such a declaration, the Conventions and the First Protocol are both immediately brought into force for the authority as a Party to the conflict.<sup>142</sup> Furthermore, the authority representing the liberation movement assumes the same rights and acquires the same obligations as a High Contracting Party to the Conventions and the Protocol. Finally, both the Conventions and the Protocol become equally binding upon all Parties to the conflict.

A formulation advanced by the Norwegian Government, designated as Article 84 *bis*, possesses similar features.<sup>143</sup> It also accords the national liberation movements defined in the amended First Article the ability to bring the Conventions and the Protocol into force in time of armed conflict with a signatory through a unilateral declaration.<sup>144</sup> However, it possesses the added features of eliminating the semantic distinction between the phrase "Powers in conflict" as employed in Common Article 2 and the phrase "party to the conflict" as utilized in the extant Article 84. It accomplishes this by

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5. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in paragraph 2 of Article 1 of the present Protocol, may undertake to apply the Conventions and the present Protocol, in relation to that conflict, by means of a unilateral declaration addressed to the depositary of the Conventions. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

- i. The Conventions and the present Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- ii. The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and present Protocol;
- iii. The Conventions and the present Protocol are equally binding upon all Parties to the conflict.

Table of Amendments, *supra* note 112, at 92-93.

<sup>142</sup> The states which advanced this proposal concerning Article 84 also proposed a correlative amendment to Article 88 of the First Protocol, which involves notifications requiring that "declarations received under paragraph 3 of Article 84, . . . shall be communicated by the quickest methods." Table of Amendments, *supra* note 112, at 96.

<sup>143</sup> Article 84 *bis* as introduced on September 11, 1974 provides:

1. If in the situations provided for in Article 2 common to the conventions and Article 1 of the present Protocol, one or more of the Powers in conflict are not Parties to the Conventions or the present Protocol, the Powers in conflict shall endeavour to bring the Conventions and the present Protocol into force, either by means of special agreements or by unilateral declarations addressed to the Swiss Federal Council or to the International Committee of the Red Cross.

2. The Powers in conflict who are Parties to the Conventions and the present Protocol shall remain bound by these instruments in their mutual relations and in relation to Powers who have entered into special agreements or issued declarations as stipulated in the preceding paragraph. The Powers who have entered into such agreements or issued such declarations assume the same rights and obligations as a party to the Conventions and the present Protocol.

3. The word "Powers" as used in the present Article as well as in Article 2, paragraph 3, common to the Conventions shall include States and such governments and authorities as are referred to in Article 4A, subparagraph (3) of the third Convention, including national liberation movements representing peoples who are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

4. The Swiss Federal Council or the International Committee of the Red Cross shall communicate by the quickest method any declaration received in accordance with paragraph 1 of the present Article. The communication of such declarations shall not affect the legal status of the Powers in conflict, or shall be regarded as a pronouncement on their legal status. Under no circumstances shall the communication of such a declaration be regarded as an unfriendly act or as an interference in the armed conflict.

Table of Amendments, *supra* note 112.

<sup>144</sup> Article 84 *bis* para 1; *see id.*

eliminating the term "party" and by defining the term "Power" to encompass both such governments and authorities as are referred to in Article 4A(3) of the Prisoner of War Convention, as well as the national liberation movements enumerated in the amended First Article.<sup>145</sup> It also provides an apparatus to permit all nonsignatories falling within these categories to effectuate the Conventions and the Protocols by entering into special agreements.<sup>146</sup>

The efficacious features of these two proposals are readily apparent. First, both make it clear that the amended First Article is intended to thrust the encompassed national liberation movements into the protective apparatus of the Conventions proper and not simply to accord them the limited augmentative protections of the Protocol. In addition, both specify that the obligation to accord such protections is of a reciprocal nature. Finally, by permitting encompassed national liberation movements to bring these humanitarian conventions into effect through the politically neutral act of a unilateral declaration, the formulations seem to bind the incumbent government in the conduct of hostilities without requiring it to take any action which might be viewed as according political or legal recognition to the insurgent movement.

Several added features contained in the Norwegian proposal, Article 84 *bis*, make it preferable to its counterpart. By rejecting the new and potentially confusing phrase "Party to the conflict" it utilizes the familiar language of Common Article 2. More importantly, however, it subtly suggests a method to eliminate the most serious conceptual deficiency of the amended First Article's formula—the problem of predicating protection upon goal appeal rather than upon more objective considerations. By defining the term "Powers" to encompass "such governments and authorities as are referred to in Article 4A, subparagraph 3 of the Third Convention," as well as the national liberation movements defined in the amended First Article,<sup>147</sup> it arguably extends humanitarian protections uniformly to an entire class of domestic conflicts of a given intensity without reference to legitimacy of purpose. Unfortunately, however, this provision of the Prisoner of War Convention is a most inappropriate vehicle to accomplish this vital objective. First, as Article 4A(3) simply provides that captured members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power are prisoners of war,<sup>148</sup> it would

<sup>145</sup> Article 84 *bis* para. 3: see note 143 *supra*.

<sup>146</sup> Article 84 *bis* para. 1: see note 143 *supra*.

<sup>147</sup> Article 84 *bis* para. 3: see note 143 *supra*.

<sup>148</sup> Article 4A(3) of the GPW Convention provides:

appear inapplicable to significant parts of the First and Second Geneva Conventions as well as the provisions of the draft First Protocol which relate to methods of combat. With respect to those humanitarian protections, the phrase "Detaining power" and the status of prisoners of war are simply inapplicable.

This insufficiency could result in the inference that such governments or authorities are to be accorded only those protections which involve the opponent as a detaining power and that it is at liberty to ignore safeguards which are inapplicable to this capacity. Second, if construed within its originally contemplated context, the pertinent clause would be of limited assistance in extending humanitarian protections to liberation movements not included within the definition of the amended First Article. In this regard, Pictet indicates that the provision contained within Article 4A(3) of the Prisoner of War Convention must be interpreted in light of the situation which motivated it—the deployment of Free French forces during World War II.<sup>149</sup> Such military personnel, asserts Pictet, differ from those enumerated in the preceding portions of the Prisoner of War Conventions only by the fact that the government or authority to whom they profess allegiance is not recognized by its adversary and, as a result, such forces are not acting on behalf of a Party to the Conflict within the meaning of Common Article 2. In all other respects, however, they possess the same attributes as the regular military forces of a recognized opponent, including wearing a uniform, carrying arms openly, a hierarchical structure, and knowledge and respect for the laws and customs of war. In addition, it is consistent with the construction to be attributed to this provision that the government or authority sponsoring such military forces be recognized by third states, particularly those which are Parties to the Convention within the meaning of Common Article 2.<sup>150</sup>

Although these criteria are essentially predicated upon considerations of intensity rather than those of a more subjective nature, they would seem unnecessarily restrictive as they appear to presume the existence of a highly organized governmental infrastructure whose *de jure* character is recognized by at least one third state. Although some insurgent movements such as the Palestine Libera-

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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:

3. Members of a regular armed force who profess allegiance to a government or an authority not recognized by the Detaining Power.

<sup>149</sup> 3 J. PICTET, *supra* note 121, at 61-64.

<sup>150</sup> *Id.* at 63.

tion Organization might fulfill these requirements,<sup>151</sup> they would generally appear to exceed those criteria which should be considered essential—the ability and willingness to apply the humanitarian safeguards they seek for themselves. It is reasonable that an insurgent movement could possess these capabilities without possessing the governmental apparatus and enjoying the extraterritorial recognition which appears to be contemplated by Article 4A(3) of the Prisoner of War Convention.

Despite these deficiencies, the Norwegian proposal presents a tantalizing solution to the most perplexing problem resulting from the present formulation of the amended First Article. It proposes simply to expand the definition of the nonstate "Powers" encompassed by the Protocol and the Conventions to include not only the national liberation movements circumscribed by the amended First Article, but also any unrecognized political entity with certain abilities. This definition could require the movement, for example, to possess the capability of complying with the provisions essential to the accomplishment of the objects and purposes of the Conventions and the Protocol. While such a minimal threshold would serve to exclude mere outlaws and brigands, it would permit insurgent entities which are capable of complying with the essential mandates of the Convention-Protocol structure to obligate themselves to do so and, in return, to secure the humanitarian protections afforded by those agreements.

In the author's opinion, the inclusion of Article 84 *bis* or a formulation similar to it is an essential correlative to the probable adoption of the amended First Article. Such a provision not only clarifies present ambiguities concerning the scope of the Conventions and the draft First Protocol as they apply to national liberation movements, but it also makes clear that such entities will enjoy the protections of these agreements only if they undertake to assume their obligations. Most importantly, however, it provides a mechanism whereby the encompassed movements can unilaterally trigger the application of these agreements. Such a capability eliminates the requirement of formal acknowledgement by the incumbent, and the possible political and juridical consequences of such a formal affirmation of the applicability of the Conventions and Protocol.

In addition, the Norwegian proposal suggests a means of eliminating the most fundamental conceptual difficulty with the amended

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<sup>151</sup> Cf. Chicago Tribune, Oct. 16, 1974, at 14, col. 1, reporting the passage of a resolution by the United Nations General Assembly admitting the Palestine Liberation Organization to participate in debates concerning the Palestinian question.

First Article—the predication of humanitarian protections upon legitimacy of purpose rather than upon some neutral criterion. Although ultimate success is not likely, a serious effort should be made to include all insurgent movements capable of implementing the essential provisions of the Conventions and the First Protocol within the protective structure of these humanitarian instruments.

However, even if it is assumed that each of the measures contained in these proposals is adopted, their ultimate efficacy in uniformly conferring rights and imposing obligations will depend upon the capabilities and good faith of the parties. In this regard, the encompassed insurgent movements will undoubtedly possess varying attitudes regarding their obligations to apply humanitarian law and a broad range of capabilities for actually doing so. The effect of such variables must also be considered in assessing the practical consequences of this effort to transpose norms designed to govern international conflicts to the context of wars of national liberation.

#### IV. SOME SELECTED PRACTICAL PROBLEMS REGARDING THE APPLICATION OF INTERNATIONAL HUMANITARIAN NORMS TO WARS OF NATIONAL LIBERATION

This section will presume an irrevocable commitment to assimilate selected wars of national liberation into the scheme of humanitarian law which regulates international armed conflicts and will deal exclusively with problems resulting from the application of the Conventions and the draft First Protocol to such conflicts. The problems envisioned fall within two broad categories: those resulting from the application of this scheme to a diverse conglomeration of unstabilized political entities rather than to states; and those resulting from the textual inadaptability of several of the Conventions' substantive provisions. This limited assessment will consider whether the impulsive conduct of the First Committee's majority is truly the optimal method for protecting the victims of wars of national liberation, or whether the formulation and adoption of a discrete system of norms would be preferable.

##### A. CONSTRAINTS GOVERNING THE TREATMENT OF CAPTURED COMBATANTS

It will be recalled that Common Article 3 simply specifies that persons placed *hors de combat* as a result of detention are entitled to

humane treatment and that torture, cruelty, degradation, and personal violence are specifically prohibited. It goes no further in establishing minimum standards governing the retention of such persons. Amended Article 1 to the First Protocol would make the relevant provisions of the Protocol fully applicable to armed conflicts involving selected liberation movements. However, the initial Red Cross proposal contained only four provisions regarding prisoners of war. The first two simply enumerated the circumstances in which a combatant is to be considered *hors de combat* and entitled to humanitarian protection.<sup>152</sup> The second two refined and expanded the categories of persons entitled to treatment as prisoners of war to include commandos<sup>153</sup> and members of resistance movements.<sup>154</sup> With respect to prisoners of war, then, the Protocol itself is practically valueless as a source of substantive safeguards. Therefore, if additional protection is to be accorded the participants in wars of national liberation, the amended First Article must be construed to extend the provisions of the Geneva Prisoner of War Convention to them as well. This application, however, raises several difficulties.

*1. Problems Regarding the Application of the POW Convention by Insurgent Groups*

The first of two fundamental questions concerning the implementation of this Convention by insurgent movements centers on the fact that the POW Convention contemplates the existence of a stabilized battle area and parties with sophisticated administrative and logistical infrastructures. Its provisions not only enunciate standards of treatment sufficient to meet basic humanitarian requirements but contemplate the establishment of permanent detention camps situated in healthful locations with infirmaries, quarters equivalent to those of the detaining power, canteens, mess facilities and recreation facilities. It also provides for the compensation of prisoners by the detaining power, the establishment of accounts and funds for this purpose, and the institution of information bureaux and postal services to facilitate contact with the exterior. Even assuming a willingness to comply with this Convention, it is most unrealistic to believe that typical insurgent movements would possess the administrative and logistical capabilities to supply such facilities. Such movements typically rely upon mobility for survival, moving

<sup>152</sup> Draft Protocol I arts. 38 & 39.

<sup>153</sup> *Id.* art. 40.

<sup>154</sup> *Id.* art. 42.

their prisoners with them as they seek to elude opponents<sup>155</sup> or strike unexpectedly. They simply cannot construct or maintain such facilities. Furthermore, they are fortunate if they can shelter, doctor, feed, and fund themselves to continue their struggle, much less supply their opponents with such amenities while denying them to themselves.

One possible solution to this incapacity is to require only that the insurgents make a good faith effort to comply with the provisions to the extent that their circumstances permit, or those that are essential to humanitarianism. Perhaps such a resolution is, from a pragmatic standpoint, workable and, in the absence of a better solution, merits consideration. Yet under the obligational formulae previously considered, the movements in question would bring the Conventions into force by asserting *a willingness to comply with their obligations* not simply by adhering to their most fundamental principles or by respecting their spirit.

It is conceivable that a formulation permitting such backsliding from the individual requirements which comprise this obligation would foster a destructive attitude toward international obligations in general. They would cease to possess the status of mandates from which no deviation is permitted and become mere enunciations of ideals to be attained perhaps sometime in the remote future. So viewed, few, if any, humanitarian norms contained in the Conventions could survive intact. A more immediate result would be a divergence of opinion as to what provisions are fundamental under the prevailing conditions and which ones are nonessential. Again, attitudes on this question would be subject to significant divergence among various cultures and, of course, a liberation movement having its own welfare at stake would find it expedient to consider as few provisions as possible "essential."

These results would indicate that rather than attempting to hold the encompassed national liberation movements to unattainable standards or permitting discretionary application in light of subjectively determined capabilities, it would be preferable to impose upon them a separate system of essential norms composed of realistic but obligatory provisions.

In this regard, the Second Protocol, formulated to augment Common Article 3 in the regulation of noninternational conflicts, sets forth a catalog of such minimal safeguards. It first forbids outrages comparable to those contained in Common Article 3.<sup>156</sup> It

<sup>155</sup> Cf. J. ROWE, FIVE YEARS TO FREEDOM 14, 147, 409-33 (1971).

<sup>156</sup> Draft Protocol II art. 6.



then *requires* the captor to afford prisoners medical care, quarters, food, water, individual or collective relief, spiritual comfort, and clothing.<sup>157</sup> In addition, a second category of benefits must be provided *within the limits of the captor's capabilities*. It includes provision for mail, separate accommodation of men and women, and the establishment of the detention facilities at a place removed from the combat zone.<sup>158</sup>

Although this approach appears more realistic than the wholesale adaptation chosen by the formulators of the amended First Article, it is doubtful whether such peculiarized treatment could be utilized in the context of those conflicts falling within the ambit of the amended First Article. To do so would probably necessitate the removal of conflicts involving the privileged national liberation movements from the operation of the Geneva Prisoner of War Convention. This would be tantamount to a repudiation of their status as "international armed conflicts"—the principal objective of these proponents. Perhaps, however, the same result could be attained through the selective elimination of those provisions of the Prisoner of War Convention which would normally be beyond the capabilities of liberation movements and which the International Committee of the Red Cross or the members of the Diplomatic Conference determine to be nonessential. This could be accomplished through the addition of an article to the First Protocol enumerating such nonessential provisions and rendering them inapplicable to armed conflicts involving the encompassed liberation movements. In their stead, an alternative formulation of more fundamental standards could be substituted with a provision requiring the application of additional safeguards when within the capabilities of the parties to the conflict. This alternative solution would incorporate the realistic approach of the Second Draft Protocol and yet not require an implicit repudiation of the international character of such conflicts. In addition, it would accomplish the objective of imposing attainable and obligatory constraints on the parties to such conflicts which would not be amenable to truncation and selective application.

The second potential problem raised by imposing the constraints of the Prisoner of War Convention upon national liberation movements *in toto* is an attitudinal one. It will be recalled that through reservations to Article 85 of the Prisoner of War Convention and subsequent practice, Communist-bloc states have made it clear that prisoners of war convicted of war crimes or other selected offenses

<sup>157</sup> *Id.* art. 8(1)(a).

<sup>158</sup> *Id.* art. 8(2).

lose their rights under this Convention.<sup>159</sup> This attitude may also infect liberation movements enjoying the support or sponsorship of such regimes. This is suggested by the purported accession of the Provisional Revolutionary Government of the Republic of South Vietnam to the Convention. That accession would have denied prisoner of war status to prisoners of war convicted of genocide, war crimes, crimes against humanity and crimes of aggression.<sup>160</sup> Because many Soviet writers equate this latter category with repressive measures of colonialist regimes<sup>161</sup> and the General Assembly Resolution of December 12, 1978<sup>162</sup> brands mercenaries involved in such efforts as war criminals, the probable result is readily apparent.<sup>163</sup> Liberation movements, if accorded the ability to bring the Prisoner of War Convention into play through unilateral declarations, can be expected to qualify their declarations by similar reservations. Their captives could then be perfunctorily branded as war criminals as suggested by the General Assembly Resolution Concerning the Legal Status of Combatants, and subsequently denied protection as prisoners of war.

This possible sequence would render the initial acceptance of responsibility an illusory act and defeat the objective of the Prisoner of War Convention. Accordingly, it is imperative that some mechanism be formulated to assure that such acts of acceptance cannot be so conditioned in the future. In this regard, Article 42 of the initial Red Cross Draft of Protocol I provides that members of resistance movements who violate the Conventions and the present Protocol shall, if prosecuted and sentenced, retain the status of

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<sup>159</sup> See text accompanying note 122 *supra*.

<sup>160</sup> Letter from the Swiss Federal Republic to the United States Department of State, *supra* note 122.

<sup>161</sup> Ginsburg, *supra* note 125, at 920-22.

<sup>162</sup> Resolution Concerning the Legal Status of Combatants, *supra* note 94, at para. 5.

<sup>163</sup> In this regard, it is noteworthy that a proposal with respect to mercenaries, styled Article 42-quarter, was submitted by the Nigerian Delegation to the ICRC Working Group during the 1976 session of the Conference. That formulation would deny prisoner of war status to all mercenaries. It provides:

1. 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.

2. 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 take part in armed conflict essentially for monetary payment, reward or other private gain.

Doc. No. CDDH/III/361/Add. 1 (June 7, 1976), reproduced in Report of the United States Delegation-Third Session, *supra* note 114, at 124. A similar formulation concerning the status of mercenaries which, however, accords the term "mercenary" an extremely narrow definition, was adopted by a consensus of the Third Committee in April 1977.

prisoners of war. Seemingly, this language could be viewed as sufficient to eliminate the problem.<sup>164</sup>

It is quite conceivable, however, that such a provision could itself become the subject of reservations by some powers. Consequently, additional alternatives merit consideration. First, Article 42 could simply be amended to assert that both it and Article 85 of the POW Convention are nonreservable. This stipulation, under generally accepted norms governing treaties, would preclude a state from acceding subject to such a reservation.<sup>165</sup> Presumably it would also preclude similar reservations by nonstate entities desiring to effectuate the POW Convention through other avenues. It is improbable, however, that such a proposal would meet general acceptance among Communist and third world states as the former have consistently insisted upon such reservations.

Alternatively, the United States could make it clear that, in its opinion, reservations to these articles are incompatible with the object and purpose of the Convention as they could readily result in the disenfranchisement of the entire military force of one of the parties to a conflict. This position, however, would be of limited value in impeding accessions with reservations. Nevertheless, it would seem, that if the United States and other similarly disposed governments made it clear that for this reason they would not consider the Prisoner of War Convention to be in effect in relation to such reserving entities,<sup>166</sup> a new attitude of circumspection and responsibility might be engendered. The reserving entity would undoubtedly desire its benefits and protections enough to forego the opportunity to engage in this largely political ploy.

It should be noted that this approach would mark a departure from the previous practice of the United States which is simply to reject the reservation without challenging the binding nature of the

<sup>164</sup> A subsequent formulation of Article 42, submitted to the Third Committee by a Red Cross working group during the 1976 session evidences some tacit backsliding with respect to the question of a prisoner of war's continued entitlement to such status. Although the new formulation unequivocally asserts that violation of the rules of armed conflict shall not deprive a combatant of prisoner of war status should he fall into the power of an adverse party, it omits the vital language of its predecessor that such persons shall retain the status of prisoners of war even if prosecuted and sentenced. Proposal by the Working Group, art. 42, para. 2, Doc. No. CDDH/III/362 (June 8, 1976), reproduced in Report of the United States Delegation-Third Session, *supra* note 114, at 118.

<sup>165</sup> See Vienna Convention on the Law of Treaties art. 14, U.N. Conference on the Law of Treaties Doc. No. A/CONF 39/27 89 (1969). Article 85 of the Red Cross draft to Protocol I contains an enumeration of articles which are nonreservable. The proposed amendment to Article 42, para. 2, could be accomplished by simply adding it to this series.

<sup>166</sup> See Vienna Convention on the Law of Treaties art. 20, U.N. Conference on

accession.<sup>187</sup> Perhaps such an attitude is preferable where it can be determined that the reservation probably will not result in wholesale abuse and the desire to establish protection for most of the combatants most of the time predominates. However, where such an assessment cannot be made with any certainty, and it appears that the opponent is probably incapable of complying with the Convention anyway, little would be lost if recognition and application were conditioned upon unqualified acceptance.

These selected problems do not exhaust the issues raised by this effort to impose the Third Convention's obligations upon insurgent movements. However, the other side of the coin should briefly be considered.

2. *Application of the POW Convention by the "Colonialist," "Alien" or "Racist" Regime—The Problem of Defining Eligible Combatants*

Perhaps the most fundamental problem concerning the extension of the Prisoner of War Convention to the insurgent movements encompassed by the amended First Article is determining exactly who is to be accorded treatment as a prisoner of war rather than as a common criminal. It is widely known that Article 4 of the Prisoner of War Convention enunciates four conditions with which members of militias, volunteer corps and other organized resistance movements, belonging to a party to the conflict, must comply. They include being commanded by a person responsible for subordinates; having a fixed, distinctive sign recognizable from a distance; carrying arms openly; and conducting their operations in accordance with laws and customs of war.<sup>188</sup>

The initial Red Cross formulation of Article 42 of the First Protocol truncates these criteria as they apply to organized resistance movements so as to encompass only the requirements of responsible command, personal distinction from the civilian population during military operations, and adherence to the Conventions and Protocol in the conduct of such operations.<sup>189</sup> In anticipation of possible efforts during the Diplomatic Conference to include the participants of liberation movements within this category of combatants, an optional provision was also appended to this article by the Red Cross. It provides:

3. In cases of armed struggle where peoples exercise their right of self-

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the Law of Treaties Doc. No. A/CONF 39/27 289 (1969).

