
MILITARY LAW REVIEW VOL. 89

An Administrative and Civil
Law Symposium: Introduction

ARTICLES

The Doctrine of Military Necessity in the
Federal Courts

Official Immunity and Civil Liability For Constitutional
Torts Committed by Military Commanders
After *Butz v. Economou*

The Supreme Court Goes to War: The
Meaning and Implications of the
Nazi Saboteur Case

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MILITARY LAW REVIEW (ISSN 0026-4040)

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AN ADMINISTRATIVE AND CIVIL LAW SYMPOSIUM: INTRODUCTION

This symposium issue is the ninth in the current series of volumes devoted to specialized areas of military law and practice. It is the second among these issues focusing on administrative and civil law. The first was volume 85, the summer 1979 issue.

The first article, by Major Stanley Levine, discusses the treatment by federal courts of the doctrine of military necessity as a basis for issuance of a multitude of regulations and directives concerning the activities of service personnel. Major Levine concludes that, after a period of weakness in the doctrine following the Supreme Court's 1969 decision in the case of *O'Callahan v. Parker*, military necessity once again is controlling in cases involving challenges to military laws, regulations, and orders. In particular, two 1980 decisions of the Supreme Court complete the turnabout in this area of law. These two cases are *Brown v. Glines*, and *Secretary of the Navy v. Huff*. Though decided by a divided court, these cases remove most of the doubt concerning the viability of the doctrine of military necessity in federal law today.

As the doctrine of military necessity is a shield for the protection of regulations and directives, so the doctrine of official immunity is a shield for government officials, military and civilian, who try to implement those regulations and directives. Lieutenant Gail M. Burgess has written an article on the latter doctrine.

Like Major Levine's article, the essay by Lieutenant Burgess discusses how the federal courts have treated a legal doctrine or theory. Unlike military necessity, official immunity has not survived recent litigation intact. Lieutenant Burgess focuses on the Supreme Court's 1978 decision in the case of *Butz v. Economou*. Prior to that decision, federal officials enjoyed absolute personal immunity for torts committed by them in the course of performing their duties. In *Butz v. Economou*, the Court distinguished constitutional torts from common-law torts, and stated that, as to the former, federal officials enjoy only the limited immunity avail-

able to state officials. Lieutenant Burgess warns that this applies to military commanders as well as civil servants.

The term "civil law" has a number of meanings, varying with context, and expressed as dichotomies: civil versus criminal law, civil versus common law, civil versus military law, and so forth. The last of the three articles in this volume, concerning the Supreme Court's decision in *Ex parte Quirin*, the Nazi saboteur case, deals primarily with military justice and to some extent with the law of war. At first glance, the article would seem to have no civil law significance at all. This is not so.

In its 1942 decision in *Ex parte Quirin*, the Supreme Court approved the trial of eight Nazi saboteurs by military commission, an extraordinary tribunal which can be convened only in wartime. Defense counsel had argued that the saboteurs should have been tried in a civil rather than a military court. In the view of Professor Belknap, the author of this article, the defense argument was correct, or at least should be considered correct if the same case were to arise today.

This issue of the *Military Law Review* could almost be called a symposium on decisions of the Supreme Court affecting various aspects of military law and practice. The three articles are a valuable addition to military legal literature, and we are greatly pleased to be able to present them to our readers.

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Editor, *Military Law Review*

THE DOCTRINE OF MILITARY NECESSITY IN THE FEDERAL COURTS*

by Major Stanley Levine**

In this article, Major Levine discusses various decisions of the United States Supreme Court and other federal courts affecting reliance by the military services on the doctrine of military necessity as a basis for issuing a multitude of regulations concerning the activities of service personnel.

The Court's 1969 decision in O'Callahan v. Parker sharply undercut the doctrine of military necessity, but the strength of the doctrine was partly restored only five years later, in Parker v. Levy. More recently, in Brown v. Glines and in Secretary of Navy v. Huff, the Court has re-established military necessity as the controlling doctrine in cases involving challenges to military laws, regulations, and orders.

Major Levine cautions, however, that the Supreme Court has decided its most recent military necessity cases with a 5-3 vote. A minor change in the Court's membership could lead to a major change in the law.

*This article is based upon an essay submitted by the author in partial fulfillment of the requirements for the Master of Laws degree at the New York University Law School, New York City, New York.

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

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I. INTRODUCTION

During the 19th and early 20th centuries, federal court review of military decisions was strictly limited to jurisdictional issues.¹ As recently as 1950, in *Hiatt v. Brown*,² the Supreme Court adhered to this limitation on scope of review in reversing the Fifth Circuit's application of the Due Process Clause to a military court decision. For over 150 years, the Supreme Court applied in the field of military law the same hands-off doctrine urged by the 18th-century economist, Adam Smith, vis-a-vis the government's regulation of the economy.

In *Reaves v. Ainsworth*,³ the High Court had decreed that it is not the function of courts to "regulate the Army."⁴ Likewise in *Orloff v. Willoughby*,⁵ the court admonished that "judges are not given the task of running the Army,"⁶ and the courts must be "scrupulous not to interfere with legitimate Army matters."⁷ Even as late as 1953, in *Orloff*, the Supreme Court spoke about the "substantial degree of civilian deference"⁸ which must be accorded military tribunals, in that review of military decisions by civilian courts must take into account the necessities of military life. Shortly thereafter, in a landmark decision which formalized this emerging doctrine of military necessity, the Supreme Court ruled in *Burns v. Wilson*⁹ that "certain overriding demands of discipline and duty" might limit "the rights of men in the armed forces."¹⁰

However, the Court's longstanding doctrines of minimal interference with military courts, and of limitations on constitutional rights of ser-

¹ See *Keynes v. United States*, 109 U.S. 336, 340 (1883); *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885).

² 339 U.S. 103, 110-111 (1950).

³ 219 U.S. 296 (1911).

⁴ *Id.* at 304.

⁵ 345 U.S. 83 (1953).

⁶ *Id.* at 93.

⁷ *Id.* at 94.

⁸ *Id.*

⁹ 346 U.S. 137 (1953).

¹⁰ *Id.* at 140.

vicemembers under the justification of military necessity, were decisively rejected in an important 1969 decision, *O'Callahan v. Parker*.¹¹

Justice Douglas, writing the *O'Callahan* opinion for the Warren Court, was suddenly citing an entirely different line of cases. Although Douglas conceded the need for specialized military courts, he was now quoting the admonition from *Toth v. Quarles*¹² that, because of "dangers lurking in military trials . . . , free countries have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintain discipline among troops in active service."¹³ Even more revealing of the Court's sentiment were references to "so-called military justice" and "the travesties of justice perpetrated under the Uniform Code of Military Justice."¹⁴

An overriding concern of the Supreme Court, in both *Toth* and *O'Callahan*, is a perceived distrust of the military justice system, which mandates a need to limit the military's jurisdiction. Therefore, in *Toth*, the Court held to be unconstitutional a section of the Uniform Code of Military Justice authorizing the court-martial of former servicemembers for crimes committed in the military but discovered after discharge. Furthermore, the Court rejected any claim of military necessity. In *O'Callahan*, the Supreme Court further restricted the jurisdiction of military courts to offenses which are deemed to be "service-connected," thereby precluding the court-martial of servicemembers for non-service-connected crimes.

However, a mere five years later, after a significant change in the membership and philosophy of the Supreme Court, a more conservative Court under Chief Justice Burger decided *Parker v. Levy*,¹⁵ which marked a return to the Court's earlier doctrine of military necessity formulated initially in *Burns v. Wilson*. The decision indicated an apparent diminution of the Supreme Court's distrust of military justice and its increased perception of the uniqueness of the military community and of military criminal codes. It did not effect a complete return to the pre-1950 era when the federal courts would not delve into the merits of

¹¹ 395 U.S. 258 (1969).

¹² 350 U.S. 11 (1955).

¹³ 395 U.S. at 264.

¹⁴ *Id.* at 266.

¹⁵ 417 U.S. 733 (1974).

constitutional claims raised by military personnel.¹⁶ But *Parker* presents very strong dictum for invoking the military necessity doctrine as a means to limit the constitutional safeguards available to servicemembers.

The landmark 1969 *O'Callahan* decision marked a high point in judicial intervention with military law, and it appeared to be the forerunner of greater constitutional restraints on the military justice system. *O'Callahan* also exemplified the Warren Court's distrust of military justice; the decision was an attempt to confine military justice as narrowly as possible.

Equally historic was the 1974 decision of *Parker v. Levy*, which marked a sharp turning point in the treatment accorded military justice by federal courts. A different Supreme Court under Chief Justice Burger no longer felt compelled to distrust the military justice system and firmly recognized that the military necessity for order and discipline may outweigh the need for constitutional safeguards for servicemembers.

From *O'Callahan* in 1969, a decision written by Justice Douglas during the Warren Court era, to *Parker v. Levy* in 1974, a 5-3 decision written by Justice Rehnquist of the Burger Court, the High Court had reversed itself completely within the short span of five years. Nowhere was this more evident than in the Court's 1973 decision, *Gosa v. Mayden*,¹⁷ written by Justice Blackmun, which denied retroactive application of the *O'Callahan* decision. Blackmun called *O'Callahan* "a clear break with the past"¹⁸ and Rehnquist, in a concurring opinion, flatly announced that *O'Callahan* was "wrongly decided and should be overruled for the reasons set forth by Mr. Justice Harlan in his dissenting opinion"¹⁹ in that case.

This paper will examine closely the emerging doctrine of military necessity and its effect on the body of case law related to military justice.

II. PARKER v. LEVY

There is no better starting point, in dissecting the doctrine of military necessity, than to focus upon the case of *Parker v. Levy*,²⁰ which has as

¹⁶ See *Hiatt v. Brown*, 339 U.S. 103 (1950).

¹⁷ 413 U.S. 665 (1973).

¹⁸ *Id.* at 680.

¹⁹ *Id.* at 692.

²⁰ 417 U.S. 738 (1974).

much of the drama and intensity of the Vietnam War as that which one can witness in the currently popular movies, "The Deer Hunter," and "Coming Home."

Captain Howard Levy was a medical doctor drafted into the United States Army during the time of the Vietnam War. Captain Levy was ordered to establish and operate a training program for Army Special Forces going to Vietnam, and he refused; Levy was charged, therefore, with violation of Article 90²¹ of the Uniform Code of Military Justice for willful disobedience of the lawful order of a superior.

Two additional charges were filed against Captain Levy because of a letter written by Levy in which he criticized the United States effort in Vietnam and made public utterances wherein he promoted insubordination and disloyalty. The particular letter was mailed by Levy to a black serviceman stationed in Vietnam, and it involved two additional violations under Articles 133 and 134 of the UCMJ.²² At Captain Levy's court-martial, a finding of guilty was returned by the all-officer jury on each of the three charges;²³ to wit, that Captain Levy had, in fact, "disobeyed orders of a superior"²⁴ in refusing to set up a training program for Army Special Forces, and had engaged in conduct "unbecoming an officer and a gentleman"²⁵ and "to the prejudice of good order and discipline"²⁶ by virtue of his public utterances to enlisted personnel.

At the court-martial, the most damaging evidence that emerged against Levy was that he had publicly criticized the government's conduct in front of enlisted men, and had labeled the Special Forces as "liars,

²¹ 10 U.S.C. 890 (1976), which makes it a violation of the Uniform Code of Military Justice to disobey the lawful order of a superior. The Uniform Code of Military Justice is hereinafter cited as "UMCJ" or as "Code" in both text and footnotes.

²² 10 U.S.C. 933 and 934, which respectively proscribe "conduct unbecoming an officer and a gentlemen" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

²³ Captain Levy was convicted by court-martial at Ft. Jackson, S.C., on June 2, 1967 (CM 416468). After conviction, he was sentenced to confinement at hard labor for three years at the Federal Penitentiary, Lewisburg, Pennsylvania, and dismissed from the service.

²⁴ Article 90 of the UCMJ.

²⁵ Article 133 of the UCMJ.

²⁶ Article 134 of the UCMJ.

thieves and killers" of women and children. Moreover, he had urged black servicemembers not to serve in Vietnam, and stated that he also would not serve.

As Levy was convicted of conduct that, essentially, amounted to engaging purely in speech, arguments naturally focused upon the first amendment as Levy's case exhausted all military appeals²⁷ and eventually ended in the federal courts.²⁸ The main argument, however, proposed on behalf of Levy was that Articles 133 and 134, commonly known as the "general articles," were constitutionally defective because they deny due process in lacking notice and warning, and they encourage arbitrary and discriminatory enforcement.

This argument persuaded the Third Circuit Court of Appeals to reverse Captain Levy's conviction.²⁹ The Circuit Court held that the general articles were unconstitutional on the grounds that they provided no notice to a servicemember as to what conduct constituted a crime. The articles fail to define crimes and set no standards by which to judge conduct. Finally, the general articles were unfairly enforced. The United States Government, recognizing the far-reaching consequences of this decision for the system of military justice, decided to appeal to the Supreme Court.³⁰

The United States Supreme Court, in a 5-3 decision written by Justice Rehnquist, reversed the Third Circuit Court of Appeals and upheld Captain Levy's conviction. In so doing, the Court rejected his claim that the general articles, 133 and 134, were so vague as to deny due process and so overbroad as to unconstitutionally burden free speech.³¹ In other words, the Court rejected the claims that Articles 133 and 134 were unconstitutionally vague under the fifth amendment's due process clause, or overbroad and therefore violative of the first amendment. In dealing with the arguments raised vis-a-vis the first and fifth amendments, the

²⁷ 39 C.M.R. 872 (1968), *petition for review denied*, 18 C.M.A. 627 (1969).

²⁸ 316 F. Supp. 473 (1970).

²⁹ 478 F.2d 772 (3rd Cir. 1973).

³⁰ It is interesting to note that the decision to appeal and the oral arguments were both made by the Solicitor General, Robert H. Bork. His conservative philosophy was similar to that of Justice Rehnquist, who wrote the majority opinion in *Parker v. Levy*.

³¹ 417 U.S. at 757-58.

High Court repeatedly cited a theory of military necessity as the foundation for upholding the constitutionality of the general articles. This is evidenced by the following analysis:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.³²

In addition, the Court said:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). In *In re Grimley*, 137 U.S. 147, 153 (1890), the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer or the duty of obedience in the soldier," . . . and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"³³

The Supreme Court extended its analogy of the differences between the civilian and military communities to the differences "between military law and civilian law . . . [holding] that [the] Code cannot be equated to a civilian criminal code,"³⁴ and concluding that "the Uniform Code of Military Justice regulates a far broader range of the conduct of military

³² *Id.* at 758.

³³ *Id.* at 743-44.

³⁴ *Id.* at 749.

personnel than a typical state criminal code regulates of the conduct of civilians."³⁵

This doctrine of military necessity was used by the Court in rejecting the claim that the general articles were overbroad on their face, in violation of the first amendment. The Court had already concluded that laws written by Congress for the military could be drafted in a broader and more flexible manner than those written for civilians.³⁶ Indeed, the Court recognized that the particular articles at issue might very well encompass constitutionally protected conduct.³⁷ Thus, if imprecise drafting was to be permitted, facial overbreadth challenges would logically be foreclosed. The Supreme Court accomplished this foreclosure by finding that the first amendment overbreadth doctrine was a narrow exception to the normal rules of constitutional construction, created as a matter of policy. And most important, the Court found that the military necessity for obedience and discipline outweighed the policy considerations behind the overbreadth doctrine.³⁸

The Court maintained that the special needs of the military justified greater restrictions on expression than were permitted in civilian life. As a result, the articles were not substantially overbroad; they proscribed a wide range of unprotected activity and relatively little protected activity. Finding that the policies which underlie overbreadth scrutiny must be accorded "a good deal less weight" in the military context, the Court held that whatever overbreadth existed was insufficient to invalidate the articles under which Levy was convicted.

The Court cogently noted:

Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In military life, however, other considerations must be weighed. The armed forces depend on

³⁵ *Id.* at 750.

³⁶ *Id.* at 756.

³⁷ *Id.* at 761.

³⁸ *Id.* at 759-80.

a command structure that at all times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States v. Gray*, 20 C.M.A. 63, 42 C.M.R. 255 (1970).³⁸

As to Captain Levy's "void for vagueness" argument, the Supreme Court ruled that one to whose conduct a statute clearly applied may not challenge it on the basis that it was vague to others. This was exactly opposite to the conclusion that had been reached previously by the Third Circuit Court of Appeals. And the High Court concluded that there was no vagueness in the general articles as applied to Levy's specific conduct of publicly criticizing our own efforts and servicemembers in the Vietnam War, and of urging black servicemembers not to serve in Vietnam.⁴⁰

The Court's 5-3 decision in *Parker v. Levy* was written by Justice Rehnquist. Also included in the majority were Chief Justice Burger and Justices Blackmun, Powell and White. The dissenters were Justices Stewart, Douglas, and Brennan.⁴¹

A dissenting opinion was written by Justice Stewart in which Justices Douglas and Brennan joined. Stewart began by flatly stating, "I find it hard to imagine criminal statutes more patently unconstitutional than

³⁸ *Id.* at 759.

³⁹ As Levy was deemed to lack standing to raise the constitutional issues, the Supreme Court did not address the manner and burden of proof needed to establish military necessity, nor did it disclose the weight required to be given a proven claim of military necessity.

⁴¹ Justice Marshall did not take part in the decision, but it could be predicted that he most likely would have joined the dissenters since he has sided with the liberal wing of the Court in most cases involving criminal and military law. The breakdown of the court was fairly familiar for watchers of the Court; the four conservative Nixon appointees were joined by the generally conservative-leaning "swing vote," Byron White, although White has swung to the other side on questions involving the first amendment.

these vague and uncertain General Articles."⁴² Stewart's dissent was largely confined to the issue of vagueness, and he was unable to find any military justification for promulgating vague rules, suggesting that the military's interest in maintaining high morale and standards of conduct would be better served by provisions for fair notice. He concluded that the criteria for determining whether the articles provided adequate notice should not differ from those applied in civilian cases.⁴³

III. THE MILITARY NECESSITY DOCTRINE

The military necessity doctrine enunciated in dictum in *Parker v. Levy* was quickly picked up by the federal courts and often quoted to justify

Certainly, as for Justice Rehnquist, it should not be surprising that he supported the government's position by holding the general articles constitutional, inasmuch as he stated in *Gosa v. Mayden*, 418 U.S. (1973), that *O'Callahan*, the 1969 landmark decision of the Warren Court, was wrongly decided and should be overruled. In *Gosa v. Mayden*, Justice Blackmun delivered the opinion of the Court in which *O'Callahan* was denied retroactive application. As Justice Blackmun was joined in his opinion by Chief Justice Burger and Justices Powell and White, the makeup of the Court in *Gosa* is almost identical to that of *Parker v. Levy*. The only difference is that Justice Marshall took part in the *Gosa* decision, and he joined the dissenters, Justices Douglas, Stewart, and Brennan.

There is a basic and sharp difference in philosophy between the two groups. As Justice Blackmun pointed out in his opinion in *Gosa*, the *O'Callahan* decision (written by Justice Douglas, joined by Justices Brennan and Marshall) was critical of the military system of justice because of the lack of certain procedural safeguards. However, Blackmun added, the court-martial process does not lack fundamental integrity in its truth-determining process. *Gosa v. Mayden*, at 680-1. Inherent in the military decisions of the five-member majority (i.e., White plus the four Nixon appointees) is a basic feeling of confidence in the military justice system. Equally apparent in the opinions of Douglas, Marshall, and Brennan is a distrust of military justice and a desire to limit the military's jurisdiction.

⁴² 417 U.S. at 774.

⁴³ Justice Stewart, however, cannot be so easily categorized. For example, Stewart dissented in *O'Callahan* (joined by Justices White and Harlan) in a scathing attack on the majority's "novel interpretation" for which there was "scant support." However, notwithstanding his dissent in *O'Callahan*, Stewart voted to give it full retroactive effect in *Gosa*. Far more revealing of Justice Stewart's moderately conservative philosophy were his stands in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), and *Greer v. Spock*, 424 U.S. 828 (1976), in which he wrote the opinion. In both cases, he joined Chief Justice Burger and Justices Blackmun, Powell, Rehnquist (i.e. the four Nixon appointees) and White in upholding the government's position against the rights of military servicemen.

the government's position vis-a-vis constitutional rights of servicemembers.

In one of the first cases to be decided after *Parker v. Levy*, the District of Columbia Circuit Court of Appeals upheld a commander's refusal to grant a servicemember permission to circulate petitions while stationed in a combat zone.⁴⁴ The court relied, in large measure upon the *Parker v. Levy* dictum that military necessity "may render permissible within the military that which would be constitutionally impermissible outside it."⁴⁵ Likewise, in *Calley v. Callaway*,⁴⁶ the Fifth Circuit Court of Appeals cited *Parker* by stating that "the different character of the military community and of the military mission require a different application for First Amendment protections."⁴⁷

In *Carlson v. Schlesinger*,⁴⁸ the District of Columbia Circuit Court emphasized that the doctrine of military necessity has added weight in a combat zone or overseas. As the case involved a soldier's rights under the first amendment (i.e., the right to distribute anti-war literature) in the combat zone of Vietnam, it was held that the greater the Government's interests, the greater is its right to prescribe reasonable regulations. In deciding for the Government, the court noted that the governmental interest is manifest in the context of a military combat zone.

In *Committee for G.I. Rights v. Callaway*, decided by the District of Columbia Circuit Court of Appeals in 1974, the cases of *Parker v. Levy* and *Carlson v. Schlesinger* were cited and relied upon by the court in upholding the Army's drug control program in Europe. In so doing, the court reversed the lower court decision.

In 1975, the United States District Court for the District of Columbia enjoined the United States Army in Europe from continuing its drug control program which involved warrantless barracks inspections, strip

⁴⁴ *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C. Cir. 1975).

⁴⁵ *Id.* at 1332-33.

⁴⁶ 519 F.2d 184 (5th Cir. 1975), cert. den. 425 U.S. 911.

⁴⁷ *Id.* at 200-1.

⁴⁸ 511 F.2d 1327.

searches, and extensive use of specially trained dogs.⁴⁹ However, the United States Court of Appeals for the District of Columbia Circuit reversed, relying heavily on *Parker v. Levy* for the proposition that the military context required a different application of certain constitutional protections.⁵⁰ In addition to *Parker*, the District of Columbia Circuit also relied upon its decision earlier that year in *Carlson v. Schlesinger*⁵¹ to support the underlying premise that the nature of military life mandates that servicemembers be accorded constitutional protections that are different in application from those given their civilian counterparts.⁵²

Thus, when the reasonableness of an intrusion is being determined by a court, the special exigencies of military life help to tip the balance in favor of constitutionality.⁵³

In examining the search and seizure provisions of the Army's program, the court found that military needs outweighed individual liberties.⁵⁴ The court noted that widespread use of drugs hampered military effectiveness, and that the primary purpose of the drug inspections was to make dysfunctional servicemembers into effective soldiers.⁵⁵ Furthermore, since the expectation of privacy is lower in the military, and the unannounced drug inspections were the most effective means of identifying drug abusers, the searches were held constitutional.⁵⁶

⁴⁹ *Committee for G.I. Rights v. Callaway*, 370 F. Supp. 934 (D.D.C. 1974). This was a decision by District Judge Gerhard A. Gesell, in which he held unconstitutional the conduct by the Army in Europe of warrantless drug inspections without a showing of probable cause. This violated the soldier's constitutional rights under the fourth amendment, in that the information gained by these inspections was used as a basis for punitive sanctions. *Id.* at 939-941.

⁵⁰ *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975).

⁵¹ 511 F.2d 1327 (D.C. Cir. 1975).

⁵² This is not arbitrary discrimination against soldiers. The Supreme Court has held that embedded in our traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

⁵³ *Carlson v. Schlesinger*, *supra*.

⁵⁴ 518 F.2d at 466.

⁵⁵ *Id.* at 476.

⁵⁶ See also *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Hagopian v. Knowlton*, 470 F.2d 201, 207 (2nd. Cir. 1972).

In applying the principle of military interest and military necessity, and noting that reasonableness in the given context is determinative of fourth amendment rights, the court used a balancing test to find that the inspections were reasonable; the aggregate weight of the Army's interest was found to be greater than the individual's interest in his own privacy. It was further held that no warrant was required for these inspections because of the administrative burden involved, and because the concomitant time lag and increased chance of a breach of secrecy might be detrimental to the effectiveness of the inspections.⁵⁷

The circuit court also reversed the lower court by additionally holding that any and all evidence obtained from the warrantless, extensive inspections conducted by the Army in its drug control program could be utilized in subsequent criminal prosecutions, and was not limited to use in furtherance of the rehabilitative purposes of the program.⁵⁸

Following the *Parker v. Levy* decision, several United States Supreme Court rulings followed in which the turning point of the Court's decision was the doctrine of military necessity. In another drug-related case, *Schlesinger v. Councilman*,⁵⁹ the High Court ruled that military jurisdiction over court martial servicemembers extended to off-post, off-duty offenses. The Supreme Court's decision reversed the lower court's decision,⁶⁰ and upheld military jurisdiction to prosecute a servicemember for the sale and gift of marijuana to another servicemember, notwith-

⁵⁷ *Committee for G.I. Rights v. Callaway*, 518 F.2d 466.

⁵⁸ 518 F.2d at 475. Although the controversial drug control program was designed primarily to rehabilitate members of the Armed Forces with problems attributable to drugs and narcotics, and to eliminate from the service those who could not be restored in a reasonable period of time, any evidence obtained was nonetheless used in subsequent disciplinary actions when the facts and circumstances indicated further violation of Army regulations.

If rehabilitation failed, a confirmed drug user could be separated from the service under other than honorable conditions, and military authorities could advise prospective government or civilian employers of the soldier's drug involvement. The record of a soldier's drug abuse could also be considered by the Army in connection with future personnel action, including duty assignments and promotions. And identified drug users were subject to continual scrutiny including, *inter alia*, unannounced urinalysis tests. *Id.* at 468-470.

⁵⁹ 420 U.S. 738 (1975).

⁶⁰ 481 F.2d 613 (1973).

standing the fact that the transactions occurred off-post and during off-duty hours.

Citing *Parker v. Levy*, the Supreme Court, in its 6-3 decision written by Justice Powell,⁶¹ decided that the issue of whether offenses by servicemembers are "service-connected" (i.e., thereby establishing jurisdiction in the military to conduct a court-martial prosecution) turned largely on gauging the impact of the offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense was distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment, said the Court, that often will turn on the precise set of facts in which the offense has occurred.

And the Supreme Court, in *Schlesinger v. Councilman*, took a back-hand slap at federal court interference with the military justice system. The Court held that whether an offense charged is "service-connected" is a matter as to which the expertise of military courts was singularly relevant. The judgments of military appellate courts are therefore indispensable to any eventual review of military trials in civilian courts. The Supreme Court made this remark because the lower federal courts had enjoined a court-martial prosecution on the grounds that the military lacked jurisdiction.

When a servicemember charged with crimes by military authorities demonstrates no harm other than that attendant upon resolution of his or her case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise. There was nothing in the circumstances of this case to outweigh the strong considerations favoring exhaustion of remedies within the military court system, or to warrant intrusion on the integrity of military court processes. Those processes were established by Congress in the Uniform Code of Military Justice in an attempt to balance the unique necessities of the military system against the equally significant interest of ensuring fairness to servicemembers charged with military offenses.⁶²

⁶¹ Again, it is important to note the composition of the Court's majority (White, Stewart, and the four Nixon appointees) and the equally consistent makeup of the dissenting minority (Douglas, Brennan, Marshall).

⁶² 420 U.S. 757-769.

The Supreme Court viewed as very serious the drug problem vis-a-vis military discipline and effectiveness. The strength of this view, coupled with the Court's parallel view that the question of military jurisdiction (i.e., the military's ability to discipline its own troops) turns on military necessity, is evidenced by the following observation in the Court's opinion:

The seriousness of the problem is indicated by information presented before congressional committees to the effect that some 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52% of these were able to return to duty after rehabilitation . . . It is not surprising, in view of the nature and magnitude of the problem, that in *United States v. Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969), the Court of Military Appeals found that use of marijuana and narcotics by military persons on or off a military base has special military significance in the light of the disastrous effects of these substances 'on the health, morale, and fitness for duty of persons in the Armed Forces.'⁶³

In *Greer v. Spock*,⁶⁴ the Supreme Court was faced with the constitutional question of whether the commander of a military installation could ban speeches and demonstrations of a partisan political nature, including the distribution of literature. In a 6-2 opinion⁶⁵ by Justice Stewart, the Court ruled that the first amendment protections do not preclude a military commander from taking such action in light of the need for military discipline. Citing *Parker v. Levy* and *Schlesinger v. Councilman*, discussed above, the Court focused upon the special role and function of the military and its need for military loyalty and discipline in providing "for the common defense" of the nation.⁶⁶ And to emphasize the point, and drive it home to all would-be political demonstrators, the Court stated:

In short it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United*

⁶³ 420 U.S. 760 n. 34.

⁶⁴ 424 U.S. 828 (1976).

⁶⁵ Justices Brennan and Marshall, once again, were the dissenters; the newly-appointed Justice Stevens, who replaced Douglas, did not take part in the decision of the case.

⁶⁶ 424 U.S. 837.

States ex rel. Toth v. Quarles, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8, 14. And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum. A necessary concomitant of the basic function of a military installation has been the historically unquestioned power of (its) commanding officer summarily to exclude civilians from the area of his command." *Cafeteria Workers v. McElroy*. 367 U.S. 886, 893, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230.⁶⁷

In upholding the authority of a military commander to prohibit political demonstrations on a military post, the Court firmly stated that a military commander must act to avert what he perceives to be a clear danger to the loyalty, discipline, and morale of the troops on base under his command.⁶⁸ Further, the Court observed that it is wholly consonant with American tradition to foster a politically neutral military establishment, and to keep the military free of partisan political entanglement.⁶⁹ Again, a constitutional issue turned upon the doctrine of military necessity and military discipline.

In *Middendorf v. Henry*,⁷⁰ a 5-3 opinion written by Justice Rehnquist, the Supreme Court denied the right to counsel for servicemembers subjected to trial by summary court-martial. This conclusion was reached notwithstanding the Court's admission that servicemembers convicted by summary court-martial face a loss of liberty and imprisonment.⁷¹ The Supreme Court justified this decision by finding the existence of "overriding demands of discipline and duty"⁷² in the armed forces, which argument led into an analysis of the military necessity doctrine as applied to the issues before the Court. The Court recognized that the introduction of counsel into the military disciplinary proceeding of summary courts-martial would unduly burden, and dilute the effectiveness of the proceeding, thereby causing a negative impact on the military system of discipline. The Court noted:

⁶⁷ 424 U.S. 837-8.

⁶⁸ 424 U.S. 840.

⁶⁹ 424 U.S. 839.

⁷⁰ 425 U.S. 25 (1976).

⁷¹ 425 U.S. 42.

⁷² 425 U.S. 48.

In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.⁷³

Again, in *United States v. Burrow*,⁷⁴ a warrantless search of an automobile was upheld. The Court cited *Parker* as dictum for the proposition that the unique status of military personnel may at times mandate different criteria for the assertion of constitutional rights. And finally, in *Culver v. Secretary of Air Force*,⁷⁵ an officer's challenge to Air Force Regulation No. 35-15 was dismissed on the basis of *Parker's* military necessity doctrine. Similarly, *Parker v. Levy* has been cited in *Wolf v. Secretary of Defense*⁷⁶ and *Staton v. Froehle*.⁷⁷

Furthermore, the courts have held that it is not necessary for the military to introduce direct evidence to make an affirmative showing that the servicemember's conduct (e.g., use of narcotics or drugs) actually prejudiced good order and discipline (i.e., such a fact to be presumed), notwithstanding that the drug use was off-duty and for purely social purposes.⁷⁸ In a related case, wherein the Navy prosecuted one of its servicemembers for promoting disloyalty in a "servicemen's newsletter," it was held that the government did not have any burden of showing a causal relationship between the defendant's conduct and specific examples of weakened loyalty.⁷⁹

The doctrine of military necessity, as enunciated in *Parker v. Levy*,

⁷³ 425 U.S. 45.

⁷⁴ 396 F. Supp. 890, 897-8 (1975).