<sup>187</sup> Memorandum from the U.S. Army Office of The Judge Advocate General, International Affairs Division, *supra* note 122.

<sup>188</sup> GPW Convention art. 4A(2).

<sup>189</sup> Draft Protocol I art. 42, para. 1.

determination as guaranteed by the United Nations Charter and the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," *members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war for as long as they are detained.*<sup>170</sup>

This proposal would appear to impose upon combatant members of the encompassed movements the requirements of distinction from the civilian population, compliance with the Conventions, and military organization, as specified by the POW Convention and modified by the preceding paragraph of Article 42 of the First Protocol.

However, as this initial formulation did not anticipate the subsequent inclusion of the members of these movements as full participants in the Conventions and the First Protocol, a question arises as to whether the imposition of these requirements, in effect, frustrates this objective. It is unrealistic to assume that guerrilla organizations will make special efforts to distinguish themselves from the civilian population or to conduct military operations in accordance with traditional norms governing the conduct of armed hostilities. Indeed, the Provisional Revolutionary Government of South Vietnam asserted in its reservation to Article 4 of the Prisoner of War Convention that the conditions enumerated in it which pertain to resistance movements are "not appropriate for the cases of peoples' wars today."<sup>171</sup> Consequently, strict application of even those limited requirements by incumbent governments would frequently foreclose the extension of prisoner of war status to the combatant forces of the encompassed liberation movements, and as a consequence, the ostensible objective of the amended First Article to expand the class of beneficiaries of such status would be effectively thwarted. Therefore, it would seem that a policy determination must be made as to whether the requirements of Article 4A(2) of the Third Convention, as modified by the initial Red Cross formulation of Article 42 of the First Protocol, are sufficiently sacrosanct to justify such a de facto disenfranchisement or whether these conditions should be further modified to avert this consequence.

There seem to be four reasons for imposing such requirements: first, to provide a basis for distinguishing the parties to the conflict from opportunist bands of thieves;<sup>172</sup> second, to foster adherence

<sup>170</sup> Draft Protocol I art. 4, para. 3 (optional) (emphasis added).

<sup>171</sup> Letter from the Swiss Federal Republic to the Department of State, *supra* note 122.

<sup>172</sup> Cf. S. J. PICTET, *supra* note 122, at 57.

to the laws of war;<sup>173</sup> third, to facilitate the protection of innocent civilians; and fourth, to provide game rules to preclude perfidious methods of attack.<sup>174</sup> Of these four purposes, only the first appears to have any genuine relationship to determining who merits prisoner of war treatment. The other three are not primarily related to status identification but appear collectively to utilize POW status as a lever to assure conformity with humanitarian and chivalrous norms. Such a methodology appears to have been squarely rejected by Article 85 of the Third Convention which prohibits the *withdrawal* of POW status as a punitive measure for individual violations of the laws of war. It would then seem that, insofar as the modified criteria encompass considerations not related to status identification but to the attainment of extrinsic objectives, they should be eliminated. Consequently, prisoner of war status should be predicated exclusively upon an indication that the captive is indeed a combatant member of the hostile party to the conflict.

During the 1976 session of the Conference, a working group of the Red Cross proposed a new formulation of Article 42 which would largely eliminate nonessential criteria such as the requirement of distinction from the civilian population during all phases of military operations and would accord prisoner of war status to the broadest possible class of combatants. This formulation simply requires that combatants, as defined by Article 41 of the First Protocol,<sup>175</sup> distinguish themselves from the civilian population while they are engaged in actual attack or in a military operation preparatory to an attack. Where the nature of hostilities precludes a

<sup>173</sup> *Id.* at 61.

<sup>174</sup> *Id.* at 59-60.

<sup>175</sup> Article 41, as adopted by the Third Committee during the 1976 session of the Diplomatic Conference, considering the term "combatant" states:

1. The armed forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinate, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system, which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. These rules include those established by applicable treaties, including the Conventions and this Protocol, and all other generally recognized rules of international law.

2. Members of the armed forces of a party to the conflict (other than medical personnel and chaplains covered by article 33 of the Third Convention) are combatants, that is, they have the right to participate directly in hostilities.

3. Where a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other parties to the conflict.

Report of the United States Delegation-Third Session, *supra* note 114, at 66. This definition itself contains two of the traditional requisites for eligibility for prisoner of war status: command by responsible leader, and compliance by the insurgent entity with the rules of international law applicable in armed conflict. Thus, as the new Red Cross formulation apparently adopts this definition in the course of its effort to define eligibility for POW status, its work-product does not constitute as radical a departure from preceding formulations as might initially appear.

combatant from so distinguishing himself, he shall, nevertheless, retain his status as a combatant provided that he carries his arms openly during actual military engagements and during such time as he is visible to the adversary in a military deployment preceding an attack.<sup>176</sup>

If this broad formulation is adopted, the ancillary objectives of protecting civilian populations and assuring conformity with humanitarian constraints could be accomplished in a manner fully consistent with the fabric of the Conventions if, upon capture, suspected offenders are accorded prisoner of war status<sup>177</sup> and subsequently prosecuted for their delicts either by a protecting power or by the detaining power.<sup>178</sup> The presence of this option should eliminate the most readily foreseeable ground for objecting to this proposal for expanding the class of combatants entitled to prisoner of war status.

A question will invariably arise as to the expediency of weaken-

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<sup>176</sup> Proposal by the Working Group art. 42, para. 3, Doc. No. CDDH/III/862 (June 8, 1976), reproduced in Report of the United States Delegation-Third Session, *supra* note 114, at 118-19. The substance of this provision was subsequently adopted by the Third Committee during the 1977 session of the Diplomatic Conference. See *The Washington Post*, Apr. 24, 1977, at 15, col. 1.

The Working Group proposal contains two other noteworthy provisions. Paragraph 4 provides for a separate but equal status for combatants who are captured while failing to observe even the minimal requirements of distinction set forth in paragraph 3. Although such persons are not deemed prisoners of war, as they have forfeited combatant status, they shall benefit from procedural and substantive protections equivalent to those accorded to POWs by the Third Convention and the Protocol. The practical distinctions between such persons and actual prisoners of war and the qualitative nature of the rights accorded these two categories are not readily apparent.

Paragraph 5 is highly relevant to the problem concerning deprivation of POW status for past delicts. It provides, in brief, that a combatant who is captured while not engaged in an attack or a preparatory military operation retains his rights as a combatant and as a prisoner of war whether or not he previously may have violated the requirements of paragraph 3 concerning personal distinction from the civilian population during actual hostilities. For further commentary concerning this new formulation of Article 42 see note 164 *supra*.

<sup>177</sup> In this regard, Article 42 *bis*, adopted by the Third Committee during the 1976 session provides that a person who takes part in hostilities and falls into the hands of an adverse party shall be presumed to be a prisoner of war if he claims such status, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf. Should a question arise as to the entitlement of such a person to such status, he shall continue to possess it and to be entitled to protection under the Prisoner of War Convention until his status has been adjudicated by a competent tribunal. Article 42 *bis*, para. 1. The text of this provision is contained in the Report of the United States Delegation-Third Session, *supra* note 114, at 67. It should be noted that Article 5 of the Third Convention also contains a provision authorizing the employment of a tribunal to determine a captive's entitlement to prisoner of war status.

<sup>178</sup> See J. BOND, *supra* note 54, at 115-16.

ing the traditional norms regarding prisoner of war status. Aside from the altruistic objective of fostering any effort to expand the range of humanitarian safeguards, several pragmatic reasons exist. First, liberality in the extension of prisoner of war treatment might, in time of an actual conflict, provide insurgents with some incentive to abide by the laws of war themselves. Second, it would seem feasible to utilize support of such an ameliorative effort as a bargaining instrument to extract from Communist and third world states an agreement to retract reservations to Article 85 of the Prisoner of War Convention or to render the articles involving post conviction retention of prisoner of war status nonreservable. These reciprocal concessions would provide a mutually beneficial extension of prisoner of war benefits without impeding the capacity to try and punish bona fide war criminals.

The problem of defining the phrase "prisoners of war" will doubtlessly be resolved during the fourth session of the Diplomatic Conference in the spring of 1977 because the ultimate formulation of Article 42 is considered one of the key issues to be settled by the Third Committee at that time.<sup>179</sup> If, indeed, the amended First Article's assimilation of selected national liberation movements with international entities is a *fait accompli*, considerations of pragmatism and humanitarianism dictate that this definitional formulation encompass as broad a class of combatants as possible.

The foregoing discussion is not intended to comprise an exhaustive survey of the issues raised by the amended First Article's effort selectively to apply the substantive protections of the Prisoner of War Convention to noninternational conflicts. However, this limited survey suggests two observations. First, the optimal solution to the capability and definitional problems resulting from the imposition of additional constraints upon such conflicts is the enunciation of a separate set of norms which are tailored to the conflicts and to the anticipated capabilities of the parties. This alternative, however, is presently most unrealistic as it tends to deprive such conflicts of their international character—the recognition of which has been the primary objective of the amendment's drafters. In the absence of such a resolution, the amendment so hastily wrought by Committee I could be made workable if several textual adjustments are made in other portions of the First Protocol and both parties to the encompassed conflicts approach their obligations in a spirit of good faith. This sanguine observation unfortunately cannot be made with respect to a similar effort to impose international norms

<sup>179</sup> See Report of the United States Delegation-Third Session, *supra* note 114, at 122-23.



governing the treatment of civilians upon a civilian population which falls victim to an internal conflict.

### B. CONSTRAINTS GOVERNING THE TREATMENT OF CIVILIANS

Perhaps the substantive incongruity generated by this effort is demonstrated most effectively by the results which obtain from applying the amended First Article to the treatment of civilian victims of the selected noninternational conflicts. The initial observations made regarding the protections afforded captured combatants in such conflicts are equally applicable to civilians. The standards enunciated by Common Article 3 of the 1949 Conventions are in dire need of augmentation if the civilian population is adequately to be protected. Although the effects of the amended First Article in ameliorating this void are most helpful in some respects, they are still of limited assistance. The First Protocol, whose substantive provisions are applied to such conflicts when they fall within its ambit, defines a civilian population as all persons who are not combatants.<sup>180</sup> This is a satisfactorily broad definition to encompass the civilian populations of the selected internal conflicts as well as those of an international nature. It then goes on to protect such populations from becoming the object of armed attack, terrorism or reprisal,<sup>181</sup> and from the destruction of indispensable supplies of food and water.<sup>182</sup> It prohibits attacks on legitimate military targets where the incidental effect upon such populations would be disproportionately large.<sup>183</sup> It requires the taking of special precautions to spare civilian populations and objects in planning or executing military operations, and authorizes the establishment of neutralized localities or protected zones where such populations are afforded a

<sup>180</sup> Draft Protocol I art. 45 provides:

Definition of civilians and civilian population

1. The civilian is anyone who does not belong to one of the categories of armed forces referred to in Article 4(A) (1), (2), (3) and (6) of the Third Convention and in Article 42 of the present Protocol.
2. The civilian population comprises all persons who are civilian.
3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.
4. In case of doubt as to whether any person is civilian, he or she shall be presumed to be so.

This formulation has been adopted by the Third Committee of the Diplomatic Conference. Report of the United States Delegation-Third Session, *supra* note 114, at 68. The Third Committee has adopted a formulation of Articles 46-53, involving protection of the civilian population against the effects of hostilities which varies somewhat from the initial Red Cross proposals.

<sup>181</sup> *Id.* art. 46.

<sup>182</sup> *Id.* art. 48.

<sup>183</sup> *Id.* art. 46.3(b).

haven from such operations.<sup>184</sup> This effort to codify the concepts of proportionality and to incorporate the Hague Rules is a necessary and admirable addition to both the Convention Relative to the Treatment of Civilian Persons (the Fourth Convention) and, in the noninternational context, to Common Article 3. This effort provides a satisfactory solution to the problem of ameliorating unnecessary combat inflicted suffering where a civilian population is caught in the midst of a war of national liberation.

However, a second shortcoming of the Third Common Article with regard to civilian victims of an internal conflict is its failure to enunciate clear, substantive standards dealing with the conditions under which they can be detained, restricted or interned. Section III of the First Protocol governs this problem by enunciating standards for the treatment of persons in the power of a party to the conflict. It first makes it clear that its protections are intended principally to augment those contained in the Fourth Convention.<sup>185</sup> It then divides the recipients of the substantive protections it affords into two categories. With respect to persons already protected under the Fourth Convention, it simply provides additional measures for protecting women and children.<sup>186</sup> With respect to persons who would not receive more favorable treatment under the Conventions, but who are still subject to the power of a party to the conflict, including a party's own nationals, it enumerates a catalog of protections whose general character possesses an uncanny similarity to those already listed in Common Article 3.<sup>187</sup> Notable additions, however,

<sup>184</sup> *Id.* arts. 52 & 53.

<sup>185</sup> *Id.* art. 63.

<sup>186</sup> *Id.* arts. 67-69.

<sup>187</sup> Draft Protocol I art. 65 provides:

**Fundamental Guarantees**

1. Persons who would not receive more favourable treatment under the Conventions or the present Protocol, namely, nationals of States not bound by the Conventions and the Parties' own nationals shall, in all circumstances, be treated humanely by the Party in whose power they may be and without any adverse distinction.

The present article also applies to persons who are in situations under Article 5 of the Fourth Convention. All these persons shall enjoy at least the provisions laid down in the following paragraphs.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, corporal punishment and mutilation;
- (b) physical or moral coercion, in particular to obtain information;
- (c) medical or scientific experiments, including the removal or transplant of organs, not justified by the medical treatment and not carried out in the patient's own interest;
- (d) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (e) taking of hostages;
- (f) threats to commit any of the foregoing acts.

3. No sentence may be passed or penalty executed on a person found guilty of an offense related to a situation referred to in Article 2 common to the Conventions except in pursuance of a previous judgment pronounced by an impartial and properly constituted court affording the following essential judicial guarantees:

- (a) no person may be punished for an offense he or she has not personally committed;
- (b) no person may be prosecuted or punished for an offense in respect to which a final judgment has been previously passed, acquitting or convicting that person.

include prohibitions against physical or moral coercion and medical experiments, and additional procedural safeguards which must precede the execution of any sentence.<sup>188</sup>

It is apparent from this language that neither of these augmentative efforts is of significant assistance in securing additional protection for civilians whose liberty has been constrained or who have been interned during a war of national liberation. Therefore, it is again essential to construe the amended First Article of Protocol I so as to include the enumerated insurgent movements within the ambit of the phrase "powers in conflict" as it is employed in the Second Article of the Fourth Convention, and to look to this Convention as the primary source of assistance.

Of course, the Fourth Convention contains conditions governing the detention of civilians which commence at the time of the initial decision to restrict or intern<sup>189</sup> and terminate with repatriation.<sup>190</sup> They include considerations as diverse as the condition of quarters, the establishment of information bureaux and the imposition of disciplinary sanctions. These protections, however, are accorded only to those civilians who are "protected persons" within the definition of the Fourth Convention:

Persons protected by the fourth Convention are those who, at a given moment in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying Power of which they are not nationals.<sup>191</sup>

This definition has significant ramifications when applied to wars of national liberation. Characteristically, in such a conflict an organization of a state's own nationals attempts to oust the incumbent regime. Common nationality is generally possessed by both rebels and incumbents, except perhaps, in the traditional and obsolete colonialist setting where the latter is the viceregent of an alien suzerain. Consequently, although the amended First Article might insert such conflicts within the structure of the Fourth Convention, the restrictive definition of protected persons renders most of its substantive

- (c) everyone charged with an offense is presumed to be innocent until proved guilty according to law;
- (d) no person may be sentenced except in pursuance of those provisions of law which were in force at the time the offense was committed, subject to later more favourable provisions.
4. Women whose liberty has been restricted shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. This does not apply to those cases where members of the same family are together in the same place of internment.
5. The persons mentioned in paragraph 1, detained by reason of a situation referred to in Article 3 common to the Conventions and who are released, repatriated or exchanged after the general cessation of hostilities, shall enjoy, in the meantime, the protection of the present article.

<sup>188</sup> See text of Draft Protocol I art. 65, *id.*.

<sup>189</sup> Civilian Convention art. 42.

<sup>190</sup> *Id.* arts. 132-135.

<sup>191</sup> *Id.* art. 4 (emphasis added).

protections unavailable. Such a result is not surprising, however, as both the Convention and the First Protocol were formulated with international conflicts between two distinct nationalities in mind.

Several corrective options appear available to transpose this essential category of safeguards to noninternational conflicts. The first, considered during the 1974 Lucerne Conference, is to expand the definition of "protected persons" beyond its present scope by substituting some other criterion for that of nationality.<sup>192</sup> This solution might work something like this. A provision could be added to the First Protocol to assert that the phrase "protected persons," as employed in the Fourth Convention, includes persons in the hands of a party to the conflict who belong to the opposing party. This expanded definition would be limited to the context of the enumerated national liberation wars.

Several problems result, however, from a resolution of this nature. The first, of course, would involve the criteria for determining what civilians belong to what party and are, as a result, protected. Such persons cannot be identified by actual participation in combat like prisoners of war, and could not be expected to admit their partisan affiliation. The use of criteria such as ethnic characteristics or place of residence would have the effect of ruling out the possibility that persons falling within such categories are simply uninvolved neutrals.<sup>193</sup> A presumption of antagonism on such grounds would contain the seeds of unbridled abuse and invite the excesses common to wars involving racial hatred. Such a definition would also, theoretically, extend no protection to neutrals seized and detained by one party or the other because it would encompass only *adverse* factions.

The second resulting problem is a practical one identical to that considered in connection with the Prisoner of War Convention. It involves, again, the ability of the typical liberation movement to afford civilian detainees the frequently sophisticated benefits enunciated in the portion of the Fourth Convention devoted to internment.<sup>194</sup> Thus, even if a formulation could be devised to transpose these provisions to the context of wars of national liberation, it is improbable that they would provoke substantial compliance.

These considerations prompt examination of another alternative, one which would not effect a definitional adjustment of the Fourth Convention itself. It would first adopt the definition of "civilian"

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<sup>192</sup> Lucerne Informal Working Group, *supra* note 138, at 21.

<sup>193</sup> Problems raised by such arbitrary categorization are examined *id.* at 22-23.

<sup>194</sup> Civilian Convention art. 1.

enunciated in the First Protocol. Such persons would comprise *all* noncombatants. A new provision could be placed in section III of the First Protocol asserting that "civilians" in the power of a party in conflict during a war of national liberation (as defined in the amended First Article), would enjoy certain specified protections. Such a provision would eliminate all considerations of partisanship and extend safeguards to civilians without necessitating some threshold determination. The protective provisions themselves could be transposed from the Fourth Convention and be selectively included on the basis of their essentiality and the probable capability of the insurgent organization to apply and adhere to them.

This solution, however, possesses two possibly deleterious consequences. First, it does nothing to make the Fourth Convention itself meaningful in the context of such conflicts. Its substantive provisions employing the term "protected persons" would remain inoperative and their status ambiguous. The second consequence is of a political nature and involves the probable reaction of the supporters of the amended First Article when confronted with a proposal that would have the effect of precluding the application of a substantial part of the Fourth Convention to wars of national liberation. Perhaps these supporters could be induced to realize that this augmentation is not intended as a repudiation of the international status accorded such conflicts by this amendment, but is simply an effort to assure that the ambiguities it creates do not result in the denial of protection to any civilian.

A second problem relative to the application of the Fourth Convention to wars of national liberation highlights this incongruity even more poignantly. This Convention is prefaced by a provision which mandates its applicability to all cases of partial or total occupation.<sup>195</sup> These formulations, however, envision situations involving the invasion of the territory of one state by the military forces of another. The incidental obligations are typically triggered by the crossing of well-defined boundaries and the establishment of a surrogate civil administration within the invaded territory. Of course, these assumptions will not generally apply in the context to which they are now transposed.

Even if a solution could be formulated to correct the related problem of redefining the phrase "protected persons" as employed in these articles to include the victims of internal conflicts, the uncertain limits of the terms "occupation" and "occupied territories" within this context would render these provisions virtually meaning-

<sup>195</sup> *Id.* arts. 47-79.

less. It is probable that insurgent forces would assert that by virtue of their status as natives and representatives of the native population, they are incapable of occupying any territory within their homeland (inasmuch as the term connotes the presence of an extrinsic or alien force), while their opponents are at all places and at all times "occupiers." As the personnel of the oppressor regime frequently constitute a nonintegrated, ethnically distinct minority, it is logical to conclude that they retain the colonialist invader character of their alien forebearers. On the other hand, the incumbent "colonial," "alien" or "racist" regimes are certain to assert that they cannot be "occupiers" of territory supporting the rebellion because they constitute the legitimate civil government. De facto control of territory by the insurgents, however, would by analogy amount to an occupation.

Thus, the ambiguous and political nature of this term would probably result in the denial to civilian inhabitants of protections relating to forcible transfers, provision of food and medicine, transmittal of relief consignments, forced labor, and the conduct of criminal prosecutions. Under the present formulation, this populace would be left with principally the residuum of protections contained in Part II of the Fourth Convention.<sup>196</sup> These safeguards are applicable to the whole populations of the powers in conflict and must be so applied. However, because these provisions provide principally for the establishment of neutral zones and for the treatment and protection of the sick and the wounded, they are clearly insufficient to duplicate the expansive provisions of the Convention which relate exclusively to occupations.

A possible solution to this second problem concerning the adaptation of the Fourth Convention to noninternational conflicts would be simply to delete, in this context, reference to the activating terms "occupations" and "occupied territories" and to extend the protections contained in the section governing occupied territories to all civilians without regard to their location. To this end, the portion of the Draft First Protocol dealing with treatment of persons in the power of a party to a conflict could be expanded to include a provision similar to a proposal made by the ICRC during the Diplomatic Conference of 1949 in an effort to obtain such protections for the victims of Article III conflicts:

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<sup>196</sup> *Id.* arts. 13-26. In addition, civilian victims of such conflicts who are actually in the power of the opposing faction would be the beneficiaries of the fundamental guarantees contained in the proposed Article 65 of the First Protocol. See note 187 *supra*.

[I]n cases of a conflict [defined by the First Article of Protocol I], persons within the country where the conflict takes place, who do not belong to the armed forces, are likewise protected by the [Fourth] Convention under the provisions relating to occupied territories.<sup>197</sup>

Such an amendment would apply the occupied territories provisions of the Fourth Convention to the selected wars of national liberation.

However, several of these articles are almost nonsensical in this unintended context. For example, Article 54 of the Fourth Convention prohibits altering the status of public officials in occupied territories. Because the total displacement of such persons is invariably the sole objective of rebel forces, it is absurd to attempt to bind them to a commitment of this nature. The inclusion of such a provision in an instrument designed to regulate the conduct of insurgent movements would only serve to engender disregard for other more essential humanitarian norms. This problem could be ameliorated by the express exclusion of such inappropriate provisions in an additional amendment to the First Protocol.

A more systemically consistent and perhaps simpler solution would be simply to abandon all efforts to transpose the "occupied territories" section *in toto* to this unintended context. In lieu of such a measure, the most important safeguards contained in this section would simply be repeated in the portion of the First Protocol dealing with the treatment of civilians. In this way, these provisions would be made expressly applicable to *all civilians* in a manner similar to that suggested in connection with protections of the Fourth Convention which are qualified by considerations of nationality. This solution would eliminate the opportunity to quibble as to who is an "occupier." It would also afford the opportunity to delete irrelevant or inappropriate provisions.

However, the potential success of such a proposal is presently minimal. As indicated previously, the establishment of a discrete system of norms governing the favored wars of national liberation is too similar to the Common Article 3-Protocol II structure and would tend to constitute a tacit repudiation of the principle that such conflicts possess the same dignity as those international conflicts traditionally governed by the Conventions proper. This result is, of course, antithetical to the intent of the proponents of the amended First Article.

Thus, in the author's opinion, it is, as a practical matter, impossible satisfactorily to transpose the provisions contained in the Fourth Convention to wars of national liberation. In this instance,

<sup>197</sup> 4 J. PICTET, *supra* note 19, at 43.

however, the problem is not simply a practical one of diminished ability to comply. Rather, it is grounded upon the absence in noninternational conflicts of the traditional assumptions which were contemplated by the formulators of the Fourth Convention. A satisfactory solution would demand that these assumptions be discarded and that a more flexible formulation be devised which disregards such inapposite concepts as nationality, invasion, and occupation. It is probable, however, that the philosophy which formulated the amended First Article will preclude such an effort.

### *C. CONSIDERATIONS REGARDING ENFORCEMENT AND THE IMPOSITION OF PENAL SANCTIONS*

Even if the foregoing practical and conceptual deficiencies regarding the application of the Third and Fourth Conventions to wars of national liberation could be resolved so as to impose constraints upon the opposing parties, a serious question would remain regarding their enforcement. In this regard, both Conventions contemplate the repression of breaches by the parties themselves through the use of municipal judicial instrumentalities. The operative provisions raise several questions regarding the ability of national liberation movements to undertake this central responsibility of self-enforcement.

#### *1. Definitional and Semantic Problems*

The principal relevant provisions of the 1949 Conventions concerning the repression of breaches are Articles 129 and 130 of the Prisoner of War Convention and Articles 146 and 147 of the Civilian Convention. These Articles, as well as analagous provisions contained in the Conventions governing treatment of the wounded and sick<sup>198</sup> and the shipwrecked,<sup>199</sup> impose obligations upon the High Contracting Parties to prosecute grave breaches which are frequently defined in terms of offenses against persons protected by the respective Conventions.<sup>200</sup> The semantic problems resulting from transposing these obligations to the context of wars of national liberation are readily apparent, and if these mandates are to have any significance in such an environment their present scope must be textually modified. First, it is doubtful whether national liberation

<sup>198</sup> GWS (Field) Convention arts. 49-50.

<sup>199</sup> GWS (Sea) Convention arts. 30-31.

<sup>200</sup> GPW Convention art. 130; Civilian Convention art. 147.



movements, undertaking to apply the Conventions and the First Protocol through the envisioned unilateral declarations of intent, will be deemed to possess the status of High Contracting Parties. Therefore, it is arguable that such entities will not be obligated to assume any of the duties delineated in these Articles even if they were capable of doing so. This problem, taken in isolation, readily lends itself to correction. During the 1976 session of the Diplomatic Conference, the First Committee added two new Articles concerning the repression of breaches in the final provision of the First Protocol. The first of these, Article 74, expands the catalog of grave breaches to include attacking civilians or civilian populations, the launching of indiscriminate attacks affecting the civilian population, and making nondefended localities or demilitarized zones the object of attacks.<sup>201</sup> In addition, the proposed version of Article 76, which imposes an obligation upon High Contracting Parties to repress such grave breaches of the First Protocol and the Conventions, contains an optional provision extending such obligations to the "Parties to the conflict" as well.<sup>202</sup> If the effort to expand Article 84 of the First Protocol is successful, and makes national liberation movements which undertake to apply the 1949 Conventions and First Protocol through unilateral declarations "Parties to the Conflict,"<sup>203</sup> the inclusion of this optional language in the ultimate formulation of Article 76 will eliminate the obligational problem. Any party to the conflict, regardless of its juridical status will be fully bound to repress breaches of the Conventions and the augmentative Protocol.

A second problem results from defining "grave breaches" largely from the perspective of the presently ambiguous phrase "protected

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<sup>201</sup> See Report of the United States Delegation-Third Session, *supra* note 114, at 3. This formulation also enunciates a new category of grave breaches which involve the following types of misconduct when committed willfully:

- (a) The transfer by the occupying power of parts of its civilian population into occupied territory, or the deportation of the inhabitants of the occupied territory from it;
- (b) unjustifiable delay in repatriation of prisoners of war or civilians;
- (c) the practices of apartheid and other inhuman and degrading practices based upon racial discrimination;
- (d) making clearly recognized historical monuments, places of worship, or works of art the objects of attacks;
- (e) depriving persons protected by the Conventions and this Protocol the rights of a fair and regular trial.

*Id.* at 82.

<sup>202</sup> *Id.* at 83. This Report asserts that it will be for the Drafting Committee to decide whether to include the words "and the Parties to the conflict" during the final session of the Conference.

<sup>203</sup> See text accompanying note 142 *supra*.

persons." Where such breaches are defined in terms of the extant definition of protected persons, most war crimes perpetrated against the civilian population during a war of national liberation would not be punishable because this status is defined principally with reference to nationality<sup>204</sup> and residence in occupied territory.<sup>205</sup> Again, however, this definitional problem can be ameliorated by expanding the phrase to encompass situations which may arise in the selected noninternational conflicts. The other problems relate principally to the capabilities of such movements to adhere to the obligations of these provisions and do not lend themselves to such facile resolution.

## 2. *Capability Problems*

The Conventions set forth three obligations with respect to grave breaches: first, to enact appropriate penal legislation; second, to search out offenders; and third, to provide for the trial of such persons.<sup>206</sup> It is improbable that typical liberation organizations will possess sufficient legislative competence or the governmental infrastructure to provide the requisite legislation at the commencement of hostilities. However, this deficiency could be cured through the adoption of the extant municipal legislation of the incumbent regime, a reasonable solution in view of the fact that, as the ostensible governmental successor to the incumbent, the insurgent organization will inherit its international responsibilities and the obligations to respect and retain municipal enactments incidental to their effectuation.

Although there are no practical reasons that would preclude liberation organizations from searching out offenders, assuming that they were so motivated, it is highly questionable whether the judicial measures contemplated in the Conventions could ensue. The final paragraphs of the Articles in question require that accused persons held for trial be accorded the procedural safeguards enunciated by the Prisoner of War Convention. These include the rights to knowledge of the allegations, counsel, an interpreter, the presence of favorable witnesses, adequate time to prepare a defense,<sup>207</sup> and appeal.<sup>208</sup> It is unlikely that insurgent movements will possess these

<sup>204</sup> See text accompanying note 143 *supra*.

<sup>205</sup> See text accompanying note 146 *supra*.

<sup>206</sup> E.g., GPW Convention art. 129; Civilian Convention art. 146.

<sup>207</sup> GPW Convention art. 105. See draft Protocol I art. 74.4(e) (formulation adopted by the First Committee during the third session of the Diplomatic Conference).

<sup>208</sup> GPW Convention art. 106.

capabilities in light of the demands of continual movement and clandestine operations, and the probable absence of qualified personnel to administer such procedures.

The solution to this problem is not to truncate these protections in order to adapt them to this context. To do so would only result in the denial of the most basic of procedural safeguards to both accused insurgents and detained officials of the incumbent regime. The only other feasible solution was considered by the Western European and Others Group at Lucerne. It would provide that a government friendly to a national liberation organization could act as its surrogate in fulfilling this office.<sup>209</sup> This resolution appears consistent with the mandates of Article 129 of the Third Convention, and Article 146 of the Fourth, as they expressly permit a party having custody of an alleged perpetrator of a grave breach to hand him over to another High Contracting Party provided the latter can make out a *prima facie* case against him. In addition, they intimate that jurisdiction over such offenses is, among parties, universal.

The success of such a proposal, however, appears entirely contingent upon the ability of the insurgent entity to obtain the services of a willing surrogate. Undoubtedly, such movements will not always enjoy the proximate and unabashed support which the Government of North Vietnam accorded the Viet Cong. Situations can be envisioned where no responsible government would want to become involved in such an internal matter, particularly where the trial of an official of the *de jure* regime might be sought by the insurgent organization. It is highly questionable whether uninvolved states would, as a rule, deal with the typical group of freedom fighters as they would with another sovereign attempting to effect the extradition of a criminal.<sup>210</sup> As a result, this alternative appears too unreliable to constitute an optimal solution but, in the absence of a conceptual retrenchment in dealing with wars of national liberation, it seems to be the best one available. Perhaps this is all that can be hoped for in view of the impetuous and ill-conceived conduct which occasioned the underlying problem. In any event, it is probable that, if and when the Conventions are applied to wars of national libera-

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<sup>209</sup> Lucerne Informal Working Group, *supra* note 138, at 18.

<sup>210</sup> This is particularly true in light of the fact that extradition is generally regulated by treaty. Pictet asserts that the formulators of Article 146 of the Fourth Convention intended the extant municipal legislation of the detaining state to regulate the extradition of a person accused of perpetrating a grave breach. The ability to obtain custody of such an offender is, of course, typically contingent upon the acquiring state's ability to make out a *prima facie* case against him. 4 J. PICTET, *supra* note 19, at 593.

tion they will, as a general rule, be deprived of the mechanisms which assure unstinting compliance.

#### V. SUMMARY

This article has considered several of the practical consequences which will ensue from the current efforts to transform the Geneva Conventions of 1949 into a device to regulate noninternational conflicts. Similar problems, particularly those relating to functional incapability and contextual inadaptability permeate both the four Conventions and the First Draft Protocol, but further exploration of them would result only in redundancy. It is, then, appropriate to consider what measures can be taken to correct several of the more flagrant deficiencies of this effort.

The amended First Article must be recognized as an enunciation of a political attitude by a homogenous coalition of states and as a measure which demonstrates their unity and strength. Because it was not formulated with a view to reinforcing a system whose essential rationality has withstood the test of time, it is not surprising that the amendment fails to achieve consistency with this system or to ameliorate its more serious deficiencies. First, the amendment retreats from the philosophy that humanitarian norms are not to be predicated upon the legitimacy of one's cause but rather are to be extended universally in the event of armed conflict. As a result, it is possible that a substantial number of noninternational conflicts, whose intensity is identical to those favored by the drafters of the amended First Article, will not be affected by the amendment and will be governed exclusively by the present Common Article 3. In addition, the amendment allows liberation movements a basis upon which to justify noncompliance with humanitarian norms in dealing with their antecedently stigmatized adversaries.

Second, from an interpretive standpoint, the proposed formulation leaves uncertain exactly what entities acquire the additional protections of the First Protocol and the Conventions and whether these movements simply gain additional rights or incur reciprocal obligations as well. In this respect it fails to resolve two critical flaws in the current formulation governing noninternational conflicts.

Third, the amendment attempts to superimpose conflicts of an essentially internal nature upon a structure designed to govern conflicts between sovereign entities. This transposition has two deleterious consequences. First, when applied to this unintended context, many of the substantive protections of the Conventions become

virtually meaningless because they simply do not relate to conditions which characterize wars of national liberation. As a frequent result, the victims of the favored conflicts, particularly captured combatants and civilians, are not extended substantially greater protections than they would have enjoyed under Common Article 3. Second, as a practical matter, this application would impose unrealistic burdens upon the insurgent organizations, assuming that obligational mutuality is intended. Typically, such entities do not possess the necessary governmental apparatus, stabilized territory, and fiscal capacity to establish and maintain the requisite facilities and the judicial machinery to enforce the Conventions adequately. Consequently, it would seem that a cavalier attitude toward the fundamental requirements of the Conventions would be engendered and that measures to assure compliance with them would be neglected.

Thus, the proposed amendment ill serves the extant Convention structure due to its doctrinal inconsistency, and fails to cure the ambiguities and protectional gaps which permeate Common Article 3. With these objections principally in mind, it is appropriate to consider several possible corrective measures.

## VI. RECOMMENDATIONS

The most appropriate solution is to abandon the assimilative approach taken by the amended First Article and to concentrate upon the refinement of a system of discrete norms, such as those enunciated in Protocol II, to govern all noninternational conflicts. Such a resolution could easily predicate the imposition of responsibilities and the conferral of protections upon considerations which typically pertain to noninternational conflicts. It would also lend itself to the formulation of obligations which are commensurate with the capabilities of insurgents and permit the elimination of conceptual repugnancies between the Conventions and the Draft Amendment. However, it is now totally unrealistic to expect the proponents of the amended First Article to accept the abandonment of their efforts to sanctify wars of national liberation, and to acquiesce in the relegation of such struggles to the subordinate category of intramural conflicts regulated by Protocol II. It is, then, apparent that such corrective measures must be taken within the framework now afforded by this amendment.

Initially, an effort should be made during the forthcoming session of the Diplomatic Conference to expand the conflict categories presently enumerated by the amended first article, preferably upon

the basis of some objective criterion such as conflict intensity. Such a measure would both afford additional protections to the participants in nonsanctified internal conflicts and divest the extension of such added protections of political overtones. This approach is necessary because the political objectives of the favored liberation movements have absolutely nothing to do with the participants' need for humanitarian protections or their ability to accord them to others. The adoption of a measure similar to the Norwegian formulation would have the effect of extending whatever additional protections are now to be accorded the favored categories to the victims of other noninternational conflicts. Again, however, it is questionable whether an expansion of this nature would acquire the necessary support of the proponents of the amended First Article. Such a measure would both tend to detract from the exclusive status presently accorded the selected wars of national liberation, and present a potential threat to the internal stability of the proponents' own governments.

It is also necessary to note that, regardless of the potential success of the proposed definitional liberalization, the ambiguity and incoherence which result from the superimposition of noninternational conflicts upon the structure of the Conventions would remain. Therefore, in any event, it is imperative that measures be taken to accommodate the Conventions, insofar as possible, to this new context in order to minimize such irrelevance and to permit them genuinely to afford additional protections. This effort could most readily be accomplished through the adoption of several proposed amendments to the First Draft Protocol. First, a formulation akin to Article 84 *bis* is necessary to make it clear that the conferral of additional protections is predicated upon reciprocity and to afford a device through which insurgent forces can activate such a scheme through unilateral declaration of intent to comply with their provisions. Second, traditional definitions and requirements which set in motion the substantive protections of the Conventions, but which possess no significance in the context of wars of liberation, must be modified and, where necessary, substitutes must be devised. Such modifications must include the liberalization of the extant requirements for qualifying as a prisoner of war. This could be accomplished through the adoption of a new formulation of Article 42 similar to that proposed by the Red Cross working group during the 1976 session of the Conference. In addition, inappropriate triggering criteria, such as "nationality" and "occupation" must be replaced with more relevant formulations. Third, where the substantive pro-

visions of the Conventions are probably beyond the capabilities of typical insurgent organizations or are simply irrelevant, they should be eliminated or replaced with a discrete enumeration of requirements.

## VII. CONCLUSION

The amended First Article to the First Draft Protocol to the Geneva Conventions of 1949 poses tremendous theoretical and practical difficulties. This article has explored those problems and recommended alterations which would lessen or eliminate the difficulties presented by superimposing noninternational conflicts on a scheme of humanitarian regulations that was intended to control international hostilities.

Although such measures would tend to reduce the grossest deformities which result from this transposition, the author's attitude toward the final product is neither enthusiastic nor sanguine. It is virtually impossible to bring this system of humanitarian constraints completely into harmony with the conditions which generally obtain in internal conflicts. Nevertheless, the new substantive protections contained in the Draft First Protocol, particularly those concerning the protection of the civilian population with respect to the effects of hostilities, methods of combat, medical evacuation, and the treatment of persons in the power of a party to the conflict, are sufficiently vital in the context of modern warfare to outweigh the conceptual and practical problems which will result from the probable adoption of the amended First Article during the final plenary sessions of the Diplomatic Conference. Consequently, its adoption should not deter Western-aligned delegations from lending their support to the First Protocol's ultimate inclusion in the growing body of conventional international law governing armed conflict. In the interim, however, such delegations must seek, insofar as possible, to reconcile the amended First Article with this body of law, for without such adjustments, it possesses the potential to seriously impede the continued efficacy of the Conventions themselves and to undermine the philosophy upon which they are based.





# THE IMPACT OF RECENT NEPA LITIGATION UPON ARMY DECISION MAKING\*

BRIAN BORU O'NEILL\*\*

## I. INTRODUCTION

The National Environmental Policy Act (NEPA)<sup>1</sup> was enacted by Congress in 1969 to protect endangered natural resources. In the past two years several cases resulting from Department of Defense base realignment actions have interpreted the scope of NEPA and considered two issues of particular importance. The first, involving the coverage of the Act, is whether its procedures apply to proposals where the only impacts will be economic, such as loss of jobs. The second, concerning procedural requirements, is whether the Act requires detailed and extensive public participation in situations where there is minimal impact upon natural resources. These two issues are of importance to more than just base realignments—they are of concern to many other Army activities and to the actions of other federal agencies.<sup>2</sup>

This article will specifically consider the manner in which these two questions have been answered in the cases spawned by recent military realignments and will address generally the applicability of NEPA to all other Army actions. The article will open with a discussion of recent judicial and legislative activity and will conclude with observations on how planners and lawyers can best ensure and demonstrate adequate compliance with NEPA.

## II. THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 requires agencies of the federal government to comply with study and public disclosure

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<sup>1</sup> Act of Jan. 1, 1970, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-4374 (1970).

<sup>2</sup> A recent post office move was the subject of litigation in *City of Rochester v. United States Postal Service*, 541 F.2d 967 (2d Cir. 1976).

sure requirements when making decisions that will affect the environment. The operative section of the Act, section 102(2)(C),<sup>3</sup> directs federal agencies to consider fully the environmental effects of proposed federal actions through the use of a detailed statement.<sup>4</sup>

The total NEPA process as mandated by the statute and by the implementing guidelines of the Council on Environmental Quality (CEQ)<sup>5</sup> and federal agencies<sup>6</sup> now includes:

1. Preparation of an environmental assessment to determine whether the proposed action is a major one that will have a significant effect on the human environment;<sup>7</sup>
2. If the action is such an action, preparation of a draft environmental impact statement;
3. Circulation of the draft environmental impact statement (EIS) to other agencies and to the public at large, allowing forty-five days for them to comment;
4. Preparation of a final environmental impact statement and circulation to all agencies, organizations and individuals that commented on the draft and to the Council on Environmental Quality; and

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<sup>3</sup> 42 U.S.C. § 4332(2) (c) (1970).

<sup>4</sup> [All agencies of the federal government shall] include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) The environmental impact of the proposed action.

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) Alternatives to the proposed action.

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) Any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.

<sup>5</sup> See *id.* § 4342 which creates the Council on Environmental Quality and directs the Council to perform various review and appraisal functions. Executive Order No. 11514, § 3(h), Mar. 5, 1970, 35 Fed. Reg. 4247, issued "in furtherance of the purpose and policy [of NEPA]" requires the Council to issue guidelines and to assist the federal agencies in preparing detailed statements on proposals for federal actions which will affect the environment. These Guidelines may be found at 40 C.F.R. pt. 1500 (1976).

<sup>6</sup> See Dept of Defense Directive No. 6050.1, Environmental Considerations in DoD Actions (Mar. 19, 1974), 32 C.F.R. § 214 (1976); Army Reg. No. 200-1, Environmental Protection and Enhancement (7 Dec. 1972), 40 Fed. Reg. 55,962 (1975) [hereinafter cited as AR 200-1]. See also U.S. DEP'T OF ARMY, PAMPHLET NO. 200-1, HANDBOOK FOR ENVIRONMENTAL IMPACT ANALYSIS (1975).

<sup>7</sup> Section 102 of the Act, 42 U.S.C. § 4332 (1970), requires the preparation of only one detailed statement that has been coordinated with appropriate agencies and the public. The draft statement is the means dictated by CEQ to allow the statutorily directed agency and public participation. The assessment is a creature of the CEQ Guidelines, the DoD Directive, and the Army Regulation and is a means to ensure the development of a reviewable administrative record of the threshold decision on whether to publish an impact statement.

5. The accompaniment of the proposal through the agency's review process.

### III. BASE REALIGNMENT LITIGATION

#### A. REALIGNMENT ACTIONS

As a result of the American withdrawal from Vietnam and the attendant reduction in defense activities there has been a series of military base realignments. One generation of these realignments was announced on November 22, 1974 by the Secretary of Defense and involved 111 separate actions, consisting of realignments of units and functions, partial closures, and total closures of bases. The Army prepared environmental assessments of the actions and other studies, including detailed cost justifications and community economic impact studies. For many of the actions the Army obtained the services of private companies which studied the social and economic impacts the proposed realignments would have on the communities to be affected. As the defense agencies concluded that these actions would not have a significant impact upon the environment—the impacts were primarily economic—environmental impact statements were not prepared and the detailed public participation requirements of NEPA were not utilized.

The November 22, 1974 announcements did, however, generate a considerable amount of litigation,<sup>8</sup> largely to forestall the projected

<sup>8</sup> NEPA litigation includes: *Breckinridge v. Schlesinger*, Civ. No. 75-100 (E.D. Ky. July 9, 1975), *rev'd*, 537 F.2d 864 (6th Cir. 1976), *application for cert. pending* (Lexington Bluegrass Army Depot); *National Ass'n of Gov't Employees v. Rumsfeld* (Philadelphia), 418 F. Supp. 1302 (E.D. Pa. 1976) (Frankford Arsenal); *National Ass'n of Gov't Employees v. Rumsfeld* (Pueblo), 413 F. Supp. 1224 (D.D.C. 1976), *notice of appeal filed* (Pueblo Army Depot); *IMAGE of San Antonio v. Rumsfeld*, 9 E.R.C. 1183 (Nos. 5A-76-CA-116, 117, W.D. Tex. May 13, 1976), *notice of appeal filed* (Kelly Air Force Base, Texas); *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975) (Richards-Gebaur Air Force Base, Missouri); *Shiffler v. Rumsfeld*, Civ. No. 75-2129 (D.N.J. May 4, 1975), *notice of appeal filed* (Forts Monmouth and Gordon, and the National Capital Region). Other litigation includes: *Perkins v. Rumsfeld*, Civ. No. 76-108 (E.D. Ky. Aug. 3, 1976) (Lexington Bluegrass Army Depot, basis of suit was alleged fraud); *City of Philadelphia v. Schlesinger*, No. 75-1405 (E.D. Pa. Nov. 4, 1975), *aff'd*, No. 76-1050 (3d Cir. Apr. 15, 1976) (Frankford Arsenal, violation of Arsenal Act); *National Ass'n of Gov't Employees v. Schlesinger*, 397 F. Supp. 894 (E.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975) (Frankford Arsenal, violation of reporting requirements in section 613 of Military Construction Act of 1970). Two NEPA cases are still pending: *Fuller v. Rumsfeld and Local 1546 v. Rumsfeld*, Civ. Nos. S-75-50, 51 (E.D. Cal. 1976) (Sharpe and Sacramento Army Depots). In those cases a motion for a preliminary injunction was denied. Other recent base closure or realignment litigation not associated with the November 1974 announcement includes: *Concerned About Trident v.*

loss of jobs and the other adverse economic impacts the closures would have on the various communities. Often the litigation was brought by interested members of Congress; always the local unions were party plaintiffs.