⁷⁵ 389 F. Supp. 331, 333-4 (1975).

⁷⁶ 399 F. Supp. 446, 450 (1975).

⁷⁷ 390 F. Supp. 503, 505 (1975).

⁷⁸ *Kekri v. Sprinkle*, 524 F.2d 328 (1975), cert. den., 426 U.S. 947 (1976).

⁷⁹ *Priest v. Secretary of Navy*, 570 F.2d 1013 (1977).

has served to emancipate military justice from some of the possible constitutional restraints to which many considered it subject. It is not, however, a totally unique policy formulated by the courts inasmuch as they have recognized a similar need in the civilian community whenever the exigencies of the situation required it.⁸⁰

As the Supreme Court stated in *Schlesinger v. Councilman*,^{80A} "in enacting the [Uniform Code of Military Justice], Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen."

IV. RECENT SUPREME COURT CASES

Most significantly, as demonstrated by two decisions⁸¹ of the United States Supreme Court handed down in the 1979-80 term, the doctrine of military necessity has not only withstood the test of time but may be regarded as the doctrine presently controlling military cases appearing before the High Court. Both cases involved first amendment rights of military servicemembers in which lower courts had held military regulations to be unconstitutional. On the basis of the military necessity doctrine, the Supreme Court reversed circuit court decisions and thereby upheld the military's position, in effect curtailing the rights of servicemembers.

In *Brown v. Glines*,⁸² the Supreme Court reversed a holding by the Ninth Circuit Court of Appeals,⁸³ in which the circuit court had affirmed

⁸⁰ See *U.S. v. Skipwith*, 482 F.2d 1272 (5th Cir. 1978), in which warrantless searches for security reasons at airports were upheld.

^{80A} 420 U.S. at 757-58.

⁸¹ *Brown v. Glines*, 444 U.S._____, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980); *Secretary of the Navy v. Huff*, 444 U.S._____, 100 S.Ct. 606, 62 L.Ed.2d 607 (1980).

⁸² 444 U.S._____, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980).

⁸³ *Glines v. Wade*, 586 F.2d 675 (1978).

a lower court's ruling⁸⁴ that certain Air Force regulations⁸⁵ were facially invalid and, therefore, violative of the first amendment rights of servicemembers.

In this particular case, Captain Glines, an Air Force Reserve captain on active duty at Travis Air Force Base, California, had circulated petitions that criticized the Air Force's grooming standards as the cause of "racial tensions" and "loss of respect for authority."⁸⁶ As the petitions were distributed without command authorization, and signatures from other servicemembers were obtained thereon, Captain Glines was the subject of administrative action and was removed from the Ready Reserves. He then challenged the regulations requiring command approval as violative of his first amendment rights, and he was upheld by both lower courts, which granted the motion for summary judgment on the grounds that the regulations were unconstitutional and an infringement of a servicemember's rights.⁸⁷

In reversing the lower courts' decisions, the Supreme Court invoked the doctrine of military necessity, relying heavily on its past rulings in *Parker v. Levy*,⁸⁸ *Schlesinger v. Councilman*,⁸⁹ and *Greer v. Spock*.⁹⁰ Citing *Parker v. Levy*, the High Court declared that "the military is, 'by necessity, a specialized society separate from civilian society'"⁹¹ and that "military personnel must be ready to perform their duty whenever the occasion arises."⁹² In citing its earlier holding in *Schlesinger v. Councilman*, discussed above, the Court declared that "the military services

⁸⁴ 401 F. Supp. 127 (N. D. Cal. 1975).

⁸⁵ The principal regulation in question was AFR 30-1 para. 9 (1971), subsequently superseded by AFR 30-1 para. 19 (1977), prohibiting servicemembers from soliciting signatures on a petition within an Air Force facility, in uniform, or in a foreign country, without first obtaining command approval. Another regulation that was challenged was AFR 35-15 para. 3 (1970), that prohibits distribution of written material within an Air Force installation without command approval.

⁸⁶ See footnote 3, 100 S.Ct. at 597-8.

⁸⁷ *Id.* at 598.

⁸⁸ 417 U.S. 733 (1974).

⁸⁹ 420 U.S. 738 (1975).

⁹⁰ 424 U.S. 828 (1976).

⁹¹ *Brown v. Glines*, 100 S.Ct. at 599.

⁹² *Id.*

'must insist upon a respect for duty and a discipline without counterpart in civilian life'.⁹³ Utilizing *Greer v. Spock*, also discussed above, the Supreme Court pointed out that "nothing in the Constitution . . . [precludes] a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."⁹⁴

And in upholding the Air Force regulations in question, the Supreme Court once again cited the classical language of *Parker v. Levy* that "the different character of the military community and the military mission requires a different application of these [First Amendment] protections . . . [which] must yield somewhat 'to meet certain overriding demands of discipline and duty'."⁹⁵ Obviously, as a commander is charged with maintaining morale, discipline, and readiness of his troops, he or she must have authority to control the distribution of materials that could adversely affect these essential attributes of an effective military force.⁹⁶

In no uncertain terms, the United States Supreme Court has confirmed the direction of an emerging body of case law that sets the military services apart with regard to constitutional protections. With unusually strong language, and with complete reliance on its past decisions, the Supreme Court freely quoted the *Parker-Schlesinger-Greer* triumvirate in holding that first amendment rights that are protected for the civil population may be denied in the military context to the extent that they interfere with and undermine command and combat effectiveness.⁹⁷ And finally the Court cited all three cases together in asserting that "because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline."⁹⁸

The Supreme Court also turned to another of its prior decisions, *Midendorf v. Henry*,⁹⁹ for the assertion that military commanders must be

⁹³ *Id.*

⁹⁴ *Id.* at 598-599.

⁹⁵ *Id.* at 599.

⁹⁶ *Id.* at 600-601.

⁹⁷ *Id.* at 599.

⁹⁸ *Id.* at 601.

⁹⁹ 426 U.S. 25, 37-40 (1976).

accorded "flexibility in dealing with matters that affect internal discipline and morale."¹⁰⁰

In the companion case, *Secretary of Navy v. Huff*,¹⁰¹ handed down by the Supreme Court on the same date as *Brown v. Glines*,¹⁰² the same five-member majority also ruled in favor of the military by upholding first amendment restrictions curtailing the rights of servicemembers. Again, the High Court reversed the decisions of lower federal courts,¹⁰³ which had upheld the constitutional rights of the military defendants.

In the *Huff* case, marines stationed overseas had been arrested and convicted for off-post distribution of materials criticizing the government of the host nation of South Korea. The accused had not obtained command approval. Such acts were in violation of Naval and Marine Corps regulations, that were subsequently challenged by the accused in federal court as violative of the first amendment. The United States Supreme Court, relying upon its decision in *Brown v. Glines*, upheld the regulations for the reasons already stated in the *Brown* case.¹⁰⁴

Both *Brown v. Glines* and *Navy v. Huff* were decided by a 5-3 majority, with the same makeup in both cases: to wit, the majority consisted of Justices White, Burger, Blackmun, Powell, and Rehnquist (i.e., White and the four Nixon appointees), with dissents voiced by Justices Brennan, Stewart, and Stevens. Although Justice Marshall did not participate in either decision, his vote most likely would have been with the dissenters. Assuming arguendo, that Justice Marshall had participated in the cases, it is apparent that a shift of merely one more vote (i.e., from the majority to minority) would have resulted in the invalidation of important military regulations and the consequent diminution of command authority.

V. CONCLUSION

Supreme Court decisions of the past six years have contributed to the formation of a significant, even controlling, doctrine of military law that

¹⁰⁰ *Brown v. Glines*, 100 S.Ct. at 602.

¹⁰¹ 444 U.S. ____, 100 S.Ct. 606, 62 L.Ed.2d 607 (1980).

¹⁰² Both cases were decided on January 21, 1980.

¹⁰³ 575 F.2d 907 (1978).

¹⁰⁴ 100 S.Ct. at 608.

overrides constitutional considerations whenever there is a significant governmental interest in upholding command discipline and authority. In almost every case reaching the High Court during this period, the doctrine of military necessity has emerged as the dominant theme in assessing the constitutional rights of military servicemembers.

However, as important as this doctrine may be in upholding command authority, it has emerged with and been continued in force by a bare five-member majority in the Supreme Court. In *Parker v. Levy* (1974), *Middendorf v. Henry* (1976), *Brown v. Glines* (1980), and *Navy v. Huff* (1980), the same five-member majority consisted in each case of Justices White, Burger, Blackmun, Powell, and Rehnquist. In *Schlesinger v. Councilman* (1975) and *Greer v. Spock* (1976), these same five Justices were joined by Justice Stewart to form a six-member majority.

As long as the High Court's majority remains intact, the military necessity doctrine will be the controlling doctrine. Certainly, the body of case law that has developed is substantial enough for stare decisis to enjoin any substantial shift in philosophy. On the other hand, any radical change in Court membership towards a more liberal philosophy may threaten this vitally important doctrine.

One final point: in closing, it should be noted that the doctrine of military necessity has caused, indirectly, a decrease in federal litigation involving military defendants, because they have discovered a more receptive forum in the Court of Military Appeals, a far more liberal court today than in the past. Certainly, the latter court, which has not embraced the doctrine of military necessity, is more attractive to the convicted servicemember on appeal than the Supreme Court and its conservative majority.

**OFFICIAL IMMUNITY AND CIVIL LIABILITY
FOR CONSTITUTIONAL TORTS
COMMITTED BY MILITARY COMMANDERS
AFTER *BUTZ V. ECONOMOU****

by First Lieutenant Gail M. Burgess, USMC**

In this article, Lieutenant Burgess reviews the Supreme Court's decision in the case of Butz v. Economou, 438 U.S. 478 (1979), and discusses its possible application to military commanders.

Arthur N. Economou was a commodity futures commission merchant. In 1970, the Department of Agriculture initiated action to suspend his registration for allegedly failing to maintain the minimum required financial resources. Economou sued the Secretary of Agriculture and various subordinate officials for actions allegedly taken by them against Economou in violation of his constitutional rights. He claimed large monetary damages. The officials defended on grounds of absolute immunity against suit for executive actions within the officials' discretionary authority.

In a long opinion, the United States Supreme Court held that, in general, only qualified immunity, not absolute immunity,

*The opinions and conclusions expressed in this article are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, the United States Marine Corps, or any other governmental agency.

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is available to officials accused of constitutional wrongs. The applicable standard of immunity is that which pertains to state executive officials. There are some exceptions; administrative law judges, for example, enjoy absolute immunity. But most officials cannot benefit from such exceptions.

Lieutenant Burgess argues that there is nothing to prevent application of this rule of law against military commanders, and that they could be sued and held personally liable for damages under the rule of *Butz v. Economou*. She urges that commanders be made aware of this, and that remedial legislation be requested from Congress.

I. BACKGROUND

On 29 June 1978, the United States Supreme Court decided *Butz v. Economou*,¹ a case which could have implications for commanding officers at all levels of responsibility. The case involved a suit by Economou, a commodity futures merchant, against the Secretary of Agriculture and various federal executive officials² in their individual capacities. Economou claimed thirty-two million dollars in damages.³ The complaint alleged ten causes of action,⁴ some of which purported to state violations

¹ 438 U.S. 478 (1978).

² *Id.* at 480. The following individuals were named as defendants: the Secretary and Assistant Secretary of Agriculture, the judicial officer and chief hearing examiner, the administrator of the Commodity Exchange Authority, the director of its Compliance Division, the deputy director of its Registration and Audit Division, and the regional administrator. *Id.* at 482 n. 2. Also named as defendants were the United States, the Department of Agriculture, and the Commodity Exchange Authority. *Id.* at 482 n. 3.

³ *Economou v. Department of Agriculture*, 535 F.2d 658, 690 (1976).

⁴ 438 U.S. at 492-83. The amended complaint alleged: (1) respondent was denied due process because defendants instituted proceedings against him without notice and when he was no longer subject to their jurisdiction. *id.* at 483; (2) defendants, in excess of discretionary authority, illegally proceeded against respondent. *id.* at 483 n. 5; (3) defendants chilled respondent's first amendment right to free expression. *id.* at 483; (4) respondent's rights to due process and to privacy under the Constitution were infringed by furnishing administrative complaints to third parties without respondent's answers. *id.* at 483 n. 5; and (5) respondent's rights to due process were violated when defendants issued a press release containing facts they should have known were false. *Id.*

The remaining causes of action alleged common law torts, including malicious prosecution, invasion of privacy, negligence, and trespass. *Id.* The Supreme Court limited its holding to respondent's constitutional claims, since these were the focus of the lower court opinions. 438 U.S. at 495 n. 22.

of respondent's constitutional rights in the course of an administrative hearing instituted against him.⁶

The United States District Court for the Southern District of New York⁵ dismissed the complaint as to the individual defendants on the ground that they had acted within the scope of their official discretion and authority, and that consequently the doctrine of absolute immunity barred suit.⁷

⁵ 438 U.S. at 483. Following a Commodity Exchange Authority (CEA) audit of respondent's company, the Secretary of Agriculture issued a complaint charging respondent with willful failure to maintain the minimum capital balance required by commodities traders. *Id.* at 481. After a second audit, an amended complaint was issued on June 22, 1979, and a hearing was held before the chief hearing examiner, who recommended sustaining the complaint. *Id.* The judicial officer to whom the Secretary had delegated his decisional authority in enforcement proceedings affirmed the decision. *Id.*

On respondent's petition for review, the Second Circuit vacated the order of the judicial officer. *Economou v. U.S. Department of Agriculture*, 494 F.2d 519 (2d Cir. 1974).

While the administrative complaint was before the judicial officer, respondent filed suit in the district court in an unsuccessful attempt to enjoin the proceedings. 438 U.S. at 481. On March 31, 1975, respondent filed a second amended complaint in the district court seeking damages, upon which the action before the Supreme Court was based.

⁶ *Economou v. Department of Agriculture*, No. 72-478 (S.D.N.Y., filed May 22, 1975). See Brief for Petitioner at 23a-28a of Appendix B, *Butz v. Economou*, 436 U.S. 478 (1978).

Jurisdiction in the second amended complaint was sought, *inter alia*, under 28 U.S.C. § 1331. In a supplemental brief, the petitioners conceded the respondent properly invoked the jurisdiction of the district court under § 1331, citing *Bell v. Hood*, 327 U.S. 678 (1946). In *Bell*, the Court held that, when a complaint seeks recovery directly under the Constitution, the federal court must entertain the suit. Jurisdiction is not defeated by the possibility that the complaint might not state a cause of action. *Id.* at 681-82.

⁷ 438 U.S. at 484. The district court had held the suit barred as to the defendant agencies under the doctrine of sovereign immunity. *Id.* at 484 n. 6.

Sovereign immunity is a common law doctrine that protects governmental entities from suit without their consent. It is absolute and defeats a suit at its inception for lack of jurisdiction. The doctrine has been justified on several grounds.

Traditionally, it was believed "that there can be no legal right as against the authority that makes the law on which the right depends." *Kawanakoa v. Polybank*, 205 U.S. 349, 353 (1907) (Holmes, J.). Today, it is justified on the grounds that governing bodies should not be hampered by fear of damage suits. *Carter v. Colson*, 447 F.2d 358, 365-66 (D.C. Cir. 1971), *rev'd on other grounds sub nom.*, *District of Columbia v. Carter*, 409 U.S. 418 (1973), and on the ground that satisfying private claims against the state would be too great a drain on public funds. See 2 F. Harper & F. James, *The Law of Torts* 1611-12 (1956).

The United States Court of Appeals for the Second Circuit reversed as to the individual defendants.⁸ It relied upon subsequent decisions

The doctrine is being dismantled legislatively and judicially. See generally K. Davis, *Administrative Law of the Seventies* ch. 25 (1976). Congress selectively waived immunity by passage of the Federal Tort Claims Act of 1946.

The waiver, however, excludes claims based upon the exercise of discretion, 28 U.S.C. § 2680(a)(1976), and certain intentional torts, *id.* at 2680(h). Congress sought through these exemptions to preserve sovereign immunity from tort claims which arise from conscious governmental decision-making. Accordingly, the doctrine of sovereign immunity still bars a claim against the government in cases involving an official exercising discretion.

To circumvent the immunity of the government, it is common to name as the defendant only the individual government official whose conduct is challenged. In an "officer suit," the most frequently litigated question is whether the suit is *in substance* against the government itself. If so, sovereign immunity still bars the suit. *Larson v. Foreign and Domestic Commerce Corp.*, 337 U.S. 682 (1949).

The majority in *Larson* clearly suggests that, in suits for damages, interference with the government is minimal, and sovereign immunity will not bar the suit. Only when the suit is for specific relief, restraining or directing the officer's actions, must the court determine whether the action is essentially against the government, and thus barred. *Id.* at 687-688.

In cases where sovereign immunity will not bar suit, a parallel doctrine has developed. Official immunity is a common law doctrine which protects government officials from *personal liability* for acts carried out in the performance of their official duties. Two levels of immunity exist, absolute and qualified.

Absolute immunity is a complete bar to suit which, upon pleading on motion to dismiss, or motion for summary judgment, entitles an official to an immediate dismissal. Qualified immunity entitles an official to a complete bar only if he can prove that he acted reasonably and in good faith.

For a general discussion of the development of the immunity doctrines, see Note, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 Temp. L. Q. 938, 938-45 (1976); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Col. L. Rev. 1 (1972); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209 (1963); Davis, *Administrative Law of the Seventies* chs. 25, 26 (1976).

⁸ 438 U.S. at 484. The court affirmed the holding of the district court which barred suit against the defendant agencies. *Economou v. Dept. of Agriculture*, 535 F.2d 688, 689 (2d Cir. 1976). The court found that Congress had not authorized either agency to be sued in its own name, *id.* at 690, and that the Federal Tort Claims Act, 28 U.S.C. 2680(h) (1976), did not support jurisdiction over respondent's claim against the United States. *Id.* at 690.

involving the immunity of state officials under 28 U.S.C. § 1983⁹ to find that defendants were entitled only to the qualified immunity available to their counterparts in state government.¹⁰

The Supreme Court granted certiorari¹¹ to decide the scope of the official immunity doctrine when constitutional violations are involved.¹² In a 5-4 opinion,¹³ the court held that, in a suit for damages arising from unconstitutional action, federal executive officials who exercise discretion are entitled only to the qualified immunity specified in *Scheuer v. Rhodes*.¹⁴ The Court further held that exceptions to this general rule of qualified immunity could be made when it is demonstrated that absolute immunity is essential for the conduct of public business.¹⁵

Applying this functional approach to immunity, the Court held that persons who perform adjudicatory functions within a federal agency are

⁹ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

¹⁰ 438 U.S. at 484-85. The court of appeals found the district court's reliance upon the doctrine of absolute immunity to be misguided in view of subsequent case law dealing with the scope of immunity extended to state officials in suits for damages under 28 U.S.C. § 1983. In the court's opinion, these cases establish that, while judges, prosecutors, and legislators require absolute immunity to perform their functions, executive officials exercising discretionary functions are adequately protected by a defense of qualified immunity. 535 F.2d at 696. The court determined that defendants were entitled only to qualified immunity, rejecting the argument that defendants acting in enforcement proceedings were because of the nature of such action entitled to absolute immunity. 535 F.2d at 696 n. 8.

¹¹ 429 U.S. 1089 (1977).

¹² 483 U.S. at 480-81.

¹³ Mr. Justice White wrote the majority opinion in which Mr. Justices Brennan, Marshall, Blackmun and Powell joined. Mr. Justice Rehnquist wrote an opinion in which the Chief Justice and Mr. Justices Stevens and Stewart joined, concurring in part and dissenting in part.

¹⁴ 438 U.S. at 507.

¹⁵ *Id.*

entitled to absolute immunity for their judicial acts,¹⁶ as are officials responsible for the decision to initiate or continue a proceeding subject to agency adjudication,¹⁷ and agency attorneys who arrange for the presentation of evidence on the record in the course of an adjudication.¹⁸ The Court then vacated and remanded the case for application of the foregoing principles to defendants.¹⁹

In order to fully appreciate the significance of this holding and its effect upon the personal liability of commanding officers it is necessary to examine previous case law concerning the scope of official immunity.

II. THE DEVELOPMENT OF THE DOCTRINE OF OFFICIAL IMMUNITY

The federal immunity doctrine, as it had evolved prior to *Economou*, provided officials of the executive branch with absolute immunity from personal liability for actions taken within the scope of their discretion, even if they acted out of malice or bad faith.²⁰ Absolute immunity is a

¹⁶ *Id.* at 512-13.

¹⁷ *Id.* at 515-16.

¹⁸ *Id.* at 516-17.

¹⁹ *Id.* at 517. It appears that most of the defendants were exercising one of the exceptional functions, and should be able to claim absolute immunity. The auditors will have to make the factual showing necessary to obtain qualified immunity.

²⁰ The notion that government officials should be shielded from liability for their misconduct evolved only gradually. Nineteenth century courts afforded officers little protection for actions taken in the performance of their responsibilities. See Engdahl, *supra* note 7. While officials were not held liable for good faith errors in judgment made while acting within the scope of their authority, *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849), a variety of circumstances could cause a court to find lack of authority, and therefore liability.

A defendant was held liable if he acted unconstitutionally, *U.S. v. Lee*, 106 U.S. 196 (1882); *Virginia Coupon cases*, 114 U.S. 269 (1884); if he made good faith errors as to the scope of his jurisdiction, and thereby acted beyond his authority, *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891); *Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 7 U.S. (2 Cranch) 331 (1806); if he acted out of malice, *Kendall v. Stokes*, 44 U.S. (3 How.) at 98-99; *Wilkes v. Dinsman*, 48 U.S. (7 How.) at 93; and if he committed a positive tort (*Engdahl, supra* note 7, at 16-17).

complete bar to suit, which upon pleading entitles an official to a dismissal of the suit against him.²¹

The explanation for the existence of this doctrine is found in two mutually interdependent conclusions: the injustice of subjecting an official to liability for an exercise of discretion which the law requires him to perform, and the danger that the threat of personal liability may hinder officials in freely executing their duties.²² Judge Learned Hand set forth the policy reasons for absolute immunity in classic terms:

[T]o subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . .

[I]t has been thought better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.²³

The need for absolute immunity for executive officials was apparent to the Supreme Court when the matter first came before it in 1896. In *Spalding v. Vilas*, the Court extended absolute immunity in a defamation suit to the head of an executive department acting within the scope of

However, by 1871, the Supreme Court began to change its philosophy. In *Bradley v. Fisher*, 80 U.S. 335 (1871), a case involving judicial officers, the court recognized the importance of allowing judges to freely exercise their discretion without fear of consequences. *Id.* at 347. It held that judges were entitled to absolute immunity for their judicial acts even if such acts were in excess of their jurisdiction or are alleged to have been done out of malice. *Id.* at 351-52.

Within a few decades, the Supreme Court carried the doctrine over to the protection of high ranking federal executive officers in *Spalding v. Vilas*, 161 U.S. 483 (1896), and eventually applied it to lower echelon federal officials in *Barr v. Matteo*, 360 U.S. 564 (1959).

²¹ See note 7, *supra*, for a more complete discussion of the various doctrines pertaining to immunity.

²² *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

²³ *Gregoire v. Biddle*, 177 F.2d 679, 681 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1949).

his authority.²⁴ Lower courts began to apply *Spalding* to a wide range of officials.²⁵

In 1959, the Supreme Court reaffirmed the trend in the lower courts by extending its holding in *Spalding*. In *Barr v. Matteo*,²⁶ a plurality of the Court held that a lower echelon federal executive official exercising discretion was absolutely immune from suit for defamation committed

²⁴ 161 U.S. 483 (1896). The cases involved an action against the Postmaster General for maliciously issuing a circular to injure plaintiff's business. The Court found the circular to have been factually accurate and issued within the scope of the official's authority. Therefore, allegations of malice notwithstanding, the official was not liable.

A narrow view of the case, and the one adopted by the court in *Economou*, is that an officer will not be liable in damages for performing his duties, if he would not otherwise be subject to liability, just because the plaintiff alleges malice. *Butz v. Economou*, 438 U.S. at 493.

A broader view was suggested by some of the language in the *Spalding* opinion, however, and many lower courts interpreted *Spalding* to protect even tortious or malicious acts of officers provided they were performed within the scope of the officer's authority. (See note 25, below.)

²⁵ See e.g., *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950) (immigration officials immune); *Laughlin v. Rosenman*, 163 F.2d 838 (D.C. Cir. 1947) (Special Counsel to the President and Special Assistant to the Attorney General immune from malicious prosecution); *Jones v. Kennedy*, 121 F.2d 40 (D.C. Cir. 1941), cert. denied, 314 U.S. 665 (1941) (members of SEC immune from charges of malicious investigation); *Glass v. Ickes*, 117 F.2d 273 (D.C. Cir. 1940), cert. denied, 311 U.S. 718 (1941) (Secretary of Interior immune from defamation suit); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938), cert. denied, 305 U.S. 643 (1938) (comptroller of currency, U.S. attorney and assistant attorney, and FBI special agent immune from malicious prosecution); *Adams v. Home Owners Loan Co.*, 107 F.2d 139 (8th Cir. 1939) (employees of Home Owners Loan Co., as agents of government, immune from suit for malicious prosecution); *Lang v. Wood*, 92 F.2d 211 (D.C. Cir. 1937), cert. denied, 302 U.S. 686 (1937) (Attorney General, parole board, warden and director of prison immune from liability for maliciously imprisoning plaintiff and revoking parole without a hearing); *Standard Nut Co. v. Mellon*, 72 F.2d 557 (D.C. Cir. 1934), cert. denied, 293 U.S. 605 (1934) (Secretary and Assistant Secretary of Treasury immune); *Gibson v. Reynolds*, 172 F.2d 95 (8th Cir. 1949), cert. denied, 337 U.S. 925 (1949) (state director of selective service and local draft board members immune); and *Colpoys v. Gates*, 118 F.2d 17 (D.C. Cir. 1940) (U.S. marshal immune in defamation action).

²⁶ 360 U.S. 564 (1959).

while acting within the outer perimeter of his authority, even if the official acted with malicious motives.²⁷

In a companion case to *Barr*, *Howard v. Lyons*,²⁸ the Court held that a Navy captain and commander of the Boston Naval Shipyard was included within the *Barr* rule, thus extending the protection of absolute immunity to military officials exercising discretionary functions.²⁹

The generally accepted rule in the lower courts after *Barr* became that a federal official is absolutely immune to suit for *any* common law tort,³⁰ provided:

²⁷ 360 U.S. at 572-75. In *Barr*, the employees of the Federal Office of Rent Stabilization sued their superior, the acting director of the office, for defamatory statements contained in a press release which criticized the employees' actions in devising a budgetary plan that had come under congressional attack. *Id.* at 565-67.

Justice Harlan wrote for a plurality. Justice Black concurred separately, emphasizing the need to promote informed public opinion by protecting statements such as those made to the press by defendant. Justice Brennan, in his dissenting opinion, severely criticized the lack of justification for the majority's decision to deprive a citizen of all redress. *Id.* at 586-91.

²⁸ 360 U.S. 593 (1959).

²⁹ *Id.* at 597-98. *Howard* is also significant for its holding that federal law applies to the immunity question. *Id.* at 597.

³⁰ *Babylon Milk and Cream Co. v. Rosenbush*, 233 F. Supp. 735 (E.D.N.Y. 1964); *Bowman v. White*, 388 F.2d 756 (4th Cir. 1968), *cert. denied*, 393 U.S. 891 (1968); *Chavez v. Kelly*, 364 F.2d 113 (10th Cir. 1966); *Continental Bank and Trust Co. v. Brandon*, 297 F.2d 928 (5th Cir. 1962); *DeLeVay v. Richmond Co. School Bd.*, 284 F.2d 341 (4th Cir. 1960); *Gaines v. Wren*, 185 F. Supp. 774 (N.D. Ga. 1960), *motion to set aside judgment denied*, 34 F.R.D. 220 (1963); *Garner v. Rathbun*, 346 F.2d 55 (10th Cir. 1965); *Golub v. Krinsky*, 185 F. Supp. 783 (S.D.N.Y. 1960); *Holmes v. Eddy*, 341 F.2d 477 (4th Cir. 1965); *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962); *Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1962); *Ruderer v. Meyer*, 418 F.2d 175 (8th Cir. 1969); *Sauber v. Gliedman*, 283 F.2d 941 (7th Cir. 1960); *Shipp v. Waller*, 391 F. Supp. 263 (D.D.C. 1975); *Steinberg v. O'Connor*, 200 F. Supp. 737 (D. Conn. 1961); *Wozencraft v. Captiva*, 314 F.2d 288 (5th Cir. 1963).

A. He is exercising a discretionary function;³¹ and

B. He is acting within the outer perimeter of his official authority.³² (At common law, when an official acted beyond the scope of his authority, he was held personally liable, as the defense of official immunity did not apply. Thus, it was crucial for an official to be acting within his authority. This remains true after *Economou*.³³)

Lower courts applied the rule in a variety of military contexts to bar civil suit for damages against officers who committed common law torts within the scope of their duties. For example, a Navy captain was not liable for alleged interference with the contract rights of a civilian employee in the course of enforcing a conflict of interest regulation,³⁴ and an Air Force colonel was not liable for statements made to the press in

³¹ Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. *Jackson v. Kelly*, 557 F.2d 735, 737 (10th Cir. 1977); *Estrada v. Hills*, 401 F. Supp. 429, 436 (N.D. Ill. 1975).

Cf. *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d at 659. In the *Gustavsson* case, the court held that discretion inheres in any act resulting from judgment or decision which it is necessary that the official be free to make without fear of vexatious or fictitious suits and alleged personal liability.

³² The commonly cited test for determining what acts are within the scope of an official's duties is whether the acts have "more or less connection with the general matters committed by law to his control or supervision." *Spalding v. Vilas*, 161 U.S. 483, 498.

Some courts have expressed a broad view that acts which are not strictly authorized by, nor in furtherance of, a rule or regulation, may nevertheless be in the line of official duty if they are deemed appropriate to the exercise of the actor's office. *Denman v. White*, 316 F.2d 524 (1st Cir. 1963); *Cooper v. O'Connor*, 99 F.2d at 139 (D.C. Cir. 1938).

A second test in *Spalding*, that acts are within the scope of authority unless they are "manifestly and palpably beyond his authority," 161 U.S. at 497-98, seems to have been discredited by the Court in *Economou*, 438 U.S. at 494.

³³ *See, e.g.*, *Green v. James*, 473 F.2d 660 (9th Cir. 1973) (Army regulations did not give the Adjutant General authority to harass defendant for going 80 mph in 25 mph zone); *Bates v. Clark*, 95 U.S. 204 (1877) (Army captain not authorized by statute to seize ships coming from French ports, only those sailing to a French port).

³⁴ *Areskog v. U.S.*, 396 F. Supp. 834 (D. Conn. 1975).

response to a charge that the Air Force had been negligent in a recent tower collapse.³⁵

III. EROSION OF THE DOCTRINE OF ABSOLUTE IMMUNITY

Although *Barr* established a standard of absolute immunity for federal officials accused of common law torts, subsequent cases began to erode the doctrine when constitutional claims were involved. These cases arose in two contexts, suits against state executive officials under 28 U.S.C. § 1983, and suits against federal officers under the implied right of action for infringement of constitutional rights developed in *Bivens v. Six Unknown Named Agents of the FBI*.³⁶

A. STATE EXECUTIVE OFFICIALS: 28 U.S.C. § 1983

Section 1983 was enacted to insure that constitutional rights could not be infringed under color of state law. A literal reading of the statute suggests no one sued under it should be entitled to immunity. Nevertheless, the Court extended absolute immunity to judges,³⁷ legislators,³⁸

³⁵ *Denman v. White*, 316 F.2d 524 (1st Cir. 1963). See also *Frost v. Stern*, 298 F. Supp. 778 (D.S.C. 1969) (defamation action by civilian employee against commander of Naval Supply Center for distributing defamatory cartoon barred by immunity); *Leighton v. Peters*, 365 F. Supp. 900 (D. Haw. 1973) (Navy weapons officer immune from suit for maliciously ordering seaman in light duty status to participate in watch); *Mandel v. Nouse*, 509 F.2d 1081 (6th Cir. 1975), (Secretary of Army, Commander, USATACOM, and immediate supervisor immune in civil defamation suit by engineers discharged pursuant to inefficient performance rating); *Pagano v. Martin*, 275 F. Supp. 498 (E.D. Va. 1967), *aff'd* 397 F.2d 620 (4th Cir. 1967), *cert. denied*, 393 U.S. 1022 (1968)(libel action by Navy petty officer against commanding officer and executive officer barred); *Sulger v. Pochyla*, 397 F.2d 173 (9th Cir. 1968) (slander action by taxi driver against general and colonel for defamatory statements made during investigation of driver's business barred by immunity); *Ward v. Hudnell*, 366 F.2d 247 (5th Cir. 1966) (discharged employee barred from suing military officer for allegedly malicious discharge); *Brownfield v. Landon*, 307 F.2d 389 (D.C. Cir. 1962) (Air Force Inspector General not liable for defamation of high ranking Air Force officer).