The plaintiffs typically sought to retain the existing economic climate in their localities in the face of Department of Defense attempts to reduce overall government expenditures. The Government typically proposed such realignment actions to consolidate similar functions carried on at several installations at one location. The realignments would result in a reduction in the total number of employees, and a transfer of jobs from the installation losing functions and responsibilities to the one expanding the scope of its operation.

### B. REALIGNMENT LITIGATION

#### 1. *Social and Economic Impacts under the National Environmental Policy Act—The Scope of the Human Environment*

Section 102(2)(C) of the Act requires impact statements when the proposed action will significantly affect the "human environment." The plaintiffs in the realignment litigation took two separate but related tacks to state claims under NEPA. The first was that economic impact, be it the inconvenience of employee dislocation or short-term community economic disruption, affected the human environment simply because it affected human beings.<sup>9</sup> The second was that there were incidental environmental impacts in the traditional sense, for example impacts on sewers and parks, and that these incidental environmental impacts combined with the economic aspects were sufficient to trigger the procedural aspects of the statute. The plaintiffs relied primarily upon three General Services Administration cases.

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Schlesinger, 400 F. Supp. 454 (D.D.C. 1975), *re'd*, Nos. 75-1515, 75-2059 (D.C. Cir. Oct. 13, 1976) (NEPA, construction of Trident support facility at Bangor, Washington); American Fed'n of Gov't Employees v. Hoffmann, Civ. No. 75-6-0652-NE (N.D. Ala. Aug. 13, 1976) (contracting out, Ballistic Missile Defense Systems Command, Huntsville, Alabama); Prince George's County v. Holloway, Civ. No. 75-590 (D.D.C. Nov. 7, 1975) (NEPA, Naval Ship Engineering Center move from Maryland to the District of Columbia); Prince George's County v. Holloway, 404 F. Supp. 1181 (D.D.C. 1975) (NEPA, Naval Oceanographic Lab move from Suitland to Bay St. Louis, Mississippi).

<sup>9</sup> *E.g.*, "It is apparent therefore that the term 'human environment' was intended to mean environment which directly affects human beings, *i.e.*, unemployment, loss of revenue, et cetera." Brief for Appellees at 28. *Breckinridge v. Schlesinger*, 337 F.2d 864 (6th Cir. 1976).

The *Hanly Trilogy*<sup>10</sup> resulted from a proposal by the General Services Administration (GSA) to construct a jail and a courthouse at Foley Square, New York. The Second Circuit thrice considered an environmental assessment determination that the construction of the jail in the inner city would not have a "significant" impact on the quality of the human environment. After twice ordering reassessments of the impact of the proposed jail construction, the court eventually upheld the GSA's determination that no environmental impact statement was required. Of note is that in *Hanly I*, the court suggested that an environmental assessment should consider factors such as "[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs. . . ." <sup>11</sup> This language in *Hanly I* was discussed in the first of the cases dealing with the November 1974 announcements—*McDowell v. Schlesinger*.<sup>12</sup>

In *McDowell*, civilian Air Force employees and the American Federation of Government Employees alleged that the Air Force had failed to comply with the requirements of NEPA in deciding to transfer an Air Force unit from Richards-Gebaur Air Force Base, Missouri to Scott Air Force Base, Illinois, and they sought to enjoin the transfer and realignment action until the Air Force complied with the Act. The proposed move involved approximately 2,992 military employees and, with the families of the employees, could possibly have resulted in an influx of 10,000 people into the Scott Air Force Base region. The Air Force did not prepare an impact statement but prepared a detailed assessment that concluded there would be no significant environmental impact. Resolving the NEPA issue, the court held that the impacts resulting from the action, which it labeled "secondary social and economic," could be significant and that an environmental impact statement should be prepared.<sup>13</sup> The court found that the transfer could affect the Richards-Gebaur, or losing area, through impacts on "existing social and economic activities and conditions in the area; problems relating to law enforcement and fire prevention; growth and development patterns in the area, including existing land use patterns, and neighborhood character and cohesiveness . . . ; and aesthetic consid-

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<sup>10</sup> *Hanly v. Kleindienst*, 484 F.2d 448 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (*Hanly III*); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (*Hanly II*); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) (*Hanly I*).

<sup>11</sup> 460 F.2d at 657.

<sup>12</sup> 404 F. Supp. 221 (W.D. Mo. 1975).

<sup>13</sup> *Id.* at 254-55.

erations."<sup>14</sup> In addition, the court found that the proposed relocation of 10,000 persons into the Scott, or gaining, area would result in impacts on housing availability and would overburden local utilities and other public services.<sup>15</sup> The court stated that while these impacts were "secondary" impacts, they fell within the scope of the "human environment."<sup>16</sup> As these secondary impacts were significant, the proper remedy was to enjoin the proposed action until the defendants complied with the requirements of section 102(2)(C) and prepared an impact statement.

In the *McDowell* case, despite the court's use of the broad terms "secondary social and economic impact," most of the effects of the realignment detailed by the court may be characterized as or akin to impacts upon traditional environmental resources. The next case, however, was a drastic departure from *McDowell*. In *Breckinridge v. Schlesinger*,<sup>17</sup> the federal district court considered a challenge to a realignment involving the Lexington Bluegrass Army Depot that when implemented would have resulted in the loss of approximately 2,600 jobs in the greater Lexington area. Army installations in Sacramento, California and Tobyhanna, Pennsylvania would have gained minimal numbers of jobs under the plan. Relying primarily on *McDowell*, the court enjoined the Army from proceeding until it had prepared an environmental statement. The court based its decision on two grounds: first, that the Army's decision process was per se illegal as the Army did not solicit public comment on the proposed realignment prior to decision;<sup>18</sup> and second, a conclusion implicit in the first ground, that plaintiffs may state a claim under NEPA where the harms alleged are only short-term unemployment and the inconvenience of employee dislocation,<sup>19</sup> which were the harms alleged.

On appeal the Sixth Circuit reversed the district court, and ordered the district court to dismiss the action.<sup>20</sup> The court held that:

In the present case there is no long term impact, no permanent commitment of a national [*sic*] resource and no degradation of a traditional environmental asset, but rather short term personal inconveniences and short term economic disruptions. We conclude that such a situation does not fall within the purview of the Act.<sup>21</sup>

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<sup>14</sup> *Id.* at 254.

<sup>15</sup> *Id.* at 238.

<sup>16</sup> *Id.* at 245.

<sup>17</sup> Civ. No. 75-100 (E.D. Ky. Oct. 31, 1975).

<sup>18</sup> *Id.*, slip op. at 11.

<sup>19</sup> *Id.*, slip op. at 15.

<sup>20</sup> 537 F.2d 864 (6th Cir. 1976).

<sup>21</sup> *Id.* at 864.

The court continued by stating that "NEPA is not a national employment act. Environmental goals and policies were never intended to reach social problems such as those presented here."<sup>22</sup> The Sixth Circuit expressly recognized that the district court's opinion in *McDowell v. Schlesinger* was contrary to its holding, and noted its decision not to follow the reasoning in that case.<sup>23</sup> During the same summer the Sixth Circuit decided *Breckinridge*, three district court cases found no necessity to file environmental impact statements under similar factual circumstances.<sup>24</sup>

These four decisions appear to be rightly decided. The ambiguity as to the scope of the National Environmental Policy Act stems from the hortatory language throughout the statute<sup>25</sup> and the use of the term "human environment" in the action forcing provision, section 102(2)(C). The legislative history indicates clearly, however, that the purpose of NEPA was to protect limited natural resources—the resource base needed for present and future generations—and was not to enhance community economic vitality or job opportunities except insofar as those concerns are furthered by preservation of the resource base. In short, NEPA is not a panacea for all of the ills that may befall society. In discussing NEPA on the floor of the Senate, Senator Jackson, the sponsor, provided insight into the breadth of the statute:

What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.

<sup>22</sup> *Id.* at 867.

<sup>23</sup> "The United States District Court for the Western District of Missouri has adopted a view contrary to ours in a case involving a similar factual situation. We respectfully decline to follow the reasoning of that opinion." *Id.* at 567 n.1 (citation omitted). The Government never appealed *McDowell*.

<sup>24</sup> *National Ass'n of Gov't Employees v. Rumsfeld* (Philadelphia), 418 F. Supp. 1302 (E.D. Pa. 1976) (Frankford Arsenal); *National Ass'n of Gov't Employees v. Rumsfeld* (Pueblo), 413 F. Supp. 1224 (D.D.C. 1974), *notice of appeal filed* (Pueblo Army Depot); *IMAGE of San Antonio v. Rumsfeld*, 9 E.R.C. 1183 (Nos. 5A-76-CA-116, 117, W.D. Tex. May 13, 1976), *notice of appeal filed* (Kelly Air Force Base, Texas). In addition, one court denied a motion for a preliminary injunction, stating: "I don't think you get to the secondary until you have found there is a primary environmental situation. And that hasn't been shown here." *Fuller v. Rumsfeld and Local 1546 v. Rumsfeld*, Nos. S-76-50, 51 (E.D. Cal. Apr. 16, 1976) (Sharpe and Sacramento Army Depots) (hearing on preliminary injunction).

<sup>25</sup> Section 101(a) of the Act, for example, states:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (1970).

....

An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings.

....

Taken together, the provisions of section 102 direct any Federal agency which takes action that it must take into account environmental management and environmental quality considerations.<sup>26</sup>

In seeking to define the crucial term "the human environment," Senator Jackson stated:

Mr. President, there is a new kind of revolutionary movement underway in this country. This movement is concerned with the integrity of man's life support system—the human environment.<sup>27</sup>

....

In many respects, the only precedent and parallel to what is proposed in S.1075 is in the Full Employment Act of 1946, which declared an historic national policy on management of the economy and established the Council of Economic Advisers. It is my view that S.1075 will provide an equally important national policy for the management of America's future environment.<sup>28</sup>

The Senate Report is in accord:

Drawing upon the testimony presented to this and other committees, however, the committee believes that the following basic propositions summarize the situation of contemporary America and the Federal Government regarding the management of the environment:

1. Population growth and increasing per capita material demands are placing unprecedented pressures upon a finite resource base.
  2. Advancing scientific knowledge and technology have vastly enlarged man's ability to alter the physical environment.
  3. The combination of the foregoing conditions presents a serious threat to the Nation's life support system.
- ....

4. The attainment of effective environmental management requires the Nation's endorsement of a set of resource management values which are in the long-range public interest and which merit the support of all social institutions.<sup>29</sup>

The legislative history thus demonstrates what common sense indi-

<sup>26</sup> 115 CONG. REC. 40416 (1969). The Sixth Circuit relied on this language in the *Breckinridge* decision. See 537 F.2d at 866.

<sup>27</sup> 115 CONG. REC. 40417 (1969).

<sup>28</sup> *Id.* at 40416.

<sup>29</sup> S. REP. NO. 91-296, 91st Cong., 1st Sess. 5 (1969); see *id.* at 8-9; H. R. REP. NO. 91-378, 91st Cong., 1st Sess. 23 (1969).



cases: NEPA was enacted to protect those physical assets that make up the resource base of the nation.

Analytically, social and economic impacts do have roles to play in NEPA analysis. Often economic impacts will result in the destruction of physical resources. Such instances include situations where drastic losses of tax revenues prevent a city from maintaining its sewerage systems, its parks or its fire department; or where large scale job loss results in massive defaults on home mortgages in an already depressed housing market resulting in turn in large numbers of empty homes—suburban ghettos. These are possibilities and highlight the proposition that the matter is only one of proof: A plaintiff must plead and prove actual, be they eventual, impacts upon natural resources, and that is what the plaintiffs in *Breckinridge* failed to do.

A second role that socio-economic factors play is that these factors are frequently barometers by which an agency can gauge the value and utility of primary environmental resources. The importance of a wetland, for example, is better assessed if its dollar value as a natural water filtration plant is known and its replacement cost can be computed.<sup>30</sup>

So actual natural impacts, be they immediate impacts or spinoffs, must exist. In this light, the noise, traffic, overburdened mass transportation systems and congestion in *Hanly I* are the type of impacts with which NEPA is concerned.<sup>31</sup> In *McDowell*, the court was, in fact, dealing with life support systems at Scott Air Force Base—housing and utilities—which are inextricably tied to our resource base. Land use patterns deal with, of course, use of the most common of all resources—land. Thus, the Sixth Circuit's decision in *Breckinridge* is not a deviation from these earlier cases. Its difference lies only in the fact that the court was much more careful in its use of terms. The court labeled those impacts that were social and economic as such, and drew distinctions accordingly. *Hanly* and *McDowell* were in ef-

<sup>30</sup> The CEQ Guidelines state a proposition related to the two just discussed:

Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities or through changes in natural conditions may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects.

40 C.F.R. § 1500.8(a)(3)(iii) (1976). The DoD Directive and the Army Regulation are to the same effect.

<sup>31</sup> It should be noted that while the court in *Hanly I* was interested in these factors, it never did believe them significant enough to require a statement. See text accompanying note 10 *supra*.

fect traditional environmental cases decided in ill conceived terms.

In sum, the current state of the law is that for an impact statement to be required there must be a significant impact upon a primary environmental asset, a part of the life support system. That requirement is in accordance with the purpose of the Act: to protect for present and future generations irreplaceable natural assets.

## 2. *Public Participation in the Threshold Decision: The Close Hold*<sup>32</sup> *Environmental Impact Assessment*

The statute by its terms requires the publication of a detailed statement only where there is a significant impact upon the environment; the Congress deemed it advisable to require extensive and expensive publication procedures and the ensuing delays only where the environmental effects were of substantial concern.

In the process of determining whether the proposed action is "substantial" and, thus, whether an environmental impact statement is required, federal agencies prepare what have often been termed "environmental assessments."<sup>33</sup> In *Hanly II*<sup>34</sup> the Court of Appeals for the Second Circuit imposed a public participation requirement at the environmental assessment stage, requiring GSA to give notice of the proposed federal action to the public and giving the public the opportunity to submit relevant facts that might bear on the finding of significance. *Hanly II* and its threshold participation requirement can be addressed in two fashions. First, *Hanly II* was decided prior to an important Supreme Court decision and the enactment of legislation that affect the scope of public participation in agency decision making. Second, and more important, is the possibility that *Hanly II* was wrongly decided.

In June of 1973 and after *Hanly II*, the Supreme Court decided *United States v. SCRAP*,<sup>35</sup> which held that NEPA does not repeal other statutory provisions by implication.<sup>36</sup> Subsequent to both the enactment of the National Environmental Policy Act and the decision in *Hanly II*, Congress passed Freedom of Information Act

<sup>32</sup> See *McDowell v. Schlesinger*, 404 F. Supp. 221, 252 n.43 (W.D. Mo. 1975). This is the policy of avoiding public disclosure of projected actions during the assessment stage to prevent the deleterious effects of premature disclosure, for example, land speculation. *Id.* See text accompanying note 39 *infra*.

<sup>33</sup> See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 835-36 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1972) (*Hanly II*); *McDowell v. Schlesinger*, 404 F. Supp. 221, 250-54 (W.D. Mo. 1975).

<sup>34</sup> 471 F.2d at 836.

<sup>35</sup> 412 U.S. 669 (1973).

<sup>36</sup> *Id.* at 694.

amendments,<sup>37</sup> which reaffirmed that under FOIA's fifth exemption intraagency predecision memoranda evidencing opinions and recommendations were not disclosable.

Congress' purpose in enacting the fifth exemption was to avoid forcing the Government to conduct all its business in "a fishbowl." Accordingly, the House Committee stated:

[I]n some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and . . . [FOIA] is designed to permit nondisclosure in such cases.<sup>38</sup>

Thus, the Freedom of Information Act affirms the legitimacy of nonpublic decision making in some instances. The proposals for federal action, the environmental assessments, and the other decision documentation often evidence recommendations and opinions that have not yet gone to final decision, and would thus be exempt from disclosure under the fifth exemption to that Act absent an explicit statutory mandate. NEPA requires public participation where there is significant environmental impact. Where there is no significant impact, and more particularly during the process of determining *whether* there will be a significant environmental impact, both statutes impel the conclusion that public participation is not required.

More importantly, *Hanly II* was wrongly decided in that the imposition of public participation requirements had no statutory, regulatory, or precedential basis. The detailed statutory public participation requirements in NEPA explicitly apply only to actions that significantly affect the environment. Consequently, absent a statutory basis, it seems unwise to impose decision-making requirements upon an agency that, in effect, increase bureaucratic red tape and delay.

Despite the lack of a statutory basis for its public participation requirement, *Hanly II* had a longer life than could have been expected. The court in *McDowell*, relying on *Hanly II*, commented upon the lack of public participation in the Air Force decision process but did not believe it necessary to decide the issue, which it called the "closehold" issue:

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<sup>37</sup> Act of Nov. 21, 1974. Pub. L. No. 93-502. 88 Stat. 1561 (amending 5 U.S.C. § 552 (1970)).

<sup>38</sup> H.R. REP. No. 89-1497. 89th Cong., 2d Sess. 5-6 (1966).

At this point some discussion of the "close-hold" procedures utilized by the USAF is warranted. The primary justification for this policy put forth by defendants is the public interest in preventing land speculation in the areas affected by the relocations. This same rationale would, of course, extend to almost every substantial federal action or project in the country.

Secrecy in the agency decision making process runs counter to the thrust of NEPA. NEPA is an environmental full-disclosure law. The policies of NEPA as set forth in § 101 contemplate that decisions with environmental effects be made in cooperation with state and local governments and concerned public and private organizations. Further, the "close-hold" procedure limits drastically the available sources of information to which an agency might turn in making the threshold decision as to the applicability of § 102(2)(C), and comments and input from individuals and groups who may well be in the best position to assess the effects of a proposed action. This was the result in this case.

... It is important to note, however, that the utilization of a "close-hold" procedure cannot excuse agency failure to gather sufficient data to make the threshold decision as to the applicability of § 102(2)(C).<sup>39</sup>

In *Breckinridge*, the district court, citing *Hanly II* and *McDowell*, declared the Army's environmental assessment invalid because of the close hold nature of the assessment as the spirit of NEPA required public participation in assessing all proposed actions. The court stated with apparent indignation:

[T]he defendants maintained what they termed a "close hold" tab on the proposed action during the course of their decisionmaking process and subsequent review. This clandestine procedure is apparently a designation by the Army of non-classified material that is nonetheless kept from public view.<sup>40</sup>

Because of the taint on the Army decision process, the court ordered the Army to prepare a detailed environmental impact statement and comply with the procedures in section 102(2)(C) as to public participation.<sup>41</sup> The Sixth Circuit reversed.<sup>42</sup> In finding that the case should have been dismissed because of the absence of any traditional environmental impact, the court implicitly held that agencies were not required to solicit public comment on those actions without traditional environmental impacts.

On July 30, 1976 the United States District Court for the Eastern District of Pennsylvania addressed the issue explicitly. In *National Association of Government Employees v. Rumsfeld*,<sup>43</sup> a November 1974 Army realignment action, the court was faced with a challenge to the

<sup>39</sup> 404 F. Supp. at 252 n.43.

<sup>40</sup> Civ. No. 75-100 (E.D. Ky. Oct. 31, 1975), slip op. at 8-9.

<sup>41</sup> *Id.* at 13.

<sup>42</sup> 537 F.2d 864 (6th Cir. 1975).

<sup>43</sup> Civ. No. 76-1430 (E.D. Pa. July 30, 1976).

proposed closure of the Frankford Arsenal in Philadelphia, Pennsylvania which would result in the elimination of approximately 3,500 jobs in Philadelphia. An environmental impact assessment was prepared on a close hold basis, and the assessment concluded that an impact statement was not needed. Judge Clarence Newcomer held that NEPA required public participation only where there is a significant environmental impact. He found that *Hanly II* imposed a public participation requirement without statutory or regulatory authority, and was wrongly decided. He distinguished *McDowell* as being a case in which those procedures were required because of significant environmental impact.<sup>44</sup>

Judge Newcomer and the Sixth Circuit were clearly right. The statute contains no mention of any requirement for an impact statement absent significant impact, let alone a requirement for public participation; and to find such a requirement in law is to impose upon the federal government the need for lengthy public participation requirements in cases that have nothing to do with the environment. While it is today unfashionable to espouse behind door decision making, it is certainly impractical and probably impossible for federal agencies to solicit comment on all proposals: Time and money mandate against it. The fact that there is presently a huge federal government that takes forever to make any decision also mandates against it. NEPA strikes a balance in attempting to change the agency decision-making processes only in the cases with which the Congress was concerned, those with significant environmental impact.

### 3. *Substantive Review of Military Decisions*

Whether courts will review the wisdom of the substance of a military decision, as opposed to the decision whether to file an impact statement, is of interest to military commanders. Suffice it to say that the courts, on various grounds, uniformly decline to review the substantive decision. The courts review procedural compliance with the Act and the decision as to whether a statement is needed. They do not review the proposed action. Even Judge Moynahan, who enjoined the Army in *Breckinridge*, was adamant about his refusal to review the rightness of the decision, as he properly believed his role to be limited to a review of procedural compliance.<sup>45</sup>

<sup>44</sup> *Id.*, slip op. at 11-13.

<sup>45</sup> Indeed, Judge Moynahan dismissed a subsequent action brought by Representative Carl Perkins. "[I]t is manifest then that the decision of whether to close out

The military lawyer may be interested in the reasons behind this judicial deference. The wisdom of certain military decisions has been held to present a nonjusticiable political question and the doctrine applies to base realignment decisions, among others.<sup>46</sup> In this light, the Administrative Procedure Act contains an exemption that covers, among other things, those realignment decisions affecting the structure of the defense force.<sup>47</sup> Thus, while there is controversy about substantive review by courts of the actions of other agencies,<sup>48</sup> that confusion does not exist with regard to military decisions within the Department of Defense.

Nonetheless, poorly planned and poorly reasoned actions might provide the justification a court needs to search out deficiencies with regard to procedural compliance with NEPA. Thus, the role of a lawyer in ensuring that an action is litigation proof is not merely limited to a procedural check list. The soundness of the action must be reviewed in order to guarantee success later in court.

#### 4. Recent Congressional Activity

On September 30, 1976 the President signed into law the Military Construction Authorization Act of 1977,<sup>49</sup> which includes a reporting requirement for reductions in authorized strength of one thousand civilian employees or 50 percent at defense installations. Specifically, no monies authorized by that Act may be expended for such actions unless:

- a. The Secretary of Defense or of the Army informs Congress of the possibility of closure or reduction;
- b. NEPA is complied with;
- c. The Congress is notified of the decision;
- d. Together with a detailed justification;
- e. And the estimated fiscal, local economic, budgetary, en-

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operations at a military facility is left to the discretion of the Secretary of Defense." *Perkins v. Rumsfeld*, Civ. No. 76-108 (E.D. Ky. Aug. 3, 1976), slip op. at 6; *see id. passim*.