³⁶ 403 U.S. 388 (1971).

³⁷ *Pierson v. Ray*, 386 U.S. 547 (1967).

³⁸ *Tenney v. Breedlove*, 341 U.S. 367 (1951).

and prosecutors.³⁹ In a series of cases beginning with *Scheuer v. Rhodes*,⁴⁰ the Court limited the degree of immunity available to state executive officials. In *Scheuer*, the Governor of Ohio, the president of Kent State University, and officials of the Ohio National Guard were held to enjoy only qualified immunity from suit for the intentional, willful, and wanton deployment of the National Guard.⁴¹

Qualified immunity affords less protection to an official than absolute immunity. It entitles him to a complete defense for his actions only if he can prove he acted in good faith and reasonably in light of all the circumstances as they appeared at the time.⁴² The Court described the degree of immunity to be applied to state executive officials as follows:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁴³

Thus, in the context of constitutional violations, the doctrine of absolute immunity was replaced by a less protective standard for state officials.⁴⁴

B. FEDERAL EXECUTIVE OFFICIALS: THE BIVENS CASE

A parallel movement, offering constitutional rights greater protection from official abuse, occurred in the context of liability of federal officials.⁴⁵

³⁹ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

⁴⁰ 416 U.S. 232 (1974).

⁴¹ *Id.* at 235, 247.

⁴² See Note 7, *supra*, for more complete discussion of the immunity doctrines.

⁴³ 416 U.S. 232, 247-48.

⁴⁴ The standard of qualified immunity has since been applied in other contexts. See *Wood v. Strickland*, 420 U.S. 308 (1974) (school board officers); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (a superintendent of insane asylums); and *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials). For a discussion of the different formulations of the qualified immunity standard, see nn. 116-35 and accompanying text.

⁴⁵ 403 U.S. at 390-395, 397.

In *Bivens*, the Court held that violations of a person's fourth amendment rights through illegal entry and search of his home by FBI agents could be compensated in damages.⁴⁶ The Court thereby created the "constitutional tort," a cause of action against federal officials for alleged deprivations of constitutional rights.

The court did not determine what standard of immunity, absolute or qualified, was to be applied to the FBI agents. On remand, the Court of Appeals for the Second Circuit⁴⁷ found that the agents were entitled to only qualified immunity based on a good-faith, reasonable belief in the legality of the arrest and search.⁴⁸

C. THE EVOLVING STANDARD

Given these two lines of cases, some courts determined that a new standard of immunity should be applied to federal officials who violate constitutional rights in the course of their duties. They reexamined the *Barr* doctrine of absolute immunity and found that it was no longer appropriate when federally originated *constitutional* violations were concerned.⁴⁹

In the specific context of the military, two cases held that only qualified

⁴⁶ *Id.* at 397-98. Since the court of appeals had not passed upon the immunity question, the Supreme Court refused to consider it and remanded the case for further proceedings. *Id.* at 398.

⁴⁷ 456 F.2d 1339 (1972).

⁴⁸ *Id.* at 1341. The Second Circuit, on remand to determine the immunity question, rejected the applicability of the *Barr* absolute immunity rule. However, the court did not totally deny its relevance in constitutional cases, only in cases where the officers are not exercising a discretionary function. *Id.* at 1343. The agents were entitled only to a defense of good faith and probable cause. *Id.* at 1347. The court further noted that it would be "incongruous" to make available to federal officers the absolute standard of immunity, and to hold state officials to only a qualified standard of immunity, for performing identical police functions. *Id.* at 1346-47.

⁴⁹ See, e.g., *Apton v. Wilson*, 506 F.2d 88 (D.C. Cir. 1974), in which Justice Department officials were held to have only the qualified immunity specified in *Scheuer* for violations of 4th and 5th amendment rights. "Such an immunity appropriately allows vindication of the fourth and fifth amendment rights at stake, while preserving for the officials involved a shield against liability that will allow vigorous, legitimate use of power." *Id.* at 92-93.

immunity applied to commanding officers who committed violations of constitutional rights. In *Butler v. United States*,⁵⁰ qualified immunity was made available to military law enforcement officials who barred protestors from the base during a visit of the President, in violation of the first amendment.⁵¹

Qualified immunity was also applied in *Alvarez v. Wilson*⁵² to the commandant of the Ninth Naval District, the commanding officer of a sub-

See also Black v. U.S., 534 F.2d 524 (2d Cir. 1976) (Secretary of Treasury and IRS commissioner no longer enjoy absolute immunity for violation of constitutional rights, although complaint dismissed on other grounds); Jones v. U.S., 536 F.2d 269 (8th Cir. 1976) (*Scheuer* qualified immunity applies to federal officials using electronic surveillance in deprivation of defendant's constitutional rights); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (IRS agents entitled to only qualified immunity); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) (section 1983 cases looked to for guidance in determining the immunity question); Rowley v. McMillan, 502 F.2d 1326, 1335 (4th Cir. 1974) (*Scheuer* decision held dispositive of federal official's claim of immunity for unconstitutional arrest and assault); State Marine Lines v. Shultz, 498 F.2d 1146, 1158-59 (4th Cir. 1974) (customs officer held to *Scheuer* standard of qualified immunity); Weir v. Muller, 527 F.2d 872 (5th Cir. 1976) (*Scheuer* reasoning may be pertinent to case involving violation of constitutional rights).

Cf. G.M. Leasing Corp v. U.S., 560 F.2d 1011, 1014-15 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); and *Bivens v. Six Unknown Named Agents of the FBI*, 456 F.2d 1339 (1972). In both cases, qualified immunity was held appropriate because officers were performing ministerial as opposed to discretionary duties.

But see *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978), in which a comptroller was found not personally liable for alleged tort based on acts within the scope of duties. In note 2, the court held that, while the qualified immunity rule sets forth broadly applicable standards for executive officials, the breadth and character of an official's discretion may make a case for absolute immunity.

⁵⁰ 365 F. Supp. 1035 (D. Haw. 1973).

⁵¹ *Id.* at 1045. The suit was brought against various military personnel who were assigned to the base when plaintiffs were barred from it. These included the base commander, the chief of security, and several security officers.

While absolute immunity was held normally available to officers, only qualified immunity was found to be available to law enforcement officials performing police duties. This distinction complicates the resolution of the immunity question in the court's opinion. The court denied summary judgment on behalf of defendants on the basis of absolute immunity, and ordered an evidentiary hearing to determine defendant's liability. *Id.* at 1045.

⁵² 431 F. Supp. 136 (N.D. Ill. 1977).

ordinate unit, and the director of administrative services, in a suit by LtJG Alvarez, a black Puerto Rican.⁵³ He was hospitalized against his will for psychiatric evaluation. Allegedly, his confinement was motivated by racial prejudice and unconstitutionally deprived him of liberty without due process.⁵⁴ The Court examined the *Scheuer/Bivens* line of cases⁵⁵ and held that qualified immunity applied, rejecting the defendants' claims that military necessity demands a standard of absolute immunity.⁵⁶

Thus, even prior to *Economou*, some courts had applied qualified immunity to military officials when constitutional rights were involved.

IV. OFFICIAL IMMUNITY AFTER *BUTZ V. ECONOMOU*

A. THE COURT'S ANALYSIS

The immediate effect of *Economou* is to clear up any confusion existing in lower courts as to when federal officers will have absolute or qualified immunity. It is now certain that most federal executive officials who exceed constitutional limits will be entitled to no more than the same qualified immunity as state executive officers.⁵⁷

The Court reached this result through a three-pronged analysis. First, it reexamined past case law including *Spalding v. Vilas*⁵⁸ and *Barr v. Matteo*.⁵⁹ It gave *Spalding* a narrow interpretation and stated that the case was never intended to immunize officials who ignore limitations on

⁵³ *Id.* at 146.

⁵⁴ *Id.* at 143.

⁵⁵ *Id.* at 143-44.

⁵⁶ *Id.* at 146. Defendant's motion to dismiss was denied in all respects. *Id.* at 147. Additionally, the court found that there were issues of fact concerning the subjective good faith of defendants, and that motion for summary judgment was an inappropriate tool for determination of these facts. *Id.* at 147. For further discussion of defendant's arguments based on military necessity, see notes 82-93, below, and accompanying text.

⁵⁷ 438 U.S. at 506-07.

⁵⁸ 438 U.S. at 497 n. 24.

⁵⁹ 438 U.S. at 499 n. 26.

their authority imposed by law.⁶⁰ It distinguished *Barr* as dealing only with state law tort claims.⁶¹

The Court found that neither *Barr* nor *Spalding* dealt with the liability of officials who exceed constitutional limitations.⁶² Moreover, neither case abolished liability for actions manifestly not in the line of duty.⁶³ It would be incongruous, in the Court's view, to hold that officials may be liable when they violate statutory limitations but may violate constitutional rights without liability.⁶⁴

The Court then examined the section 1983 cases⁶⁵ and found, absent congressional direction to the contrary, no distinction for purposes of immunity law between suits brought against state officials under section 1983 and suits brought directly under the Constitution against federal officials.⁶⁶

*Bivens*⁶⁷ provided the final justification for the Court's holding, even though *Bivens* did not involve the immunity question. The Court determined that absolute immunity could not have been intended to apply or else the cause of action recognized in *Bivens* would be meaningless.⁶⁸

In conclusion, citing *Marbury v. Madison*,⁶⁹ the Court found that no official is exempt from federal law, and thus any official seeking an absolute exemption from liability must bear the burden of proving that such an exemption is justified by public policy.⁷⁰ Generally, however, public policy will support only the limited immunity specified in *Scheuer*.⁷¹

The rest of the opinion holds that the special functions exercised by those persons who perform various adjudicatory and prosecutorial func-

⁶⁰ 438 U.S. at 493-94.

⁶¹ 438 U.S. at 495.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 438 U.S. at 496-500.

⁶⁶ 438 U.S. at 500-01.

⁶⁷ 438 U.S. at 509 n. 36.

⁶⁸ 438 U.S. at 501.

⁶⁹ 5 U.S. (1 Cranch) 137 (1803).

⁷⁰ 438 U.S. at 506.

⁷¹ 438 U.S. at 506-07.

tions⁷² within an administrative agency justify the same absolute immunity accorded to judges and prosecutors at common law.⁷³

In a strong dissent, Justice Rehnquist challenged many of the premises supporting the Court's decision to cut back on the absolute immunity afforded federal officials.⁷⁴ While the Court's decision may be criticized, particularly for its failure to address the underlying policies,⁷⁵ the function of this paper is not to criticize but to enlighten commanders as to the implications of the *Economou* decision for their personal liability.

⁷² See Notes 16-19, above, and accompanying text.

⁷³ 438 U.S. at 508-17.

⁷⁴ 438 U.S. at 518-30. Rehnquist concurs in the Court's holding insofar as it affords absolute immunity to persons performing adjudicatory functions. *Id.* at 517. He strongly criticizes the Court's holding that qualified immunity is generally the appropriate standard for federal officials. He objects to the Court's narrow interpretation of *Spalding*, finding it "unnaturally constrained." *Id.* at 518.

In Rehnquist's view, the *Spalding* court would have held the Postmaster General immune even if his actions had been unconstitutional. *Id.* He finds the basis for distinguishing between constitutional and common law torts impractical in the immunity context and of questionable logical justification. *Id.* at 519-20. Such a distinction ignores the basic policy justifications which are behind the official immunity doctrine, such as avoiding deterrence of fearless performance by federal officers. *Id.* at 520-21.

Rehnquist finds a valid distinction between § 1983 qualified immunity and absolute immunity for federal constitutional violations. Section 1983 was enacted by Congress to supervise and check state officers. To fulfill this congressional intent, it was necessary for the courts to grant qualified immunity. The federal government, however, can internally check and supervise its own officers. The majority's attempt to avoid the force of this argument by equating general federal question jurisdiction under 28 U.S.C. § 1331 with § 1983 is misguided, in his view. *Id.* at 524-26.

Section 1331, which grants jurisdiction, does not create a right of action for constitutional violations. To date, the only recognized private right of action for damages under the constitution is the fourth amendment. *Bivens* will not be drained of meaning if absolute immunity is applied. Those subject to suit under *Bivens* (police officers) are entitled to qualified immunity under the common law anyway. Moreover, if Congress thinks redress for constitutional violations is important, it can waive sovereign immunity. *Id.* at 524.

Rehnquist's major concern, however, is for the potential disruption of the government which the majority decision invites. In his view, the Court's two solutions, a "special function" exemption and avoidance of spurious claims through dismissal on summary judgment, are inadequate attempts to dam the flood of litigation which is likely to ensue. *Id.* at 526-27.

⁷⁵ K. Davis, *Administrative Law of the Seventies* § 26.00-3-2 (1976).

B. MILITARY OFFICERS' IMMUNITY—QUALIFIED OR ABSOLUTE?

The first question to be addressed is whether, after *Economou*, military officers are likely to be subject to the general rule of qualified immunity, or whether an absolute exemption from personal liability may be sought on the grounds that it is required by public policy. Under the Court's "special function" exception,⁷⁶ it can be asserted that absolute immunity is essential for the effective operation of the military and is necessary to allow military officers to maintain order and discipline among their subordinates. However, the success of this argument is uncertain at best.

For example, the Court of Appeals for the Eighth Circuit, in *Tigue v. Swaim*,⁷⁷ a case decided after *Economou*, has rejected this broad argument and opted for a more particularized analysis of each officer's functions, his immunity at common law, and the interests sought to be protected.⁷⁸ The case involved a suit by an Air Force captain against the base hospital commander, an Air Force colonel, for libel and false imprisonment which occurred when the colonel ordered the captain confined for psychiatric evaluation on a questionable set of facts.⁷⁹

⁷⁶ 438 U.S. at 508.

⁷⁷ 585 F.2d 909 (8th Cir. 1978).

⁷⁸ *Id.* at 914.

⁷⁹ *Id.* at 910. The facts of the case are as follows: While stationed at Little Rock Air Force Base, the plaintiff was asked to contribute to a fund for coffee mugs for departing officers. Plaintiff objected to this practice and filed an administrative complaint with the Inspector General, who recommended the practice cease.

Plaintiff's commander was unhappy with plaintiff's decision to press the complaint and had defendant schedule plaintiff for a mental evaluation pursuant to the Human Reliability Program (HRP). The purpose of the program is to ensure selection of only those personnel stable enough to handle nuclear weapons.

Defendant was medical staff advisor for HRP. Defendant set up an appointment which plaintiff did not keep, and he was removed under the HRP. He was then scheduled for an evaluation by a civilian psychiatrist, which appointment was cancelled by defendant. Another appointment with a retired colonel was scheduled. He examined plaintiff but deferred diagnosis, saying plaintiff was suffering from a thyroid condition, an admittedly false diagnosis.

Plaintiff was ultimately confined for 22 days to undergo psychiatric evaluation. The resulting report stated that Tigue suffered from no mental disorder and his difficulties stemmed from a refusal to contribute money to a fund for coffee mugs. *Id.* at 910-12.

The Court recharacterized the claim as a constitutional one of deprivation of liberty without due process of law⁸⁰ and determined that the extent of the colonel's immunity was dependent upon the *Economou* decision.⁸¹ The court rejected the colonel's argument that absolute immunity was required by the demands of military necessity and discipline.⁸² It stated that:

[W]e have no other alternative under *Butz* than to hold that military officers during peacetime are not automatically clothed with absolute immunity in every situation. *Butz* demands a particularized inquiry into the functions an official performs and the circumstances under which they are performed prior to the granting of absolute immunity.⁸³

The district court had granted summary judgment on the grounds that all military officers, when acting within the scope of their duties, are immune from suit. The Eighth Circuit rejected this.⁸⁴ It then inquired into the specific functions performed by the colonel, however, and found that absolute immunity was appropriate.⁸⁵ The colonel's function as psychiatric evaluator of persons in the nuclear weapons program, in which the captain was a participant, involved national security interests which justified absolute immunity.⁸⁶

The trial court in *Alvarez v. Wilson*⁸⁷ also rejected a broadly based military necessity argument as a justification for absolute immunity.⁸⁸ The court recognized that, "Generally speaking, commanding officers in

⁸⁰ *Id.* at 913. "The complaint alleges specific facts to establish that Tigie was unlawfully deprived of liberty without due process of law. . . ."

⁸¹ *Id.* at 913.

⁸² *Id.* at 914.

⁸³ *Id.* at 913-14.

⁸⁴ *Id.* at 914.

⁸⁵ *Id.* at 914-15.

⁸⁶ *Id.* at 915.

⁸⁷ 431 F. Supp. 136 (N.D. Ill. 1977).

⁸⁸ *Id.* at 145-46. The court refused to rely on *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974), as establishing a standard of qualified immunity in this context. Despite *Brubaker*, which held that qualified immunity is available to federal officers who violate the fourth amendment, the court felt that the defendants had made strong arguments supporting absolute immunity for military members, and that these arguments should be examined. 431 F. Supp. at 145.

the armed forces are charged with duties to maintain order and discipline among their troops."⁸⁹ Citing *Greer v. Spock*,⁹⁰ the court also recognized "the constitutional mission of armed forces to provide for the common defense and to be ready to fight wars should the need arise."⁹¹

Nevertheless, the court found that these arguments did not justify blanket immunity.⁹²

The individual defendants are hardly at the brink of combat. These defendants are physicians, administrators, or both. . . . They are not responsible for making wartime decisions or training sailors. The nature of defendants' actual duties tempers the military need for absolute immunity.⁹³

In both cases the courts rejected broad application of absolute immunity in favor of the balancing approach implicitly approved in *Economou*.⁹⁴ They weighed the harm to the individual if deprived of redress,

⁸⁹ *Id.* at 145.

⁹⁰ 424 U.S. 828 (1976).

⁹¹ 431 F. Supp. at 145.

⁹² *Id.* at 146. A key factor in the court's decision may have been the allegation by plaintiff that defendant's actions were racially motivated. In the court's eyes, this enhanced the severity of the individual deprivation. *Id.* at 146.

⁹³ *Id.* at 145-46.

⁹⁴ The court in *Tighe* accurately described the balancing process implicit in *Economou*. "[T]he Court determined that the risk of discouraging the vigorous exercise of governmental authority was usually outweighed by the harm to the individual citizen if he cannot bring suit for violations of his constitutional rights." 453 F. Supp. at 913.

For example, in *Economou*, the Court balanced governmental and individual interests to determine that those exercising various adjudicatory functions in an agency were entitled to absolute immunity. The immunity granted at common law and the interests behind it were balanced against the individual's interest in redress.

The Court found absolute immunity justified in the case of administrative judges, for instance, since litigation invariably involves great pecuniary or personal interests which would motivate the parties to sue a judge for a wrongful decision. Absolute immunity is required to protect the integrity of the judicial process. The individual's interest in redress finds protection in the safeguards of the judicial process itself. 438 U.S. at 513-14. See discussion of the various judicial immunities, *id.* at 508-14.

against the disruptive effect of holding individual officers liable.⁹⁵ It seems that, under this balancing approach, a military officer in peacetime will be entitled to absolute immunity only if he is performing a function that is sufficiently related to national security to outweigh the individual's interest in redress.⁹⁶ Thus, as the *Alvarez* court seems to indicate, a stronger case for absolute immunity exists when officers are responsible for wartime decisions, training soldiers,⁹⁷ or as in *Tigue*, maintaining a nuclear weapons program.⁹⁸

As Rehnquist points out in his dissent in *Economou*,⁹⁹ this "special function" immunity is not nearly as protective as the traditional *Barr* doctrine of absolute immunity.¹⁰⁰ An officer may not know until inquiry at trial whether or not immunity will be recognized in his individual case.

Even if a blanket absolute official immunity for all military officers is not recognized by the courts, the parallel doctrine of intramilitary immunity developed after *Feres v. United States*¹⁰¹ may offer the protection of absolute immunity.¹⁰² To date, intramilitary immunity has been utilized

⁹⁵ *Tigue v. Swaim*, 585 F.2d 909, 913, *Alvarez v. Wilson*, 431 F. Supp. 136, 146.

⁹⁶ This finds support in the early common law. The general rule was that officers in command of military forces *during wartime* are not personally liable for injuries resulting from their official acts. *Dow v. Johnson*, 100 U.S. 156 (1879); *Ford v. Surget*, 97 U.S. 594 (1878); *Lamar v. Browne*, 92 U.S. 187 (1875); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). However, personal liability could be incurred when the officer acted wantonly, or in the absence of any reasonable necessity. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

⁹⁷ 431 F. Supp. 136, 145.

⁹⁸ 585 F.2d 909, 914.

⁹⁹ 438 U.S. at 517-30.

¹⁰⁰ *Id.* at 527. "[T]his is a form of 'absolute immunity' which in truth exists in name only." *Id.*

¹⁰¹ 340 U.S. 135 (1950). In *Feres*, the Supreme Court held that the United States was not liable under the Federal Tort Claims Act, 28 U.S.C. § 2674, for injuries to servicemen due to the negligence of government officials, where the injuries arose out of or were in the course of activity incident to service. The *Feres* doctrine was recently cited with approval by the Court in *Stencel Aero Engineering Corp. v. U.S.*, 431 U.S. 666, 669 (1977). The *Feres* rationale is predicated in part on considerations of military discipline and the special relationship of soldiers to superiors and the effects on discipline of maintenance of suits. *Id.* at 671-72.

¹⁰² The Supreme Court indicated in *Economou* that the holding of qualified immunity does not preclude a defendant official from asserting, on summary judgment, some other common law or constitutional privilege. 438 U.S. at 508 n. 35.

only to bar suits between servicemembers for service-connected injuries committed through negligence.¹⁰³ It is unclear whether the intramilitary immunity doctrine will extend to both intentional and negligent *constitutional* violations.¹⁰⁴

One court has been willing to apply the intramilitary immunity doctrine to malpractice actions against individual officers, whether those actions be based on common law negligence principles or fifth amendment due process principles.¹⁰⁵ Yet the *Tigue* court did not consider applying intramilitary immunity outside the common law context.¹⁰⁶

Given the Supreme Court's delineation between the magnitude of in-

¹⁰³ Lower courts have extended the *Feres* rationale to bar suits between service members, primarily in cases involving medical malpractice and ordinary negligence. See *Adams v. Banks*, 407 F. Supp. 140 (E.D. Va. 1976) (Army nurse barred from seeking damages from two Army surgeons for malpractice); *Hass v. U.S.*, 518 F.2d 1138 (4th Cir. 1975) (Marine injured while riding horse rented from stable owned by Marine Corps barred from suit against U.S. and civilian manager of the stable); *Rotko v. Abrams*, 338 F. Supp. 464 (D. Conn. 1971), *aff'd* 455 F.2d 992 (2d Cir. 1972) (*Feres* doctrine not limited to negligence. "The reasoning of the Supreme Court clearly indicates that it is the status of the claimant as a serviceman, rather than the theory of his claim which governs. . ."); *Roach v. Shields*, 371 F. Supp. 1893 (E.D. Pa. 1974), *aff'd* 504 F.2d 1403 (1974) (action for malpractice by active duty soldier against Navy doctor barred by intramilitary immunity); *Martinez v. Schrock*, 537 F.2d 765 (3d Cir. 1976), *cert. denied*, 430 U.S. 920 (1977) (Army surgeons protected by intramilitary immunity from claim by representative of the estate of deceased enlisted man); *Bailey v. DeQuevedo*, 375 F.2d 72 (3d Cir. 1967) (action by enlisted man against Army surgeon for malpractice barred by intramilitary immunity); *Tirill v. McNamara*, 451 F.2d 579 (9th Cir. 1971) (Army physician is immunized from tort liability to fellow soldier when the act of alleged malpractice occurred in military hospital); *Bailey v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965) (no cause of action for malpractice by Army surgeon when sued by enlisted man).

But see *Henderson v. Bluemink*, 511 F.2d 399, 402 (D.C. Cir. 1974) (in a suit by civilian against Army doctor for malpractice, defendant has only limited form of immunity since acts involve medical, not governmental discretion).

¹⁰⁴ *But see* *Rotko v. Abrams*, 338 F. Supp. 464 (D. Conn. 1971), *aff'd* 455 F.2d 992 (2d Cir. 1972).

¹⁰⁵ *Misko v. U.S.*, 453 F. Supp. 513 (D.D.C. 1978). The case involved a suit by a national guard officer against Army medical officers alleging, *inter alia*, deprivation of liberty without due process. *Id.* at 513. The court found the claim barred by *Feres*, since the characterization of a malpractice claim in constitutional terms should not make a difference in the application of the *Feres* doctrine. Otherwise, *Feres* could be abrogated by an exercise in pleading. *Id.* at 515.

¹⁰⁶ *Tigue v. Swaim*, 585 F.2d 909, 914 n. 10.

terests protected by constitutional and common law rights.¹⁰⁷ It seems likely that intramilitary immunity may not serve to bar suits between military members for constitutional violations.

C. LIMITATIONS ON *ECONOMOU*

Assuming that military officers will generally enjoy only qualified immunity unless they prove an exception is justified, we must explore the limits of the context in which the qualified immunity standard operates.

First, the qualified immunity standard applies only when constitutional violations are concerned.¹⁰⁸ Several courts have interpreted *Economou* to mean that the *Barr* rule of absolute immunity for common law torts exists coextensively with the *Economou* rule of qualified immunity for constitutional violations.¹⁰⁹

Any protection offered by a rule of absolute immunity for common law torts may be illusory, however. As Justice Rehnquist points out in his dissent, common law violations are easily painted in constitutional

¹⁰⁷ In *Economou*, the court preserves the distinction between common law and constitutional torts, and by holding the latter subject to the standard of qualified immunity, indicates that a more protective posture is appropriate when constitutional rights are at stake. See Rehnquist, concurring in part and dissenting in part, 438 U.S. at 523.

¹⁰⁸ 438 U.S. at 495. The extension of *Barr* immunity is accepted by the Court with respect to state tort claims. See also Rehnquist dissenting, *id.* at 522-23.

¹⁰⁹ See *Granger v. Marek*, 583 F.2d 781, 784 (6th Cir. 1978) (while in *Economou* the Court held there was only qualified immunity from damages liability for federal executive officials for constitutional violations, the Court distinguished *Spalding* and *Barr* as dealing with common law violations); *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978) (federal officials not entitled to absolute immunity in action for violation of constitutional rights; however, official immunity still applies where suit is for ordinary tort claims); *Tigue v. Swaim*, 585 F.2d 909, 913 (it is a correct statement of the law that *Butz* is limited solely to constitutional claims).

Prior to *Economou*, the Court of Appeals for the D.C. Circuit had preserved the *Barr* rule for common law claims. *Expeditions Unlimited v. Smithsonian Inst.*, 566 F.2d 289, 293 (D.C. Cir. 1977), cert. denied, 98 S.Ct. 8144, 57 L.Ed.2d 1160-61 (1978). But see *Davis, Administrative Law of the Seventies* § 26.00-3-1 at 215 (1976) (the probability is that the Court will move away from the absolute immunity of *Barr* for nonconstitutional torts).

colors.¹¹⁰ As in *Alvarez* and *Tigue*, false imprisonment is quickly characterized as deprivation of liberty without due process. The majority's hope that spurious claims will be weeded out on summary judgment¹¹¹ may be little more than a pipedream.

A second factor which may limit *Economou's* applicability is the fact that the Supreme Court avoided the question of which constitutional rights may be implicated in a suit for damages. It states in a footnote, "The Court's opinion in *Bivens* concerned only a fourth amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution."¹¹²

Many courts and commentators have argued for an expansive interpretation of *Bivens* and have extended the *Bivens* cause of action to a variety of other constitutional rights.¹¹³ However, the expansive interpretation is not universal.¹¹⁴ The concurring opinion of Justice Harlan in *Bivens* suggests a restriction of the constitutional damages action on the

¹¹⁰ 438 U.S. at 520.

¹¹¹ *Id.* at 507-08. See also Rehnquist dissenting, *id.* at 527.

¹¹² *Id.* at 486 n. 8.

¹¹³ *Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1564 n. 155 (1972); *Dellums v. Powell*, 566 F.2d 231 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 3146, 57 L. Ed. 2d 1161, motion for rehearing denied, 58 L. Ed. 2d 201 (1978) (cause of action for first amendment violation); *Paton v. LaPrade*, 524 F.2d 862, 869-70 (3d Cir. 1975) (first amendment violation compensable in damages); *Yiamouyiannis v. Chemical Abstracts Svc.*, 521 F.2d 1392 (6th Cir. 1975) (first amendment); *State Marine Lines v. Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); *Butler v. U.S.*, 365 F. Supp. 1035 (D. Haw. 1973) (first and fifth amendments); *Moore v. Koesler*, 457 F.2d 892 (3d Cir. 1972) (fifth amendment); *Alvarez v. Wilson*, 431 F. Supp. 144 (Naval officers subject to damage action under fifth amendment).

¹¹⁴ See *Misko v. U.S.*, 453 F. Supp. 513, 515 (1978) (court reserves question of whether damage action exists under the fifth amendment); *Tigue v. Swaim*, 585 F.2d at 913 n. 7 (the court reserves question of whether *Bivens* action exists for violation of fifth amendment); *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978) (en banc) (no private cause of action for money damages under the fifth amendment by congressional staff member discharged by congressman allegedly due to sex discrimination); *Torres v. Taylor*, 456 F. Supp. 951 (S.D.N.Y. 1978) (cause of action for damages for violation of fifth and eighth amendments not implied in favor of federal prisoner when he could be compensated under the Federal Tort Claims Act); *Moore v. Schlesinger*, 384 F. Supp. 163, 165 (D. Col. 1974) (*Bivens* doctrine should be limited to fourth amendment); *Davidson v. Kane*, 337 F. Supp. 922 (E. D. Va. 1972) (limiting *Bivens* to fourth amendment).

basis of the Court's ability to fashion a remedy.¹¹⁵ The majority's silence in *Economou* as to the scope of the cause of action recognized in *Bivens* leaves some doubt as to whether military officers will be held liable in damages for violations of constitutional rights other than those protected by the fourth amendment.

D. GOOD FAITH AND REASONABLENESS DEFENSE

Once it is determined that a constitutional violation exists and that qualified immunity is the standard to be applied, the next inquiry is what the standard of qualified immunity demands in the way of legal and factual proof. Since the Court held that the *Scheuer* standard of qualified immunity is applicable to federal officials,¹¹⁶ it is necessary to examine this standard and the cases which have followed in *Scheuer's* wake.

Under the doctrine of qualified immunity set forth in *Scheuer*, an official must establish that:

1. He acted in good faith;
2. He had reasonable grounds for belief in the validity of his conduct;
and
3. He performed the actions in the course of his official conduct.¹¹⁷

However, the *Scheuer* case provided no clues as to the proper application

¹¹⁵ 408 U.S. 409 n. 9, (Harlan, J. concurring):

[T]he experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of fourth amendment rights . . . The same, of course, may not be true with respect to other types of constitutionally protected interest, and therefore the appropriateness of money damages may well vary with the nature and magnitude of the personal interest asserted.

Id.

¹¹⁶ 438 U.S. at 507.

¹¹⁷ 416 U.S. 232, 247-248.

of this standard. Only later in *Wood v. Strickland*¹¹⁸ did the Court attempt to give content to the rather vague standard announced in *Scheuer*.