<sup>46</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See Perkins v. Rumsfeld*, Civ. No. 76-108 (E.D. Ky. Aug. 3, 1976), slip op. at 7.

<sup>47</sup> "This chapter [entitled Judicial Review] applies . . . except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701 (a) (2) (1970). *See City of Philadelphia v. Schlesinger*, No. 75-1405 (E.D. Pa. Nov. 4, 1975), *aff'd*, No. 76-1090 (3d Cir.), *cert. denied*, 45 U.S.L.W. 3380 (1976).

<sup>48</sup> *See Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975).

<sup>49</sup> Act of Sept. 30, 1976, Pub. L. No. 94-431, 90 Stat. 1349.

vironmental, strategic, and operational consequences of the action; and

- f. No irrevocable action is taken for 60 days following the notification.<sup>50</sup>

The provision was the result of a long conflict between the executive and legislative branches and is a successor to an earlier structured one year study and reporting requirement vetoed by the President.<sup>51</sup> The only new requirement, in fact, is the 60-day waiting period. Presently the Department of Defense as a matter of course informs the Congress of candidates and of decisions and prepares justifications, and economic, social and environmental impact studies for its proposals.

### III. ADEQUATE NEPA COMPLIANCE

In addition to clarifying the status of the law, the last year's litigation has taught the Army valuable lessons for planning actions. As the foregoing discussion demonstrates, the Act itself requires detailed study and public comment procedures only when there will be a significant environmental impact. The implementing guidance adds a few other steps. However, the concern of the courts for human beings and the natural distrust of decisions that are not adequately documented will often prompt the courts to strain their reading of the statute or regulations in order to allow a reassessment of the consequences of the proposed action or the development of what would, in essence, be a mitigation plan. It is this concern for human beings, a concern that the Army shares, that dictates that the following procedures be complied with in planning any action. Further, the costs and inconveniences resulting from an injunction are so significant that every precaution possible must be taken to avoid judicially imposed delays.<sup>52</sup>

#### A. THE DECISION AS TO STATEMENT OR ASSESSMENT

Army policy, which has met with the judicial approval discussed in the preceding pages, is that an EIS is needed only when there is a

<sup>50</sup> *Id.* § 612.

<sup>51</sup> President Ford vetoed H.R. 12384, 94th Cong., 2d Sess. on July 2, 1976. See 6 [1976] U.S. CODE CONG. & AD. NEWS 2305-06.

<sup>52</sup> The injunction at Lexington as a result of *Breckinridge* cost the Army about \$100,000 per working day from October 31, 1975 to September 10, 1976. Despite the Army's eventual victory, the litigation was prolonged and complicated: *Breckinridge v. Schelesinger*, No. 75-100 (E.D. Ky. Oct. 31, 1975), *motion for expedited appeal granted*, No. 75-2505 (Jan. 14, 1976), *rev'd*, 337 F.2d 864 (6th Cir. July 9,

significant impact upon a primary environmental resource. In addition, statements are prepared when there is environmental controversy.

In addition to the explicit Army policies, however, the following factors should bear on any decision as to whether to file a statement:

1. Any kind of controversy may make the filing of a statement advisable as it allows opportunity to co-opt any potential opponents of the action;
2. In some situations, the EIS's public participation procedures may be the only way to gather necessary information from the affected public;
3. In situations where there is an affected public, the EIS publication procedures may facilitate the framing of issues by allowing the various publics to act as their own advocates;
4. The EIS publication procedures often allow top level decision makers access to other than the approved staff view on the proposal;
5. If litigation is a certainty, it may enhance success in the courtroom;
6. It adds a public perception of legitimacy to a decision; and
7. The statement is a valuable intergovernmental coordinating tool, particularly when dealing with area economic recovery programs.

The planner should recognize that the impact process is a valuable tool.

Conversely, EIS's are expensive and significantly delay the decision-making process. In addition, the formulation of EIS's for nonenvironmental cases may create a practical precedent as to need for EIS's in future similar cases. Moreover, should the case proceed to litigation, preparation of a statement might shift the focus from the need for a statement to the adequacy of the one prepared. In essence, the Army may be foregoing the defense that the action does not significantly affect the environment. Last, the benefits of an EIS may be accomplished by alternative means without incanting NEPA.

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1976), *petition for rehearing denied*, (6th Cir. Aug. 13, 1976), *motion for stay pending application for certiorari denied*, (6th Cir. Aug. 20, 1976), *motion for stay denied* (U.S. Sept. 6, 1976, Stewart, J.), *dismissed*, (E.D. Ky. Sept. 10, 1976), *application for certiorari pending*.

At the same time, much communications equipment was not repaired due to the resulting turmoil in the entire depot system. Add to the above, litigation costs, embarrassment, and not least of all, the uncertainty in the lives of valued Army employees, and the economic and social costs of delay may be seen in proper perspective.



*B. PUBLIC PARTICIPATION AND EFFECTIVE  
DECISION MAKING*

In EIS cases, public participation is statutorily required. It ensures that an adequate decision package will be formulated. Decision makers are not aware of all that goes on within affected communities, and thus, this opportunity for information gathering may often result in an adequate and defensible product or result in an early decision to abandon an ill-conceived proposal. Moreover, the public participation period is the time to co-opt potential opposition; because by discovering all the arguments of those opposed to the action prior to decision, Army planners can remedy all inadequacies in their proposal. In addition, a well documented public dialogue is invaluable in convincing the federal judge to dismiss a case. Public hearings, public comment, meetings with community leaders and all the public scrutiny that occurs during the planning process for EIS actions are the best way to litigation-proof a proposed action.

*Hanly, McDowell*, and the district court decision in *Breckinridge* all resulted from a common belief that closed door decision making is wrong in almost any case. With regard to those actions for which an environmental impact statement is not required, public comment and the conduct of public hearings, while not required, may be a tactically desirable part of the decision process, as they pre-empt the distaste for "secrecy."

The planning process for an EIS action is best begun with an announcement of the possibility that certain alternative actions may be taken and of the decision to study those alternatives. Solicitation of comments on the scope of the study may be advisable. In addition, solicitation of studies by local and state governments is an effective way to gather information and to make these organizations' participation part of the planning process.

During the formulation of the Army draft environmental impact statement, however, the manager will want to focus his resources upon the draft. He will not want to use his personnel and money engaging in premature dialogue over tentative and unverified data. Accordingly, during preparation, release of working papers may not be advisable and the role of the Army may best be limited to accepting information.

At the time of the publication of the draft environmental impact statement, which should be accompanied by an adequate decision document explaining the reasons for the action and an analysis of

alternatives, a detailed public participation process should begin.<sup>33</sup> Press releases, congressional notifications, publication of a notice of availability in the *Federal Register*, and announcements to employees and other affected publics should all kick off the campaign.

Public hearings should be held during this 45-day comment period. Arrangements for the public hearings should be coordinated with groups opposed to the action and should be held in all affected locales. The theory behind any public hearing is to allow a full airing of all issues and an opportunity for all to speak their minds. The format should be agreed to by all parties. A format that has worked well for the Army Corps of Engineers entails an initial presentation by the proponent, statements from the public, and a question and answer period at the end. For the most part, a decision maker should preside at the hearing. Technical arrangements and advice can best be provided and are available from the local Corps District Engineer, who holds public meetings on a day-to-day basis and is staffed to assist in such ventures. Meetings with local groups may also be appropriate. After this extensive dialogue, an adequate final environmental impact statement can be prepared, and all real issues should be highlighted for the decision maker.

### C. THE LENGTH OF THE ADEQUATE STATEMENT OR ASSESSMENT

The adequate statement or assessment presents a problem to authors and reviewers. It should be brief but at the same time must not omit anything. One manner in which to accomplish that goal is to deal in detail with the real impacts, those that would be of concern to a decision maker, and the feasibility of alternatives in the main volume of the statement or assessment. Those meaningless charts one always finds in impact statements and the discussions of minor impacts or nonimpacts can be incorporated by reference and included in appendices and supporting studies. Hopefully, this method will result in a readable document for decision makers, for the public, and for the always present court.

### D. THE CONTENT OF THE ADEQUATE STATEMENT

Any environmental document, be it statement or assessment, must assess the totality of the proposed action. The sin of

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<sup>33</sup> See 42 U.S.C. § 4281 (1970); Office of Management and Budget Circular A-95 (Jan. 2, 1976).

segmentation—dealing with only parts of a related project—will often result in an environmental study being declared deficient by a court *à la McDowell*.<sup>54</sup> Thus, with regard to Army realignment actions the impact on both the losing and gaining installations must be addressed. Often the significant environmental impacts will be at the gainer as that is where the life support system will be stressed. In addition, coordinate federal actions, such as reductions in force by other federal agencies, or construction, must also be addressed.<sup>55</sup> Last, if the proposed action is merely a precursor to subsequent actions, those subsequent actions must be also addressed. The Army does not engage in, and the courts do not sanction "decide now and plan later" proposals.

While the Army policy is that socio-economic concerns in and of themselves do not require the preparation of an environmental impact statement, policy also dictates that social and economic factors be addressed whenever an impact statement or assessment is prepared.<sup>56</sup> Community impacts and equal employment opportunity impacts at gaining and losing installations, and numerous other socio-economic aspects are generally addressed in the multitudinous Army studies that precede any action. The role of the planner and the lawyer is to ensure that these social and economic studies are packaged in integrated impact analyses.

One last factor—the statement or assessment must consider all practical or feasible alternatives in sufficient detail to allow fair public comment on them.

### E. THE PAPER TRAIL

Most of the Army cases have been won without numerous witnesses. Ideally, a case can be submitted to a federal district court on the basis of the administrative record.<sup>57</sup> A good administrative record embodies the following:

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<sup>54</sup> In *McDowell*, the impact on the gainer, Scott Air Force Base, was not adequately assessed.

<sup>55</sup> The military case on point, while recent, was not the result of the November 22, 1974 announcement. It dealt with the move of the Naval Oceanographic Laboratory from Suitland, Maryland to Bay St. Louis, Mississippi. The EIS was adjudged inadequate for, among other reasons, its failure to consider a proposed Army move to Bay St. Louis, *Prince George's County v. Holloway*, 404 F. Supp. 1181 (D.D.C. 1975).

<sup>56</sup> CEQ Guidelines, 40 C.F.R. 1500.8(a)(3)(iii) (1976); DoD Dir. 6050.1, 32 C.F.R. § 214.7(b)(2) (1975); AR 200-1, para. 2-9(2)(b).

<sup>57</sup> The Supreme Court has urged agencies to develop reviewable administrative records. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

*1. An integrated document*

The best administrative record is contained in as few documents as possible. The need to tie numerous decision documents together by affidavit results in confusion and weakens the Army case. Thus, an environmental impact statement and a decision document that cross-reference each other and all other significant studies, memoranda, and letters provide the best basis for defending an Army action. Defense on the basis of two documents is the best defense of all.

*2. Evidence of no post hoc decision making*

Studies conducted after decision, unless they are up-dates, are generally irrelevant once the Army is in court. Thus, Army lawyers and planners should ensure that adequate environmental documentation is completed, including the filing of the final environmental impact statement where required, before a decision is made. While it is possible to focus the planning process on a preferred alternative for a proposal, Army documentation and Army representations to the public must reflect that no decision has been made. In this light, it is good planning from both litigation and management perspectives to leave as many options open as possible to the decision maker when preparing Army documentation. Thus, all feasible alternatives should be flushed out in both the impact statement or assessment and the decision documentation. By ensuring no documentary evidence of *post hoc* decision making and by carrying through alternatives to the date of decision, the "decide now and study later" charges can be refuted.

*3. Up-dates*

After a decision has been made, planners may wish to fine tune or alter implementation plans. Accordingly, environmental documentation will have to be up-dated, and in some situations a supplemental impact statement will have to be filed with the Council on Environmental Quality. In addition, new developments may require updated analysis. In such cases, the new analysis should become part of the paper trail, the administrative record.

*F. CONTRACTING OUT ENVIRONMENTAL STUDIES*

Private contractors are developing expertise in writing impact statements and assessments. The planner may desire to use a contractor, or, because of a lack of in-house expertise may have to use

a contractor. There are advantages, however, to preparing the documentation in house. By having the statement or assessment prepared by an in-house team of planners and environmental specialists at the same time as the decision documentation is prepared, environmental considerations can be integrated into all aspects of the study and the proposal. In addition, Army planners should be the most knowledgeable about the proposal. Where Army expertise exists, it may be best to use it.

#### G. REVIEW OF IMPACT STATEMENTS AND ASSESSMENTS

A good statement highlights real issues and discusses both sides. The lawyer is uniquely qualified to review statements in that review only encompasses making sure that the statement does highlight the real issue; does not miss any important issues; contains nothing inflammatory; adequately discusses alternatives; and provides rational bases for discarding alternatives.

### IV. CONCLUSION

The whole planning process should be pointed towards litigation. While the recent cases have given the Army a greater likelihood of success in court, the recent increase in litigation mandates that military attorneys sit beside their clients from the beginning as they plan their actions.<sup>58</sup> By ensuring an action is litigation proof, attorneys also ensure that the planning process works as it should.

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<sup>58</sup> The Army Chief of Staff stated in a letter to his major commanders on March 10, 1976:

During the past year the Army has come under attack in the Federal Courts for alleged failure to comply with the provisions of NEPA. Additional litigation would not be surprising. These legal actions delay, and in some cases could prevent, timely accomplishment of priority Army actions. Because of the probability of litigation, legal counsel should be involved in the early planning stages of our proposed actions.



## CLASS ACTIONS AND THE MILITARY \*

Major H. A. Dickerson \*\*

### I. INTRODUCTION

Much of the litigation against the federal government could be prevented if the officials who formulated policy took the time to carefully consider the effects that their decisions might have on individual citizens. Decision and policy makers should explicitly consider these effects before finalizing their actions, particularly in view of the fact that an individual plaintiff may bring a civil action in a federal district court to vindicate his rights. Further, a person who sues to redress a grievance against the Government may discover that there are many others who could bring suit on similar grounds; and if their number is so large that their joinder as named plaintiffs is impracticable, a class action is then possible.

In the class action, named representatives sue or defend on behalf of the entire class,<sup>1</sup> and the judgment, whether or not favorable to the class, is generally binding on all members of the class.<sup>2</sup> The typical class action is brought on behalf of a class against a

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<sup>1</sup> Class actions may be defined simply as "actions on behalf of or against a class under [Federal Rule of Civil Procedure] 23. . . ." C. WRIGHT & A. MILLER, *MANUAL FOR COMPLEX LITIGATION* § 0.10, at 4 (1973). The cases and articles which have considered Rule 23, as well as Rule 23 itself, frequently refer to the various subdivisions of the rule simply by using the appropriate subdivision letter and number symbols: For example, "the prerequisites of subdivision (a)" or "maintaining a (b) (3) action." In this article, every effort has been made to lay a foundation for such shorthand, yet possibly confusing, references.

<sup>2</sup> *FED. R. CIV. P.* 23(c)(3). This subdivision allows one exception to the generally binding effect of a judgment. A judgment in an action maintained as a class action under section (b)(3), where questions common to the class are found to predominate over any questions affecting only individual members of the class, will not be binding on members of the class who have requested exclusion from the class by a date set by the court that is prior to the judgment.

single defendant or against a small number of joined defendants.<sup>3</sup> In such cases, although it may not have been economically feasible to sue as a single plaintiff or even as joined plaintiffs, it may become financially practical to bring a class action. For the same reasons, a class action has the capability of vastly increasing the financial exposure of a defendant who had expected that only a few plaintiffs with small claims would sue.

By its very nature, the military establishment affects large classes of people, and it is natural that the class action device is being used increasingly in suits against the military. While there are no figures available on the number of class action suits pending against the Departments of Defense and Army, figures show that in recent years there has been a general increase in class actions in the federal courts.<sup>4</sup>

While class action litigation against the Army is primarily defended by the Department of Justice<sup>5</sup> with direct assistance from the Litigation Division,<sup>6</sup> Army attorneys at the installation where such litigation arises are required to make prompt and detailed

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<sup>3</sup> Not so common are class actions brought *against* a class. Even less common are class actions brought on behalf of one class against individuals representing another class. *E.g.*, *Smith v. Swornstedt*, 57 U.S. (16 How.) 288 (1853), in which the Supreme Court allowed a representative suit to be brought in a contest between two sectional groups of the Methodist Episcopal Church of the United States over funds originally belonging to the entire church before it split into two entities.

<sup>4</sup> [1975] ANN. REP. OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, at XI-74 to 83. As of June 30, 1975, of the almost 120,000 pending civil cases in the federal courts, 1,584 were class actions. This number represents a 10.8% increase in class action cases over the preceding fiscal year. Class actions are generally more complicated than other civil actions, and the resulting increase in workload in class action litigation was 19.6%. The Fifth, Second, and Ninth Circuits accounted for 54.8% of the pending class action suits. The two districts with the highest number of *new* filings during fiscal year 1975 were the Southern District of New York (178) and the Northern District of California (159). In the 500 cases involving the United States as a party, 47 had been brought in the District Court for the District of Columbia. The *Report* did not indicate which federal agencies were involved in the 500 federal cases, but of the 500 cases, civil rights cases account for 220 cases; prisoner petitions, 43 cases; contract claims, 18 cases; and labor suits, 13 cases.

Discussions with members of the Litigation Division of the Office of The Judge Advocate General of the Army indicate that the Army has not been ignored as a defendant in class action suits.

<sup>5</sup> 28 C.F.R. pt. 0 (1975).

<sup>6</sup> Army Reg. No. 27-40, *Legal Services—Litigation*, para. 3-1 (15 June 1973). Litigation in all courts against the federal government is defended by the Department of Justice and the local U.S. Attorney. In the Department of the Army, the lawyers in the Litigation Division, Office of The Judge Advocate General, work very closely with the Department of Justice by preparing litigation reports, by assisting in the preparation of motions and briefs, and frequently by appearing in court.



legal reports to the Litigation Division,<sup>7</sup> and may sometimes be called upon to appear in court.<sup>8</sup> The purpose of this article is to acquaint military attorneys with the current state of the law regarding federal class actions and thereby provide military attorneys with a frame of reference to guide their involvement in litigation at their installations.<sup>9</sup> This article will first discuss the general prerequisites for class actions under Rule 23 of the Federal Rules of Civil Procedure, and will then describe the three categories of class actions and their sometimes different procedural requirements. Finally, it will briefly examine the relationship between Rule 23 and certain jurisdictional issues. Cases involving the military will be briefly presented, primarily to clarify the various prerequisites for and the categories of class actions. In addition, these cases will identify situations where litigation is likely.<sup>10</sup>

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<sup>7</sup> *Id.* paras. 2-1b, 2-1c & 2-3d. If the subject matter of the proceedings involves possible Congressional, Secretarial, or Army Staff interest, or requires the immediate attention of The Judge Advocate General (for example, a motion for a temporary or preliminary injunction, or any other proceeding which has a return of less than 60 days, or requires immediate action by the Department of Justice), the local judge advocate or legal advisor must telephone his report to the Litigation Division and then follow it up with an electrical transmission or written communication as required by the Litigation Division. *Id.* para. 2-3d. Class action litigation will always require this expeditious reporting to and coordination with the Litigation Division.

<sup>8</sup> In the pending case of *Henson v. United States Army*, Civ. No. 76-45-C5 (D. Kan. 1976), where the soldier-plaintiffs have alleged that the Army has violated the Privacy Act's requirement that federal agencies must maintain accurate records, an Army judge advocate assigned to Ft. Riley has made several federal district court appearances, including presentation of oral argument against class action certification. The plaintiffs have alleged that the Army improperly maintained Unit Manning Reports because duty assignments were not properly stated. The plaintiffs have further alleged that they were trained in jobs and skills completely unrelated to skills listed on the reports. As a result they will be required to take promotion tests in the skills listed on the reports without the benefit of training in the stated skills.

While the case is still pending an individual action, the district judge denied the plaintiffs' motion for class action certification on June 4, 1976 on the grounds that questions of fact common to the class did not predominate over questions affecting only individual members and that a class action would not be superior to individual suits.

<sup>9</sup> Although the experience and practice of the Department of the Army will be highlighted, this article is equally applicable to all the military departments. The cases discussed in this article should bear out the proposition that none of the military departments is immune from class action suits.

<sup>10</sup> Hopefully, this article will alert the military lawyer to particular activities or even general and accepted practices of his command which warrant special attention. The military lawyer interested in preventing litigation before it arises should also be aware that, generally speaking, the federal courts expect the Army and those who act for it to do four things: first, to scrupulously follow its own regulations; second, to be scrupulously fair; third, to act unemotionally and with good judgment; and fourth, to base judgments on facts and objective analysis. *See*

## II. RULE 23—THE BASICS

## A. PREREQUISITES FOR MAINTAINING A CLASS ACTION UNDER RULE 23(a)

Subdivision (a) of Rule 23<sup>11</sup> lists the prerequisites for bringing a class action. These are necessary preconditions, but not sufficient in themselves to justify the action, as the introductory language of subdivision (b) makes clear.<sup>12</sup> For certification of a class action, a party must satisfy the prerequisites of subdivision (a) and any one of the three provisions in subdivision (b). The burden is on the party bringing a class action to show that the various requirements of Rule 23 are met.<sup>13</sup> Subdivision (a) lists four prerequisites. Two others not explicitly listed but self-evident are that a definable class must exist and that the representative(s) must be members of the class.<sup>14</sup>

## 1. A class must exist

An essential prerequisite to maintaining a class action is the existence of a class whose bounds are definable.<sup>15</sup> While the class does not have to be so precisely defined that every possible

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O'Roark, *Military Administrative Due Process of Law as Taught by the Maxfield Litigation*, 72 MIL. L. REV. 137 (1976).

<sup>11</sup> (a) *Prerequisites to Class Action*. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

<sup>12</sup> "[A class action may be maintained] if the prerequisites of subdivision (a) are satisfied, and in addition [one of the following conditions is met]. FED. R. CIV. P. 23 (b) (emphasis added).

<sup>13</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974) (Eisen IV). However, there is some danger to a defendant in relying on this principle because Rule 23 is a procedural rule and not a matter of substantive law. There is a good argument that the flexibility and discretion inherent in Rule 23 coupled with the necessity for an early class ruling mean that traditional burden of proof concepts have limited applicability to a determination of whether certification should lie. For an excellent discussion of this point see Newberg, *Burdens of Proof for Class Issues*, 3 CLASS ACT. REP. (No. 4) 103 (1974).

<sup>14</sup> 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1759, at 573 (1972) [hereinafter cited as WRIGHT & MILLER].