According to the Court in *Wood*, the test for qualified immunity contains both "subjective" and "objective" elements. Not only must an official act sincerely and with a good faith belief that his actions are right,¹¹⁹ but he must not act in violation of "clearly established constitutional rights."¹²⁰ He is thus held to a standard based upon "permissible intentions and knowledge of basic, unquestioned constitutional rights."¹²¹

In *O'Connor v. Donaldson*,¹²² the Court elaborated upon this requirement and stated that "an official . . . has no duty to anticipate unforeseeable constitutional developments."¹²³ The Court's recent decision in *Procunier v. Navarette*¹²⁴ indicates that in *Scheuer*, *Wood*, and *O'Connor*, the Court was attempting to elaborate a single standard of qualified immunity.¹²⁵ Under *Procunier*, there are basically two circumstances under which an official may be liable: if he acts out of malice (subjective bad faith),¹²⁶ or if he is violating a clearly established constitutional right (objective bad faith).¹²⁷

¹¹⁸ 420 U.S. 307 (1975).

¹¹⁹ *Id.* at 321.

¹²⁰ *Id.*

¹²¹ *Id.* at 322.

A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Id.; see also Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U.L. Rev. 526 (1977).

¹²² 422 U.S. 563 (1975).

¹²³ *Id.* at 577.

¹²⁴ 434 U.S. 555 (1978).

¹²⁵ The Court lumps the three cases together with *Scheuer* in its discussion of the section 1983 standard of executive immunity in *Economou*. This would seem to indicate the Court considers that the four cases express a single standard. The Court sets forth the *Scheuer* standard in *Economou* and then states, "subsequent decisions have applied the *Scheuer* standard in other contexts . . ." citing *Wood*, *O'Connor* and *Procunier*. See 438 U.S. at 498. For a discussion of the single standard developed under *Scheuer*, see Freed, *supra* note 121, at 551-65.

¹²⁶ *Procunier v. Navarette*, 434 U.S. 555, 566 (1978).

¹²⁷ *Id.* at 562.

The standard is designed to prevent malicious deprivation of, or conscious indifference to, constitutional rights. Once it is determined that an official has acted in good faith, the question of liability will probably turn upon the settledness of a constitutional right and, if the right is settled, whether the official acted reasonably in relation thereto.¹²⁸

The Court indicates in *Procunier* that it may apply a narrow definition of when a constitutional right is settled. In that case, prison officials were sued under section 1983 for negligent interference with prisoners' outgoing mail, allegedly in violation of the prisoners' first amendment rights.¹²⁹ The Court found that there was no clearly established first amendment right with respect to correspondence of convicted prisoners, and therefore, no basis for abrogating the immunity defense.¹³⁰

By this holding, the Court avoided the question of whether simple negligence in relation to constitutional rights can give rise to liability.¹³¹

¹²⁸ Freed, *supra* note 125 at 558.

¹²⁹ 434 U.S. at 557-58.

¹³⁰ *Id.* at 565.

[T]here was no 'clearly established' first and fourteenth amendment right with respect to the correspondence of convicted prisoners . . . Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as in good faith' (citation omitted).

Id.

¹³¹ The complaint in *Procunier* alleged negligent interference with a prisoner's mail. Had the Court found a clearly established right they would have been forced to confront the issue of whether negligent deprivation of a constitutional right gives rise to liability. Clearly, negligent interference is not sufficient to establish malice under the second leg of the *Procunier* holding. 434 U.S. at 566. "To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us." *Id.*

In June of 1979, the Supreme Court decided in the case of *Baker v. McCollan* that false imprisonment resulting from a sheriff's negligence does not give rise to a claim of denial of due process under the fourteenth amendment. In 1972, one Leonard McCollan was arrested on a narcotics charge and released on bond. He had been booked under the name of his brother, Linnie Carl McCollan, respondent in the case, because he was carrying a duplicate of Linnie's driver's license. Subsequently an arrest warrant intended for Leonard was issued in Linnie's name. Linnie was arrested and spent three days in jail until the error was discovered. Linnie sued the sheriff and his insurer. The United States District Court for the Northern District of Texas directed a verdict for the defendants. *McCollan v. Tate*, 575 F.2d 509, 510-11 (5th Cir. 1978).

While the question has not yet been addressed by the Court, the *Scheuer* standard seems broad enough to encompass non-intentional violations.¹³² For example, qualified immunity might not bar liability if an officer should have known his sources were unreliable, or if, from the facts available, he reaches illogical conclusions about the constitutionality of his actions.

In light of *Scheuer*, an official should be able to establish as an affirmative defense that he acted subjectively in good faith, and that he did not act in violation of clearly established constitutional rights. Subjective good faith may be inferred from all the circumstances.¹³³ Objective good faith may be established by reliance upon the advice of counsel,¹³⁴ or a legal command such as a statute, regulation, or judicial decision,¹³⁵ providing there are no reasons for an official to know the statute is unconstitutional, or the decision is invalid.

The Fifth Circuit reversed, holding that the case should have been allowed to go to a jury. The court felt that a jury could find that the sheriff had acted unreasonably under 42 U.S.C. § 1983 and under the Constitution in failing to institute procedures for identification which would have prevented McCollan's erroneous imprisonment. (The sheriff's subjective good faith was not in question.) 575 F.2d at 512-13.

The Supreme Court reversed the Fifth Circuit. McCollan was arrested under a warrant conforming a fourth amendment requirements, and therefore it could not be said that he was deprived of his liberty *without due process of law*. The Constitution does not guard against mistakes in identification on the part of arresting and detaining officials. McCollan might have a claim under state law based on the tort of false imprisonment, but that would not give rise to liability under section 1983. *Baker v. McCollan*, 47 U.S.L.W. 4834, 61 L. Ed. 2d 433 (1979).

¹³² This view is adopted in Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L. Rev. 501, 520-23 (1977).

¹³³ Friedman, *supra* at 524.

¹³⁴ *Id.* at 538-541. See also *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975). Here, a college president's belief that he could fire students from the college newspaper without first amendment violation was no defense in a section 1983 suit. "[I]t appears clear that he should have known better and would have had he sought legal advice." *Id.* at 263 (Gee, J. concurring).

¹³⁵ Friedman, *supra* at 529-32. See also *Mason v. Claytor*, 459 F. Supp. 174 (D.D.C. 1978). In this case, a civilian employee of NAVAIR, found guilty of sex discrimination, sued the official who signed the agency decision. He alleged deprivation of fifth amendment rights. The court found that the claim was barred by defendant's qualified immunity, because the defendant had acted according to regulations. Therefore, there was no material issue as to good faith. Moreover, plaintiff had not presented specific facts challenging defendant's affidavits alleging good faith and reasonableness. *Id.* at 178.

E. DEGREE OF INVOLVEMENT

One question left unresolved by *Economou* is the degree of participation necessary to subject one to liability. In *Economou*, the Secretary of Agriculture was a named defendant even though his involvement was tangential.¹³⁶ Similarly, in *Alvarez*, the commandant of the Ninth Naval District was a named defendant, even though he contended he had no personal involvement in the decision to hospitalize Alvarez and no authority to supervise or command the officers who directed the Medical Center.¹³⁷ The Court found that he had sufficient personal involvement to be a defendant, because he had expressed concern about the Race Relations Seminars run by the plaintiff.¹³⁸

Personal involvement need not entail active participation. The Court stated the following test: "A defendant is personally involved in the acts of his subordinates if he had knowledge of the conduct and consented to it."¹³⁹

This seems to be in accord with the common law view that a superior officer is not liable for the tort of his subordinate if there is no evidence to connect the officer personally with the wrong.¹⁴⁰ However, liability may be imposed on a superior if he *directs* or *participates* in the tort.¹⁴¹

Recent case law developed in the context of section 1983 suits indicates that, while a superior cannot be sued solely because his employee commits

¹³⁶ Pursuant to regulations, the Secretary (or his subordinate) issued a complaint against Plaintiff upon belief of a violation. 438 U.S. at 481.

¹³⁷ 481 F. Supp. 186, 146.

¹³⁸ *Id.* at 146.

¹³⁹ *Id.*

¹⁴⁰ K. Davis, *Administrative Law Treatise* § 26.01 (1958); *Robertson v. Sichel*, 127 U.S. 507 (1888) (collector of customs not personally liable for tort committed by his subordinates in negligently storing trunk, where there was no evidence to connect the collector personally with the wrong).

¹⁴¹ *Rich v. Warren*, 123 F.2d 198 (6th Cir. 1941) (Army major held liable for injuries caused to a pedestrian when his driver negligently drove a government car, the theory of liability being the major's acquiescence or encouragement). See also *Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971).

a tort, if the employee takes unconstitutional action pursuant to a policy decision made by the superior, the superior may be liable.¹⁴²

Thus, while some form of personal involvement is necessary for liability, acquiescence, encouragement, direction, or official policy may be sufficient.

F. REMEDIES

If a military official is unable to sustain the burden of proving he acted reasonably and in good faith, he will be held liable for damages. Although in the majority of cases an official will be able to successfully raise the defense, it may be wise to take measures to meet the threat of potential liability.

1. Relief Through Legislation

One solution to the problem of official liability is legislative. The Court indicated that Congress could act to by-pass the holding in *Economou*.¹⁴³ For example, Congress can explicitly terminate the right to sue officers, substitute a consented liability of the United States for the liability of the officer, and make that the exclusive remedy.¹⁴⁴ Alternatively, Con-

¹⁴² *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). A municipality cannot be held liable solely because it employs a tortfeasor. Congress did not intend liability unless action pursuant to official municipal policy of some nature caused a constitutional tort. The touchstone of section 1983 action is that official policy must be responsible for a constitutional deprivation. *Id.* at 690-91.

Cf. *Rizzo v. Goode*, 423 U.S. 362 (1976). In this case, the Court held that, absent a showing of direct responsibility for the actions of subordinates, an official is not liable for deprivation of constitutional rights following from failure to act in the face of statistical evidence which indicated a pattern of police abuse.

Although these cases arise under section 1983, at least one court has indicated that the same pleading requirements exist for actions arising under section 1983 and the Constitution. *Black v. U.S.*, 534 F.2d 524, 527 (2d Cir. 1976).

¹⁴³ 438 U.S. at 504.

¹⁴⁴ See, e.g., 28 U.S.C. § 2679 (b) - (e), (employee-tortfeasor may no longer be sued for motor vehicle accidents); 38 U.S.C. § 4116(a), (doctors and other medical personnel of the Veterans Administration may no longer be sued).

gress could authorize the governmental unit to indemnify¹⁴⁵ or purchase liability insurance for certain classes of officials.

Congressional action in this area is currently pending. On 15 January 1979, a bill was introduced in the House which would amend the Federal Tort Claims Act to provide an exclusive remedy against the United States in suits based upon acts or omissions of United States employees.¹⁴⁶ While legislation such as this is clearly desirable, the chances of passage are uncertain at best, especially in light of unsuccessful attempts to pass similar legislation last session.¹⁴⁷

2. *Relief Through Reimbursement*

Unless Congress authorizes indemnification of federal employees found liable in damages for constitutional torts, there seems to be no authority

¹⁴⁵ The federal government is authorized to indemnify its officials in only a narrow range of cases. See e.g., 10 U.S.C. § 1089(f) (West Supp. 1977), 22 U.S.C. § 817(f) (West Supp. 1977), 42 U.S.C. § 233(f) (1970), 42 U.S.C. § 2458(f) (West Supp. 1977). Under these statutes, certain medical personnel of the Department of Defense, CIA, Department of State, Public Health Service and NASA may be indemnified for liability for personal injury or death, where no direct remedy exists against the United States. See also 10 U.S.C. § 7423 (1970) (liability for wrongful collection of internal revenue may be indemnified).

¹⁴⁶ H.R. 193, 96th Cong., 1st Sess., 125 Cong. Rec. H-162 (Jan. 15, 1979) (introduced by Rep. Chappell).

¹⁴⁷ In the 95th Congress, 1st Sess., legislation was introduced which would have amended the Federal Tort Claims Act to provide an exclusive remedy against the United States in suits based upon acts or omissions of United States employees. Amendments were proposed to 28 U.S.C. §§ 1346(b), 2672, 2674, 2675(a), 2679(b) and (d), and 2680(h). The effect of these amendments would have been to provide an exclusive remedy against the United States for tort claims for money damages arising under the Constitution when the employee is acting within the scope of his office or employment. S. 2117, 95th Cong., 1st Sess. (1977).

After extensive joint hearings before the Senate Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Judiciary Committee, the bill apparently died in committee. See *Amendments to the Federal Tort Claims Act: S. 2117: Joint Hearings before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Judiciary Committee*, 95th Cong., 2d Sess. (1978).

generally allowing an official to seek reimbursement from the government by withdrawing funds from an appropriated account.¹⁴⁸

An alternative is for either the agency or the officer himself to sponsor a private bill for relief before Congress to reimburse him for the judgment.¹⁴⁹ There is no guarantee that an agency will support a private bill, particularly if an officer has acted wrongfully. However, in cases where an employee's actions are not wrongful and the Government has escaped liability on a less than equitable basis, the chances of indemnification through a private bill are increased.¹⁵⁰

3. Representation by Government Counsel

Even if an official may not be certain of being reimbursed for any judgment against him, he can be certain of being reimbursed for his costs

¹⁴⁸ See Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1191-92 (1977).

Though the Constitution is silent on the subject, the Justice Department has taken the view that paying the judgments of federal officials in any other case [absent explicit statutory authorization, note *supra*] would be an unauthorized expenditure of public funds.

Id. But see 44 Comp. Gen. 312 (1964). In that case, the Comptroller General decided that a contempt fine was different in principle from a judgment. If there is an administrative determination that the fine is incurred in accomplishment of business for which a Department's salaries and expense appropriations are made, the fine can be paid from that account.

But cf. 31 Comp. Gen. 246 (1952). There, the Comptroller General decided that a fine imposed for a parking violation committed while driving a government vehicle in the performance of official duties is a personal responsibility of the employee, and there is no authority for the payment thereof from appropriated monies.

¹⁴⁹ The passage of private bills for relief is sometimes effected when federal officials are found liable for money damages.

In this respect the power of Congress is almost limitless. Its authority stems from the constitutional provision empowering it to pay the debts of the United States [U.S. Const. art. I, § 9]. The Supreme Court has interpreted this power very broadly, as including debts or claims 'which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual.'

Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 21.01 (1970), quoting *United States v. Realty Co.*, 164 U.S. 427, 440-41 (1896) (footnotes omitted).

An example of such a private bill is Priv. L. No. 89-225, 80 Stat. 1630, reimbursing an employee of the U.S. Department of Agriculture for a compromise settlement in a suit against him. See *Supplemental Memorandum for the Respondents, Butz v. Economou*, No. 78-709, at 4-5 (1977).

¹⁵⁰ Jayson, *supra* note 149, at § 178.02.

of litigation in most cases.¹⁵¹ The Department of Justice policy is to represent government employees upon request whenever they are sued in a personal capacity for acts done in the course of official duty.¹⁵²

If a defendant is also a target for criminal investigation,¹⁵³ or if the Justice Department has to cease representation due to a conflict of interest,¹⁵⁴ private counsel will be hired at no expense to the litigant, within certain limitations.¹⁵⁵ If the constitutional violations are committed within the general scope of an official's authority, there would seem to be no reason that an official will not be represented by the Government, even after *Economou*.

V. CONCLUSION

The *Economou* decision may have a significant impact upon the decision-making processes of military officials. Under the previous rule of absolute immunity, an official needed only to allege that he had acted within the scope of his authority to be immune from suit.

After *Economou*, if a plaintiff can establish that an official has violated a clearly established constitutional right which is compensable in damages, an official will have to prove either that he is performing a special function which requires absolute immunity, or that he acted reasonably and in good faith. Either alternative imposes more of a burden on an official than the previous rule of absolute immunity.

In those few cases where the burden is not sustained, an official will

¹⁵¹ There is administrative case law in support of this proposition. See, e.g., 6 Comp. Gen. 214 (1926); 5 Comp. Gen. 951 (1925); 9 Op. Atty. Gen. 51, 51-53 (1857).

¹⁵² The representation policy of the Department of Justice is set forth at 28 C.F.R. § 50.15, 50.16 (1977). This is implemented in the Army by chapter 3 of Army Reg. No. 27-40. Litigation (15 June 1973, and change 1, 15 June 1978).

¹⁵³ 28 C.F.R. at § 50.15(a)(5).

¹⁵⁴ *Id.* at § 50.15(a)(6).

¹⁵⁵ *Id.* at § 50.16(b)(2). Payments to private counsel may cease if the Department of Justice decides to pursue a federal criminal charge against the employee, determines that his actions were not within the scope of duty, resolves the conflict of interest which led to private representation, or generally determines that such representation is not in the interests of the United States.

be personally liable for damages. Currently, his only hope of reimbursement for any judgment lies in the fortuity of a private bill for relief.

The Supreme Court in *Economou* acted to provide special protection for constitutional rights. However, it did so at the expense of the decisionmaking processes of Government officials. The clear solution to the problem of official liability and redress for constitutional rights is now legislative.

By waiving sovereign immunity and providing an exclusive remedy against the United States for constitutional violations committed by officials within the scope of their authority, Congress can strike an equitable balance between the two competing interests. Citizens will have effective redress, and the integrity of the official decision-making process will be protected.

THE SUPREME COURT GOES TO WAR: THE MEANING AND IMPLICATIONS OF THE NAZI SABOTEUR CASE*

by Professor Michal R. Belknap**

*In this short article, Professor Belknap discusses the decision of the United States Supreme Court in the case of *Ex parte Quirin*, 317 U.S. 1 (1942). That case held legal the trial of eight Nazi saboteurs before a military commission, an extraordinary tribunal which may be convened only in wartime. Under current law, a military commission has jurisdiction over only unusual offenses such as spying and aiding the enemy.*

Professor Belknap provides a short account of the events giving rise to this World War II case. He reviews the legal and practical considerations which led the President and the Attorney General to choose trial by military commission over other forms of trial. The author examines the viewpoints of the various justices then sitting on the Supreme Court.

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

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Professor Belknap criticizes the Court's decision in the light of today's understanding of criminal due process and the correct balance between individual rights and collective security. Acknowledging that the pressure of a total war commitment of national effort compels adjustment of that balance, he concludes nevertheless that the trial could and should have taken place in a civil court.

I. INTRODUCTION

On July 29, 1942, in the midst of their summer recess, the justices of the United States Supreme Court suddenly hastened back to Washington for a special session, the first the Court had held in more than two decades. Although nearly three months had passed since the American victory at Midway, Rommel's forces continued their advance across North Africa, and German submarines went on sinking thousands of tons of Allied shipping in the Atlantic.

The total war then raging around the globe was very much on the minds of the judges as they seated themselves before a large audience. The case that had brought them hurrying back to Washington involved eight enemy agents who had entered the United States on a sabotage mission, and it pitted the warmaking powers of the national government against the apparent demands of important provisions of the Bill of Rights. The Court's answers to the questions it posed would reveal a great deal about the capacity of the Constitution to safeguard civil liberties in a nation preoccupied with waging total war.¹

The importance of *Ex parte Quirin*, as this case came to be known, was readily apparent at the time, and in the years since 1942 it has continued to excite the interest of constitutional scholars and popular writers alike. These commentators have failed, however, to fully comprehend either its meaning or its implications. To Eugene Rachlis, the author of a lively but undocumented account of the misadventures of the Nazi saboteurs, the Supreme Court hearing represents only one chapter of a drama that began in Germany and ended in the electric chair at the District of Columbia jail.² For Richard Polenberg, a scholarly historian

¹ E. Rachlis, *They Came to Kill* 253 (1961); *New York Times*, July 29, 1942, at 1, col. 3.

² E. Rachlis, *supra* note 1, at 241-67.

of the American domestic scene during World War II, *Quirin* is significant mainly because it helped prevent public hysteria about Axis subversion.³

Legal scholars and constitutional historians, on the other hand, have focused their attention on the interrelated questions of how successful the judges were in maintaining the prerogatives of the civil courts against encroachment by military power and whether the legal system actually dispensed justice in this case or only added a meaningless procedural veneer to what was in reality summary punishment. In 1943, Cyrus Bernstein praised the Court's performance in that case for demonstrating that "ours is a government of justice and democratic principles."⁴ A cynical Edward S. Corwin, on the other hand, "characterized this opinion as little more than a ceremonious detour to a predetermined goal. . . ."⁵ Over the years other scholars, such as Robert Cushman, Clinton Rossiter, Paul Murphy, and Alpheus Mason, have taken stands between these polar positions. But only Mason has recognized that what the case involved was not so much a conflict between military and judicial power as an effort on the part of the Supreme Court to define its own role in a total war.⁶

Both Mason and J. Woodford Howard are alert to this facet of *Ex parte Quirin*, but neither adequately explains the case's outcome nor satisfactorily elucidates its implications. What the Supreme Court did was to balance individual rights against the claims of a government waging total war, and to decide that the latter were more important. Rather than capitulating to the power of the sword, the justices enlisted in the national military effort, embracing attitudes which would render constitutionally guaranteed civil liberties vulnerable throughout the rest of World War II and in the Cold War era which followed.⁷

³ R. Polenberg, *War and Society* 44-45 (1972).

⁴ C. Bernstein, *The Saboteur Trial: A Case History*, 11 *Geo. Wash. L. Rev.* 131 (1943).

⁵ E. Corwin, *Total War and the Constitution* 118 (1947).

⁶ Cushman, *Ex Parte Quirin Et Al.—The Nazi Saboteur Case*, 28 *Cornell L.Q.* 54 (1942) (hereinafter cited as Cushman, *Ex Parte Quirin Et Al.*); Cushman, *The Case of the Nazi Saboteurs*, 36 *Am. Political Sci. Rev.* 1082 (1942); C. Rossiter, *The Supreme Court and the Commander in Chief* 115-16 (1951); P. Murphy, *The Constitution in Crisis Times 1918-1969*, at 243 (1972); A. Mason, *Harlan Fiske Stone* 666, 671 (1956).

⁷ Mason, *supra* note 6, at 666, 671; J.W. Howard, *Mr. Justice Murphy* 300 (1968).

II. FACTS OF THE CASE

The *Quirin* case began on the foggy night of June 12, 1942 when a German submarine deposited at Amagansett, Long Island, four men who had previously lived in the United States. Recent graduates of a sabotage school near Brandenburg, they had returned to this country to destroy key transportation facilities and cripple its aluminum industry. Several days after their landing, four other men assigned to the same project slipped ashore at Ponte Verde Beach, near Jacksonville, Florida. The leaders of the two teams, George John Dasch and Edward John Kerling, were to rendezvous in Cincinnati on July 4, and, sometime thereafter, their covers established, the saboteurs would begin their deadly work.⁸

Neither the Cincinnati meeting nor the planned sabotage ever took place. While still on the beach, the Long Island team was discovered by a Coast Guardsman, and although the four saboteurs managed to break contact with him and make their way to New York City, Dasch apparently concluded that their eventual capture was inevitable. He and Ernest Peter Burger decided to save themselves by betraying the others. After telephoning the FBI, Dasch traveled to Washington where he made a full confession to the Bureau. Agents in New York arrested Burger and the rest of the Long Island team, as well as two members of the Florida group, who had made their way north from Jacksonville. The Bureau located Hans Haupt when he walked into its Chicago office in a bold attempt to clear himself of draft evasion charges, and from him it learned the whereabouts of the fourth member of the Florida team. By June 27 all eight of the would-be saboteurs were in custody.⁹

When FBI Director J. Edgar Hoover announced their capture that evening, Americans, starved for good news from the war, reacted as if their country had just won a major military victory.¹⁰ Along with triumphant cheering there arose cries for the blood of the saboteurs, Raymond

⁸ Rachlis, *supra* note 1, at 3-9, 43-66, and 87-113.

⁹ *Id.* at 117-20 and 150-65. Although Dasch insisted he had decided to betray the operation even before the saboteurs left Germany, his actions prior to the encounter with the Coast Guardsman indicate otherwise. That incident provides the most plausible explanation for what seems to have been a change of heart.

¹⁰ New York Times, June 28, 1942, at 1, col. 8, and July 15, 1942, at 13, col. 4; Bernstein, *supra* note 4, at 137; Rachlis, *supra* note 1, at 169-70.

Moley of *Newsweek* insisting, "We ought to meet this threat with the most swift and most ruthless punishment which the law permits."¹¹ President Franklin D. Roosevelt agreed completely. "Offenses such as these are probably more serious than any offense in criminal law," he wrote on June 30 in a "Secret & Confidential" memorandum to Attorney General Francis Biddle. "The death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American government." Eschewing the presumption of innocence fundamental to the Anglo-American system of criminal law, the President expressed the opinion that the arrested men were "just as guilty as it is possible to be." Nor did he entertain any doubts about how to deal with them. They should, he told Biddle, "be tried by court martial. . . ."¹²

III. SELECTION OF A TRIBUNAL

A. MILITARY VERSUS CIVIL TRIAL

The President's preference for a military trial was understandable, for, should a civil court try the accused men, six of them could not be executed, and obtaining death penalties against the other two would be extremely difficult. The obvious charge was attempted sabotage, but that offense carried a maximum penalty of thirty years in prison. Burger and Haupt could be prosecuted for the capital crime of treason, because while living in this country, they had become United States citizens. But the Constitution itself provides that a conviction for that offense can be had only if the accused confesses in open court or the government produces testimony by two witnesses to the same overt act. The Justice Department foresaw factual as well as legal problems if it attempted to prosecute Haupt and Burger for treason, and, of course, it could not charge the other defendants, all of whom were German citizens, with that offense.¹³

Well aware of the problems a civil trial would pose for the government,

¹¹ Perspective: Death for the Saboteurs, *Newsweek*, July 6, 1942, at 64.

¹² F.D.R., Memorandum for the Attorney General, June 30, 1942, Box 76, FDR MSS, Franklin D. Roosevelt Presidential Library, Hyde Park, New York (hereinafter cited as FDR MSS).

¹³ Attorney General, Memorandum for the President, June 30, 1942, OF5086, FDR MSS; Respondents Answer to Petitioner, at 84, *Burger v. Cox*, 317 U.S. 1 (1942); E. Rachlis, *supra* note 1, at 60.

Attorney General Biddle concluded: "A Military Commission is preferable because of the greater flexibility, its traditional use in cases of this character and its clear power to impose the death penalty. . . ."¹⁴ His conclusion reflected the thinking of Assistant Solicitor General Oscar Cox, who had advised him that "[u]nder the internationally accepted 'law of war', apart from our Constitution, enemy aliens or domestic citizens who came through lines out of uniform for the purpose of engaging in hostile acts . . . are subject to trial by military tribunals." Although realizing that in the 1866 case of *Ex parte Milligan* the Supreme Court had ruled against the use of such bodies where the civilian courts were open and functioning, Cox insisted this decision did not apply to defendants such as these.¹⁵

B. APPOINTMENT OF A MILITARY COMMISSION

Sharing his views, Biddle suggested to the Secretary of War "that the saboteurs be tried by a special military commission."¹⁶ He and members of his staff conferred at length with the Secretary, the Judge Advocate General, and other War Department officials and were already in the process of drawing up the necessary papers when Biddle received Roosevelt's memorandum urging a military trial for the saboteurs.¹⁷

¹⁴ Attorney General, Memorandum for the President, June 30, 1942, OF5036, FDR MSS.

¹⁵ Oscar Cox, Memorandum for the Attorney General, June 29, 1942, Box 61, Oscar Cox MSS, Franklin D. Roosevelt Presidential Library, Hyde Park, New York (hereinafter cited as Cox MSS).

¹⁶ Francis Biddle, Memorandum for the President, June 29, 1942, OF3603, FDR MSS.

The military commission is an extraordinary tribunal which has occasionally been convened under wartime conditions, to try offenses under the law of war committed by persons who are not members of the armed forces of the United States. For an extensive discussion of the military commission, its legal basis, jurisdiction, membership, procedures, and powers, see W. Winthrop, *Military Law and Precedents* 831-46 (1920).

The military commission is mentioned several times in the current Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1969 (Rev. ed.). Under Article 21, U.C.M.J., the military commission shares concurrent jurisdiction with courts-martial as to violations of Article 104, concerning aiding the enemy, and Article 106, concerning spying. The military commission also has contempt power under Article 46.

¹⁷ *New York Times*, June 30, 1942, at 1, col. 3.

On July 1 the Attorney General telephoned the President about the matter, and later that same day he sent the White House a proposed order creating a military commission to try the eight saboteurs, together with a draft proclamation.¹⁸ The proclamation, which Roosevelt issued on July 2, declared that all citizens or residents of nations at war with the United States and all persons who gave obedience to or acted under the direction of such powers—if these individuals had entered or attempted to enter the United States and were charged with sabotage, espionage, hostile acts, or violations of the law of war—were subject to the law of war and the jurisdiction of military tribunals. Roosevelt's order further closed the civil courts to such persons and forbade them to "seek any remedy or maintain any proceeding" in the courts of the United States, except as authorized by the Attorney General and Secretary of War.¹⁹ As Biddle pointed out, the proclamation would "produce the same practical results" in the saboteur case as suspending the writ of habeas corpus, without raising "the broad policy questions which follow a 'suspension' of the writ."²⁰

At the same time that he issued it, Roosevelt also announced the appointment of a military commission to try the saboteurs, consisting of four major generals and three brigadier generals. The order creating this body provided that it should have the power to make rules for the conduct of its proceedings, "consistent with the powers of military commissions under the Articles of War," and authorized it to admit any evidence which in the opinion of the president, Major General Frank R. McCoy, would have "probative value to a reasonable man." The order further required the "concurrence of at least two-thirds of the members" for conviction or imposition of any sentence. The President also directed that, after the proceedings, the trial record should be transmitted to him for appropriate action, thus ensuring there would be no appeal except to the mercy of the Commander-in-Chief. In addition, the order appointed as prosecutors both Biddle and Judge Advocate General Cramer. To oppose them as

¹⁸ Francis Biddle to Marvin McIntyre, July 1, 1942 and Biddle, Memorandum for the President, July 1, 1942, both in OF5036, FDR MSS.

¹⁹ Franklin D. Roosevelt, Proclamation Denying Certain Enemies Access to the Courts of the United States, Exhibit B, *Ex parte Quirin*, July Special Term—1942, *Ex parte* and Miscellaneous Case Files, 1925—1958, Records of the Supreme Court of the United States, Record Group 267, National Archives (hereinafter cited as *Ex parte Quirin* File).

²⁰ Biddle, Memorandum for the President, June 30, 1942, OF5036, FDR MSS.

defense counsel, it designated Army Colonels Cassius M. Dowell and Kenneth Royall.²¹

While official Washington applauded the President's order, the Nazis were transferred to military control and transported to the capital to await the beginning of their trial.²² They did not have to wait long. By July 8 the commission was ready to begin trying them on charges of aiding enemies of the United States and spying (offenses proscribed by the 81st and 82nd Articles of War respectively), as well as for violating the uncodified international law of war and for conspiracy.

C. SECRECY OF THE PROCEEDINGS

General McCoy and his colleagues met that day in complete secrecy, behind the locked doors and blacked-out windows of room 5235 of the Justice Department building, a converted FBI assembly hall.²³ The ostensible reason for excluding the press and public—and for even forbidding the Office of War Information to prepare daily summaries of the proceedings—was that the testimony involved “the security of the United States and the lives of its soldiers, sailors, and citizens.”²⁴

It is at least as likely that the trial was held in secret to protect the reputations of the Federal Bureau of Investigation and the Coast Guard. Since Hoover's dramatic announcement that his agency had arrested all the saboteurs within two weeks after their arrival, the Bureau had basked in glory. What the public did not know, and what an open trial would

²¹ Presidential order dated July 2, 1942, Exhibit A, *Ex parte* Quirin File; New York Times, July 3, 1942, at 3, col. 2. See also biographical sketch of General Cramer in Dep't of the Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, at 161 (1975).

²² Attorney General, Memorandum for Mr. Hoover, July 3, 1942, Exhibit C, *Ex parte* Quirin File; J. A. Ulio, Memorandum for the Provost Marshal General, Military District of Washington, July 3, 1942, Exhibit D, *Ex parte* Quirin File; E. Rachlis, *supra* note 1, at 179.

²³ Charge Sheet, Exhibit E, *Ex parte* Quirin File; E. Rachlis, *supra* note 1, at 183.

²⁴ New York Times, July 10, 1942, at 9, cols. 1-3. For another expression of this justification for the secrecy of the trial, see the column by Arthur Krock in *id.*, July 12, 1942, section IV, at 3, col. 2. See also *Army Sticks to "No Admission" as Nazi Saboteurs Are Tried*, Newsweek, July 20, 1942, at 27, and *Espionage: 7 Generals v. 8 Saboteurs*, Time, July 20, 1942, at 15.

have revealed, was that Dasch's betrayal of his comrades, rather than brilliant investigative work, was responsible for the quick capture of the saboteurs. The Bureau's determination to keep this fact a secret was disclosed during the trial when Agent Norvel D. Willis admitted that FBI officials had offered to arrange a presidential pardon for the turncoat if he would plead guilty and not testify about his role in the apprehension of his confederates. A public trial might further have revealed that FBI officials had treated Dasch's first telephone contact with the Bureau as a crank call. In addition, such a proceeding would have disclosed that the Coast Guard had been using unarmed beach patrols on Long Island, and that the escape of the saboteurs from Amagansett had resulted from its failure to inform the FBI for twelve hours about what had happened there.²⁵

IV. PROTEST OF DEFENSE COUNSEL

The secrecy surrounding the trial kept Americans unaware, not only of the mistakes of the Coast Guard and the FBI, but also of a challenge to the legality of the entire proceeding, launched by the defense attorneys. Neither Dowell, a career soldier, nor Royall, a wartime volunteer with a brilliant record as a trial lawyer in North Carolina, had sought the unenviable job of defending the saboteurs. Both, however, were conscientious attorneys who felt a professional obligation to do everything possible for their clients.²⁶

Because the two lawyers entertained serious doubts about the legality and constitutionality of both the President's proclamation and his order creating the military commission, they became convinced they must challenge them in the civil courts. This posed a problem, for Dowell and Royall were army officers, and Roosevelt was their Commander in Chief. Furthermore, they had been named defense counsel by the very order they wished to challenge, a fact that raised doubts in their minds about whether they were "authorized to institute the [necessary] proceedings. . . ."

On July 6 the two lawyers wrote to Roosevelt, requesting that he

²⁵ Washington Post, June 29, 1942, at 6, col. 2; New York Times, June 29, 1942, at 4, col. 2, and July 7, 1942, at 7, col. 8; E. Rachlis, *supra* note 1, at 143-45, 150-55, 198-200.

²⁶ E. Rachlis, *supra* note 1 at 181-82.

"issue to us or to someone else appropriate authority to that end."²⁷ The only reply was a telephone call from presidential secretary Marvin McIntyre, advising them to make their own decision about the extent of their duties and authority. The lawyers then informed the President that, in their opinion, they had no choice but to seek out civilian attorneys willing to litigate the validity of his order and proclamation and, if unable to obtain such assistance, to do this themselves. Although Biddle had at first thought perhaps Roosevelt ought to relieve the doubts of the defense attorneys, he now advised the President that the White House should not respond to them. Roosevelt agreed.²⁸

Although lacking authorization from his Commander-in-Chief, Royall nevertheless attempted to enlist the services of a civilian expert on constitutional law willing to challenge the Chief Executive in court. After Harvard professor Zechariah Chafee, Jr., and several other lawyers turned him down, though, he gave up the search for outside help.²⁹ When the commission convened on July 8, Royall himself announced that "in our opinion, the order of the President of the United States creating this Court is invalid and unconstitutional."³⁰ The civil courts were open, he observed, and there were civil statutes covering the offenses of which the defendants were accused; thus, only a civil court could try them. Furthermore, Royall argued, the presidential order violated several provisions of the Articles of War, an act of Congress. Nor could Roosevelt's proclamation, issued after commission of the alleged crimes, extend military jurisdiction to his clients.³¹ "The purpose of these remarks [and his own in the same vein]," Dowell informed the Commission, was "... simply to ward off any assumption that the defense accepts by participating in this proceeding the legality of the tribunal or its method of constitution."³²

²⁷ Dowell and Royall to the President, July 6, 1942, Box 76, FDR MSS.

²⁸ Dowell and Royall to the President, July 7, 1942; Francis Biddle to the President, July 6, 1942; Biddle, Memorandum for the President, July 9, 1942; and FDR, Memorandum for the Attorney General, July 8, 1942, all in Box 76, FDR MSS.

²⁹ E. Rachlis, *supra* note 1, at 210.

³⁰ Trial Proceedings, at 4, Box 194, FDR Map Room, Franklin D. Roosevelt Presidential Library, Hyde Park, New York.

³¹ *Id.* at 4, 22-25.

³² *Id.* at 7.

Having made this point for the record, he and Royall proceeded with the military trial, meanwhile also seeking a Supreme Court test of the procedures authorized by the President. Although the Court had recessed for the summer, and its members were scattered across the country, Justice Hugo Black was still at his home in nearby Alexandria, Virginia. Royall telephoned him there, but Black declined to help. Then a funeral brought Justice Owen Roberts back to Washington. After Royall told him about the defense's intentions and his fruitless talk with Black, Roberts invited the attorney to his farm near Philadelphia, promising to have his uncooperative colleague there too. Royall urged Biddle to attend also. The Justice Department was prepared for such a hearing, but the Attorney General, apparently wishing to check with Roosevelt before entering into a legal contest over the President's war powers, hesitated briefly before agreeing to participate.

On Thursday, July 23, Biddle, Royall, Cramer, and Dowell flew to Philadelphia. There both sides urged the justices to hear the case. After listening to their arguments, Black and Roberts discussed the matter among themselves, then telephoned Chief Justice Harlan Stone at his vacation retreat in New Hampshire. After talking to them, Stone agreed to call the Court into special session to receive petitions for writs of habeas corpus from the accused saboteurs.³³

V. THE HEARING

A. PUBLIC REACTION

Word that the justices would assemble was given to the press on the afternoon of July 29. This news was not universally well received. In the opinion of the *Los Angeles Times* such a hearing was "totally uncalled for." "The Supreme Court," it declared, "should never have been dragged into this wartime military matter."³⁴ Such publications as the *Detroit Free Press* and the *Meridian* (Mississippi) *Star* also condemned the hearing, and in North Carolina the *Charlotte News* castigated native son Kenneth Royall for his role in the affair. The Court was not without defenders, though. Such prestigious publications as the *Washington Post*,

³³ E. Rachlis, *supra* note 1, at 210-12, 243-46; Ernest W. Jennes, Memorandum to Mr. Cox, July 1, 1942, Box 61, Cox MSS.

³⁴ July 29, 1942, section II, at 4, cols. 1-2.

the *New York Times*, and the *Atlanta Constitution* commended the justices for upholding the Bill of Rights and due process of law. Although hardly sympathetic to the saboteurs, the editors of these newspapers realized, as the *Post* put it, that what was at stake here was "not their liberties. . .but ours."³⁵

Amidst swirling controversy, Stone and his colleagues trooped back to Washington. One justice, Frank Murphy, a lieutenant colonel in the army reserve, was on military maneuvers when he received word of the special session over a field telephone and another, William O. Douglas, was still speeding east from Oregon when the hearing commenced.³⁶

B. ARGUMENTS OF DEFENSE COUNSEL

The justices, along with a capacity crowd that included many prominent persons, assembled to witness a performance which starred Kenneth Royall as counsel for seven of the saboteurs. Defendant Dasch, whose interests differed considerably from those of his former confederates, had been assigned his own military lawyer. That officer, Colonel Carl Restine, believed his client would be most likely to receive lenient treatment if he disassociated himself as much as possible from the other men, so he elected not to involve Dasch in the quest for writs of habeas corpus.

As an advocate for the remaining saboteurs, Royall advanced five propositions, both in oral argument and in a brief which he and Dowell submitted to the Court. The first of these, which had to be accepted before the others could even be considered, was that the petitioners had a right to bring this action. Haupt was entitled to do so, Royall contended, because, as he had never taken an oath of allegiance to Germany, joined its army or the Nazi Party, nor in any other way renounced his U.S. citizenship, he retained all the privileges of an American citizen. Although conceding the other defendants were enemy aliens, Royall insisted that, in the absence of some valid statute or executive proclamation to the contrary, they too were entitled to initiate an action in this country's courts. That brought him to his second proposition.

³⁵ E. Rachlis, *supra* note 1, at 249-50; *Washington Post*, July 31, 1942, at 12, col. 2; *Atlanta Constitution*, Aug. 1, 1942, at 4, cols. 1-2; *New York Times*, July 29, 1942, at 16, col. 2, and July 30, 1942, at 14, col. 2.

³⁶ E. Rachlis, *supra* note 1, at 253.

Roosevelt's proclamation, Royall contended, was unconstitutional and invalid. The President, he argued, lacked either statutory authorization or inherent power to issue it. Because Roosevelt had increased the penalties to which the accused were subject, and had done so after the commission of the alleged offenses, his proclamation was in effect an *ex post facto* law. Furthermore, it violated the fifth and sixth amendments, as well as part of the Constitution's judicial article and its clause governing suspension of the writ of habeus corpus.

The order creating the military commission was as defective as the proclamation, Royall insisted, for it failed to justify the jurisdiction it conferred. With one exception, spying could be dealt with constitutionally by a military court only if committed on or near a military installation or in a zone of actual military operations. The exception was for spying by a member of the American armed forces, and it obviously was not applicable here. Since the beach patrols were unarmed in the sectors where the saboteurs had landed, those could not be areas of operation. Consequently the Article 82 charge was invalid.

The defense also pointed out that Article 82 duplicated a criminal law which the civil courts had competence to enforce, and that the saboteurs had been arrested by civil rather than military authorities. In addition, the defense insisted that the prosecution's allegation of spying was technically defective. For reasons similar to those which should have prevented the military from trying the defendants under Article 82, it had no right to try them under Article 81 either. Counsel for the saboteurs criticized with particular vigor the notion that the President could create a court to hear cases involving alleged infractions of an unwritten international law of war, insisting that this amounted to inventing and punishing previously unknown crimes.⁸⁷

⁸⁷ *Id.* at 180 and 244-45; *New York Times*, July 30, 1942, at 1, col. 8; Brief in Support of Petitions for Writs of Habeus Corpus, at 12-40, *Burger v. Cox*, 317 U.S. 1 (1942); C. Bernstein, *The Saboteur Trial*, *supra* note 4, at 151-56.

The issue of Haupt's citizenship was confused by the fact that the saboteurs' superiors told them so little about their status that they did not themselves know whether those among them who had not been members of the armed forces when they were recruited for the sabotage program became members at that time or later. Burger's situation differed from that of Haupt in that, unlike his confederate, he clearly had joined the German army, although as a result of conscription rather than enlistment. E. Rachlis, *supra* note 1, at 57, 83, 234; Respondent's Answer to Petitioner, at 84-85, *Burger v. Cox*, 317 U.S. 1 (1942).

The defense also contended that Roosevelt's order conflicted with pre-existing statutory law. The thirty-eighth article of war, which authorized the President to prescribe the procedures, including modes of proof, to be used by military commissions, required him, insofar as practicable, to apply the rules of evidence utilized in criminal trials before United States district courts. Roosevelt's "probative value to a reasonable man" standard represented, counsel for the saboteurs pointed out, a radical departure from those rules. The defense attorneys added that the presidential order also violated another provision of Article 38, which directed that "nothing contrary to or inconsistent with these articles" be prescribed.

Article 43 required a unanimous vote for a court martial to impose a death sentence or convict anyone of an offense (such as spying) for which execution was mandatory. Further, they noted, that article demanded a three-fourths vote for imposition of any sentence involving imprisonment for more than ten years. The President's order, on the other hand, authorized the commission to do all of these things with the concurrence of a mere two-thirds of its members. Roosevelt's directive conflicted also with Article 70, which required a thorough and impartial investigation, analogous to consideration by a grand jury, before a case could be brought to trial.

Finally, the defense contended, the order ignored the provisions for review set forth in Articles 46 and 50½. These required that every record of trial by a court martial or military commission be referred by the confirming authority (in this case the President) to his staff judge advocate or the Judge Advocate General and that, before execution of any sentence requiring presidential approval, the record be examined by a board of review set up by the Judge Advocate General. By ordering that the record be forwarded directly to him and by making Cramer a member of the prosecution staff, the defense argued, Roosevelt had made compliance with these statutory requirements impossible.³²

Royall and Dowell also insisted that the President had no right to subject the saboteurs to a military trial. As they had not been apprehended while spying or aiding the enemy within a theater of operations

³² Brief in Support of Petitions, *supra* note 37, at 12, 40-51; New York Times, July 30, 1942, at 1, col. 8, and at 4, cols. 2-5.

and did not belong to any of the six categories of persons enumerated in the Articles of War themselves, they simply were not subject to American military law. Even more important, there were available civilian courts in which they could be tried.

Royall and Dowell rested the most important of their five propositions squarely on the Court's 1866 decision in *Ex parte Milligan*, with its holding that military trials where the civilian courts were open and functioning were unconstitutional.³⁹ This ruling, they argued, "enunciated principles which fully support the position which the petitioners are taking in this case."⁴⁰ While conceding that *Milligan* had been the target of some recent criticism, the defense insisted the majority opinion in that case was "still the law" and that "the Constitutional protections provided therein still govern the trial of persons in this country. We contend," said Royall and Dowell, "that even Congress could not authorize a Military Commission in the instant case."⁴¹

C. THE PROSECUTION'S RESPONSE

The prosecutors fervently disagreed. In their own brief they sought to distinguish the present case from *Milligan*, arguing that the 1866 decision (the product of a Civil War military trial in which the defendant was an Indiana resident who had neither crossed through the Union lines nor entered into a theater of operations) had arisen out of a situation so different that it should not be considered a controlling precedent.⁴² During oral argument, Biddle at times reiterated this position, assuring the justices at one point that they could "decide this case without touching a hair of the *Milligan* case. . . ." Twice, though, the Attorney General asked the Court to overturn the 1866 decision. Perhaps the best formulation of the government's position was his response to a question from Justice Robert Jackson: "We do not think the *Milligan* case applies, but if it does it is bad law and we will ask the court to overrule part of it." Although, as Jackson noted, the 1866 decision had long been "re-

³⁹ Brief in Support of Petitions, *supra* note 37, at 12, 55-61; C. Bernstein, *supra* note 4, at 155-66; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁴⁰ Brief in Support of Petitions, *supra* note 37, at 61.

⁴¹ *Id.* at 62-63.

⁴² Brief for Respondent, at 10, *Burger v. Cox*, 317 U.S. 1 (1942).

garded as a landmark in American liberty," the Attorney General was prepared to sweep it aside as an outmoded relic.⁴⁵

Biddle and his colleagues treated the rest of the defense argument in an equally cavalier fashion. The government's brief, for example, asserted that belligerent enemies had no right of access to the civil courts, because if they did, the Constitution would give them benefits it withheld from this country's own fighting men, a state of things that was obviously unthinkable. Similarly, when such individuals were subjected to military trial, the President had no obligation to extend to them the procedural safeguards with which the law surrounded courts-martial of American soldiers and sailors.⁴⁴

Although the government challenged the defense position on most of the issues of fact and law raised by the case—insisting, for example, that the East Coast was indeed a theater of military operations and that the existence of criminal statutes under which the defendants could have been tried in civilian courts did not deprive the commission of jurisdiction—its argument was less legal than quasi-military.⁴⁵ "The United States and Nazi Germany are fighting a war to determine which of the two shall survive," the prosecutors' brief observed. "This case is no more than a small skirmish, but on an important front. It is part of the business of war."⁴⁶ In their effort to convince the Court that military considerations necessitated a ruling against the defendants, Biddle and Cramer moved from the indisputable position that the President "had the clear duty to meet force with force" to a considerably more dubious contention that his obligation to respond to an attack upon the safety of the United States required the creation of a military commission to try these "invading enemy belligerents."⁴⁷

The bridge that carried their argument across a logical chasm was the concept of total war. "Wars today are fought on the total front . . ." the

⁴⁴ Munson, *The Arguments in the Saboteur Trial*, 91 *Univ. of Pa. L. Rev.* 239, 246-47 (1942). Munson was a member of the prosecution staff. Biddle and Jackson are quoted in: *New York Times*, July 31, 1942, at 4, cols. 2-3.

⁴⁵ Brief for Respondents, *supra* note 42, at 12.

⁴⁶ *Id.* at 7, 11, and 46.

⁴⁷ *Id.* at 62.

⁴⁸ *Id.* at 11.

prosecutors reminded the Court. No longer were they limited to armed combat, as they had been in the days of *Ex parte Milligan*. Now there were battlefields of transportation, production, and morale, and the enemy's spies and saboteurs were every bit as dangerous to the nation's safety as its tanks and submarines.⁴⁸ "The time may now have come," the government's brief observed, "when the exigencies of total and global war must force a recognition that every foot of this country is within the theater of operations."⁴⁹ The test of "whether or not the civil courts are open to punish crimes" was now "unrealistic."⁵⁰ The United States had no choice but to subject these defendants to military justice, because "today the nation that will not wage total war usually meets total defeat."⁵¹

D. THE COURT'S INTERIM DECISION

The trouble with the prosecution's "total war theory," as Royall pointed out, was that it swept "anything that affects the war" within the military sphere. "There has got to be some limit on that," he insisted, "or we have very few constitutional guarantees left when we go to war."⁵² Whether such limits existed, and, if so, where they lay, were, despite the attention given to some thorny jurisdictional questions, the crucial issues in the verbal battle that raged before the Court for five and one-half hours on July 29 and another three and one-half the following day. Biddle urged an expansive reading of the President's powers as Commander in Chief, while Royall championed the traditional guarantees of the Bill of Rights. Chief Justice Stone and Associate Justices Jackson, Frankfurter, and Reed subjected both to endless questioning.⁵³

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 46.

⁵⁰ *Id.* at 47.

⁵¹ *Id.* at 9.

⁵² Royall's argument on this point is quoted by Munson, *supra* note 43, at 251.

⁵³ *Saboteur Trials*, *Newsweek*, Aug. 10, 1942, at 32; *New York Times*, July 30, 1942, at 1, col. 8, and at 4, cols. 2-5, and July 31, 1942, at 1, col. 1, and at 4, cols. 2-4.

On July 28, defense counsel sought from the United States District Court for the District of Columbia leave to file petitions for writs of habeas corpus. That court denied their applications. When the Supreme Court convened, Royall and Dowell confronted the justices with two requests, one for leave to file petitions for habeas corpus there, and the other for a writ of certiorari to review the adverse ruling of the district court.

Although argued at great length, the saboteur case was decided quickly. Less than twenty-four hours after the lawyers concluded their presentations, the high tribunal assembled again, in order that the Chief Justice might read its terse per curiam opinion. The Court held that the President possessed the authority to try the saboteurs before a military commission, that the body which he had created was lawfully constituted, and that "petitioners . . . have not shown cause for being discharged by writ of habeas corpus."⁵⁴

The news media applauded this decision, most commentators agreeing that the American system of justice had distinguished itself in the saboteur case. "It is good to know that even in wartime and even toward the enemy we do not abandon our basic protection of individual rights," enthused *New Republic* in an editorial typical of many which the decision inspired.⁵⁵ In contrast, Norman Cousins of *Saturday Review* saw the handling of the saboteur case as making "an ostentation out of democratic procedure" and "a farce out of justice." Although the United States had not simply lined its prisoners up against a wall and shot them, as doubtless would have happened in Nazi Germany, the "due process" it had accorded these enemies was a sham. "If the saboteurs actually *had a chance* it would be different," Cousins commented sarcastically, "but they didn't."⁵⁶

Although Attorney General Biddle did not formally contest the Court's right to render a decision in the case, lawyers and judges alike feared that for it to do so under these circumstances might constitute an illegitimate exercise of original jurisdiction. Consequently, while oral argument was in progress, Royall and Dowell perfected an appeal from the district court to the United States Court of Appeals for the District of Columbia and then applied to the Supreme Court for certiorari before judgment. The Court granted this only minutes before announcing its decision in the case. 47 F. Supp. 431 (D. D. C. 1942); 317 U.S. at 18-20; A. Mason, *supra* note 6 at 656-57; Cushman, *Ex Parte Quirin Et Al.*, *supra* note 6, at 56-57.

⁵⁴ Supreme Court of the United States, Per Curiam Opinion, July 31, 1942, *Ex parte Quirin* File; *New York Times*, Aug. 1, 1942, at 1, col. 1; E. Rachlis, *supra* note 1, at 268, 272. Leave to file petitions for habeas corpus in the Supreme Court itself was denied, and the orders of the district court were affirmed.

⁵⁵ *The Saboteurs and the Court*, *New Republic*, Aug. 10, 1942, at 159; *New York Times*, Aug. 1, 1942, at 10, col. 1; Moley, *The Supreme Court on the Job*, *Newsweek*, Aug. 10, 1942, at 64; *Chicago Daily Tribune*, Aug. 1, 1942, at 10, cols. 1-2; Cushman, *Ex parte Quirin Et Al.*, *supra* note 6, at 63-64.

⁵⁶ *The Saboteurs*, *Saturday Rev. of Literature*, Aug. 8, 1942, at 8.

VI. THE COURT'S FULL OPINION

The proceeding which Cousins considered so hypocritical ended with the observation of the Chief Justice that preparation of a full opinion would take some time. By October 29, when this opinion—or, more accurately, rationalization for the decision—finally appeared, it could not have mattered less to six of the defendants. They had been dead for two months. The military trial, interrupted only temporarily by the habeas corpus hearing, had concluded on the afternoon of Saturday, August 1, little more than a day after the Supreme Court announced its decision. The generals, after deliberating until Monday morning, found all the defendants guilty and sentenced each to death. However, with the concurrence of Biddle and Cramer, they recommended that the punishments of Dasch and Burger be commuted to life imprisonment. The commission communicated its conclusions directly to the President, informing not even the defendants of its decision.

After studying the record and findings for more than two days, Roosevelt accepted all the generals' recommendations but that regarding Dasch, whom he decided to imprison for only thirty years. For the six saboteurs condemned to death the end came quickly, all of them dying in the electric chair of the District of Columbia jail on August 8. Only after these executions had been carried out in secrecy did the White House reveal to the public the results of the trial and the fate of the defendants.⁵⁷

The Government's announcement concluded the saboteur case with a finality that robbed the Supreme Court's opinion of immediate practical significance. Unable to influence the fate of the defendants and unwilling to challenge the warmaking branches of the government (even on issues as judicial in nature as criminal procedure and the jurisdiction of the federal courts), the justices chose not to take a stand in favor of individual rights. Only on the question of whether the saboteurs might challenge in a civilian forum the army's right to try them did they express significant disagreement with the government.⁵⁸

⁵⁷ Cushman, *Ex Parte Quirin Et Al*, *supra* note 6, at 58; *Ex parte Quirin*, 317 U.S. 1 (1942); *New York Times*, Aug. 2, 1942, at 1, col. 3, Aug. 4, 1942, at 1, col. 5, and at 8, cols. 4-5; Aug. 8, 1942, at 8, col. 2; and Aug. 9, 1942, at 1, col. 4; E. Rachlis, *supra* note 1, at 272-86.

⁵⁸ *Ex parte Quirin*, 317 U.S. at 25.

A. CONCERN FOR APPEARANCES

The Court accepted the prosecutors' position on all other disputed issues in part to protect its image. Concern for appearances had influenced the handling of this case from the beginning. That is why Frank Murphy had not participated in *Ex parte Quirin*. No legal precedent required a judge on active reserve duty to disqualify himself from such a case, but after "some remarks were passed in Conference" about the propriety of his participation, Murphy elected to withdraw, "lest a breath of criticism be leveled at the Court."⁵⁹ Later, Stone was asked to delete from his opinion a relatively innocuous sentence acknowledging the guilt of the saboteurs, presumably because it might convey the impression that, when they had decided the case, the members of the Supreme Court had not presumed the defendants innocent.⁶⁰

In a memorandum to his colleagues, the Chief Justice indicated his belief that, at the time of the July hearing, some of the issues raised by defense counsel had not been properly before them, but argued that nevertheless the opinion should resolve these questions against the Nazis. Otherwise, he said, the Court would be left "in the unenviable position of having stood by and allowed six men to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied to secure petitioners' liberty."⁶¹

B. SUPPORT FOR THE WAR EFFORT

Although desire to avoid presenting the Court in an unfavorable light no doubt influenced the content of the opinion, another factor was more important in determining its character: a judicial conviction that concern for individual rights must not restrict the capacity of the nation to wage total war. It is ironic that Lieutenant Colonel Murphy should have been the only justice to excuse himself from the saboteur case, for, as his biographer has observed, "Rather than perceiving judicial duty as the

⁵⁹ Note to Ed (Kemp), Sep. 10, 1942, Box 47, Frank Murphy MSS, Michigan Historical Collections, University of Michigan.

⁶⁰ H.F.S., Memorandum for the Conference, Oct. 17, 1942, Box 269, Hugh Black MSS, Manuscript Division, Library of Congress (hereinafter cited as Black MSS).

⁶¹ Memorandum for the Court, Sep. 25, 1942, Box 68, Harlan Fiske Stone MSS, Manuscript Division, Library of Congress (hereinafter cited as Stone MSS).

legitimation of power in a struggle to the death, he conceived of his function as championing human rights. . . ."⁶²

1. *Views of Justice Robert Jackson*

In this respect Murphy's views differed substantially from those of Robert Jackson, who sought to convince other members of the Court that "the majestic generalities of the Bill of Rights designed to safeguard our free society" should not be made available to the likes of the saboteurs. The prisoners were, Jackson argued, part of the enemy's military forces. He believed there were "the soundest reasons why courts should refrain from reviewing in any way orders of the President respecting prisoners of war." As Jackson saw it, the handling of prisoners "is part of the work of waging war."⁶³

"The magnitude and urgency of the menace presented by this hostile military operation and the measures to meet it," he contended, "were for the Commander in Chief to decide." In Jackson's opinion, not even Congress could restrict the President in the discharge of such warmaking responsibilities.⁶⁴ "I think," he said, "we are exceeding our powers in reviewing the legality of the President's Order and that experience shows the judicial system unfitted to deal with matters in which we must present a united front to a foreign foe."⁶⁵

2. *Views of Justice Felix Frankfurter*

As Jackson acknowledged, none of his seniors in service on the Court shared these views, characterized by Black's clerk, John P. Frank, as "an expression of complete executive authority."⁶⁶ But Justice Frankfurter came close to doing so. "The ultimate Constitutional basis for the President's right in utilizing an instrument like the McCoy Commission is his power as Commander in Chief to conduct the war," Frankfurter

⁶² J. W. Howard, *supra* note 7, at 277.

⁶³ Memorandum by Justice Jackson, Oct. 22, 1942, Box 269, Black MSS. The entire handling of the saboteur case was, of course, predicated on the assumption that the defendants were not prisoners of war. Had they been POWs, their trial and executions would have been blatant violations of the Geneva Convention.

⁶⁴ Memorandum by Mr. Justice Jackson, undated, Box 269, Black MSS.

⁶⁵ Memorandum by Mr. Justice Jackson, Oct. 22, 1942, Box 269, Black MSS.

⁶⁶ *Id.*; John P. Frank, Memo to Mr. Justice Black, undated, Box 269, Black MSS.

observed. It was not for judges to question the Chief Executive's interpretation of legislation "bearing on the exercise of this military power," nor to meddle in "the actual combative aspect of war."⁶⁷

In fact, the trial of offenses committed far from any actual fighting had so little to do with the combative aspect of the war that excellent legal minds considered it the sole province of the civil courts.⁶⁸ Frankfurter could not accept this idea, for inherent in it was the possibility that jurists, whose opinions he, like his friend Judge Jerome Frank, seems to have regarded as "rather absurd to bother about" when America was fighting for survival, might interfere in some indirect way with the national crusade.⁶⁹ In a document circulated to his colleagues, most of which consisted of a fictional but revealing dialogue between himself and the saboteurs, he noted that some of the best lawyers he knew were then serving with the armed forces and predicted how they would react to anything less than unanimous rejection of the constitutional arguments advanced by the saboteurs:

What in the hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power. . . .⁷⁰

Frankfurter seemed anxious, not merely to avoid the wrath of these warrior attorneys, but actually to join them in what he considered "a war to save civilization itself from submergence."⁷¹ Stone, Jackson, and other members of the Court apparently shared his desire to enlist in the national military effort. Even Murphy contracted a case of "war fever," which

⁶⁷ Felix Frankfurter, Memorandum, undated, Box 269, Black MSS. Frankfurter made an identical statement in a letter of Sep. 14, 1942 to Stone, Box 68, Stone MSS.

⁶⁸ Charles Burlingham to Frankfurter, June 29, 1942, Box 35, Felix Frankfurter MSS, Manuscript Division, Library of Congress (hereinafter cited as Frankfurter MSS).

⁶⁹ John P. Frank to Frankfurter, Nov. 13, 1942, Box 55, Frankfurter MSS.

⁷⁰ Box 269, Black MSS.

⁷¹ Address by Associate Justice Felix Frankfurter at the Inauguration of Dr. Harry N. Wright as sixth president of the City College of New York, on Wednesday, Sep. 30, 1942, Box 196, Frankfurter MSS.

inspired him not only to volunteer for Army service but to become an active propagandist for America's crusade against the Axis. During its summer of '42 the Supreme Court, mentally at least, went to war.⁷²

C. EFFECT OF THE PRESIDENT'S PROCLAMATION

Having enlisted in the fight against the Axis, the Court's members declined to "grant individual rights against our military authorities which our enemies would never reciprocate toward captured Americans."⁷³ Only the first of the five propositions of the defense won their approval. As spokesman for all of his colleagues, Stone announced that nothing in Roosevelt's proclamation had precluded "access to the courts for determining its applicability to the particular case," and that neither the proclamation "nor the fact that they [were] enemy aliens" had barred the saboteurs from obtaining judicial consideration of their contention that the military trial had been illegal and unconstitutional.⁷⁴

The Chief Justice was not being entirely candid, for the proclamation, although wretchedly drafted, did appear designed to bar prisoners such as the saboteurs from seeking any relief at all in the civil courts, including writs of habeas corpus. Further, the proclamation seemed to forbid non-military tribunals from entertaining any proceedings at all brought on behalf of such defendants. By distorting the meaning of the proclamation, the Court was able, without directly challenging the Commander-in-Chief, to announce that, even in wartime, habeas corpus would always

⁷² J. W. Howard, *supra* note 7, at 272. It should be noted, however, that Stone turned down an offer from Roosevelt to head up an investigation of the rubber shortage. Although Frankfurter had recommended him for the assignment, the Chief Justice considered it inappropriate for a judge to participate in the business of the legislative and executive departments. Roosevelt and Frankfurter: Their Correspondence 1928-1945 at 662-64 (M. Freedman ed. 1967).

⁷³ Memorandum by Justice Jackson, Oct. 22, 1942, Box 269, Black MSS.

⁷⁴ *Ex parte Quirin*, 317 U.S. at 25.

remain available to test the legality of executive actions.⁷⁵ History dictated caution in the assertion of this principle, for when Chief Justice Roger Taney, in reliance on it, had ordered military authorities to deliver up a prisoner during the Civil War, they had defied his order, thus revealing the helplessness of the law before the power of the sword.⁷⁶

Stone and his colleagues managed to announce the continued availability of the courts in a manner that did not threaten to result in such a demonstration of the relative impotence of the judiciary, but they achieved this procedural success only at the cost of badly undermining substantive judicial control of military power. The Court rejected completely the defense contention that the proclamation had been unconstitutional and invalid. In issuing it, Stone said, the President had exercised authority conferred on him by Congress in the fifteenth article of war. Actually, that provision, designed to restrict the court martial jurisdiction the legislature was creating, said of military commissions merely that they might be used to try offenses already made triable before such bodies by either federal statutes or the law of war. Thus, contrary to Stone's contention, it did not so much grant authority as disclaim intention to take away any then in existence.⁷⁷

The Court disposed of the defendants' constitutional argument in an

⁷⁵ The proclamation read:

[S]uch persons shall not be privileged to seek any such remedy or proceeding sought on their behalf in the courts of the United States, or its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

Note 19, *supra*.

⁷⁶ *Ex parte Merryman*, No. 9487, 17 F. Cas. 144 (D.C.D. Md. 1861).

⁷⁷ Article 15 of the Articles of War declared:

[T]he provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.