<sup>15</sup> *Edwards v. Schlesinger*, 377 F. Supp. 1091 (D.D.C. 1974) (class action certification denied for a class composed of "all past, present and future female applicants" to the service academies because it was ill-defined); *Rappaport v. Katz*, 62 F.R.D. 512 (S.D.N.Y. 1974); *American v. Raymond Lea Organizations, Inc.*, 59 F.R.D. 143 (C.D. Cal. 1973); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd on other grounds*, 498 F.2d 825 (2d Cir. 1971); 7 WRIGHT & MILLER, *supra* note 14, § 1760.

member can be identified at the beginning of the action,<sup>16</sup> the general outlines of the class must be determinable.<sup>17</sup> As Wright and Miller note, the existence of a class "is a question of fact that will be determined on the basis of the circumstances of each case."<sup>18</sup> This factual determination was illustrated in *Cullen v. United States*,<sup>19</sup> where a class composed of Air National Guardsmen contested an Air Force regulation which prohibited the wearing of wigs. The district court in *Cullen* gave two reasons for the requirement that the class be definable: "This definition of the class is carefully drawn so that it will not only insure the proper representation of the class by the named plaintiffs, but also allow a class which is in reality similarly situated to the named plaintiffs."<sup>20</sup> The court defined the class as

all members of Illinois Air National Guard units who were stationed or headquartered at the O'Hare Air Field at the time this action was filed and who are presently subject to or in the future may be subject to punitive measures as a consequence of a violation of Air Force Regulation 35-10. . . .<sup>21</sup>

The court rejected a request by the plaintiffs for a retroactive inclusion of Guardsmen who had been stationed at O'Hare prior to the date that the action was filed by saying that honoring the request "would only obfuscate the issues and unnecessarily complicate the instant action."<sup>22</sup>

## 2. *The representatives must be members of the class*

Ordinarily, the named representative party must be a member of the class he purports to represent.<sup>23</sup> Indeed, the opening phrase of subdivision (a) of Rule 23 requires that "one or more *members* of a class"<sup>24</sup> serve as the representative. Of course, whether the puta-

<sup>16</sup> *Dolgow v. Anderson*, 43 F.R.D. 472, 492 (E.D.N.Y. 1968); 7 WRIGHT & MILLER, *supra* note 14, § 1760, at 580; Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. INDUS. & COM. L. REV. 527, 529 (1969).

<sup>17</sup> *Rappaport v. Katz*, 62 F.R.D. 512, 515 (S.D.N.Y. 1974); 7 WRIGHT & MILLER, *supra* note 14, § 1760, at 580.

<sup>18</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1760 and cases cited at 579 n.89.

<sup>19</sup> 372 F. Supp. 441 (N.D. Ill. 1974).

<sup>20</sup> *Id.* at 447.

<sup>21</sup> *Id.* at 446-47.

<sup>22</sup> *Id.* at 446.

<sup>23</sup> *Bailey v. Patterson*, 369 U.S. 31 (1962); 7 WRIGHT & MILLER, *supra* note 14, § 1761. *But see* Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure?*, 8 VAL. L. REV. 333, 354 & n.103 (1974).

<sup>24</sup> FED. R. CIV. P. 23(a) (emphasis added); *see* note 11 *supra*.

tive representative is a member of the class depends upon how the court defines the class.

A difficult problem in applying the membership-in-the-class prerequisite arises when an association seeks to act as the representative of its members.<sup>25</sup> Some courts have stated that the association is not requesting any relief for itself and therefore is not a member of the class it purports to represent; consequently, it cannot bring a class action on behalf of its membership.<sup>26</sup> Other courts have made an exception to this rule for associations created specially to protect the interests of their members if those interests are the subject of the action.<sup>27</sup> Where the association is a bona fide unincorporated association, Rule 23.2 of the Federal Rules provides that members of the unincorporated association may be appointed as representative parties for the class of association members.<sup>28</sup>

### 3. Numerosity

Rule 23(a)(1) provides that a class action may be maintained only if the size of the class makes "joinder of all members . . . impracticable."<sup>29</sup> "Impracticable" means extremely difficult or inconvenient, but not necessarily impossible.<sup>30</sup> What constitutes "imprac-

<sup>25</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1761, at 588.

<sup>26</sup> *E.g.*, *Organized Migrants in Community Action, Inc. v. James Archer Smith Hosp.*, 325 F. Supp. 268 (S.D. Fla. 1971); see 7 WRIGHT & MILLER, *supra* note 14, § 1761, at 588.

<sup>27</sup> *E.g.*, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968); *Alabama Independent Serv. Station Ass'n, Inc. v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N.D. Ala. 1939); see 7 WRIGHT & MILLER, *supra* note 14, § 1761, at 589.

<sup>28</sup> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23 (d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23 (e).

FED. R. CIV. P. 23.2. Because there appear to be fewer prerequisites for an action brought under Rule 23.2 than there are for one brought under Rule 23, government agencies being sued under Rule 23.2 should investigate whether the suing association is indeed unincorporated. It has been suggested that "at a minimum an organization that seeks to sue . . . under Rule 23.2 must have control over its members, at least with regard to the sphere of activity involved in the issues being litigated." 7A WRIGHT & MILLER, *supra* note 14, § 1861, at 461.

<sup>29</sup> FED. R. CIV. P. 23 (a) (1); see note 11 *supra*.

<sup>30</sup> *Advertising Specialty Nat. Ass'n v. FTC.*, 238 F.2d 195, 198 (1st Cir. 1956); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn. 1973), *aff'd on other grounds sub nom. Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973). In *Klinkhammer*, the district court, in an action challenging the validity of a Marine Corps regulation proscribing the wearing of short hair wigs at reserve drills, held that the joinder of other Minnesota members of a ready reserve component as plaintiffs was not inconvenient and hence not "impracticable." The court held the regulation invalid and reasoned that the joinder was not impracticable because

ticability" or "numerosity" depends on the facts of each case and no set rule has been established by the courts. If the named plaintiffs are the only members of the class, however, the numerosity test is not satisfied.<sup>31</sup>

There are a variety of relevant factors necessary for a determination of whether joinder of all members is impracticable. These factors include the size of the class, the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject of the dispute.<sup>32</sup> The most obvious factor is the size of the class. Although the party bringing the class action does not have to show the exact number of potential members, he does have the burden of proving numerosity or impracticability of joinder, and mere speculation as to the number of members in the class will not satisfy Rule 23(a) (1).<sup>33</sup> There is no set standard as to what size class fulfills the Rule's requirement of being "so numerous that joinder of all members is impracticable." Classes containing from three to 350 members have been held to be too small to satisfy the numerosity requirement.<sup>34</sup> Conversely, classes containing from 25 to 300 members have been held by other courts to satisfy the numerosity requirement.<sup>35</sup>

In *Cortright v. Resor*,<sup>36</sup> a class action on behalf of 56 members of the 26th Army Band at Fort Wadsworth, New York seeking mandamus and an injunction to prevent military officials from interfering with their first amendment right to protest the Vietnam War, the court held that a class of 56 was sufficiently numerous. The court stated that the numerosity requirement "is flexible; a large

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[u]nlike many class actions, the potential class members here are all recorded on files at the reserve unit. Moreover, all class members gather together once a month for drills, and thus can be notified easily. This decision if and when final, should establish a precedent and for practical purposes be as effective as a class action would be in any event.

*Id.* at 71.

<sup>31</sup> *Committee to Free Fort Dix 38 v. Collins*, 429 F.2d 807 (3d Cir. 1970) (dictum). This was an action for injunctive and declaratory relief from a denial by the commander of Ft. Dix of a request by civilians to demonstrate against stockade conditions at Ft. Dix and the treatment of a group of 38 prisoners known as the "Fort Dix 38." The plaintiffs sought to certify the case as a class action on behalf of "all others who seek to exercise their constitutional right to protest certain practices at Ft. Dix." The court found the case moot on other grounds, but in dictum on the class action question, stated that there was no evidence of any persons being affected other than the named plaintiffs and that plaintiffs' "amorphous reference to persons not otherwise expressly named as plaintiffs is insufficient to state a class action. . . ." *Id.* at 812.

<sup>32</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1762, at 600.

<sup>33</sup> *Id.* at 594.

<sup>34</sup> *See id.* at 596-98 & nn. 41-57.

<sup>35</sup> *See id.* at 598-99 & nn. 59-65.

<sup>36</sup> 325 F. Supp. 797 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 243 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

range of discretion is left to the district judge,"<sup>37</sup> and gave two reasons for its holding. First, it said, "Class actions have been allowed to proceed with considerably fewer than 56 in the class."<sup>38</sup> Then it stated that "[t]his litigation calls for expeditious resolution, particularly because it involves the United States Army. If all of the interested members of the band were to intervene, the action might be unnecessarily protracted and cluttered. . . ."<sup>39</sup>

Slightly different reasoning was employed by the federal district court in *Cullen v. United States*.<sup>40</sup> There the court held that evidence that 325 Air National Guardsmen at a particular airport desired to wear short hair wigs indicated that "although mere numbers should not be the sole guideline, [the joinder of all 325 members of the class would] clearly be impracticable."<sup>41</sup> The *Cullen* court did not stress expediency as did the *Cortright* court, but simply stated that

[a]s a practical matter, the capacities of even the best judges and jurors to absorb the factual situation presented are finite and the capacity of a courthouse does not begin to reach that of a coliseum. Joinder of all members of the putative class is impracticable because it would stretch the facilities and abilities of this Court beyond their elastic limit.<sup>42</sup>

While there can be too few members to satisfy the numerosity requirement, there apparently is no upper limit as far as impracticability of joinder is concerned.<sup>43</sup> The district court in *Committee for G.I. Rights v. Callaway*<sup>44</sup> did not even deem it necessary to state a reason for finding it impracticable to join 145,000 soldiers in the United States Army's European Command in a request to enjoin that command's drug abuse prevention plan.<sup>45</sup>

In any event, the many cases dealing with the impracticability of joinder conflict when viewed solely in terms of the number of members in the class. The cases can only be reconciled by looking at all the circumstances of a given case and remembering that, ex-

<sup>37</sup> *Id.* at 807.

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

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

<sup>40</sup> 372 F. Supp. 441 (N.D. Ill. 1974).

<sup>41</sup> *Id.* at 447.

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

<sup>43</sup> *E.g.*, *Allen v. Monger*, 404 F. Supp. 1081 (N.D. Cal. 1975) (class of 6,000 crewmen on two aircraft carriers seeking to circulate and send a petition to Congress); *Committee for G.I. Rights v. Callaway*, 370 F. Supp. 984 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 466 (D.C. Cir. 1975) (class of 145,000). Large classes do, however, present problems of adequacy of representation, notice and manageability. These points are discussed *infra*.

<sup>44</sup> 370 F. Supp. at 937.

<sup>45</sup> *Id.* The court originally refused to certify the case as a class action for other reasons. See note 79 and accompanying text *infra*.

cept for cases involving very large classes, the impracticability of joinder is not a question to be resolved by mere consideration of numbers.

#### 4. Commonality of questions

Rule 23(a)(2) requires that there be "questions of law or fact common to the class. . . ." <sup>46</sup> This provision does not require that *all* questions be common; nor does it establish any test of commonality other than to suggest by use of the plural "questions" that there be more than one common question.<sup>47</sup> In practice, neither the parties nor the courts spend much time determining whether the commonality requirement has been satisfied.<sup>48</sup> The question is generally subsumed in determining whether the case falls within one of the three categories of class actions of subdivision 23(b). The existence of common questions is essential to a finding that the case falls within any one of those three categories. This will become more apparent during the later discussion of Rule 23(b). But, for example, in Rule 23(b)(2) suits the court must determine that "the party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ." <sup>49</sup> "If these 'grounds' exist, it demonstrates that there are common questions of law or fact. . . ." <sup>50</sup> Similarly, an action is maintainable under Rule 23(b)(3) only if the court finds that common questions predominate over individual issues,<sup>51</sup> and the requirement that common questions *predominate* is obviously more stringent than that there simply be common questions.

#### 5. Typicality

Rule 23(a)(3) requires that the representative parties present claims or defenses that are typical of those of the class.<sup>52</sup> The facts of the named plaintiffs' case need not be identical with those of other class members; it is only necessary that the disputed issue occupy essentially the same degree of centrality to the named plaintiffs' claim as it does to that of the other members of the pur-

<sup>46</sup> FED. R. CIV. P. 23(a)(2); see note 11 *supra*.

<sup>47</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1763, at 604.

<sup>48</sup> *Id.*

<sup>49</sup> FED. R. CIV. P. 23(b)(2); see note 74 *infra*.

<sup>50</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1763, at 610.

<sup>51</sup> See note 87 *infra*.

<sup>52</sup> FED. R. CIV. P. 23(a)(3); see note 11 *supra*.

ported class.<sup>53</sup> The standard of typicality is closely related to the standard of commonality discussed above and the standard of adequacy of representation to be discussed in the next section. There is a tendency by many courts to ignore the typicality requirement or to include it along with commonality in their consideration of whether the representative parties will adequately protect the class.<sup>54</sup> This is usually an adequate approach.

If, however, one closely analyzes a situation for the purpose of resisting class action certification, it may be wise to remember that occasionally the same facts may be viewed differently when considering questions of commonality, typicality, and adequacy of representation. For example, the typicality standard "may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are raised."<sup>55</sup> Likewise, the typicality standard may have a significance independent of the Rule 23(a)(4) adequacy of representation requirement if it is used to concentrate on those situations where the main claims or defenses of the representatives are markedly different from those of the rest of the class even though the representatives may be quite zealous and talented.<sup>56</sup>

#### 6. *Adequacy of representation*

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class.<sup>57</sup> Because of the binding effect of the judgment on absent class members,<sup>58</sup> adequacy of representation is of critical importance in all class actions, and courts are under an obligation to carefully examine the adequacy of representation prerequisite in every case.<sup>59</sup>

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<sup>53</sup> *Taliaferro v. State Council of Higher Educ.*, 372 F. Supp. 1378 (E.D. Va. 1974); *Cottrell v. Virginia Elec. & Power Co.*, 62 F.R.D. 516 (E.D. Va. 1974).

<sup>54</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1764 at 611-13.

<sup>55</sup> *Id.* at 614; e.g., *Elkind v. Liggett & Myers, Inc.*, 66 F.R.D. 36, 41 (S.D.N.Y. 1975).

<sup>56</sup> E.g., *LaMar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 465 (9th Cir. 1973) (typicality not satisfied in an action by a plaintiff class against a defendant class of pawnbrokers for violations of the Truth in Lending Act because, even though the representative could adequately represent the class and their causes of action were similar, the representative's action was against a defendant with whom the rest of the class had no cause of action).

<sup>57</sup> "[T]he representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); see note 11 *supra*.

<sup>58</sup> See note 2 *supra*.

<sup>59</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1765, at 617; e.g., *Eisen v. Carlisle &*



It is instructive to look at the other five prerequisites from the standpoint of their effect on adequacy of representation. For example, if the representative is not a member of the class, he has no standing to sue and as one court has noted, "A plaintiff who is unable to secure standing for himself is certainly not in a position to fairly insure the adequate representation of those alleged to be similarly situated."<sup>60</sup> In short, the named plaintiff should be a member of the class he seeks to represent.<sup>61</sup> He may not be a member, either because he fails to meet his own description of the class, or because he has no personal claim.<sup>62</sup>

Likewise, if the representative's claim is not typical of the claims of the class there will be a failure to meet the adequacy of representation prerequisite as well as a failure to meet the requirement of typicality. Most courts seem to combine these two prerequisites with consideration of whether the representative parties will adequately protect the interests of the class.<sup>63</sup> Further, courts will look closely to see if there are antagonistic or conflicting interests between the representatives and the absent class members. The courts seem to carefully avoid the possibility that the litigants are involved in a collusive suit or that the interests of the representatives and the absent class members are diametrically opposed. However, only a conflict that goes to the core of the dispute will defeat a party's claim to representative status.<sup>64</sup> Moreover, if the court can divide the class into subclasses or separate those issues that merit class action treatment from those which are antagonistic, then the action will not be dismissed.<sup>65</sup>

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Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II). For an excellent account of the tortured 10-year history of this extremely important litigation which resulted in an expensive defeat for a plaintiff with a \$70 claim, see Ward, *The Eisen Case, Notice and Sub-Classes—New Battlelines* in CLASS ACTIONS 1976: THE BASICS 39-50 (PLI Litigation and Course Handbook Series No. 83, 1976).

<sup>60</sup> Kaufman v. Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971). But see Allen v. Monger, 404 F. Supp. 1081, 1088 (N.D. Cal. 1975); Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure?*, 8 VAL. L. REV. 333, 355 & n. 109 (1974) (discussion of the ideological plaintiff).

<sup>61</sup> Sosna v. Iowa, 419 U.S. 393 (1975).

<sup>62</sup> Joslyn, *Adequacy of Representation*, in CLASS ACTIONS 1975: THE BASICS 121-48 (PLI Litigation Course Handbook Series No. 83, 1975) [hereinafter cited as *Adequacy of Representation*]; e.g., Morris v. Connecticut Gen. Ins. Corp., 64 F.R.D. 159 (D. Conn. 1975) (noncollege graduate plaintiff could not represent "graduates of predominantly or wholly black colleges").

<sup>63</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1789, at 657.

<sup>64</sup> *Id.* § 1768, at 639.

<sup>65</sup> FED. R. CIV. P. 23(c)(4).

Recent cases have suggested that intervention or lack of intervention is irrelevant in determining adequacy of representation.<sup>66</sup> In civil rights and Bill of Rights cases, the courts may feel that the constitutional issues are broader than the personal interests of any of the absent class members.<sup>67</sup>

The courts often look closely to ensure that the representative party's attorney is qualified, experienced and generally able to conduct the proposed litigation. This is not so much a matter of age as it is a matter of specialization and prior involvement in class actions.<sup>68</sup>

Finally, the financial means of the named party can also be a factor in determining adequacy of representation. The representative must not be so undercapitalized that he is unable to give notice of the suit to prospective class members or conduct extensive litigation on their behalf.<sup>69</sup>

### B. CLASS ACTIONS MAINTAINABLE UNDER RULE 23(b)

As stated, mere satisfaction of the prerequisites just discussed is not sufficient for the maintenance of a class action. Rule 23(b) sets forth a series of circumstances, the existence of any one of which along with satisfaction of Rule 23(a), warrants the certification of a class action. There are three primary alternative sets of circumstances.

#### 1. *Class actions when separate actions might adversely affect class members or the opposing party*

Rule 23(b)(1) authorizes a class action when it is necessary to prevent possible adverse effects, either on the party opposing the class or on absent class members, that might result if multitudinous separate actions were permitted.<sup>70</sup> The provision is divided into two

<sup>66</sup>7 WRIGHT & MILLER, *supra* note 14, § 1768, at 650, 658 & n.10.

<sup>67</sup> *E.g.*, Cortright v. Resor, 325 F. Supp. 797, 808 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

<sup>68</sup>7 WRIGHT & MILLER, *supra* note 14, § 1766, at 634; *Adequacy of Representation*, *supra* note 62, at 131. This investigation was apparently made in Cullen v. United States, 372 F. Supp. 441 (N.D. Ill. 1974), where the court made the specific finding that counsel was experienced.

<sup>69</sup> *Adequacy of Representation*, *supra* note 62, at 129; *e.g.*, Rolston v. Volkswagen, A.G., 61 F.R.D. 427 (W.D. Mo. 1973).

<sup>70</sup> A class action is maintainable if in addition to the prerequisites of Rule 23(a):-

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

clauses. The purpose of the first clause is to allow class actions to avoid the risk of inconsistent adjudications that would "establish incompatible standards of conduct for the party opposing the class."<sup>71</sup>

The purpose of the second clause is to authorize class actions to avoid the risk of separate adjudications that could be "dispositive of the interests [of nonparty class members or] substantially impair or impede their ability to protect their interests."<sup>72</sup> The intention here is to deal with situations where, for example, numerous parties are making claims on a limited fund or where individual shareholders are bringing an action to compel the declaration of a dividend that all the shareholders are entitled to.<sup>73</sup>

## 2. *Class actions for injunctive or declaratory relief*

Rule 23(b)(2) provides that a class action is appropriate when the defendant has acted or refused to act on grounds generally applicable to the class and the representatives are seeking "final injunctive relief or corresponding declaratory relief."<sup>74</sup> As the first clause indicates, class action treatment is useful in this situation because it will settle the legality of the behavior of the party opposing the class in a single action. An injunction on behalf of one plaintiff is not always the same thing as an injunction on behalf of an entire class, particularly if the single plaintiff's case is mooted before the completion of trial or appellate review,<sup>75</sup> or if the defendant is recalcitrant and forces multiple suits.<sup>76</sup>

FED. R. CIV. P. 23(b)(1). The discussion of 23(b)(1) will be brief because, even though it provides the perfect example of a class action involving a joint right, in practice very few cases fit its strict dimensions. One court has even gone so far as to hold that Rule 23(b)(1)(A) is applicable only in those cases in which there is a total absence of individual issues. *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M.D. Pa. 1973).

<sup>71</sup> FED. R. CIV. P. 23(b)(1)(A); see note 70 *supra*.

<sup>72</sup> FED. R. CIV. P. 23(b)(1)(B); see note 70 *supra*.

<sup>73</sup> These shareholders' actions are to be distinguished from derivative actions by shareholders to enforce a right of a corporation which are provided for in FED. R. CIV. P. 23.1. An action that is not for the benefit of the corporation but merely seeks to enforce the rights of shareholders against the corporation is not a derivative action. When a personal action of this nature is brought by representative shareholders, it may qualify as a class action under Rule 23(b)(1)(B).

<sup>74</sup> [A class action is maintainable if in addition to the prerequisites of Rule 23(a):]

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole: . . . .

FED. R. CIV. P. 23(b)(2).

<sup>75</sup> *E.g.*, *Sosna v. Iowa*, 419 U.S. 393 (1975).

<sup>76</sup> Morrison, *Bringing a Case Against a Federal Agency* in "PUBLIC INTEREST" LITIGATION 23, 28 (FLI Litigation Course Handbook Series No. 80, 1975). This article contains an excellent checklist for either side of federal agency litigation.

"Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as the basis for later injunctive relief."<sup>77</sup> Further,

action or inaction is directed to a class within the meaning of the subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.<sup>78</sup>

In situations where the plaintiff's prayer is predominantly for money damages, he must either delete the claim for money damages or meet the more stringent requirements of the third category of class actions as set forth in Rule 23(b)(3) where common questions are required to predominate over individual questions.

For example, in *Committee for G.I. Rights v. Callaway*, the court originally refused to certify the case as a class action in part because of the plaintiffs' request for damages. Only after plaintiffs abandoned their damage claims in the pretrial proceedings did the court certify the case under the Rule 23(b)(2) injunctive relief category of class action.<sup>79</sup> Conversely, in *Cullen v. United States*,<sup>80</sup> an action for an injunction, declaratory judgment, and money damages, the plaintiff had to gain certification under the Rule 23(b)(3) common question predominance category.

Most cases brought under the injunctive relief category of class actions involve civil or constitutional rights where, for example, a party is charged with discriminating unlawfully against a class.<sup>81</sup> However, there are many examples of other types of actions, such as price discrimination and environmental suits.<sup>82</sup> In addition to the *Committee for G.I. Rights* case, there are three other recent examples of injunctive relief category class action cases which are typical of the complex cases pending against the military.