317 U.S. at 27.

equally dubious fashion. Unable to find any provision in the nation's frame of government which explicitly authorized either Congress or the President to provide for the trial of such persons before a military commission, it stirred together several powers of each and concluded that the totality gave "the National Government" the authority to do so. Some of the constitutional prohibitions to which the petitioners had pointed, Stone simply ignored. By going to such lengths to justify Roosevelt's proclamation, the Chief Justice, while preserving the form of judicial review, gutted it of substance.

He went on to brush aside the contention that the order creating the commission had been invalid because it failed to comply with the procedural requirements of the Articles of War. Arguably, Congress had no authority to impose restrictions upon the Commander-in-Chief's dealings with enemy belligerents, but the Court sidestepped this constitutional problem, simply holding that the cited provisions were inapplicable to this case.

Although all of its members agreed that the Articles of War afforded no basis for the issuance of writs of habeas corpus, the Court was, Stone acknowledged, divided as to why this was so. Some justices insisted that none of the articles applied to military commissions, but others believed only that use of the procedure called for by the President was not foreclosed by those to which the defense had pointed. That all the judges had started with a conclusion and worked backward to find reasons justifying it was painfully obvious.

D. USE OF MILITARY TRIAL JUSTIFIED

Although less transparently the product of efforts to reach a predetermined result, the Court's discussion of why a military trial of the defendants had been proper exhibited a similar reluctance to challenge the Commander-in-Chief. As Stone put it,

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their effort to thwart or impede our military effort have violated the law of war.⁷⁶

⁷⁶ *Id.* at 28.

The judiciary should not interfere with detentions and trials ordered by the President "without the clear conviction that they are in conflict with the Constitution or laws of Congress. . . .," he said.⁷⁹ The position of the Court was that the Articles of War authorized military commissions to try offenses against the laws of war.

The fact that Congress had failed to define by statute all the acts condemned by the laws of war did not affect the legality of using a military commission to dispose of "unlawful combatants"—persons, such as spies and saboteurs, who had passed through military lines out of uniform—because that class of defendants historically had been punishable by military commission. In issuing his order creating the body that tried the Nazis, the President had undertaken to exercise the power conferred on him by Congress "and also such authority as the Constitution itself gives the Commander in Chief to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."⁸⁰ What the authority was, the Court did not bother to say.

But the Court's members clearly rejected the claim that the President had violated the saboteurs' rights by denying them civilian trials. Stone noted that one specification of one charge against the eight had accused them of going behind American lines in civilian dress to destroy war industries and materiel. This, he reasoned, amounted to an allegation of unlawful belligerency. As that offense was one which traditionally had been dealt with by military commissions, neither article III, section 2 of the Constitution, nor the fifth and sixth amendments had ever applied to it. Since the grand jury indictment and jury trial requirements of those provisions were the bases of the defendants' claim that they were entitled to civilian justice, this analysis destroyed their argument.

Stone's reasoning, however, depended on some rather dubious interpretation of constitutional language. The fifth amendment explicitly excepted from its requirement for indictment by grand jury, "cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger." From such an express exclusion one would normally imply an intent to include everything else which a provision

⁷⁹ *Id.* at 25.

⁸⁰ *Id.* at 28.

might reach. A similar exception was, according to the Court, implicit in the sixth amendment's guarantee of a jury trial, so both it and the grand jury requirement would seem to have governed all cases but those involving American servicemen, including ones in which the defendants were enemy belligerents.

Stone, however, concluded otherwise, despite *Ex parte Milligan*. The Chief Justice sought to distinguish the 1866 case on the basis that Milligan, an Indiana Copperhead who had helped to organize a pro-Southern group called the Order of American Knights, had never resided in territory controlled by a hostile government. He also argued that Milligan, unlike these defendants, had not been subject to the law of war because he "was a non-belligerent," an assertion dependent upon a characterization of the Copperhead conspirator as "not part of or associated with the armed forces of the enemy" that considerably distorted historical reality.⁸¹ The American Knights allegedly had plotted an armed uprising in Indiana and had sought Confederate military assistance.⁸²

Milligan's case may have differed significantly from those of the German aliens among the saboteurs. But Haupt, like Milligan, was a United States citizen and apparently not a member of the enemy's armed forces. Other than Haupt's brief stay in Germany—part of an ill-fated around-the-world odyssey that began when he fled Chicago for Mexico after impregnating his girlfriend—and his re-entry into the United States, nothing of legal significance distinguished his case from Milligan's.⁸³ As a citizen charged with engaging in activity that amounted to levying war against the United States and giving aid to its enemies, Haupt should have been tried for treason.⁸⁴

⁸¹ *Id.* at 45.

⁸² Nevins, *The Case of the Copperhead Conspirator*, essay in *Quarrels that Have Shaped the Constitution* 100 (J. Garraty ed. 1964).

⁸³ E. Rachlis, *supra* note 1, at 57-63, 82-83.

⁸⁴ In his extensively researched study of the law of treason in the United States, J. Willard Hurst expresses the view that—

where the defendant is charged with conduct involving all the elements of treason within the constitutional definition and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem to disregard the policy of the Constitution to permit him to be tried under another charge than 'treason.'

Stone realized this, but after failing to find a satisfactory justification for the fact that the government had not tried him for that offense in a civil court, he resorted to repeated references to Haupt's offense as "unlawful belligerency," apparently hoping that giving it another name would somehow alter its identity.⁸⁶ Even if correct, his characterization of Haupt's offense was not an adequate response to the claim that *Miligan* governed this case, for although the Chief Justice was able to cite numerous examples of trials of unlawful belligerents by American military commissions, all of them predated the 1866 decision.⁸⁶

In an even more cavalier manner, Stone disposed of the apparent inconsistency between his resolution of *Quirin*, and traditional wisdom concerning the reach of the army's judicial power. Despite the fact that the ruling he was making was bound to inject an element of confusion into this area of the law, he remarked casually, "We have no occasion now to define with meticulous care the ultimate boundaries of military tribunals to try persons according to the law of war." The only guidance the Chief Justice offered to the lawyers and judges who would have to

But, he notes, "the decision in *Ex parte Quirin* casts considerable doubt on this analysis." Hurst then subjects Stone's treatment of the treason issue to vigorous criticism. *The Law of Treason in the United States* 147-48 (1971).

In a letter to the Author, dated September 25, 1978 and written after reading an early draft of this article, Professor Hurst expressed the following view:

The Court's summary dismissal of the treason clause as (impliedly) qualified by the (not well defined) laws of war seems to me to reject the presumption of policy which the Constitution intended. The Court should have insisted on applying the treason clause to Haupt's case, not out of any doubt about Haupt, but in respect to the Constitution's general concern for the future handling of the offense.

It should be noted, however, that one delegate to the Constitutional Convention, Rufus King of New York, did say that Congress *might* (although not that it *should*) punish capitally under other names what might be called treason. B. Chapin, *The American Law of Treason* 83 [1961]. Whether Haupt could have been prosecuted for treason depended, of course, on whether or not he was a United States citizen, an issue the Court chose not to resolve. It took the position that in any event citizenship could not relieve an "enemy belligerent" of the "consequences" of unlawful belligerency. 317 U.S. at 20, 37.

⁸⁶ Stone to Bosky (his clerk), Aug. 20, 1942, Box 68, Stone MSS.

⁸⁶ 317 U.S. 32-33 n. 10.

wrestle with other cases in the future was the unenlightening observation that the saboteurs "were plainly within those boundaries. . . ."⁸⁷

Stone's purpose was not to elucidate the law, but rather to justify as best he could a dubious decision. Stone realized Haupt should have been tried for treason in a civil court, and despite the efforts of Justice Frankfurter to persuade him that the provisions of the Articles of War relating to appellate review did not apply to military commissions convened by the President, he remained unconvinced that the handling of that facet of the case had been completely proper.⁸⁸ Although ultimately finding more support for his colleague's position than he had expected, Stone confessed he could not "say that I am over-enthusiastic about [it]." After completing that portion of his draft opinion, he wrote to Frankfurter, "About all I can say for what I have done is that I think it will present to the Court all tenable and pseudo-tenable bases for decision."⁸⁹

On the issue of whether or not the fifth and sixth amendments forbade trial by military commission of persons unaffiliated with the American armed forces, Stone may have believed what he wrote, but he had to admit that there was little authority for his position.⁹⁰ Far from being compelled by the status of the prisoners to hold them amenable to army justice, he enlisted one of his clerks in a calculated effort to "show that petitioners are unlawful belligerents in the International Law and Law of War sense," in order that their case might "be distinguished from that of Milligan. . . ."⁹¹

Distinction of *Quirin* from the earlier ruling was essential, Justice Black thought, if the Court was to avoid subjecting "every person in the United States to trial by military tribunals for every violation of every

⁸⁷ *Id.* at 45-46.

⁸⁸ *Id.*; Stone to Frankfurter, Sep. 16, 1942, Box 68, Stone MSS. For Frankfurter's position, see the undated memorandum by him in Box 269, Black MSS.

⁸⁹ Stone to Frankfurter, Sep. 16, 1942, Box 68, Stone MSS.

⁹⁰ Stone to Bosky and Morrison, Aug. 14, 1942, Box 68, Stone MSS.

⁹¹ Stone to Bosky, Aug. 9, 1942, Box 68, Stone MSS.

rule of war. . . .⁹² But the Court as a whole was less concerned about preserving constitutional limitations on the judicial power of the armed forces than with endorsing the way in which Roosevelt had disposed of the saboteurs. Whatever its defects, Stone's opinion served that purpose. Because most legal commentators agreed with what the Chief Justice was trying to accomplish, they found unobjectionable both the *Quirin* ruling and the way he had justified it. While the law reviews applauded, Court and country, having, as an army lawyer put it, sent "to death or to a shameful living death those eight who treacherously sneaked past our borders . . . turned away and gave full attention to the grim task ahead."⁹³

VII. SUBSEQUENT DEVELOPMENTS

Although the saboteur case itself soon slipped from the thoughts of a nation preoccupied with winning a war, the judicial ideas and attitudes reflected in the *Quirin* opinion persisted, menacing individual constitutional rights long after the final defeat of Germany and Japan. The problem was not that the Supreme Court had consigned the defendants to an unjust fate (for all eight were clearly guilty of serious crimes), but rather that it had accepted as virtually axiomatic the proposition that the guarantees of the Bill of Rights must not be allowed to interfere with the nation's capacity to fight its enemies. The Court had also adopted the corollary that it was for those actively involved in the business of war-making, rather than for judges, to decide what actions might be justified by the pursuit of victory.

Attorney General Biddle, who understood the significance of *Quirin*, informed Roosevelt that the Court had ruled that, where the law of war applied, the Constitution did not. "Practically then, the *Milligan* case is out of the way and should not plague us again," he assured the President.⁹⁴

⁹² Black to Stone, Oct. 2, 1942, Box 269, Black MSS.

⁹³ The quote is from C. Bernstein, *supra* note 4, at 189. For other examples of support for the Supreme Court from legal commentators, see Dorothy Wilbourn, *Constitutional Law—Power of Court to Review Jurisdiction of Military Commission*, 31 Illinois B.J. 216 (1943), and Comment, *Constitutional Law—Saboteurs and the Jurisdiction of Military Commissions*, 41 Michigan L. Rev. 481 (1942). One student note, 29 Univ. of Virginia L. Rev. 317 (1942), did evidence some unease about the implications of the *Quirin* decision.

⁹⁴ Memorandum for the President, OF3608, FDR MSS.

What Biddle meant, of course, was that the Commander in Chief no longer had to worry about the Supreme Court interfering, in the name of individual rights, with measures which the political branches of the government considered necessary to the war effort. That he did not have to worry suggests that American civil liberties were in a perilous position. World War II, it is true, produced far fewer abuses of individual rights, particularly freedom of expression, than had World War I. But this was due largely to the virtual absence of domestic opposition to the national military effort, and to Biddle's determination to limit sedition prosecutions.

As several scholars have noted, neither the country, nor its political and intellectual leaders, nor such organizations as the American Civil Liberties Union, were truly libertarian in their outlook. Those individuals who fell outside the very broad national consensus supporting the war needed protection from judges willing to enforce the Constitution's guarantees. Because of its total war mentality, the Supreme Court was not always willing to provide such protection.⁹⁵

A. DECISIONS PROTECTING CIVIL RIGHTS

Although many scholars have lauded the Court for protecting civil liberties during World War II,⁹⁶ some of the decisions on which they have based their evaluations, such as *Cramer v. United States*, which reversed a treason conviction, and *Duncan v. Kahanomoku*, which held unconstitutional the use of military courts to try civilians in Hawaii, were rendered when the war was nearly over or had already ended.⁹⁷ In ruling that public schools could not compel Jehovah's Witnesses to salute the flag, the Court took a firm stand against hysterical super-patriotism while

⁹⁵ F. Biddle, in *Brief Authority* 234-35 (1962); P. Murphy, *supra* note 6, at 225-26; R. Polenberg, *supra* note 3, at 38-55; G. Perrett, *Days of Sadness, Years of Triumph* 357-83 (1974); Preston, *Shadows of War and Fear*, essay in *The Pulse of Freedom* 152 (A. Reitman ed. 1975); J.M. Burns, *Roosevelt* 216-17 (1970).

⁹⁶ P. Murphy, *supra* note 6, at 226-30; R. Polenberg, *supra* note 3, at 49; E. Corwin, *supra* note 5, at 106-07; A. Mason, *supra* note 6, at 698. For dissenting views, see G. Perrett, *supra* note 95, at 365-67, and R. McCloskey, *The Modern Supreme Court* 45-53 (1972).

⁹⁷ *Duncan v. Kahanomoku*, 327 U.S. 304 (1946); *Cramer v. United States*, 325 U.S. 1 (1945).

fighting still raged, but this case did not involve even an apparent threat to the war effort.⁹⁸

Some of the high tribunal's decisions did thwart attempts to repress supporters of the enemy, but these cases turned on rather narrow issues of statutory interpretation and sufficiency of the evidence.⁹⁹ Probably the best explanation for them is that the dissident defendants simply did not appear to represent anything more than a lunatic fringe, so tiny that its propagandist activities could not possibly hamper the fight against the Axis. Indicative of this is Justice Murphy's comment, made while freeing twenty-five Buddhists in *Keegan v. United States*, that he and his colleagues were "not unmindful of the fact that the United States is now engaged in a total war for national survival and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable sector is disloyal."¹⁰⁰ The implication was that, if the Court had believed the Buddhists posed a threat to the nation's unity and fighting strength, it would have ruled against them.

Murphy and his colleagues had succumbed to a constitutional relativism which dictated that the security of individual rights vary inversely with the extent to which their exercise seemed to threaten the capacity of the nation to wage war against its enemies. Thus, Hugo Black, although he had accepted Stone's *Quirin* opinion, could declare emphatically in a January 18, 1946 letter to the Chief Justice dealing with *Duncan v. Kahanamoku*, "the *Milligan* majority opinion in my judgment expressed constitutional views that were sound then [in 1866] and are sound now."¹⁰¹

B. THE JAPANESE-AMERICAN INTERNMENT CASES AND SUBSEQUENT DEVELOPMENTS

So too, the same Court that freed pro-German propagandists could stand by while the Army removed loyal Japanese-Americans from their homes on the West Coast and hauled them off to inland concentration camps in what Edward S. Corwin, in 1947, identified as "the most drastic

⁹⁸ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁹⁹ *Keegan v. United States*, 325 U.S. 478 (1945); *Hartzel v. United States*, 322 U.S. 680 (1944); *Viereck v. United States*, 318 U.S. 236 (1943).

¹⁰⁰ 325 U.S. at 689.

¹⁰¹ Box 72, Stone MSS.

invasion of the rights of citizens of the United States by their own government . . . in the history of our nation."¹⁰² As justification for this abuse of a racial minority, the justices accepted pleas of military necessity, although the military situation on the Pacific Coast in no way required what the government had done.¹⁰³ The Court's reasoning was that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . ." If individuals suffered, that was unavoidable, for "[a]ll citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure."¹⁰⁴

Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.¹⁰⁵

These Japanese-American cases, as Corwin pointed out soon after the war ended, "brought the principle of constitutional relativity to the highest pitch yet. . . ."¹⁰⁶ He was too close to postwar developments to notice that this principle had not ceased to operate on V-J Day. Confronted with military demands for a free hand in dealing with enemy war criminals, the Court soon undermined even the jurisdictional achievement it had recorded in *Quirin*. In a series of cases decided between 1948 and 1950 it consistently refused to consider granting writs of habeas corpus to German and Japanese prisoners challenging their convictions by American and Allied military tribunals abroad. Indeed, despite the per-

¹⁰² E. Corwin, *supra* note 5, at 91. Belated efforts to repair the damage are underway. A bill before Congress, S.1647, would establish a commission to investigate what harm was done the Japanese-Americans by the relocation, and to recommend remedies. Senate Committee on Governmental Affairs, Commission on Wartime Relocation and Internment of Civilians Act, S. Rep. No. 96-751, 96th Cong., 2d Sess. (1980).

¹⁰³ P. Murphy, *supra* note 6, at 232-37; R. Daniels, Concentration Camps U.S.A. 42-73, 130-43 (1971); *Ex parte Endo*, 323 U.S. 288 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

¹⁰⁴ *Korematsu v. United States*, 323 U.S. at 219 and 220.

¹⁰⁵ *Hirabayashi v. United States*, 320 U.S. at 93.

¹⁰⁶ E. Corwin, *supra* note 5, at 100.

sistent protests of a minority of its membership, the Court declined even to grant them the sort of hearing it had accorded the saboteurs.¹⁰⁷

Motions filed by United States citizens subjected to military justice in Europe and Japan fared no better. As these requested unconstitutional exercises of original jurisdiction, one could not fault the Court for rejecting them. But except in the last of nine cases, only Black and Rutledge were willing even to state that its action should not be taken as prejudicing the filing of the same petitions in appropriate district courts.¹⁰⁸

Equally disturbing was the fact that in the only one of the foreign war criminal cases not disposed of with a per curiam opinion too brief to explain the decision, the Court held that habeas corpus was unavailable because, in creating the military tribunal that had tried the petitioner, General Douglas MacArthur had acted as an agent of the Allied Powers, rather than of the United States.¹⁰⁹ In a concurring opinion, Douglas pointed out that at some future date "an American citizen might stand condemned" by such a tribunal, and if "no United States court can inquire into the lawfulness of this detention, the military have acquired, contrary to our traditions (see *Ex parte Quirin* . . .) a new and alarming hold on us."¹¹⁰

Actually, it was not so much the military as war itself that had gained a hold over the rights of the American people. Three years after the surrender of Germany and Japan, the Supreme Court continued to justify challenged governmental actions as war measures. In *Ludecke v. Watkins*, a decision upholding an order deporting a German as an enemy alien after the fighting in Europe had ceased, the Court emphasized the fact that the "state of war" had not yet been officially terminated by treaty, legislation, or presidential proclamation. It was for the political

¹⁰⁷ *Hirota v. MacArthur*, 338 U.S. 197 (1948); *In re Flesch*, 337 U.S. 953 (1949); *In re Steimie*, 337 U.S. 913 (1949); *In re Mühlbauer*, 336 U.S. 964 (1949); *In re Dammann*, 336 U.S. 922 (1949); *In re Eichel*, 333 U.S. 865 (1948); *Everett v. Truman*, 334 U.S. 824 (1948); *Milén v. United States*, 332 U.S. 789 (1947).

¹⁰⁸ *In re Bush*, 336 U.S. 971 (1949); *United States v. Bickford*, 336 U.S. 950 (1949); *Ex parte Betz* (together with six other cases), 329 U.S. 672 (1946); Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 567 (1949).

¹⁰⁹ *Hirota v. MacArthur*, 338 U.S. 197 (1948).

¹¹⁰ *Id.* at 202.

branches of the government to bring the conflict legally to an end, it said.¹¹¹ But the Court also upheld as a valid exercise of the war power the Housing and Rent Act of 1947, a statute enacted *after* publication of the December 31, 1946 presidential proclamation officially terminating hostilities. In that case, the justices insisted that the Constitution gave Congress postwar authority to remedy evils that had arisen from the rise and progress of the war.¹¹²

C. THE COLD WAR

Among the problems that necessitated use of the war power after fighting ended, as Justice Frankfurter indicated in a footnote to his opinion in *Ludecke*, were certain changes in Europe greatly affecting American foreign policy and national security.¹¹³ For Frankfurter and his colleagues, World War II never ended; it simply dissolved into the developing Cold War between the United States and the Soviet Union. They saw this new international conflict as justifying the continued use of emergency powers originally made operative by the shooting war against the Axis.

Thus, when the Justice Department refused, without even granting her a hearing on allegations of espionage based entirely on hearsay, to allow a war bride who was originally from now-Russian dominated Czechoslovakia to enter the United States, the Supreme Court upheld its action.¹¹⁴ In so doing, the Court relied on legislation passed by Congress in June 1941 which authorized the President to impose additional restrictions on entry into the country during the national emergency he had proclaimed on May 27 of that year. "The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and national emergency . . .," the Court declared. "The national emergency [had] never terminated," it noted, and "a state of war still exists."¹¹⁵

Because the Russian-American confrontation prevented conclusion of a peace treaty with Germany, World War II had become legally, at least,

¹¹¹ 335 U.S. 160 (1948).

¹¹² *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

¹¹³ 335 U.S. at 169 n. 14, and at 170 n. 15.

¹¹⁴ *Knauf v. Shaughnessy*, 338 U.S. 521 (1950); *D. Cauter, The Great Fear* 261-63 (1978).

¹¹⁵ 338 U.S. at 546.

perpetual. It was however, not this technicality but judicial attitudes that kept American constitutional law on an emergency footing. The response of the Supreme Court to cases spawned by the Cold War and the often-hysterical domestic anti-Communism that accompanied it was reminiscent of the way the high tribunal had rebuffed the Nazi saboteurs.

Even when handling litigation that did not actually involve the war powers of Congress or the executive, the Court displayed the same readiness to sacrifice constitutional rights to what the political branches characterized as the demands of national security that had prevailed in *Ex parte Quirin*. Thus, in *Dennis v. United States*, in order to uphold the convictions of eleven of Russia's American allies, the top leaders of the Communist Party of the United States, for teaching and advocating the violent overthrow of the government, it adopted an adjustable definition of freedom of speech under which the meaning of that right in any given context depended on the gravity of the evil the authorities sought to prevent discounted by the improbability of its occurrence.¹¹⁶

Here was the same sort of relativism to which the Court had succumbed in 1942, and it reached this result for similar reasons. The author of the *Dennis* opinion, as well as that in another important first amendment case, *American Communications Association v. Douds*, in which the Court upheld the anti-Communist affidavit provision of the Taft Hartley Act, was Fred Vinson, who had succeeded Stone as Chief Justice in 1946.¹¹⁷ Asked later to explain these rulings and Vinson's attitude toward civil liberties generally, two of his law clerks emphasized that the former Secretary of the Treasury had "just gotten promoted from a wartime administration." In a Cold War, as in a hot one, the government had to protect itself, Vinson believed. Consequently, he did not have "a hell of a lot of patience with some of the far out civil libertarians."¹¹⁸

VIII. CONCLUSION

Eventually, Vinson was replaced as Chief Justice by a man who did have such patience—Earl Warren. Under Warren, the Supreme Court

¹¹⁶ 341 U.S. 494 (1951).

¹¹⁷ 339 U.S. 382 (1950).

¹¹⁸ Interview with Howard J. Trienens and Newton N. Minow, Feb. 27, 1975, Fred M. Vinson Oral History Project, University of Kentucky, at 30 and 32. The first quote is from Trienens, the second from Minow.

shook off its total war mentality and displayed an invigorated concern for civil liberties. But, in the opinion of this writer, for more than a decade after the summer of 1942 the judicial attitudes that led to the decision in *Ex parte Quirin* continued to dominate the Supreme Court and to endanger the constitutional rights of the American people. In deciding the saboteur case the Court had fallen into step with the drums of war. For so long as its members marched to their beat, the Court remained an unreliable guardian of the Bill of Rights.

BOOK REVIEW:

FEDERAL RULES OF EVIDENCE MANUAL*

Stephen A. Saltzburg** and Kenneth R. Redden,** *Federal Rules of Evidence Manual*. Charlottesville, Virginia: The Michie Company. Second edition, 1977, pp. xxxi, 875. Cumulative Supplement for 1980, pp. 347. Price: \$50.00. Publisher's address: Michie/Bobbs-Merrill Co., Inc., P.O. Box 7587, Charlottesville, VA 22906.

*Reviewed by Lieutenant Colonel Herbert J. Green****

The history of modern military criminal law is measured by three major landmarks. The first was the enactment in 1950 of the Uniform Code of Military Justice.¹ The second, 18 years later, was also statutory, the Military Justice Act of 1968.² This year the third major landmark has been established. On 12 March 1980, the President, by Executive Order, amended the Manual for Courts-Martial and promulgated the Military Rules of Evidence.³

*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. The book here reviewed is briefly noted at page 130, below.

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¹ Uniform Code of Military Justice, ch. 169, 64 Stat. 108 (1950), codified at 10 U.S.C. § § 801-940 (1976).

² Military Justice Act of 1968, Pub. L. No. 90-332, 82 Stat. 1335.

³ Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). For extensive substantive discussion of the new Military Rules of Evidence, see the symposium issue, May 1980, of *The Army Lawyer*, the monthly companion to the quarterly *Military Law Review*.

The new rules make sweeping changes in military law. The Manual evidentiary rules⁴ have been abolished and replaced with a new code of evidence which substantially adopts the Federal Rules of Evidence, except in two sections. Section III of the military rules is, in large part, a codification of fourth, fifth, and sixth amendment practice and has no analog in the federal rules. Section V sets out in great detail the law of privileges and differs substantially from the privileges section of the federal rules. In contrast, the federal section V, consisting of only one rule, prescribes merely that the question of witness privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁵

The remainder of the military rules—the vast majority—are substantially identical with and are in fact substantially verbatim copies of the federal rules.

The adoption of the federal rules of evidence in 1975⁶ made a significant contribution to federal civilian practice. For the first time federal evidentiary rules were codified in one place. As a result the federal practitioner's continuous need to resort to evidence treatises or to case law to find the rules of evidence was materially lessened.

The adoption of the military rules will not bring to the military practitioner the same benefits that accrued to his civilian counterpart. Military evidentiary law is and has been for a long time collected in the Manual for Courts-Martial. In fact, as a result of the adoption of the military rules and the adherence to the wording of the federal rules, the military practitioner may find it more difficult to practice under the new rules. Heretofore, the Manual for Courts-Martial has set out in great detail the minute requirements of all evidentiary rules, one step at a time, in by-the-numbers fashion.

In contrast, the federal rules and now the new military rules are not

⁴ The old rules are set forth in chapter XXVII, Manual for Courts-Martial, United States, 1969 (Rev. ed.).

⁵ Fed. R. Evid. 501.

⁶ Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975), *codified at* 28 U.S.C. App. (1976), long title: Rules of Evidence for United States Courts and Magistrates.

as detailed and require more reading "between the lines" to understand and apply. An example of this difference is shown by the disparate treatment of the reply doctrine. The Manual for Courts-Martial, in paragraph 143b, states:

A letter or similar written communication, or a telegram or radiogram, purporting to be a reply from the addressee of a written or other type of message shown to have been communicated to that addressee or to have been placed in a reliable channel of communication may be inferred to be genuine.⁷

The reply doctrine as such is not mentioned in the new rules. Instead, the authentication provision of the new rules provides the following:

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. . . .

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
. . . .

[4] *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.⁸

Since the new rules differ substantially from their predecessors, and because in many respects, as indicated by the foregoing example, they are neither as clear nor as detailed, the military practitioner will need substantial assistance in making the transition to the new evidentiary rules.

This assistance can be obtained almost totally from the *Federal Rules of Evidence Manual*. The volume is divided into six parts. Part One, a short chapter on the background of the Federal Rules of Evidence, and

⁷ MCM, 1969 (Rev.), para. 143b(1), at 27-30.

⁸ Fed. R. Evid. 901.

Part Four, an essay on the relationship between the federal rules and the common law, provide the setting for the use of the rules. Part Three contains ancillary changes to the United States Code and to those federal rules of procedure that are related to the federal rules of evidence. Part Five contains those rules of evidence which were proposed by the Supreme Court but rejected by Congress. Part Six is a chart cross-referencing state law rules of evidence. Included are references to the Military Rules of Evidence.

The heart of this Manual is Part Two. The official text of each federal rule is reprinted and is followed by the editors' comments, the reports of the Supreme Court Advisory Committee on the rules, and the various relevant congressional reports. These are followed by a synopsis of every important federal and state court opinion interpreting the rules, and references to other relevant legal authority.

In essence the authors have provided in one volume a quick reference to all the important and relevant authority pertaining to all the federal rules of evidence. The Manual can be used as an initial reference work to help the lawyer begin his research and it can provide invaluable aid to the trial lawyer and judge when he or she needs a speedy reference during a trial. In addition this volume provides the lawyer with information about the drafters' intent, and gives great insight into the policies behind each rule.

It is impossible to overestimate the value of this work. It is to the Federal Rules of Evidence what Wright's hornbook is to federal procedure⁹ and what Prosser's is to torts.¹⁰ It is that good. It is a classic and it is essential.

⁹ Charles A. Wright, *Handbook of the Law of Federal Courts* (3d ed. 1976).

¹⁰ William L. Prosser, *Handbook of the Law of Torts* (4th ed. 1971).

BOOK REVIEW:

GOVERNMENT CONTRACTS IN A NUTSHELL, 1979*

W. Noel Keyes,** *Government Contracts in a Nutshell*. St. Paul, Minnesota: West Publishing Co., 1979. Pp. xlv, 423. Price: \$7.95. Paperback. Publisher's address: West Publ. Co., 50 W. Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165.

*Reviewed by Lieutenant Colonel Robert M. Nutt****

Writers in the field of government contracts abound and proliferate. They have waxed eloquent in articles, scholarly in texts or hornbooks, and simplistic in surveys which have purported to exhaust the subject—"Everything you ever wanted to know. . . ."

Professor Keyes admits that much has been written on the subject of government contracts; but, he says, no single volume has yet met the needs of those who want a balanced book—broad enough to interest those who want a survey, yet detailed enough to treat the subject matter properly. "Accordingly, a comprehensive single volume on Government Contracts appears to be needed. Neither treatment of every sub area or the resolution of all the conflicting points of view is possible, but critical

*This work is noted in *Publications Received and Briefly Noted* at page 119 of the present volume.

**Professor of Law and Director of Clinical Law at the Pepperdine University School of Law, Malibu, California.

***Judge Advocate General's Corps, United States Army. Lieutenant Colonel Nutt is chief of the Labor and Civilian Personnel Law Office, under the Assistant Judge Advocate General for Civil Law, at the Pentagon, Washington, D.C. He was deputy commandant and director of the Academic Department, TJAGSA, Charlottesville, Virginia, 1979-80, and was chief of the Contract Law Division, TJAGSA, from 1976 to 1979.

Lieutenant Colonel Nutt is co-author, with Major Gary L. Hopkins, of *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (1978); a book review published at 88 Mil. L. Rev. 133 (1980); and two articles published in *The Army Lawyer*, July 1978 at 15, and December 1978 at 8.

examination of all principal areas may prove helpful at this time."¹ The question is, has Professor Keyes reached this goal in his "nutshell"?

Every book should have a plot, even non-fiction. Something should tease the mind. A book should entice its reader as a lure entices a fish. In the area of government contracts, this presents a real challenge. But, as in all fields of law, government contracts provides an ample number of "truth is stranger than fiction" cases to make fun reading with plenty of scholastic elixir from literally hundreds of relevant recent cases to assuage serious researchers. I was hoping to find these qualities in Professor Keyes' nutshell, but did not.

This books contains a broad summary of contents which is encouraging. The outline of each chapter is very detailed. Indeed it appears likely to cover all the relevant points that a survey should.

Setting out, then, on my journey through the contract creation, performance, and disputes resolution processes, I looked for recent relevant cases, succinct statements with analysis of the law, and a citation or two that I could use in research. I was disappointed. I felt that references to cases and regulations were for the most part dated, that is, late 1960's and early 1970's. And while there were some references to recent statutory changes, i.e., the Contract Disputes Act of 1978,² very few references were to the late 1970's. In fact, the ASPRs (Armed Services Procurement Regulations) became the DARs (Defense Acquisition Regulations) in March of 1978, yet are still cited as ASPRs by Professor Keyes. In certain areas, the law has changed, or the rule has been insufficiently stated by Professor Keyes. For example, the treatment of protests at page 188 suggests that the Supreme Court has set out new criteria following the famous *Scanwell* decision. Yet there is no citation to the relevant Supreme Court case. It is perhaps *Califano v. Sanders*, 430 U.S. 99 (1977)?