The case of *Maxfield v. Callaway*,<sup>83</sup> involving reserve officers who were passed over for promotion by improperly constituted promotion boards, was brought as an injunctive relief category class action. The case is currently in abeyance because the district court on September 16, 1975, at the request of the plaintiffs, dismissed the case without prejudice so the officers could exhaust their administrative

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<sup>77</sup> Notes of Advisory Committee on 1966 Amendments to Rules of Civil Procedure, reprinted at 39 F.R.D. 69, 98, 100 (1966) (Rule 23(b)(2)).

<sup>78</sup> *Id.*

<sup>79</sup> 370 F. Supp. 934 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 466 (D.C. Cir. 1975).

<sup>80</sup> 372 F. Supp. 441 (N.D. Ill. 1974).

<sup>81</sup> 7A WRIGHT & MILLER, *supra* note 14, § 1775, at 28.

<sup>82</sup> *Id.* at 28-29.

<sup>83</sup> Civ. No. K 75-501 (D. Md. filed Apr. 21, 1975).

remedies before the Army Board for the Correction of Military Records.

Another important military case in litigation is *American Federation of Government Employees v. Hoffmann*,<sup>84</sup> which involves a reorganization of the United States Army Ballistic Missile Defense System Command (BMDSCOM) in Huntsville, Alabama. The plaintiffs have alleged that the Secretary of the Army and the Commanding General of BMDSCOM violated the law in executing three private service contracts. On behalf of all civil service employees at BMDSCOM, the plaintiffs are seeking injunctive relief to prevent their discharge during the life of any of the challenged contracts. On January 5, 1976, the district court certified the case as a class action under Rule 23(b)(2).

Finally, the U.S. Army Tank Automotive Command, in Warren, Michigan was involved in a class action employment discrimination suit involving alleged failures by the Army to fully implement the "Upward Mobility Plan" for 1974 and to meet its goal for recruitment of minority employees.<sup>85</sup> The government's motion to dismiss was granted on April 13, 1976 on the grounds that the named plaintiffs lacked standing as they had been recruited and hired before 1974 and because they had not shown that they had not been trained and promoted to the full extent of their abilities. The court further held that a class action could not be instituted without the presence of a named plaintiff with standing to represent the class.<sup>86</sup>

### 3. *Class actions when common questions predominate*

Unlike the categories discussed above, which provide for the bringing of a class action based on the type or effect of the relief being sought, this subdivision authorizes a class action when common questions of law or fact exist and a determination is made that the class action is superior to other available methods for resolving the dispute fairly and efficiently.<sup>87</sup> In general, this type of class

<sup>84</sup> Civ. No. 75-G-0652-NE (N.D. Ala., filed 1975). See also *American Fed'n of Gov't Employees v. Callaway*, 398 F. Supp. 176 (N.D. Ala. 1975).

<sup>85</sup> *James v. Rumsfeld*, Civ. No. 75-72478 (E.D. Mich. 1975).

<sup>86</sup> Discussion of the issues and problems presented by employment discrimination suits is beyond the scope of this article. See Rosenblum, *Equal Employment Suits*, in "PUBLIC INTEREST" LITIGATION 99-113 (PLI Litigation Course Handbook Series No. 80, 1975). This article is written from a plaintiff's point of view and is current except for its discussion of *Hackley v. Johnson*, 360 F. Supp. 1247 (D.D.C. 1973), and *de novo* review. The district court's decision was reversed by the Court of Appeals for the District of Columbia Circuit late in 1975 in *Hackley v. Roudeshush*, 520 F.2d 108 (D.C. Cir. 1975).

<sup>87</sup> (b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

action is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action."<sup>88</sup>

The two key words in this subdivision are "predominate" and "superior." In reality they are two additional prerequisites for this type of action which are not applicable in the other two categories of class actions. First, Rule 23(b)(3) requires that the court find that common questions of law or fact predominate over any questions affecting only individual members.<sup>89</sup> The predominance test is really an attempt to balance the right to bring individual actions so that each person can protect his own interests with the economies that can be achieved by allowing a multi-party dispute to be resolved on a class action basis.<sup>90</sup> Second, the court must find "that a class action is superior to other available methods for a fair and efficient adjudication of the controversy."<sup>91</sup> Like the predominance test, this test is somewhat vague and the court is again called upon to strike a balance. In some cases, there is no alternative to a class action and this determination will usually settle the matter in favor of a class action.<sup>92</sup>

To aid the court in resolving whether these two prerequisites have been met, Rule 23(b)(3) lists four nonexclusive factors which the court should consider: the interest of the individual members of the class in controlling their own cases; whether any litigation concerning the controversy has already commenced; the desirability of concentrating the trial in a single forum by means of a class action, in contrast to allowing the claims to be litigated separately in the courts where they would ordinarily be brought; and the problems of man-

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

<sup>88</sup> 7A WRIGHT & MILLER, *supra* note 14, § 1777, at 44-45.

<sup>89</sup> FED. R. CIV. P. 23(b)(3).

<sup>90</sup> 7A WRIGHT & MILLER, *supra* note 14, § 1777, at 47.

<sup>91</sup> FED. R. CIV. P. 23(b)(3).

<sup>92</sup> Sullivan & Fuchsberg, *Major Class Action Considerations*, in CLASS ACTIONS PRIMER 11 (J. Fuchsberg ed. 1973). There are alternatives, however, to a class action, including use of intervention and joinder under Federal Rules 19 and 24. Another option is to encourage the parties to use a test case or to apply 28 U.S.C. § 1407 (1970), which authorizes individual actions to be brought, consolidated for pretrial purposes before the Judicial Panel on Multidistrict Litigation, and then tried separately by the courts in which they originally were instituted. 7A WRIGHT & MILLER, *supra* note 14, § 1779, at 59-65.

agement of the class action which are likely to arise.<sup>93</sup> While courts often will not specifically discuss these factors in their written opinions,<sup>94</sup> they are considered in most common question predominance type class actions.

In common question predominance type class actions, the notice required to be given to absent class members is more stringent than that required in the other two categories of class actions. The requirements are contained in Rule 23(c)(2)<sup>95</sup> and it should be noted that individual notice is required for all members who can be identified through reasonable effort, and that the judgment will include all members unless they opt out by requesting exclusion. Individual notice in 23(b)(3) predominance cases is not a discretionary matter which can be waived.<sup>96</sup> Finally, it should be noted that in situations where the relationship between the parties is truly adversarial, the cost of notice to members of the class must initially be born by the litigant who represents the class, and inability to pay for the notice requires dismissal of the class action.<sup>97</sup>

### C. THE RELATIONSHIP BETWEEN RULE 23 AND JURISDICTIONAL CONSIDERATIONS

As a general rule, styling a suit as a class action does not alter any other jurisdictional or procedural requirements. Rule 82 of the Federal Rules of Civil Procedure makes it clear that Rule 23 cannot be construed to broaden the subject matter jurisdiction of the district courts.<sup>98</sup> "Thus a class action can be maintained only if it complies with the requirements of the jurisdictional statute under which it is brought."<sup>99</sup>

The question of whether any jurisdictional amount requirement is involved in a class action suit is tied to the question of whether class members may aggregate their claims or whether each one must

<sup>93</sup> *Notes of Advisory Committee on 1966 Amendments to Rules of Civil Procedure reprinted in* 39 F.R.D. 69, 104 (1966) (Rule 23(b) (3)).

<sup>94</sup> *E.g.*, *Cullen v. United States*, 372 F. Supp. 441 (N.D. Ill. 1974) (court discussed the prerequisites of 23(a) and simply concluded that the predominance and superiority tests of 23(b)(3) and been met).

<sup>95</sup> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

FED. R. CIV. P. 23(c)(2).

<sup>96</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>97</sup> *Id.*: 7A WRIGHT & MILLER, *supra* note 14, § 1788, at 169-70.

<sup>98</sup> 7 WRIGHT & MILLER, *supra* note 14, § 1735, at 547-48.

<sup>99</sup> *Id.* at 548.

claim sufficient damages to qualify under the statute.<sup>100</sup> The Supreme Court in *Zahn v. International Paper Co.*<sup>101</sup> established that if the \$10,000 jurisdictional amount is required, either because the jurisdiction is grounded on diversity,<sup>102</sup> or on a federal question,<sup>103</sup> each member of the class, named or unnamed, must have a claim in excess of \$10,000. The effect of *Zahn* is not as great as would appear at first glance for several reasons. First, many of the "federal question" statutes such as those dealing with civil rights, anti-trust, and securities laws have no jurisdictional amount requirement.<sup>104</sup> Secondly, in some constitutional rights cases courts have held the rights to be inherently and automatically worth more than \$10,000.<sup>105</sup> Other courts, while not automatically finding the statutory amount, merely require the plaintiff to show either a present probability that the damages, or the *value* of the right sought to be protected in injunction cases, exceeds \$10,000 or that the cost to the defendant of enforcing the rights claimed by the plaintiff might well exceed \$10,000.<sup>106</sup>

This confusion over the proper test for determining the amount

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<sup>100</sup> *Id.* at 558-65.

<sup>101</sup> 414 U.S. 291 (1973).

<sup>102</sup> 28 U.S.C. § 1332 (1970).

<sup>103</sup> 28 U.S.C. § 1331 (1970).

<sup>104</sup> *E.g.*, 42 U.S.C. § 2000e-5(f) (1970) (Equal Employment Opportunity Act); 42 U.S.C. § 1983 (1970) (Civil Rights Act).

<sup>105</sup> *E.g.*, *Allen v. Monger*, 494 F. Supp. 1081, 1088 (N.D. Cal. 1975) (dictum); *Cortright v. Resor*, 325 F. Supp. 797, 808-11 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). *Contra*, *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973) (An action for declaratory judgment and injunction to obtain use of chapel facilities at military base for anti-Vietnam war memorial service was subject to jurisdictional amount requirement of the federal question statute, and because plaintiffs admitted that only "symbolic damages" were involved, the court dismissed the action on the theory that "a claim not measurable in 'dollars and cents' fails to meet the jurisdictional test of amount in controversy. . . ." *Id.* at 954-55.

<sup>106</sup> *E.g.*, *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 472 (D.C. Cir. 1975) (claim for injunctive rather than financial relief concerning basic civil rights does not make a claim nonjusticiable under 28 U.S.C. § 1331 (1970) and the court held that the jurisdictional amount requirement was satisfied when viewed from the pecuniary standpoint of either the plaintiffs or the defendants); *Spock v. David*, 469 F.2d 1047, 1050-53 (3d Cir. 1972), *rev'd on other grounds*, 424 U.S. 828 (1976) (first amendment rights are not incapable of valuation and because the court could not determine that political candidates who were barred from entering Fort Dix would be unable to justify their jurisdictional claims based on the value of their campaign, the court of appeals would not dismiss the case for lack of federal question jurisdiction); *Allen v. Monger*, 404 F. Supp. 1081, 1087-88 (N.D. Cal. 1975) (jurisdictional amount requirement satisfied in suit to allow circulation of congressional petitions relating to assignment of two aircraft carriers by looking to the costs that the Navy would have saved had the two ships not been deployed away from their locations in California).



in controversy when the right asserted cannot be valued in dollars and cents has been obviated for suits against the federal government. A recent amendment to the basic federal question statute<sup>107</sup> eliminated the \$10,000 jurisdictional amount requirement in federal question suits against the United States or its agencies, or any officer or employee of the United States who is sued for acts performed in his official capacity.

### III. CONCLUSION

Rule 23 is a procedural device and theoretically should play a subordinate role to the substantive law. There is, however, some question whether the tail wags the dog, for the potentially crippling effect of a class action is enormous. The initial district court opinion in *Committee for G.I. Rights* enjoining the Army's drug abuse prevention program in Europe was released in January of 1974.<sup>108</sup> The court of appeals reversed the decision, holding the program essentially constitutional; but that decision was handed down in September 1975.<sup>109</sup> In the intervening time, indeed, for months before the district court decision, there was a considerable turmoil over how the Army could deal with what it considered to be a drug epidemic which seriously threatened its fighting effectiveness. It is safe to say the crippling effects of the district court decision would have been less had the case not been a class action. If that had been the case, the Army would have only been concerned over whether the constitutional rights of a limited number of individuals had been violated. Instead they were confronted with a class of 145,000 individuals.

Discovery problems can also be magnified by styling a case a class action. For example, in the case of *Berlin Democratic Club v. Rumsfeld*,<sup>110</sup> in a memorandum and order denying the plaintiff's petition for class action status for a group of U.S. citizens in Germany subject to Army surveillance, the district judge stated:

If a class were to be certified, plaintiffs would be permitted to inquire into the past and present scope of military intelligence gathering activities in Europe to determine if any of the practices alleged in the complaint have been inflicted on others. Identification of persons surveilled, the time period during which they were being surveilled, the type of surveillance methods, etc., would necessarily be disclosed. While Rule 26(c) provides protective procedures . . . which would keep much of the

<sup>107</sup> Act of Oct. 21, 1976, Pub L. No. 94-575, 90 Stat. 2721.

<sup>108</sup> *Committee for G.I. Rights v. Callaway*, 370 F. Supp. 934 (D.D.C. 1974).

<sup>109</sup> 518 F.2d 466 (D.C. Cir. 1973).

<sup>110</sup> 410 F. Supp. 144, 163-64 (D.D.C. 1976).

information confidential, it can fairly be anticipated that discovery of these matters would become enmeshed in complex procedural motions resulting in *in camera* inspections and subsequent delay.

In denying certification under both Rule 23(b)(2) and (b)(3), the court stated that the alleged surveillance—if found to exist and if found to be unconstitutional—could effectively be prohibited by an injunction without the need for class action and its far broader discovery requirements. It will undoubtedly be less cumbersome for the Army to search its records pertaining to a limited number of plaintiffs than to do the same for a class of all United States citizens in Germany.

On the other hand, class actions under Rule 23 (and similar state statutes) provide small claimants with a method of obtaining redress for claims otherwise too small for individual suits, and also provide a way for courts to eliminate repetitious litigation. However, in the conduct of its daily operations and in the promulgation of regulations, the military should not be unmindful of the potential effect of a class action suit. It has already seen the crippling effect of class actions on far-ranging activities because of the sweeping nature of the remedy. Furthermore, with the current recognition of the "constitutional tort," the possibility of a class action brought on behalf of all the members of a unit seeking damages because, for example, an inspection was conducted illegally or searches were routinely not based upon probable cause, should not be forgotten.

In preparing a defense to a class action, counsel should initially be concerned with whether subject matter jurisdiction and a justiciable controversy exist. One prerequisite of justiciability is that each plaintiff must have standing. Furthermore, no class action can be instituted without the presence of a named plaintiff with standing to represent the class.

Because there are a number of prerequisites to class action certification that must be established by the party proposing certification, the analysis for determining whether class action certification is available is fairly straightforward. Assuming that there is subject matter jurisdiction and that the plaintiffs have standing, counsel opposing certification must demonstrate that one or more of the prerequisites of Rule 23(a) or (b) discussed in this article have not been met. Counsel proposing certification often assume the existence of the Rule 23(a) prerequisites and summarily conclude that the requirements of all three of Rule 23(b)'s alternative categories have been met. Opposing counsel should not accept plaintiff's conclusions unless they are factually and legally supported. For exam-

ple, defense counsel should never assume that the plaintiff is a member of the class he seeks to represent. It is always possible that he is not, either because he fails to meet his own definition of the class or because he lacks standing.

In summary, government counsel should be skeptical when a plaintiff asserts his class action can be maintained under all three subdivisions of Rule 23(b). For example, the plaintiff's statement that "the prosecution of separate actions by . . . individual members of the class would create a risk of (A) inconsistent or varying adjudication . . . which would establish incompatible standards of conduct for the party opposing the class, . . ." <sup>121</sup> may be undercut by the fact that no other member of the class has filed a separate action, and none is likely to do so. The requirements for each subdivision are different and counsel for the government must go over each issue and prerequisite point by point.

Accordingly, military attorneys must be apprised of both the possibilities and limitations of class action suits under Federal Rule 23. With knowledge of the drastic effects such a suit can have on command activities, judge advocates can better counsel their commanders when regulations or policies are being formulated; understanding the device's limitations, military attorneys can restrict the impact of subsequent litigation if important military policies are challenged in a class action suit.

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<sup>121</sup> FED. R. CIV. P. 23(b)(1)(A).



## BOOKS REVIEWED & BRIEFLY NOTED \*

### THE MY LAI MASSACRE AND ITS COVERUP: MILITARY JUSTICE MISCONSTRUED

*The My Lai Massacre and Its Coverup: Beyond the Reach of Law?*  
Edited by Joseph Goldstein, Burke Marshall and Jack Schwartz.  
New York: The Free Press. 1976. Pp. 586. Cloth, \$10.95, Paper,  
\$2.95.

*Reviewed by Norman G. Cooper \*\**

*The My Lai Massacre and Its Coverup: Beyond the Reach of Law?* consists of Volume I of the Peers Report<sup>1</sup> with a short commentary by two Yale University Law School professors, Joseph Goldstein and Burke Marshall, and Jack Schwartz, a graduate of that law school, together with supplementary materials. By itself, the reproduction of the Peers Report (the official Department of the Army investigation of both the My Lai incident and its cover-up) justifies purchase of this book. The Report provides a platform for the authors' suggestion that an appropriate legislative and/or executive body explore how to sever responsibility for the investigation and prosecution of My Lai-like crimes from the military and vest jurisdiction over such offenses in the federal executive and judicial system. Of course, the authors' proposal presupposes the inadequacy of the Peers and related military investigations into the My Lai tragedy as well as a failure of the military criminal justice system.

To any military lawyer familiar with the so-called My Lai Cases, these suppositions are not acceptable. The authors assert, for example, that "the Army has failed to establish who among those in command and in the field were responsible, and to hold them accountable. . . ."<sup>2</sup> The Peers Report itself goes far to identify both command and criminal responsibility for what occurred at My Lai. Indeed, the authors acknowledge that "[the] report is thorough in detail and generally forthright in its findings."<sup>3</sup> The authors,

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\* The opinions and statements in these reviews are the personal opinions of the individual reviewers and do not necessarily represent the views of the Department of the Army, The Judge Advocate General's School or any other governmental agency.

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<sup>1</sup> THE REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATION INTO THE MY LAI INCIDENT (1974) [PEERS REPORT].

<sup>2</sup> GOLDSTEIN, MARSHALL & SCHWARTZ at 4.

<sup>3</sup> *Id.* at 11.

moreover, fail to note that the actual criminal prosecutions were not necessarily based upon the Peers Report, but were the result of lengthy and wide-reaching investigations by the Army's Criminal Investigation Division which ultimately involved over five hundred statements, twenty-four separate reports, and more than forty-five suspects, including ex-soldiers. In short, the Army did act and decisively so to investigate and determine responsibility for My Lai.

While it may have been possible in many instances to identify those individuals responsible for misdeeds at My Lai in 1968, it was quite another proposition to hold those so identified criminally responsible two years later. Indeed, the inquiry of Lieutenant General William R. Peers focused upon the adequacy and suppression of immediate post-My Lai command investigations, not upon the development of any evidence which would be admissible in a criminal prosecution. Many of the necessary facts about My Lai did not surface until during the preparation and even after the completion of the Peers Report; and military prosecutors were hampered in establishing the necessary facts beyond a reasonable doubt because witnesses had lapses of memory or grew reluctant to testify, and because many essential witnesses themselves were accused or suspected of crimes at My Lai. Then, too, many of the allegations in the Peers Report formed the basis of certain charges which were hastily drafted to meet the two year statute of limitations which expired on March 16, 1970. In brief, there was a considerable chasm to cross between the accusations in the Peers Report and proof of guilt beyond a reasonable doubt in a criminal prosecution.

The authors of *The My Lai Massacre and Its Coverup* have misread the record in concluding that the Army was not institutionally responsive to war crimes. Their premise is specifically refuted by two legal circumstances. First, the majority of those individuals at My Lai were "beyond the reach of law," not as the result of any relevant investigatory or prosecutorial shortcomings, but rather because the military has no power to prosecute ex-soldiers. Therefore, it is misleading to state as the authors do, that "the Peers Report is at once a powerful vindication of the law of war and an example of the military's ignoble failure to enforce that law,"<sup>4</sup> when the military is constitutionally prohibited from exercising court-martial jurisdiction over discharged servicemen.<sup>5</sup> The authors choose to pass over this rather substantial barrier to prosecution of all those responsible for crimes at My Lai with the footnote observation that "it is not clear

<sup>4</sup> *Id.* at 14.

<sup>5</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

from the statistics made public with the Peers Report how many escaped liability for this reason. . . ."<sup>6</sup> To the contrary, the Peers Report itself clearly indicates that of the twenty-eight officers (the class of individuals most likely to remain in the Army and hence be subject to court-martial jurisdiction) suspected of involvement in the coverup of My Lai crimes, nine were either deceased or beyond military jurisdiction as civilians.<sup>7</sup>

Second, the authors' claim of institutional incapacity to deter or punish crimes similar to those that occurred at My Lai is specifically refuted by the authors' own footnote listing of war crime cases.<sup>8</sup> Even a partial listing of reported cases clearly demonstrates the successful prosecution and punishment of perpetrators of war crimes by the military. In addition, the prosecution of cases separated in time, distance and circumstance from actual events is difficult in any jurisdiction, and the My Lai cases were made more so by the unavailability of key individuals such as the Task Force Commander, Lieutenant Colonel Frank A. Barker (deceased), who was essential to the planning, execution and reporting of the My Lai operation. Thus, the successful prosecution of other war crimes cases, the legal and testimonial barriers to successful prosecution of the My Lai cases and the overall historical evidence do not point to an institutional failure on the part of the military to investigate and prosecute war crimes.

*The My Lai Massacre and Its Coverup* is valuable not because of the authors' particular message, but because it contains a major historical document, Volume I of the Peers Report. For the student of war

<sup>6</sup> GOLDSTEIN, MARSHALL & SCHWARTZ at 15 n.4.

<sup>7</sup> See *id.* at 318.

<sup>8</sup> Reported cases: see, e.g., *United States v. Keenan*, 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969); *United States v. Schultz*, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969); *United States v. Crider*, 45 C.M.R. 815 (N.C.M.R. 1972); *United States v. Willey*, 44 C.M.R. 390 (A.C.M.R. 1971); *United States v. Bumgarner*, 43 C.M.R. 559 (A.C.M.R. 1970); *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968); *United States v. Potter*, 39 C.M.R. 791 (N.B.R. 1968).

Unreported courts-martial: *The New York Times*, quoting Army sources, said that of those charged with crimes in Vietnam similar to that for which First Lieut. William L. Calley, Jr. was convicted, 38 had been convicted under U.C.M.J. Art. 118 (murder), 20 had been convicted of lesser offenses, and 23 had been acquitted. *The New York Times*, April 7, 1971, 12, col. 4.

Other war crimes: see generally Citizens Commission of Inquiry (ed.), *The Dellums Committee Hearings on War Crimes in Vietnam* (1972); Vietnam Veterans Against the War, *The Winter Soldier Investigation* (1972); Kunen, *Standard Operation Procedure* (1971); Coates, Limquero, and Weiss (eds.), *Prevent the Crimes of Silence* (1971); Russell, *War Crimes in Vietnam* (1967).

*Id.* at 15 n.7.

and military law this book is a necessary acquisition, one which provides some significant insight into the tragic events of My Lai and their aftermath.



## CUSTER TAKES THE STAND

Jones, Douglas C., *The Court-Martial of George Armstrong Custer*. New York: Scribners. 1976. Pp. 291. \$8.95.

*Reviewed by Joseph A. Rehyansky \**

George Armstrong Custer faced a court-martial in 1867 on charges stemming from his bungled campaign against the Cheyenne. He was sentenced to be suspended from the Army for a year, but his old friend Phil Sheridan got most of the sentence set aside and gave the 7th Cavalry back to its Golden Cavalier. That trial, however, is not the subject of Colonel Jones' fascinating novel. We are here concerned with Custer's second brush with the military justice system, which of course never took place. But it would have, the author posits, had Custer been lucky enough to survive the holocaust in Montana on what the Plains Indians called the Greasy Grass, and white men have come to know as the Little Big Horn.

Serious students of the battle believe that Custer did not die as Errol Flynn played it—ringed by his troopers and blazing away with his twin Colts to the last. He was probably shot out of his saddle in midstream as the Sioux and Cheyenne, who had started to retreat, realized how small Custer's 264-man element was, and turned to regroup and encircle him. There were between 4,000 and 6,000 braves—more hostiles than Custer had cartridges—the largest single assemblage of Indian warriors ever gathered, before or since. Custer combined this bit of unique bad luck with a recklessness that defies belief. No effective reconnaissance was performed before the attack and for no discernible reason Custer chose to split the 655-man regiment into three detachments. The detachment under Captain Benteen missed the area of the main engagement by so wide a mark that it never even heard the shots that annihilated Custer's troops.

So much for history. Colonel Jones begins his novel in New York, eighteen months after the battle. Custer has been found alive on the battlefield that now bears his name, nearly dead from loss of blood and exposure. But he has recovered. Ulysses Grant, stung by Custer's testimony before congressional committees investigating the corruption of presidential appointees on the frontier, has had enough of Custer. William Sherman, the Commanding General of the Army, has long deplored Custer's persistent dabbling in politics,

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his shameless show-boating, his tasteless sale of highly exaggerated first person narratives describing his own exploits, and his reputed corruption in soliciting kickbacks from frontier trading posts. Sherman dutifully agrees with the President. But you can't court-martial a commander for losing, so an assortment of well-documented instances of disobedience are charged against him. All of them are directly related to the battle and to Custer's preparations—or lack of preparations—for it. Democratic party bigwigs, the Broadway theater set (in whose company Custer actually spent the last few months before the famous fight while he was supposed to be training his regiment for the campaign), and half the newspapers in New York cry "Scapegoat!" The Army is split down the middle: Custer has never been popular with sober professionals, but he has no monopoly on negligence. More than one general officer still on active duty blundered badly enough during the Civil War to cause the decimation of his own command.

Every one of the book's characters is real, sketched from life and authentic records. For the prosecution there is Major Asa B. Gardiner, one of eight judge advocates actually on active duty in 1877. He would earn a share of real life fame a few years later when he would become the only judge advocate ever to prosecute an incumbent Judge Advocate General.<sup>1</sup> Representing the defense is Major William Winthrop, perhaps the most erudite judge advocate of the 19th century. Custer retains civilian counsel, too, the brilliant club-footed trial lawyer Allan Jacobsen, an associate in the mid-western law firm headed by Custer's father-in-law. Major General John M. Schofield, Superintendent of West Point, is the president of the court. He has a brilliant war record and is considered one of the most intellectual officers in the Army; his reputation is marred only by his eccentric one-man campaign to authorize the establishment of a major naval installation in Hawaii, at Pearl Harbor. Among the other members of the court are Major General Irwin McDowell and Brigadier General John Pope, who between them cost the Union two armies at First and Second Bull Run.

Custer is there, too, all the George Custers and all the reputations he carried with him: flamboyant, colorful, brilliant, reckless, irresponsible, ambitious, dedicated. He was known as the Golden Cavalier and the Boy General. He was also known by his men as Horse Killer, for the relentless way he drove men and mounts on campaign. The 7th Cavalry in fact had the highest desertion rate of

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<sup>1</sup> See Rohie, *The Court-Martial of a Judge Advocate General: Brigadier General David G. Suaim (1884)*, 56 MIL. L. REV. 211, 218, 220-34 (1972).

any cavalry regiment in the Army. He willfully chooses to antagonize the court by appearing before it in the uniform of a major general of volunteers, a rank he attained during the Civil War before his 25th birthday. Now, at the time of the trial, he is serving as a Regular Army lieutenant-colonel, and is not quite 38 years old.

And there is the Army. General Bruce C. Clark, retired, has written that "The Army isn't what it used to be. It never was." But this is a much different Army from the one we know: poorly fed, occasionally paid, pathetically understrength, and ill-equipped. Many of Custer's men died while trying to clear jammed shell casings from the barrels of their single-shot Springfields; four or five rounds fired from these weapons and they required a full cleaning, else the powder-caked barrels locked the next cartridge in place. Most of the Sioux were armed with Winchester repeaters. If these inadequacies weren't enough to demoralize a dedicated man, there was also the rank structure: this was an Army top-heavy with field grade officers, like Custer himself, who had been reduced from higher volunteer ranks earned quickly during the heady days of the Civil War. Newly commissioned lieutenants had, on the average, 15 years to wonder what being a captain was like before they actually found out. And while they waited there was always the chance of winding up with their hair hung as a trophy in a Sioux lodge or Cheyenne encampment. This was the era in which General of the Army Douglas McArthur's father, for instance, after having been a volunteer colonel and a Medal of Honor winner in the Civil War, began a tenure as a Regular Army captain which would last 23 years.<sup>2</sup>

Finally, there is Libby. From any perspective she appears to have been a remarkable woman. Libby was 21 when she married the dashing young general, and only 33 when he died. She subsequently wrote three successful books about their life together on the frontier,<sup>3</sup> and never remarried. She died in New York in 1933, at age 90. Elizabeth Bacon Custer was beautiful, brilliant, conniving and, for some inexplicable reason, utterly devoted to her "Autie." In the novel she regards her husband's flirtations as she would a small child's petty transgressions and remains steadfastly convinced that he is a genuine hero, wronged by an Army he loves. During the trial

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<sup>2</sup> Arthur MacArthur. For those who stayed on through the Spanish-American War, the rank structure loosened up a bit. He eventually retired as a lieutenant-general.

<sup>3</sup> *BOOTS AND SADDLES* (1885); *FOLLOWING THE GUIDON* (1891); *TENTING ON THE PLAINS* (1887).

she knows just when to smile, when to avert her eyes, when to faint (as when Major Reno describes how his face and mouth were covered with the brains of his Indian scout who, galloping next to him, took a Sioux bullet in the forehead). The author gives her the last word in the novel as she maneuvers—successfully—for an advantage for Custer.

The trial itself is authentic, yet suspenseful and fast moving. The ritual of courts-martial has changed over the years in many respects, but the formality, fairness, and openness of the proceeding closely parallels current practice. When Custer elects to take the stand in his own defense, he is read a rights warning by General Schofield that could have come from a court-martial tried yesterday. Through the parade of witnesses the battle is recreated, step by bloody step, to the ultimate disaster. One of the government's witnesses is an Indian scout who survived, and who provides one of the most emotionally charged moments in the trial. He is resplendent in ceremonial dress, and must testify through an interpreter. He claims to have told Custer that there were many more hostiles out there than the 7th Cavalry could handle, and that they should follow their original plan and wait for the rest of General Terry's column before attacking. No one in this courtroom in civilized, elegant old New York believes the Indian, and he senses the skepticism. The prosecution questions him only briefly and the defense doesn't bother to cross-examine. He is excused, but instead of leaving the courtroom he pauses in front of the defense table, points a trembling finger at Custer's face, and bellows in English, "Too many, Yellow Hair, *too many!*" Custer sits frozen with rage, glaring back.

Everyone knows throughout the trial that, win or lose, Custer is through. If convicted he will undoubtedly not be imprisoned and will probably not even be cashiered. But even if acquitted, he will never again command the respect he once did after the full story of the Little Big Horn has been told in court, under oath, by survivors. Indeed, even before the trial begins, Custer's beloved 7th gets a new, permanent commander. It can never be his again. The unit identification which held sway over our Army virtually until World War II is something we can never fully understand, but Custer and his colleagues do. This tradition brings about the most poignant moment in the story. The verdict is brought in on a Friday afternoon. As Custer and his party are escorted from the Governor's Island courtroom, formal retreat is under way. They stop to pay their respect as "To the Colors" is played. The drum major sees Custer out of the corner of his eye and when the music is done and the band

moves off, he brings his baton up smartly and then down again. The band blares "Garry Owen."<sup>4</sup> Custer watches in tears, saluting as the band marches away and the notes grow fainter and fainter in the chilly, drizzly dusk of the early winter evening.

This book is well and authentically written, but the heavy hand of the amateur prose stylist is evident here and there. Jones, a retired Army lieutenant-colonel, has written only one other book, and this is his first novel. His flair for introspection on the part of his characters leads him into blatant inaccuracy at least once: Major Gardiner, the prosecutor, finds himself wishing he had some combat experience so he might identify more fully with the story unfolding in court. Gardiner, in fact, though a lawyer, served as a cavalry officer through a large part of the Civil War and won the Medal of Honor at Gettysburg.<sup>5</sup>

Nevertheless, this is a good book, filled with history's echoes and personalities, worth the writing and fun to read.

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<sup>4</sup> Which was, and still is the 7th Cavalry's Regimental Song.

<sup>5</sup> See *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 83 (1975).

Nesbitt, Murray B., *Labor Relations in the Federal Government Service*. Washington, D.C.: BNA. 1976. Pp. vii, 545. \$17.50.

Professor Murray Nesbitt's *Labor Relations in The Federal Government Service* traces in meticulous detail the evolution of labor organizations representing civilian employees of the federal government. Professor Nesbitt, an Associate Professor of Political Science at Queens College, City University of New York, has taught or worked with public sector labor law for the last twenty-five years and began work on this book under a grant from the Institute of Labor Relations at New York University. Completion and publication followed a number of years of additional research.

Unfortunately, the fruition of Professor Nesbitt's remarkably detailed research is a text that is of primarily historical interest. Practitioners of federal labor relations law who are in search of specific guidance to aid in the resolution of newly developed questions on representation matters, negotiability, or third party hearings under Executive Order 11491 are apt to find this book to be of limited value. While historical perspective will obviously provide useful insight for solving current problems, Professor Nesbitt's book is not (nor was intended to be) the much needed analysis of decisions of the program authorities who are responsible for settling specific issues in the current federal labor relations program.

Professor Nesbitt presents an almost election-by-election account of the internal and external struggles of federal labor organizations from their nineteenth century origins through the turbulent periods of World War I, the New Deal, and the early 1960's up to their status under President Ford's Executive Order 11838. Of chief interest to management and union labor counselors alike is his excellent discussion of the constitutional theories most readily adopted by the courts to limit judicial review of attacks upon the executive's role in administering federal labor relations—the doctrines of governmental sovereignty and separation of powers. Also of potential assistance to labor counselors is Professor Nesbitt's treatment of federal wage control policies and public sector strikes.

Professor Nesbitt asserts that there is an increasing trend for civil servants to withhold their services despite undiminished governmental opposition to strike-related conduct. In attempting to distinguish constitutionally protected activity from employee efforts to coerce management, the author concludes that management has been forced to reappraise traditional attitudes toward striking federal employees because of union litigation, evolving standards of employee conduct in the private sector, limited statu-

tory recognition of public employee bargaining rights, and the increased likelihood of public sector strikes. The basic solution he offers is to grant employees more favorable bargaining conditions than those presently existing under Executive Order 11491.

The book's discussion of the negotiability of substantive provisions in federal bargaining agreements is useful for an understanding of the topical scope of negotiations, although the negotiability of certain subjects has been expanded or modified since publication. The content of the negotiability section reemphasizes the fact that this book was not intended to be a primer for negotiations. Illustrating specific provisions common to many negotiated agreements, the author again favors the past at the expense of the present. Abundant Department of Labor statistics from 1965 through 1973 characterize by-gone contracts, when a synopsis of more current statistics would seem to be of more interest to all but the most historically inclined labor relations specialists.

Tucked away in the author's consideration of the federal scope of bargaining is a passing reference to the rather unique obligation of federal managers to be strictly neutral, primarily with regard to union organizing efforts. Professor Nesbitt observes:

This principle of neutrality, imbedded in Civil Service Commission guidelines, was intended to apply essentially to situations preceding the recognition of an exclusive bargaining agent. Its projection into situations where an exclusive agent has been recognized runs counter to the concept of recognition, a fact that some employing officials do not appear to understand.<sup>1</sup>

Professor Nesbitt does not elaborate on this conclusion, but it is evident that he distinguishes neutrality from the restrictions imposed upon management under section 19(a) of the Executive Order,<sup>2</sup> as well as from traditional management restraints on the political role of federal employees.

Aside from the commendable but tedious commitment to historical detail, there is reason to question the author's inclusion of lengthy passages devoted to developments in the Postal Service, the TVA, the state level public sector, and the Canadian public sector labor programs, inasmuch as each of these programs is technically separate and distinct from the program applicable to most federal agencies under Executive Order 11491.

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<sup>1</sup> NESBITT at 206.

<sup>2</sup> Management may not, for example, communicate anything to unit employees (without union consent) that would even indirectly derogate the role of the exclusive representative, regardless of truth. See, e.g., Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (Oct. 24, 1975).

Readers in search of a better understanding of our federal labor relations program should recognize Professor Nesbitt's apparent sympathy with the predominant objectives of organized labor in the federal government, including the expansion of the scope of negotiations and a more responsive administration of the program. They should also be aware of his extensive and well researched historical contribution. They should not, however, expect to find a timely legal analysis of the current, specific problems which confront the labor relations program.

DENNIS F. COUPE



Cummings, Frank, *Capitol Hill Manual*. Washington, D.C.: BNA, 1976. Pp. 128. \$17.50.

Any work published in 1976 whose title contains the terms "Capitol Hill," "Washington," or "Congress" invokes visions of the scandals which affected some of Congress' more powerful legislators in the mid 1970's. Fortunately, Frank Cummings has tended away from the seamy side of Washington and created instead a very readable introduction to the work-a-day world of Congress.

*Capitol Hill Manual* does not contain an extensive analysis of how legislation is formulated, written, examined, and ultimately passed by Congress. The original material in this book amounts to only 128 pages and provides an interesting introduction to congressional procedures that will briefly acquaint the reader with the legislative process. The remainder of the book is given over to extensive appendices which will serve as useful references once the text has been digested. The appendices contain 190 pages and include copies of a lobbyist's registration form, the standing rules of the Senate, the House rules, the model committee caucus and committee rules, and extracts from the Legislative Reorganization Acts of 1946 and 1970.

Mr. Cummings' qualifications for writing *Capitol Hill Manual* are excellent. For approximately four years, he served as administrative assistant to one of Congress' noted members, Senator Jacob Javits of New York. From this position, he observed first hand the day-to-day give and take legislators engage in and the ways in which they deal with each other and the various staffs on Capitol Hill. Later, his experience as Minority Counsel to the highly technical and busy Senate Labor and Public Welfare Committee allowed him to view Congress from a different vantage point. From this new position, he observed committees and subcommittees, their staffs and internal power groups. This experience on the Hill, tempered by his present detachment from Congress as a practicing attorney in a New York-Washington law firm, has produced a surprisingly interesting manual.

The *Capitol Hill Manual* begins with a nuts-and-bolts outline of the legislative process. It explains the drafting of measures, sponsorship and introduction of bills, committee actions, floor actions and conference committee activities. These explanations are basic in their approach without reiterating lessons learned in high school government courses. Mr. Cummings' comments about portions of the process are enjoyable and enlightening while reflecting his personal beliefs. He makes his editorial comments easily recognizable,

however, so that the reader can accord them the weight he or she feels appropriate.

The second and fourth parts of this book discuss topics which draw the reader into the personal side of Capitol Hill. These two sections explain briefly matters such as the inner workings of a Congressman's office, how Congressmen get on committees, how staff personnel get their jobs and how lobbyists and caucuses operate. Mr. Cummings explains where the old and new power groups are and how they operate. By explaining these facets of Congress, he deftly reveals to the newcomer the real way our laws are made.

Part three of Mr. Cummings' work deals with a complex and tedious congressional process in less than ten pages. It addresses money bills. Congress has spent years devising this system and Congressmen have spent careers trying to stay abreast of it, but the *Capitol Hill Manual* handles it in nine pages. In so doing, Mr. Cummings retains his original purpose of allowing the reader a brief overview of the entire system and avoids being snared into an in-depth explanation of money bills.

Other areas are dealt with in short order as well. The book mentions oversight hearings and Mr. Cummings states that he is uncertain what role they will play in the future. He points out that each House committee with over twenty members must establish an oversight subcommittee and that other committees may hold oversight hearings when they believe them beneficial in determining how legislation within their area of responsibility is being implemented. In the 1970's Congress has found the oversight hearing (often accompanied by extensive press coverage) to be an attractive vehicle for keeping a close watch on the activities of the executive agencies. If the 94th Congress is a barometer of the future, congressional use of these hearings will increase.

Mr. Cummings may have covered two areas a bit too briefly, even for the novice. One of these areas is publications. While he mentions the *Congressional Record*, he fails to explain the contents of that important publication and others that are of value to persons newly exposed to Capitol Hill. Printed material such as the Congressional Calendar, the *Federal Register*, committee hearings and committee reports should warrant at least a passing comment to alert the reader to these valuable resource materials.

Another area receiving too little attention is that of terminology. The *Capitol Hill Manual* contains a glossary of terms which covers a scant thirty-eight items. The book's value could have been enhanced by providing a more extensive glossary to accompany the

very useful and extensive appendices.

Overall, *Capitol Hill Manual* admirably accomplishes its goal of introducing a newcomer to the workings of Congress. The book is an excellent introduction for lobbyists, new congressional staff members, and persons in executive agencies who find themselves about to deal with Congress on a frequent basis. It will be of limited assistance to persons who want in-depth knowledge in the area of legislation, those interested in legislative drafting or those who wish to know the exact operations of Congressmen or their staffs. Unlike most such works, it is readable, accurate and worthy of perusal by lawyers with a desire to know how an idea becomes a law. Newcomers to Washington who will be encountering Congress on a regular basis would be remiss in not reading this book.

DONALD A. DELINE

McDonald, William F. (ed.), *Criminal Justice and the Victim* (preface by Samuel Dash). Beverly Hills, California: Sage Publications, Inc. 1976. Pp. 288. \$17.50 cloth; \$7.50 paper.

America's criminal justice system focuses on the individual accused of perpetrating crime, ignoring the victim in the process. This situation probably stems from the fact that the courts, and indeed society as a whole, consider only the fate of criminal defendants. Although prosecutors represent the interests of society, they do so by trying defendants and thus represent the community in a general sense, not as a victim's advocate.

Volume 6 in the Sage Criminal Justice System Annuals considers the role of the victim in the scheme of a criminal justice system. Earlier volumes have considered the rights of the accused, the role of drugs and criminal law, and the jury and juvenile justice systems. The preface to this volume postulates that "treatment of victims is underresearched and poorly understood,"<sup>1</sup> and the succeeding articles attempt to belie that assessment.

The book logically follows the path of the criminal justice process by considering the victim's initial decision to invoke the system, the effects of the victim's personal characteristics on the outcome of the case, and proposals that reparations or compensation be paid to victims. The articles included in this collection have been authored by individuals with strong academic credentials, either university professors or staff researchers for public institutes which study the problems of criminal law administration. As often as not, the articles present the product of research funded by LEAA grants.

Individual contributions themselves range from significant works containing considerable original research and analysis to occasional short summations of the current literature with cosmetic recommendations for change.<sup>2</sup> Fortunately few of the twelve selections fit into this latter category. Because most of the articles detail the results of empirical research, the book is filled with statistical tables, appendices and notes. It is neither light reading nor for the moderately interested generalist.

Two selections do stand out as worthwhile reading for the harried criminal law administrator or practitioner. The first of these articles attempts to correlate the effect the characteristics of a victim of a violent crime will have upon disposition of the state's case against the alleged perpetrator.<sup>3</sup> Using statistics taken from the

<sup>1</sup> McDONALD at 9 (preface).

<sup>2</sup> Lynch, *Improving the Treatment of Victims: Some Guides For Action*, in *id.* at 165.

<sup>3</sup> Williams, *The Effect of Victim Characteristics on the Disposition of Violent Crimes*, in *id.* at 177.

U.S. Attorney's Office in the District of Columbia, the author considers the effects of the *victim's* responsibility for the crime, the victim's relationship to the defendant, and other variables. The fundamental observation of importance is that these issues significantly affect the disposition of the case only at the administrative level, for example, when the decisions whether to charge or prosecute are made.<sup>4</sup> The second analysis of interest to practitioners assesses the effect of the victim's characteristics on judicial decision making.<sup>5</sup> Although the methods of analysis may be somewhat suspect, for instance utilizing judges' "in-court utterances and facial cues"<sup>6</sup> to determine their reactions to classes of victims, the article's conclusion questions the validity of the long assumed principle of criminal law that "extralegal factors, such as the appearance of the victim or the defendant, have an influence on the decision making of judges and juries."<sup>7</sup>

This then is primarily a thoughtful analysis that questions the present focus of our system of criminal justice,<sup>8</sup> although it does contain several articles which will aid attorneys in formulating a litigating strategy.

BRIAN R. PRICE

<sup>4</sup> *Id.* at 204.

<sup>5</sup> Denno & Cramer, *The Effect of Victim Characteristics on Judicial Decision Making*, in *id.* at 215.

<sup>6</sup> *Id.* at 220.

<sup>7</sup> *Id.* at 222.

<sup>8</sup> Unfortunately this thoughtful analysis does not seem able to generate tremendous optimism that the criminal justice system will refocus its attention on the victim. In one selection which considers the use and short term success of victim advocacy, the authors note:

For a while, morale and membership in the group [of community members who would actively support victims by accompanying them through the pretrial and trial stages of the process] was high. Monthly meetings were held at which police, judges and prosecutors were invited to speak. The group later began to encounter problems in mobilizing supports for the endless series of hearings. The activities were further undermined when the gang [whose members stood accused of assaulting and otherwise victimizing the group members] filed a large damage suit against the local police and some members of the neighborhood group for violating their civil rights.

DuBow & Becker, *Patterns of Victim Advocacy*, in *id.* at 147, 153.



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2. Cummings, Frank, *Capitol Hill Manual*. Washington, D.C.: Bureau of National Affairs, Inc., 1976. Pp. 129, plus Appendices. Cost: \$17.50. See p. 195 *supra*.
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\* Mention of a work in this section does not preclude later review in the *Military Law Review*.

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