Another example between pages 227 and 230 deals with the Limitation of Cost Clause (FPR 1-7.202.3; DAR 7.203.3 or 7.402.2). Only three cases are cited and these are old. There is no way to tell which version of the clause is referenced or what the current state of the law really is as of

¹ W. Keyes, *Government Contracts in a Nutshell*, preface at xix.

² 41 U.S.C. 601 et seq. (1978). This statute was signed into law by the President on 1 November 1978.

the publication date. Right now, in cost contracts the rule can be succinctly stated to be that no overruns will be funded under the current version of the 1966 LOC clause unless the contracting officer under subparagraph (b) (of either the FPR or DAR clause) modifies the contract in writing, or unless the facts show that the contractor was excused from giving notice because of a post-performance G&A cost increase which the contractor could not have discovered in time to give the requisite notice. Professor Keyes omitted this most significant exception when he did not refer to *General Electric v. United States*.³

Another questionable reference is found at page 340, the contracting officer's conference. The conclusions in this paragraph had to have been drawn from draft legislation that did not find its way into the 1978 law. There is no requirement in any statute for the conference described here. While it may be desirable to confer and the people referred to may indeed be the "right level" for settlement discussions, it is misleading to vouchsafe a procedure as fact when it is not.

Further, the discussion of cardinal change⁴ may be historical only, rather than a good reflection of current law. The bottom line is that agency boards of contract appeals, just like the Court of Claims, may entertain *any* claim related to a contract.⁵ This means that either forum can look to a clause and provide the express remedy for which the parties contracted or, if the facts prove a breach, the forum can grant such other relief as might be appropriate, i.e., reformation, rescission, or damages. We should not, therefore, be as concerned with the old law as with the new because complete relief can now be granted by the agency board or the Court of Claims.

Finally, I was not pleased with the mixed citation format. Sometimes cases were cited in the text. Sometimes they were cited in the table of authorities,⁶ but often it was difficult to decide which statement the referenced authority was intended to support. And then there were times when great expanses of material appeared with no footnotes at all, just occasional references to a case in the text.⁷ For the reader or practitioner this proves unsatisfactory.

³ 194 Ct. Cl. 678 (1971).

⁴ W. Keyes, note 1, *supra*, at 244-48 and 351-53.

⁵ 41 U.S.C. 607(d) and 609(a) (1978).

⁶ W. Keyes, note 1, *supra*, at 373-408.

⁷ For an example, see W. Keyes, note 1, *supra*, at 261-81.

All in all, this little book surveys government contracts. It lacks credibility, however, as a research tool.

I really thought the plot had potential, but somewhere along the way I lost track of the story. Maybe some day we will see a single volume that does it all. This nutshell is not it!

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section V, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Publishers or Printers of Publications Noted; Section III, Authors or Editors of Publications Noted; and Section IV, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section V. For books having more than one principal author or editor, all authors and editors are listed in Section III.

In Section II, Publishers or Printers of Publications Noted, all firms or organizations are listed whose names are displayed on the cover or on or near the title page of a noted publication. Excluded from this list are institutional authors and editors who are listed in Section III. No distinction is made in Section II among copyright owners, licensees, distributors, or printers for hire.

The opinions and conclusions expressed in the notes in Section V are

those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. PUBLISHERS OR PRINTERS OF PUBLICATIONS NOTED

Anchor Press, Doubleday & Company, Inc., 245 Park Avenue, New York, N.Y. 10017 (Nos. 25, 27).

Brookings Institution, ATTN: Director of Publications, 1775 Massachusetts Ave., N.W., Washington, D.C. 20036 (Nos. 5, 17, 18).

Burke Publications, 1744 West 75th Street, Hialeah, Florida 33014 (No. 3).

Crane, Russak & Co., Inc., 347 Madison Ave., New York, N.Y. 10017 (Nos. 22, 23, 24).

Doubleday & Company, Inc., 245 Park Ave., New York, N.Y. 10017 (Nos. 12, 25, 27). (See also Anchor Press.)

Facts on File, Inc., 119 West 57th St., New York, N.Y. 10019 (No. 21).

Government Printing Office (Superintendent of Documents), Washington, D.C. 20402 (Nos. 1, 7, 13, 14, 16).

Hoover Institution Press, Department F911, Stanford University, Stanford, CA 94305 (No. 4).

John Wiley & Sons, Inc., 605 Third Ave., New York, N.Y. 10016 (No. 6).

Michie/Bobbs-Merrill Co., Inc., P.O. Box 7587, Charlottesville, VA 22906 (No. 19; Green book review).

Naval War College Press, Newport, R.I. 02840 (No. 9).

North Carolina, University of, Press, Chapel Hill, N.C. 27514 (No. 26).

Northrop University School of Law, 1155 West Arbor Vitae Street, Inglewood, CA 90306 (No. 15).

Practicing Law Institute, 810 Seventh Ave., New York, N.Y. 10019 (No. 10).

Prentice-Hall, Inc., Englewood Cliffs, N.J. 07632 (No. 11).

Sijthoff & Noordhoff International Publishers bv, P.O. Box 4, Wilhelminalaan 12, 2400 MA Alphen aan den Rijn, The Netherlands (No. 2).

Stockholm International Peace Research Institute, ATTN: Publications Dept., Sveavägen 166, S-113 46 Stockholm, Sweden (Nos. 22, 23, 24).

Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (Nos. 1, 7, 13, 14, 16).

Taylor & Francis, Ltd., 10-14 Macklin Street, London WC2B 5NF, United Kingdom (Nos. 22, 23, 24).

U.S. Government Printing Office (Superintendent of Documents), Washington, D.C. 20402 (Nos. 1, 7, 13, 14, 16).

University of North Carolina Press, Chapel Hill, N.C. 27514 (No. 26).

West Publishing Company, 50 W. Kellogg Blvd., P.O. Box 3526, St. Paul, MN 55165 (Nos. 8, 20; Nutt book review).

Wiley, John, & Sons, Inc., 605 Third Ave., New York, N.Y. 10016 (No. 6).

III. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Armed Forces Information Service, *Code of the U.S. Fighting Force* (No. 1).

Barry, Donald D., F.J.M. Feldbrugge, George Ginsburgs, and Peter

B. Maggs, *Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law* (No. 2).

Burke, Jay, *Jury Selection: The TA System For Trial Attorneys* (No. 3).

Corfman, Eunice, editor, and National Institute of Mental Health, *Families Today: Family Violence and Child Abuse, DHEW Publication No. (ADM) 79-895* (No. 13).

Corfman, Eunice, editor, and National Institute of Mental Health, *Families Today: Mental Illness in the Family, DHEW Publication No. (ADM) 79-898* (No. 14).

Duignan, Peter, and Alvin Rabushka, editors, *The United States in the 1980s* (No. 4).

Feldbrugge, F.J.M., Donald D. Barry, George Ginsburgs, and Peter B. Maags, *Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law* (No. 2).

Gelles, Richard J., Murray A. Straus, and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (No. 25).

Ginsburgs, George, Donald D. Barry, F.J.M. Feldbrugge, and Peter B. Maags, *Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law* (No. 2).

Hartman, Peter, and Arnold R. Weber, editors, *The Rewards of Public Service; Compensating Top Federal Officials* (No. 5).

Hui, Y.H., *United States Food Laws, Regulations, and Standards* (No. 6).

Kaplan, Irving, editor, *Dep't of Army Pamphlet No. 550-59, Angola: A Country Study* (No. 7).

Keyes, W. Noel, *Government Contracts in a Nutshell* (No. 8).

Levie, Howard S., editor, *Documents on Prisoners of War, Volume 60 of the N.W.C. International Law Studies* (No. 9).

Maggs, Peter B., Donald D. Barry, F.J.M. Feldbrugge, and George Ginsburgs, *Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law* (No. 2).

Manning, Jerome A., *Estate Planning* (No. 10).

Mogel, Leonard, *The Magazine: Everything You Need to Know to Make It in the Magazine Business* (No. 11).

Mooney, Robert F., and André R. Sigourney, *The Nantucket Way* (No. 12).

National Institute of Mental Health, and Eunice Corfman, editor, *Families Today: Family Violence and Child Abuse, DHEW Publication No. (ADM) 79-895* (No. 13).

National Institute of Mental Health, and Eunice Corfman, editor, *Families Today: Mental Illness in the Family, DHEW Publication No. (ADM) 79-898* (No. 14).

Northrop University School of Law, *Northrop University Law Journal of Aerospace, Energy, and the Environment* (No. 15).

Nyrop, Richard F., editor, *Dep't of Army Pamphlet No. 556-31, Iraq: A Country Study* (No. 16).

Pechman, Joseph A., editor, *Setting National Priorities: Agenda for the 1980s* (No. 17).

Pechman, Joseph A., editor, *What Should Be Taxed: Income or Expenditure?* (No. 18).

Rabushka, Alvin, and Peter Duignan, editors, *The United States in the 1980s* (No. 4).

Rea, Peter, and Stockholm International Peace Research Institute, *World Armaments and Disarmament: SIPRI Yearbooks 1968-1979: Cumulative Index* (No. 24).

Redden, Kenneth R., and Stephen A. Saltzburg, *Federal Rules of Evidence Manual* (No. 19).

Saltzburg, Stephen A., and Kenneth R. Redden, *Federal Rules of Evidence Manual* (No. 19).

Shanor, Charles A., and Timothy P. Terrell, *Military Law in a Nutshell* (No. 20).

Sigourney, André R., and Robert F. Mooney, *The Nantucket Way* (No. 12).

Sobel, Lester A., editor, *Quotas and Affirmative Action* (No. 21).

Steinmetz, Suzanne K., Murray A. Straus, and Richard J. Gelles, *Behind Closed Doors: Violence in the American Family* (No. 25).

Stockholm International Peace Research Institute, *Chemical Weapons: Destruction and Conversion* (No. 22).

Stockholm International Peace Research Institute, and Arthur H. Westing, *Warfare in a Fragile World: Military Impact on the Human Environment* (No. 23).

Stockholm International Peace Research Institute, and Peter Rea, *World Armaments and Disarmament: SIPRI Yearbooks 1968-1979: Cumulative Index* (No. 24).

Straus, Murray A., Richard J. Gelles, and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (No. 25).

Terrell, Timothy P., and Charles A. Shanor, *Military Law in a Nutshell* (No. 20).

Thompson, James Clay, *Rolling Thunder: Understanding Policy and Program Failure* (No. 26).

Van den Bosch, Robert, *The Pesticide Conspiracy* (No. 27).

Weber, Arnold R., and Robert W. Hartman, editors, *The Rewards of Public Service: Compensating Top Federal Officials* (No. 5).

Westing, Arthur H., and Stockholm International Peace Research Institute, *Warfare in a Fragile World: Military Impact on the Human Environment* (No. 23).

IV. TITLES NOTED

Angola: A Country Study, Dep't of Army Pamphlet No. 550-59, *edited by Irving Kaplan* (No. 7).

Behind Closed Doors: Violence in the American Family, *by Murray A. Straus, Richard J. Gelles, and Suzanne K. Steinmetz* (No. 25).

Chemical Weapons: Destruction and Conversion, *by Stockholm International Peace Research Institute* (No. 22).

Code of the U.S. Fighting Force, *by Armed Forces Information Service* (No. 1).

Dep't of Army Pamphlet No. 550-59, Angola: A Country Study, *edited by Irving Kaplan* (No. 7).

Dep't of Army Pamphlet No. 550-31, Iraq: A Country Study, *edited by Richard F. Nyrop* (No. 16).

Documents on Prisoners of War, Volume 60 of the N.W.C. International Law Studies, *edited by Howard S. Levie* (No. 9).

Estate Planning, *by Jerome A. Manning* (No. 10).

Families Today: Family Violence and Child Abuse, DHEW Publication No. (ADM) 79-895, *by National Institute of Mental Health, and Eunice Corfman, editor* (No. 13).

Families Today: Mental Illness in the Family, DHEW Publication No. (ADM) 79-898, *by National Institute of Mental Health, and Eunice Corfman, editor* (No. 14).

Federal Rules of Evidence Manual, *by Stephen A. Saltzburg and Kenneth R. Redden* (No. 19).

Government Contracts in a Nutshell, *by W. Noel Keyes* (No. 8).

Iraq: A Country Study, Dep't of Army Pamphlet No. 550-31, *edited by Richard F. Nyrop* (No. 16).

Jury Selection: The TA System for Trial Attorneys, *by Jay Burke* (No. 3).

Magazine: Everything You Need to Make it in the Magazine Business, *by Leonard Mogel* (No. 11).

Military Law in a Nutshell, *by Charles A. Shanor and Timothy P. Terrell* (No. 20).

Nantucket Way, *by Robert F. Mooney and André R. Sigourney* (No. 12).

Northrop University Law Journal of Aerospace, Energy, and the Environment, *by Northrop University School of Law* (No. 15).

Pesticide Conspiracy, *by Robert van den Bosch* (No. 27).

Quotas and Affirmative Action, *edited by Lester A. Sobel* (No. 21).

Rewards of Public Service: Compensating Top Federal Officials, *edited by Peter Hartman and Arnold R. Weber* (No. 5).

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Setting National Priorities: Agenda for the 1980s, *edited by Joseph A. Pechman* (No. 17).

Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law, *by Donald D. Barry, F.J.M. Feldbrugge, George Ginsburgs, and Peter B. Maggs* (No. 2).

United States Food Laws, Regulations, and Standards, *by Y. H. Hui* (No. 6).

United States in the 1980's, *edited by Peter Duignan and Alvin Rabushka* (No. 4).

Warfare in a Fragile World: Military Impact on the Human Environment, *by Stockholm International Peace Research Institute, and Arthur H. Westing* (No. 23).

What Should Be Taxed: Income or Expenditure? edited by Joseph A. Pechman (No. 18).

World Armaments and Disarmament: SIPRI Yearbooks 1968-79: Cumulative Index, by Stockholm International Peace Research Institute and Peter Rea (No. 24).

V. PUBLICATION NOTES

1. Armed Forces Information Service, *Code of the U.S. Fighting Force* (DOD GEN-11A/DA Pam 360-512/NAVEDTRA 46907 Navy Stock No. 0503-LP-004-5350/AFP 34-10/NAVMC 2681). Washington, D.C.: U.S. Department of Defense, 1979. Pp. 16.

The Code of Conduct for Members of the Armed Forces of the United States was first prescribed in 1955 by President Eisenhower in Executive Order No. 10631, dated 17 August 1955. An outgrowth of the experiences of American military personnel during the Korean War, it is a set of six rules or articles which are intended to enable Americans as prisoners of war to endure mistreatment by their captors and to withstand inducements to misconduct.

The six articles enable the service member to define who he is and what are his responsibilities in combat and as a prisoner. Article 5 of the Code of Conduct, concerning communications between prisoners and their captors, was amended in 1977 by order of President Carter to make clear that prisoners must, not may, give their name, rank, service or social security number, and date of birth, as required by the 1949 Geneva Prisoner of War Convention.

The AFIS publication here noted presents the updated text of the Code and its explanatory and interpretive comments in a pleasing and easily readable format. Elaborately illustrated, it is not designed to be carried around in one's pocket; wallet cards are available for that purpose. Rather, it is intended for use as an instructional text. It is a joint service publication intended for all United States military personnel.

The Armed Forces Information Service is a field activity of the Office of the Secretary of Defense, under the Assistant Secretary of Defense (Public Affairs). Located in Arlington, Virginia, the AFIS is comprised of two other agencies, the American Forces Press and Publications Serv-

ice, which is responsible for *DEFENSE/80*, noted at 88 Mil. L. Rev. 147 (1980), and other publications; and the American Forces Radio and Television Service, well known to military personnel who have been stationed overseas.

2. Barry, Donald D., F.J.M. Feldbrugge, George Ginsburgs, and Peter B. Maggs, *Soviet Law After Stalin, volume III, Soviet Institutions and the Administration of Law*. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff International Publishers bv, 1979. Pp. xiv, 414. Price: Dutch florins 115.00 or US \$57.50.

This is the last volume of a three-volume set which reviews the development of law and legal institutions in the Soviet Union since the death of Joseph Stalin in 1953. The first volume, *The Citizen and the State in Contemporary Soviet Law*, was published in 1977 and focused on the status of the individual under Soviet Law. The second, published in 1978, was *Social Engineering Through Law*. All three volumes together comprise Item No. 20 in the series "Law in Eastern Europe," published by the Documentation Office for East European Law, at the University of Leyden, in the Netherlands.

In form, the third volume is a collection of nineteen essays on various aspects of both criminal and administrative law in the Soviet Union. In addition to essays on administrative procedures and on trends in Soviet criminal law, there are writings on the relationship of the Communist Party with various Soviet legal institutions; the Soviet legal profession; Soviet law concerning taxation, and budgetary and fiscal matters; trade union organizations; the law concerning socialist property; and other topics.

Of interest to judge advocates are two short articles on Soviet military law. "The Reform of Soviet Military Justice: 1953-1958," was written by George Ginsburgs, who in addition to being one of the editors is also on the faculty of the Rutgers University School of Law, at Camden, New Jersey. "Are Military Courts Necessary?" was written by René Beerman of the Institute of Soviet and East European Studies, at the University of Glasgow, in Scotland. (The author of the essay concludes that military courts do indeed serve a useful and necessary function.)

For the convenience of readers, the book offers a detailed table of contents, a table of abbreviations, and a subject-matter index. Footnotes

are collected at the ends of the essays to which they pertain. There is limited use of charts, graphs, and other illustrations.

Donald D. Barry is with Lehigh University, Bethlehem, Pennsylvania; and F.J.M. Feldbrugge, the University of Leyden. As mentioned above, George Ginsburgs is at Rutgers. Peter B. Maggs is associated with the College of Law of the University of Illinois.

The first volume of *Soviet Law After Stalin* was briefly noted at 84 Mil. L. Rev. 132 (1979), and the second volume, at 84 Mil. L. Rev. 133 (1979).

3. Burke, Jay, *Jury Selection: The TA System for Trial Attorneys*. Hialeah, Florida: Burke Publications, 1980. Pp. ix, 149. Price: \$35.00. Looseleaf binder.

The set of psychological theories known as transactional analysis, or TA, was developed by Dr. Eric Berne and others to enable people to get along better with other people. Dr. Berne's theory of personality is described in the books "I'm OK—You're OK," "Games People Play," and many other publications. Essentially, the theory asserts that human personality is comprised of at least three components, or aspects, the parent, the adult, and the child. The parent and child aspects each have two varieties, for a total of five behavior styles which between them describe most of what happens in interpersonal relations.

It is the contention of Jay Burke, a psychologist working in Florida, and of other writers, that transactional analysis can be applied to jury selection by practicing trial attorneys. Procedurally, this application is a matter of carefully planned questioning during voir dire, sometimes with the assistance of a psychologist or psychiatrist as a member of the defense or prosecution team. Mr. Burke's book provides an extensive description of the practical mechanics of interpersonal relations, described in the terminology of transactional analysis. The author, who has served attorneys as a consultant on jury selection, provides examples from his experience of means by which an attorney can determine how a juror will perform in a particular type of case.

The book is organized in twenty-three short chapters, with two appendices. It is a looseleaf publication, maintained in a standard three-ring binder, designed for use in connection with one-day jury selection seminars which Mr. Burke conducts monthly or oftener. For the con-

venience of users, the book offers a short preface and a detailed table of contents. Appendix A provides information concerning seminars, Mr. Burke's consultation services, and other matters. The second appendix is a glossary of terms peculiar to transactional analysis. Footnotes are collected together at the end of the book.

4. Duignan, Peter, and Alvin Rabushka, editors, *The United States in the 1980s*. Stanford, California: Hoover Institution, Stanford University, 1980. Pp. xxxix, 868. Price: \$20.00.

In this collection of twenty-nine essays on foreign and domestic policies, the authors identify the issues and problems facing the United States during the next ten years. The authors, who include representatives from the academic and governmental communities, are moderately optimistic. Not all problems can be solved at acceptable cost, perhaps; but there are means available for blunting the effects of even the worst of them. Meaningful choices are available, and the national will to adhere to choices made does exist.

The work here noted is thus similar in its purposes to another collection of essays noted elsewhere in this issue. *Setting National Priorities: Agenda for the 1980s*, edited by Joseph A. Pechman, has been published by the Brookings Institution, Washington, D.C.

This large book is divided into two roughly equal parts, the first focusing on domestic issues, and the second on foreign affairs. The essays on domestic matters deal primarily with questions of economic policy, including taxation, welfare reform, social security, and the like. Other topics included are energy options, health programs and policies, housing, the environment, and higher education. The contributors include such well-known names as Milton Friedman and Alan Greenspan.

The focus of part II, Foreign Affairs, is again heavily slanted toward economic matters, such as foreign economic policies of the United States, international business, foreign aid, and energy resources. There are also essays on arms control, nuclear warfare, intelligence operations, and technology as a basis for power. The second part includes also six essays on the various geographic areas of the world.

The book offers a table of contents, a foreword, a preface, and an introduction, as well as biographical sketches of the contributors, and a

subject-matter index. Footnotes are chiefly collected at the ends of the articles to which they pertain. There is some use of charts and graphs.

The editors, Alvin Rabushka and Peter Duignan, are both senior fellows of the Hoover Institution. Alvin Rabushka was formerly a professor of political science at the University of Rochester. Peter Duignan is a specialist in African history.

The Hoover Institution on War, Revolution and Peace, located on the Stanford University Campus, is a center devoted to advanced interdisciplinary study of public affairs questions of the twentieth century. It was founded by Herbert Hoover in 1919. Among the Institution's assets are a large library and collection of documents pertaining to domestic and foreign affairs. The Institute publishes the results of both basic and applied research conducted by holders of its fellowships.

5. Hartman, Robert W., and Arnold R. Weber, editors, *The Rewards of Public Service: Compensating Top Federal Officials*. Washington, D.C.: The Brookings Institution, 1980. Pp. xi, 238. Price: \$11.95, cloth cover; \$4.95, paperback.

This collection of seven essays, originally presented at a Brookings-sponsored conference in 1978, explores the problems of setting salaries for members of Congress and for top-level executive and judicial employees of the federal government. In general, the Congressional salary scale sets the upper limits for salaries of all but a few officials in the other branches of government. This has its good and bad aspects, which are explored in the essays in this volume.

The book opens with an introductory essay, "The Ways and Means of Compensating Federal Officials," by the two editors. Thereafter the remaining essays are divided into three groups, or parts. Part One contains two essays discussing the history of Congressional pay and the politics of setting salaries for all types of government officials. The second part deals with alternative methods of setting salaries, including maintenance of comparability with salaries in the private sector of the economy. The final part focuses on certain special problems of conflict-of-interest regulations and the effect of top officials' salaries on other federal employees.

The book offers a foreword and a detailed table of contents, including a list of the many statistical tables used in the book. Footnotes appear on the pages to which they pertain. There is some use of statistical

appendices, chapter by chapter. The volume closes with a list of participants in the 1978 conference, and a subject-matter index.

The authors of the various essays come from the academic world and government service, and one is from private industry. Robert W. Hartman is a senior fellow in the Brookings Economic Studies program, and Arnold R. Weber is provost of Carnegie-Mellon University. Both have published a number of writings on governmental finance.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." Founded in 1927 through the merger of three other organizations, the stated purposes of the Brookings Institution are "to aid in the development of sound public policies and to promote public understanding of issues of national importance." The Institution is governed by a board of trustees, with executive authority vested in a president. Bruce K. MacLaury.

6. Hui, Y. H., *United States Food Laws, Regulations, and Standards*. New York City, New York: John Wiley & Sons, Inc., 1979. Pp. xv, 616.

This reference work is directed to students, scientists, government officials, businessmen, attorneys, and others who are in any way concerned with the regulation of food production and distribution, and their relationship with public health. The book discusses the various federal agencies which regulate food, and describes and summarizes their controlling statutes, implementing regulations and directives, and other significant publications.

The book is organized in seven chapters. The opening chapter, and one of the longest, discusses the Department of Agriculture. Shorter chapters follow which deal with the Department of Commerce, the Consumer Product Safety Commission, the Environmental Protection Agency, and the Federal Trade Commission. Another long chapter concerns the Food and Drug Administration of the Department of Health, Education, and Welfare. The book closes with a chapter on the Bureau of Alcohol, Tobacco, and Firearms, of the Department of the Treasury.

The book offers a preface and a short table of contents, with somewhat more detailed listings of contents at the beginning of each chapter. There is extensive use of charts and graphs, and the chapters are supplemented

by appendices setting forth the texts of selected regulations, and other information. The book closes with a list of agency addresses and a subject-matter index. There are no footnotes; citations are inserted directly in the text.

The author, Y. H. Hui, was at the time of publication of his book an associate professor of nutrition in the Department of Home Economics at Humboldt State University, Arcata, California. He holds a Ph.D. in nutrition from the University of California at Berkeley, and is much interested in food law.

7. Kaplan, Irving, editor, *Dep't. of Army Pamphlet No. 550-59, Angola: A Country Study*. Washington, D.C.: U.S. Government Printing Office, 1979. Pages: xxiii, 286. Index, appendix, bibliography, and glossary.

This volume is comprised of five chapters by various authors describing the People's Republic of Angola, its history, people, government, economy, and military and police forces. Emphasis is on conditions of the last ten or twenty years, but there is considerable discussion of the earlier history of the country also. This work is one of over a hundred studies of different countries or groups of countries prepared by scholars of Foreign Area Studies, a directorate within the American University, Washington, D.C.

When Angola became independent in 1975, its seacoast had been a Portuguese colony for hundreds of years. Parts of the interior, however, were independent or semi-independent until the 1920's. The country is probably best known for the three-party civil war which broke out after independence, with varying degrees of involvement on the part of the United States, Cuba, and other foreign powers. The MPLA, headed by President Agostinho Neto, gained the upper hand over the other two parties in 1978, and the country began to stabilize itself. President Neto died in 1979 and was succeeded by the foreign minister, Jose Eduardo dos Santos.

With a geographic area of approximately 481,000 square miles, Angola is over thirteen percent as large as the United States. Its estimated population is almost 7,000,000 people. The capital, Luanda, is also the largest city, approaching 500,000 people. The government is republican in form and Marxist in orientation, headed by a president who governs with the assistance of an organ called the Council of the Revolution. Production has declined in most areas of the economy during the tran-

sition from the former capitalist structure to the present mixed-socialist form of economy. However, petroleum exports have helped maintain the country's gross national product and balance of payments. Much of the petroleum production is in the hands of the Gulf Oil Corporation, operating in the enclave of Cabinda, a strip of land some 2,500 square miles in area, situated to the north of Angola, physically separated from it by part of Zaire, but under Angolan administration.

The book is organized in five chapters discussing the history, social structures, geography, government, politics, national security apparatus, and economy of Angola. Each chapter was written by a different author, all of them presumably scholars connected with American University.

The book offers a foreword, preface, country profile, and detailed table of contents. There are no footnotes, but each chapter concludes with bibliographical information, and a bibliography appears near the end of the book. There is some use of illustrations, maps, and statistical tables in the text, and a statistical appendix. The volume concludes with a glossary of terms and a subject-matter index.

This study of Angola and the other studies mentioned above are produced under the Department of the Army Area Handbook Program, the DA pamphlet 550 series, and are sold through the U.S. Government Printing Office, or distributed to Army addressees by the U.S. Army Adjutant General Publications Center, Baltimore, Maryland. However, the area handbooks, like issues of the *Military Law Review*, do not present the official views of the United States Government. The study of Angola is a second edition, replacing the Area Handbook for Angola, which was published in 1967.

8. Keyes, W. Noel, *Government Contracts in a Nutshell*. St. Paul, Minn.: West Publishing Co., 1979. Pp. xlv, 423. Paperback. Price: \$7.95.

The West Nutshell Series, which numbers about sixty titles, is known to generations of law students. This comparatively recent addition to the series summarizes federal government procurement for the use of law students and practicing attorneys seeking an introduction to this complex and highly specialized body of contract law. A review by Lieutenant Colonel Robert M. Nutt may be found at page 100, above.

The book is organized in sixteen chapters dealing with the major points on which federal government procurement differs from private-sector

contracting under the common law, the Uniform Commercial Code, and other authorities. These points include such matters as the power of the United States to enter contracts, and the authority of particular government agents to commit the government to contractual obligations; contractor responsibility requirements; protests by unsuccessful bidders; implementation of socioeconomic policies in government contracting; special questions of taxation; and other matters.

This is an elementary text. As such, it does not, and is not intended to have, the depth of coverage of *Federal Procurement Law* by Professors Nash and Cibinic of George Washington University, now partly available in a third edition, reviewed by Major Gary L. Hopkins at 86 Mil. L. Rev. 151 (1979). Nor does Professor Keyes' book offer the breadth of coverage of Major Glenn E. Monroe's *Government Contract Law Manual*, reviewed and noted at 88 Mil. L. Rev. 133 (1980), which, though an elementary text, devotes considerable space to state, local, and international procurement as well as the federal variety.

It should be noted also that Professor Keyes' book, although apparently published after September 1979, is not entirely up to date. For example, it refers to the Defense Acquisition Regulation by its former designation of Armed Services Procurement Regulation. However, this is not a matter of substance. In any event, no introductory text should be accorded more weight as authority than it can bear. There is no substitute for direct examination of the applicable government regulations and contract clauses and decisional authorities.

For the convenience of users, the book offers a preface, a summary of contents, a detailed table of contents or outline, and a table of cases cited. The book closes with a short bibliography, a chapter-by-chapter list of authorities cited, and a subject-matter index.

The author, W. Noel Keyes, is a professor of law and Director of Clinical Law at the Pepperdine University School of Law, Malibu, California. He received his education primarily at Columbia University, New York City, and was formerly a judge advocate in the U.S. Naval Reserve.

9. Levie, Howard S., editor, *Documents on Prisoners of War, Volume 60 of the N.W.C. International Law Studies*. Newport, R.I.: Naval War College Press, 1979. Pp. xxvii, 853.

This volume is a collection of reprints of difficult-to-obtain official doc-

uments pertaining to the treatment of prisoners of war in various times and places. The collection is a companion to volume 59 of the N.W.C. International Law Studies. That volume, a treatise on the law pertaining to prisoners of war, is discussed further below.

Volume 60 contains extracts from or complete texts of one hundred seventy-five documents. The documents consist chiefly of treaties, statutes, decrees, reports of court decisions, U.N. General Assembly resolutions, regulations, and other similar items. They are arranged in chronological order, the first forty-nine items dating from ancient times up to 1929. The remaining documents, over two-thirds of the total, date from World War II and subsequent decades up to 1977. Each document is preceded by an explanatory note and a list of sources.

The book provides for the convenience of users a preface and a detailed table of contents, as well as a list of abbreviations and a subject-matter index.

Volume 60 is the latest of the Naval War College International Law Studies. That series, informally called the "Blue Book" series, began in the 1890's with the publication of various lectures on international law delivered at the College. The series was terminated in the mid-1960's, but was resumed in 1978 with the publication of volume 59.

The editor of volume 60, Professor Howard S. Levie, formerly of the Saint Louis University School of Law, was also the author of volume 59, *Prisoners of War in International Armed Conflict*. That volume provided a comprehensive treatment of the law governing the status, employment, protection, and punishment of prisoners of war, current through 1977. Volume 59 was reviewed by Major James A. Burger at 86 Mil. L. Rev. 155 (fall 1979), and was also briefly noted at 84 Mil. L. Rev. 151 (spring 1979).

Professor Levie is a retired Army JAGC colonel. Among his many other published writings is an article, *The Employment of Prisoners of War*, 23 Mil. L. Rev. 41 (1964). He held the Naval War College Stockton Chair of International Law during the academic year 1968-69. He is a 1930 graduate of the Cornell University Law School, Ithaca, New York, and was on active duty in the Army from 1942 to 1963.

10. Manning, Jerome A., *Estate Planning*. New York City, N.Y.: Practising Law Institute, 1980. Pages: xii, 395. Price: \$40.00.

This volume is one of many published in recent years concerning various aspects of the popular and lucrative subject of estates and trusts. The volume here noted is by implication a companion to *The Estate Tax*, by James B. Lewis, another Practising Law Institute text published in 1979, noted at 85 Mil. L. Rev. 183 (1979). The Manning book also discusses taxation; it would be virtually impossible to write a treatise on estate planning without mention of the tax implications of particular choices. However, Manning's book does emphasize purposes of estate planning, such as support of the testator's spouse or children or continuation of a family business, beside which tax considerations may take second place.

This book, which replaces a previous edition by Joseph Trachtman, is organized in twelve chapters, dealing with marital deductions, sprinkling trusts, charitable bequests, guardianship and trusteeship for children, gifts of various types, life insurance, retirement benefits, business interests, joint interests, and other topics. Chapter 12 considers payment of estate taxes.

The book is addressed to lawyers, trust officers, and the like, but it is written in relatively plain language that could be comprehended by the intelligent layman reviewing his will for points to discuss with his lawyer. This is not strictly a how-to-do-it book; there are, for example, almost no sample clauses or forms for wills and trust agreements. Those of course might vary from state to state, and the author doubtless intends his text to be a general supplement to the attorney's specific state law materials.

For the convenience of users, the book offers a preface and a table of contents. The work closes with a table of authorities cited and a subject-matter index. Footnotes appear at the bottoms of the pages of text to which they pertain, and are numbered consecutively within each chapter separately.

The author, Jerome A. Manning, is a member of the New York City law firm of Stroock and Stroock and Lavan. He received his LL.B. degree from New York University in 1952 and his LL.M. from Yale University in 1953. Early in his career, Mr. Manning worked with Mr. Trachtman on the previous edition of this book. Mr. Manning has taught estate planning and other subjects at New York University for many years.

11. Mogel, Leonard, *The Magazine: Everything You Need to Know to*

Make It in the Magazine Business. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1979. Pp. ix, 192. Price: \$7.95. Paperback.

This volume by a successful publisher explains through capsule case histories and practical examples the mechanics of editing, producing, and distributing a periodical. Written in an informal, conversational style, the book sets forth its author's views on every aspect of the magazine publishing trade, its opportunities, and its pitfalls. The book does not pertain to law or legal periodicals, although it does include one short chapter on the law pertaining to publishing.

The periodicals discussed by Mr. Mogel are primarily glossy-paper magazines containing photographs and artwork, which present news, hobby information, and the like. These are usually supported at least partly by advertising revenue, and are technically called "consumer" magazines. Some bar journals might fall in this category, but law reviews would be classified under another heading.

The book is organized in fifteen chapters, dealing with such topics as the functions of the publisher, editor, and other personnel; development of advertising sales; layout; subscription and newsstand sales; promotional efforts; and the like. Two chapters discuss the mechanics of starting a new magazine. The chapter entitled "Magazine Publishing and the Law" reviews in six pages some common legal problems of publishing, including libel, obscenity prosecution, invasion of privacy, and copyright questions. The book offers a table of contents, introduction, glossary of terms, bibliography, and subject-matter index.

The author, Leonard Mogel, is publisher of *National Lampoon* and of *Heavy Metal*. He teaches the skills of publishing at New York University, and was formerly publisher of the Diners' Club magazine, *Signature*.

12. Mooney, Robert F., and André R. Sigourney, *The Nantucket Way*. Garden City, New York: Doubleday & Company, Inc., 1980. Pp. 204. Price: \$12.95.

This entertaining book by two Nantucket attorneys is an account of three hundred years of Nantucket Island's legal history. It is not a law book, but a description of the personalities and events surrounding the development and implementation of the law on this island community off the coast of Massachusetts. Though Nantucket is perhaps best known as a summer resort, it has many full-time residents. The authors were

interested in trying to describe the distinctive features of this permanent population, which until the twentieth century was isolated from, and developed independently of, the New England mainland.

The book is organized in seventeen short chapters, and is copiously illustrated with groups of pictures of outstanding Nantucket personalities and historic sites. Maps of Nantucket Island are provided inside the front and back covers. There are a table of contents and a preface, but no index. An appendix sets forth the text of Nantucket's first code of laws, enacted locally in 1672.

The authors are both practicing attorneys on Nantucket, where they are two among a half-dozen solo practitioners. This is their first book.

13. National Institute of Mental Health and Eunice Corfman, editor, *Families Today: Family Violence and Child Abuse, DHEW Publication No. (ADM) 79-895*. Washington, D.C.: U.S. Government Printing Office, 1979. Pp. iii, 78.

The National Institute of Mental Health, an agency of the United States Department of Health, Education, and Welfare, has published a two-volume, thousand-page work entitled, *Families Today: A Research Sampler on Families and Children*. The work is a collection of nearly forty essays on various aspects of American family life today, and parts of it have been published as separate pamphlets. The publication here noted is one of these pamphlets.

This pamphlet contains three of the essays from the two-volume work. The triad opens with "Physical Violence in Families," which is followed by "Child Abuse: A Review of Research." The pamphlet closes with "Helping Abused Children and Their Parents."

The pamphlet offers a table of contents. Most of the essays have dual authorship, by one or more researchers identified as "principal investigator," and by another person identified as "writer." Footnotes are not used, but bibliographic information appears at the end of each essay. The pagination of the two-volume work is preserved, and topic headings and phrases are used to break up the text.

The pamphlet is issued by the Division of Scientific and Public Information, within the National Institute of Mental Health. The NIMH, in turn, is part of the Alcohol, Drug Abuse, and Mental Health Adminis-

tration, which is within the Public Health Service, in the U.S. Department of Health, Education, and Welfare. The NIMH Division of Scientific and Public Information issues three types of publications, science reports, science monographs, and bibliographies. Science reports are primarily case studies. Science monographs, of which this pamphlet is an example, are described as being "typically book-length integrative state-of-the-art reviews, critical evaluations of findings, or program assessments of current research on a selected topic related to the NIMH mandate."

14. National Institute of Mental Health and Eunice Corfman, editor, *Families Today: Mental Illness in the Family*, DHEW Publication No. (ADM) 79-898. Washington, D.C.: U.S. Government Printing Office, 1979. Pp. iii, 182.

The National Institute of Mental Health, an agency of the United States Department of Health, Education, and Welfare, has published a two-volume, thousand-page work entitled, *Families Today: A Research Sampler on Families and Children*. The work is a collection of nearly forty essays on various aspects of American family life today, and parts of it have been published as separate pamphlets. The publication here noted is one of these pamphlets.

This pamphlet contains seven of the essays from the two-volume work. Opening the collection is "Depression and Low-Income, Female-Headed Families," followed by "The Mentally Ill at Home: A Family Matter." Next come "Heredity and Mental Illness," and "Poor Family Communication and Schizophrenia." The last three essays focus on children: "Detection and Prevention of Childhood Depression," followed by "New Light on Autism and Other Puzzling Disorders of Childhood," with "Basic Training for Parents of Psychotic Children" concluding the pamphlet.

The pamphlet offers a table of contents. Each essay has dual authorship, by one or more researchers identified as "principal investigator," and by another person identified as "writer." Footnotes are not used, but bibliographic information appears at the end of each essay. The pagination of the two-volume work is preserved, and topic headings and phrases are used to break up the text.

The pamphlet is issued by the Division of Scientific and Public Information, within the National Institute of Mental Health. The NIMH, in turn, is part of the Alcohol, Drug Abuse, and Mental Health Administration, which is within the Public Health Service, in the U.S. Depart-

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15. Northrop University School of Law, *Northrop University Law Journal of Aerospace, Energy, and the Environment*. Inglewood, California: Northrop University, 1979. Pp. 152. One issue per year. Price: \$5.00 for one-year subscription.

The first issue, winter 1979, of this specialized annual periodical is devoted to articles, notes, and comments on the topic of photogrammetry, remote sensing, and the law. Photogrammetry is the technique of making measurements from photographs, usually aerial photographs. Use of this technique for preparing maps is well known, but it also has possible applications for location of earth resources, reconstruction of traffic accidents and crimes, and planning of real estate developments. Legal issues raised include violation of privacy of individuals and territorial sovereignty or integrity of states; release of information gained; liability for negligence on the part of firms doing photogrammetric work; and related matters.

The three short leading articles in volume I, number 1 of this Northrop University journal are primarily descriptive, with little or no legal analysis. That seems appropriate for an introductory issue of a journal devoted to a subject outside common knowledge. Legal questions are discussed in nine notes and comments prepared by the student editors of the journal.

The *Military Law Review* has published one article related to photogrammetry and remote sensing, "Legal Implications of Remote Sensing of Earth Resources By Satellite," by Major Gary L. Hopkins, 78 Mil. L. Rev. 57 (fall 1977). Major Hopkins also prepared a book review on the same subject, published at 80 Mil. L. Rev. 266 (spring 1978).

16. Nyrop, Richard F., editor, *Dep't of Army Pamphlet No. 550-31, Iraq: A Country Study*. Washington, D.C.: U.S. Government Printing Office, 1979. Pages: xxi, 320. Index, appendices, bibliography, and glossary.

This volume is comprised of five chapters by various authors describing the Republic of Iraq, its history, people, government, economy, and military and police forces. Emphasis is on conditions of the last ten years, but information about the country's previous history is also provided. This work is one of over a hundred studies of different countries or groups of countries prepared by scholars of Foreign Area Studies, a directorate within the American University, Washington, D.C.

The modern state of Iraq has been independent since 1932. Initially a kingdom, the country became a republic in 1958. Prior to World War One, the country comprised three provinces of the old Ottoman Empire. Thereafter until independence, it was a British mandate under the League of Nations. The country is ruled by the Baath Party, whose ideology emphasizes pan-Arab unity and liberation of the Islamic world from Western domination.

With a geographic area of about 170,000 square miles, Iraq is about five percent as large as the United States. Its estimated population exceeds 12,000,000 people. The capital and largest city is Baghdad, with about 4,000,000 people. This city has special importance not only because of its large population and political status, but also because for centuries during the Middle Ages it was the capital of the Abbasid Caliphate, which dominated the Islamic world at the time.

Iraq is the world's fifth largest producer of crude oil, and the fourth largest exporter. Oil revenues account for about sixty percent of the country's gross national product. Otherwise the economy is primarily agricultural. Dates are an important export.

The book is organized in five chapters, discussing the history, social structure, geography, economy, government, politics, and national security structure of Iraq. Each chapter was written by a different author, all of them presumably scholars connected with American University.

The book offers a foreword, preface, country profile, and detailed table of contents. There are no footnotes, but each chapter concludes with bibliographical information, and a bibliography appears near the end of the book. Illustrations, maps, and statistical tables are scattered throughout the text. Two appendices are provided. The first is a collection of seventeen statistical tables setting forth information about Iraq's economy, military forces, and other matters. The second is an essay on the

international oil industry in relation to Iraq's economy. The book closes with a glossary of terms and a subject-matter index.

This study of Iraq and the other studies mentioned above are produced under the Department of the Army Area Handbook Program, the DA pamphlet 550 series, and are sold through the U.S. Government Printing Office, or distributed to Army addresses by the U.S. Army Adjutant General Publications Center, Baltimore, Maryland. However, the area handbooks, like issues of the *Military Law Review*, do not present the official views of the United States Government. The study of Iraq replaces a previous edition published in 1971.

17. Pechman, Joseph A., editor, *Setting National Priorities: Agenda for the 1980s*. Washington, D.C.: The Brookings Institution, 1980. Pp. xiii, 563. Price: \$18.95, cloth cover; \$8.95, paperback.

This collection of sixteen essays by many different authors is a review and evaluation of the choices in domestic and foreign policy facing the United States during the next ten years. It thus has a purpose similar to that of another collection of essays noted elsewhere in this issue, *The United States in the 1980s*, a Hoover Institution publication edited by Peter Duignan and Alvin Rabushka.

The sixteen essays are numbered as chapters and are loosely divided between domestic affairs and international relations, with three or four chapters overlapping these two major areas. After an introductory chapter by the editor, there follow chapters on economic matters and energy problems. The other primarily domestic chapters deal with health, safety, and environmental regulations, medical care, education and training, and fiscal matters.

Shifting to international questions, chapter 9 concerns defense policy, and the next six chapters focus on various countries or regions of special concern to the United States: the Middle East, the Soviet Union, China, Japan, the Atlantic Alliance, and the third World. The last chapter of the book, "The Crisis of Competence in Government," deals with problems of presidential and congressional leadership and administrative competence.

A foreword and table of contents are provided, as well as a summary of contents in the introductory chapter mentioned above. There is some use of statistical tables and figures, primarily in the earlier chapters.

Footnotes appear on the pages to which they pertain. There is no bibliography or index.

About half of the nineteen authors are Brookings Institution staff members, or are otherwise associated with the Institution. The other contributors are from the academic and governmental communities. Joseph A. Pechman, the editor for this volume, served as editor for the last three volumes of the annual series called *Setting National Priorities*. The volume here noted is the eleventh in that series.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." Founded in 1927 through the merger of three other institutions, the principle purposes of the Brookings Institution are stated to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance. The organization is run by a board of trustees, with executive authority vested in a president. The present incumbent of that office is Bruce K. MacLaury.

18. Pechman, Joseph A., editor, *What Should Be Taxed: Income or Expenditure?* Washington, D.C.: The Brookings Institution, 1980. Pp. xi, 332. Price: \$14.95, cloth cover; \$5.95, paperback.

This volume presents a collection of six essays which deal with the pros and cons of taxation of consumption, or expenditure, rather than taxation of income, as a means of raising revenue for the United States Government in an equitable manner. The essays were originally presented at, or are outgrowths of, a conference which took place in October of 1978 under the sponsorship of the Brookings Institution and the Fund for Public Policy Research.

The purpose of a tax on consumption or expenditure is to encourage individual taxpayers to save and invest as much of their income as possible. The tax base is income minus savings, which should equal expenditures. The expenditure or consumption tax loosely resembles the sales tax, used primarily by state and local governments in the United States, and the value added tax, used in many Western European countries. However, the mechanical operation of the tax would differ from that of a sales or value-added tax. This is described at length in the essays. Taxation on consumption or expenditure apparently is not in effect in any country at the present time, and has only rarely been used in the

past. This may in part be due to the obvious political unpopularity of a tax which would favor those with larger incomes.

The book offers a foreword, detailed table of contents, and subject-matter index. There is some use of statistical tables and charts. Footnotes appear at the bottoms of the pages to which they pertain. Written comments by various participants in the October 1978 conference are appended to most of the essays. There is some bibliographical information following the third essay.

The essayists, like the other participants in the conference, come primarily from the fields of law and economics. The majority are on the faculties of various universities, but a number of representatives of the Treasury and other governmental agencies and some non-governmental organizations were also present. The editor, Joseph A. Pechman, is director of the Economic Studies program at the Brookings Institution.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education and publication in economics, government, foreign policy, and the social sciences generally." Formed in 1927 through the merger of three organizations, its purposes are stated to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance." It is governed by a board of trustees, with executive authority vested in a president, who is Bruce K. MacLaury at the present time.

The book here noted is the eleventh volume in the second series of Brookings Studies of Government Finance.

19. Saltzburg, Stephen A., and Kenneth R. Redden, *Federal Rules of Evidence Manual* (2d edition). Charlottesville, Virginia: The Michie Company, 1977. Pp. xxxi, 875. Cumulative Supplement for 1980. Pp. 347. Price: \$50.00.

The Federal Rules of Evidence were enacted on 2 January 1975, with an effective date of 1 July 1975, and are contained in an appendix to Title 28, United States Code (1976). The edition of the Manual here noted replaces the first edition, published in 1975 just three months before the Rules took effect. Case law and scholarly commentary accumulated so rapidly that the authors had to produce a second edition only two years later. The bulky supplement for 1980 is now available, and doubtless is a harbinger of a third edition to come within the next couple of years.

Military attorneys should be interested in the *Federal Rules of Evidence Manual*. The new Military Rules of Evidence are substantially based upon the Federal Rules, and thus the decisions of civilian courts under the latter will be relevant to the military application of the rules. The Military Rules will eventually appear in chapter XXVII of the Manual for Courts-Martial, United States, 1969 (Revised Edition).

The organization of the book and supplement here noted follows the organization of the Federal Rules of Evidence themselves. The text opens with short sections which set forth the history of the codification efforts preceding the Rules, and some general comments concerning the text of the rules. The main body of the work covers the eleven chapters of the Rules, rule by rule. The text of each rule is set forth, followed by an editorial explanatory comment, excerpts from legislative documents pertaining to the rule, a note on recent developments, and a bibliography pertaining to the rule. The 1980 supplement follows this plan of organization, except that it consists primarily of revised editorial explanatory comments and notes on recent developments.

The main body of the Manual is followed by a section reviewing other relevant statutory and rule changes, and an essay relating the new rules to the common law. Rules approved by the Supreme Court but rejected by Congress are next set forth. These items are found only in the basic 1977 text, not the 1980 supplement. Both the basic text and the supplement offer master federal-state cross reference charts, indicating, rule by rule, the extent to which the various states have adopted the Federal Rules. Differences in state versions of the rules are described. Both text and supplement have tables of cases. The text closes with a subject-matter index.

The two authors are professors of law at the School of Law of the University of Virginia, located adjacent to The Judge Advocate General's School, near Charlottesville, Virginia. Professor Redden received his law degree from the University of Virginia in 1940, and Professor Saltzburg graduated from the University of Pennsylvania Law school in 1970.

The *Federal Rules of Evidence Manual* was reviewed by Lieutenant Colonel Herbert Green, chief of the Criminal Law Division, The Judge Advocate General's School, Charlottesville, Virginia, at 89 Mil. L. Rev. 98 (1980).

20. Shanor, Charles A., and Timothy P. Terrell, *Military Law in a*

Nutshell. St. Paul, Minn.: West Publishing Co., 1980. Pp. xl. 378. Paperback.

This recent addition to the well-known West Nutshell Series provides a brief summary of and introduction to all of American military law. This is a book for the beginner, and not the specialist in military law. It is addressed to students without previous familiarity with the subject, and also to practicing attorneys who may occasionally and infrequently have a question concerning military law, and who need help in locating relevant authorities for further research.

The book is organized in ten chapters. The first chapter, introductory in nature, provides an overview of civilian control over the military services. This is followed by chapters on entry into military service, and first amendment rights in the service. A long chapter on military criminal law comes next, and a chapter on the law of war in international law. Administrative discharges and veterans' benefits are the subjects of the next two chapters. The book closes with short chapters on defense contracts, tort claims in the military, and labor-management relations pertaining to civilian employees of the government.

The volume opens with a preface, detailed table of contents, and table of cases cited. Citations generally are inserted directly in the text. The book closes with a subject-matter index.

Charles A. Shanor has been an associate professor of the School of Law of Emory University, Atlanta, Georgia, since 1978. He received his legal education at Oxford University and the University of Virginia. Timothy P. Terrell, also an associate professor at Emory, graduated from Yale Law School in 1974.

21. Sobel, Lester A., editor, *Quotas and Affirmative Action*. New York, New York: Facts on File, Inc., 1980. Pp. 193. Price: \$15.00.

This book is a history of efforts to promote or retard racial integration and equality of opportunity for women in the United States during the decade of the 1970's. Written in the clipped style of a newspaper or news magazine, it is an edited collection of "Facts on File" news reports issued from time to time during the past ten years. As the book's title suggests, its emphasis is on problems concerning numbers of people: students in all types and levels of schools, employees in the government and the private sector, and people in other areas of life.

The primary editor, Lester A. Sobel, has written an introduction, "Conflict Over Ideas, Actions & Motives," which provides an overview of the decade and of the book's contents. This is followed by five substantive sections, "Integration Level Low in Early 1970s," "Policy Conflicts & Uncertainty," "Hardening Positions," "Growing Conflict & Uncertainty," and "Confusion as 1980s Approach."

The news items reported or described in the book deal primarily with employment and schooling. In the area of employment, the focus is on hiring and promotion of blacks and women. Lawsuits and court decisions are discussed, along with the positive and negative efforts of employers, government agencies at all levels, and private organizations.

Concerning schooling, much space is devoted to the controversial busing plans which have been implemented or ordered in many racially-imbalanced school districts. Higher education is also covered. The Bakke case, concerning use of minority group quotas in professional school admissions programs, is discussed, along with its predecessors. In the area of education, the focus is more on equality of opportunity for minority group members, especially blacks, than on women.

The book offers a detailed table of contents and a subject-matter index. There are no footnotes or bibliography, but citations are inserted in text in newspaper fashion. The type is rather small, which however has the advantage of allowing more information to be crowded on each page, even if it is not always easy to read. Two columns of print appear on each page.

The primary editor, Mr. Sobel, is assisted by two others, Joseph Fickes and Raymond Hill, identified as contributing editors. Grace M. Ferrara is credited as indexer.

22. Stockholm International Peace Research Institute, *Chemical Weapons: Destruction and Conversion*. London, United Kingdom, Taylor & Francis, Ltd., 1980. Pp. 201. Price: UK pounds 6.50. Paperback.

This book is a collection of twelve essays dealing with various aspects of chemical warfare and weaponry, problems of destruction of chemical weapons and conversion of weapons supplies and production facilities to other uses, and verification of destruction and conversion. The essays were originally written for, or are an outgrowth of an international symposium on the subject conducted by SIPRI at Stockholm in June of 1979.

For a number of years, various countries, chiefly the United States and the Soviet Union, have conducted negotiations concerning a convention which would prohibit the production, stockpiling, and deployment of nerve gases and other chemical weapons, and would require the destruction of existing supplies. Progress has been slow, and one area difficult to resolve has been the disposition of the supplies now existing. SIPRI has concluded that this is not an insuperable problem; that acceptable means of destroying or converting existing supplies are available or can be developed.

The book is organized in three parts. Part I is an introduction, defining the issues discussed later in the book, and providing an overview of proposed resolutions for those issues. The second part is the heart of the book, containing eleven of the twelve essays. The final part is a review of the current status of United States-Soviet Union negotiations concerning chemical weapons.

The text is supplemented by three appendices. The first is a copy of an official report on United States-Soviet negotiations, released in the summer of 1979. The second is a United Nations summary and bibliography of all United Nations materials on the subject of chemical weaponry. Appendix 3 is a list of parties to the 1972 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. The significance of this convention is that the United States and the Soviet Union are signatories, and that the lessons learned in connection with this convention could be applied to chemical weaponry.

The book was edited by SIPRI staff members and consultants. The Stockholm International Peace Research Institute describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." Financed by appropriations of the Swedish Parliament, the Institute was established in 1966 in honor of Sweden's 150 years of unbroken peace.

23. Stockholm International Peace Research Institute and Arthur H. Westing, *Warfare in a Fragile World: Military Impact on the Human Environment*. London, United Kingdom: Taylor & Francis Ltd., 1980. Pp. xiv, 249.

This work discusses the effects which past wars have had on earth's ecology. With heavy use of statistical tables and chapter appendices, the

primary author, Dr. Westing, demonstrates that human activity, civil as well as military, has massively changed the environment. He notes that, heretofore, strictly military damage to the environment has been transitory in nature; but he warns that, with nuclear weaponry and other technology now available to the world's military forces, the potential exists for vast and irreparable damage to the world around us.

The book is organized in eight chapters. After an introductory chapter, the work discusses the various regions of the world, temperate, tropical, desert, and so forth. Both civil and military use and abuse of each region are discussed, and conclusions are set forth, chapter by chapter. The book is concluded by a chapter on global ecology.

For users of the book, a preface and detailed table of contents are offered, followed by a table of conversions of weights and measures. The book closes with an extensive bibliography and a subject-matter index. There are no footnotes, but bibliographical information is provided in appendices at the ends of the various chapters.

The author, Dr. Arthur H. Westing, is a professor of ecology and dean of the School of Natural Science at Hampshire College, Amherst, Massachusetts. He was a senior research fellow at SIPRI when he wrote this book. Editorial assistance was provided by Rajesh Kumar.

The Stockholm International Peace Research Institute describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." The organization is financed by appropriations of the Swedish Parliament, and was founded in 1966 on the occasion of Sweden's 150th anniversary of peace. The personnel of the organization are of many nationalities. The current director is Dr. Frank Barnaby of the United Kingdom. The organization does try to promote peace, but is otherwise nonpartisan and nonpolitical.

24. Stockholm International Peace Research Institute and Peter Rea, *World Armaments and Disarmament: SIPRI Yearbooks 1968-1979: Cumulative Index*. London, United Kingdom: Taylor & Francis Ltd., 1980. Pp. 90. Price: U.K. pounds 5.00.

The ten SIPRI yearbooks published between 1969 and 1979 discuss the build-up of weapons supplies in the world's nations, and of efforts to control the rate and nature of this build-up. Accounts are given of the

development, production, sale, and deployment of new weapons systems of all types. The arms trade is described, together with relevant developments in international law, including agreements on defense measures and on arms control. The SIPRI yearbooks contain many charts, graphs, and statistical tables setting forth information about weaponry and its significance in international relations. The yearbooks are a research aid to anyone interested in their subject matter, including international lawyers specializing in the law of war and its branches.

Adequate indexing of writings is almost as important as the substantive content of the writings themselves. If a writing cannot be found by researchers, it might as well never have been written. Each of the SIPRI yearbooks has its own index, but the cumulative index here noted links all ten volumes together. The cumulative index is more than a mere pasting together of the ten separate indices. It contains new entries and a new organization of old entries, to ensure adequate cross-referencing of related topics.

For the use of researchers, the book offers an explanatory preface and introduction, as well as a list of the ten SIPRI yearbooks and instructions for ordering them.

The Stockholm International Peace Research Institute describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulation." The Institute's operations are funded by appropriations of the Swedish Parliament. It was founded in 1966 to commemorate Sweden's 150 years of peace. The Institute is controlled by a Governing Board whose members come from many countries. The executive head of the Institute is its Director, Dr. Frank Barnaby, from the United Kingdom.

25. Straus, Murray A., Richard J. Gelles, and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family*. Garden City, New York: Anchor Press/Doubleday, 1980. Pp. viii, 301. Price: \$10.95.

The chilling subject of child abuse has become much more familiar to the reading public during the past ten years, as studies and analyses have proliferated. But family violence takes many other forms in addition to mistreatment of children by parents. Wife-beating (and occasionally husband-beating) is an integral part of most scenes of ongoing family violence, as are fighting between siblings, attacks by children on their parents, and similar involvement of other relatives. More is now pub-

lished concerning all these subjects than before, but there are still gaps, and this book seeks to fill some of them at least in part.

Family violence has been an intractable problem partly because of all the factors that cause the phenomena to be underreported or denied, and partly because it takes place in the context of the total family environment, which is often perpetuated from generation to generation. The authors of the book here noted propose a number of ways of dealing with the problem, through crisis-intervention centers, counselling and day-care services, training in effective parenting, family planning, and the like. The authors have concluded that removing a child from an abusive home is not an effective remedy, for many reasons. The correct approach, as they see it, is to take action to reduce the pressures which lead to abusive conduct in the first place.

The book is organized in ten chapters which are grouped in five parts, describing the nature and extent of violence in the American family, and the difficulties in studying it; the long-term social patterns and immediate causes which lead to violence; and possible ways of dealing with violence in the future.

For the convenience of readers, the book offers a table of contents and a foreword. There is considerable use of statistical tables, some of which are set forth in three appendices near the end of the book. There are few footnotes, and these are gathered together before the appendices. A bibliography and a subject-matter index complete the volume.

Murray Straus holds a Ph.D. degree in sociology from the University of Wisconsin, and is a professor of sociology at the University of New Hampshire. He has published many articles on sociological topics. Richard Gelles is an associate professor of sociology and department chairman at the University of Rhode Island, and Suzanne K. Steinmetz is an associate professor at the College of Home Economics of the University of Delaware.

26. Thompson, James Clay, *Rolling Thunder; Understanding Policy and Program Failure*. Chapel Hill, North Carolina: The University of North Carolina Press, 1980. Pp. xv, 199. Price: \$14.00, cloth cover; \$6.50, paperback.

This book is a case study of the earlier part of the Vietnam War, from 1961 to 1968, as a foreign policy program which failed to accomplish its

purposes. The author discusses why the federal bureaucracy took so long to realize that its Vietnam efforts were not producing the desired results, and what this slowness of realization implies for future programs. The phrase "Rolling Thunder" comes from a hymn, "How Great Thou Art," and was the code name for a series of heavy strategic bombing raids carried out by the United States during the Tet Offensive of 1968.

The author describes the infighting within the American national security apparatus during the 1960's, between the majority who initially favored bombing, and a steadily growing minority who were convinced that bombing would not accomplish anything. The minority temporarily prevailed, when heavy bombing was halted between 1968 and 1972. The author's view is pessimistic. He concludes that "much of what comes out of the national security bureaucracy as foreign policy may be related more to the internal needs of the bureaucracy than to the problem at hand," and that "much of the foreign policy decision process resembles an organized anarchy" (pages 151 and 153). As for the future, he asserts, "The strategic lesson—that the use of conventional bombing against a non-industrial country organized to fight and win a revolutionary war will fail—appears to be unlearnable" (pages 155-56).

The book is organized in six chapters. The first three provide an introduction and a factual description of the Rolling Thunder program and its failure. Chapter 4 concerns intelligence gathering and evaluation related to the program. The fifth chapter sets forth the theories relied upon by the author, and the sixth applies those theories to the organizational and foreign policy problem under discussion.

The book offers a short table of contents, lists of illustrations, tables, figures, and maps, and a preface. Footnotes are collected at the end of the book, with a bibliography of selected references and a detailed subject-matter index.

The author, James Clay Thompson, is an assistant professor of political science at the University of North Carolina, Greensboro. At the time of publication of his book, he was also a staff member of the Office of the Assistant Secretary of Defense for National Security Affairs.

27. Van den Bosch, Robert, *The Pesticide Conspiracy*. Garden City, New York: Anchor Press/Doubleday & Company, Inc., 1980. Pages: xii, 212. Price: \$4.95. Paperback.

One of the major problems facing American agriculture today is the control of insects and other pests. Poisons of all sorts have routinely been used for control in the past, but scientists and others concerned with ecology have increasingly come to realize that this may often be both ineffective and positively dangerous. For example, insects often develop immunity to chemicals which, however, continue to be poisonous to man, especially to fruit pickers and other farm workers, and to food handlers and consumers. Further, a pesticide which is effective against one type of insect may promote another type which normally would be prey for the first type. Many other problems inhere in the use of pesticides.

The author of this book is firmly convinced that reliance upon pesticides is largely unnecessary and undesirable. He criticizes the chemical industry for its extensive efforts to promote the use of pesticides and to inhibit regulation thereof. Accounts are provided of conflicts between the Department of Agriculture and the Environmental Protection Agency, and between the academic and business communities over the use of pesticides.

As an alternative to automatic and heavy use of chemicals to suppress insects, the author proposes an approach which he calls "integrated control." This requires examination not only of the size and distribution of insect populations and their direct effect on plantlife, but also of a host of other factors—rainfall, temperature, wind, normal processes of aging, soil erosion, and many others—that can affect both plant health and insect populations. Very often what is needed is not an insecticide, but fertilizer, irrigation, promotion of natural enemies of particular insects, and other changes in farming technology. Integrated control has been used with great success in rice production in the People's Republic of China.

Though the author has impressive credentials as a scientist, this book is written for the layman rather than the scientist. It is written in a colorful, informal style that catches and holds the reader's attention. This is not a lawbook, although it does provide some information about environmental legislation affecting use of pesticides. There is no mention of military use of chemicals.

The book is organized in sixteen chapters grouped in four parts, following a preface and a prologue. There is minor use of charts and graphs in the text. A glossary of scientific terms is provided. Footnotes, including references and citations to authority, are grouped together at the end

of the book. The notes are followed by a short selected bibliography and a subject-matter index.

The Pesticide Conspiracy is not a new book. It was first published in hardcover by Doubleday in 1978. The author, Robert van den Bosch, died in that year. He had been a professor of entomology and chairman of the Division of Biological Control at the University of California at Berkeley. Professor van den Bosch held a Guggenheim fellowship. At various times he served as consultant to private organizations and governmental agencies, both American and foreign.

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I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review*. That index was continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

This index is organized in five parts, of which this introduction is the first. Part II, below, is a list in alphabetical order of the names of all authors whose writings are published in this volume. Part III, the subject-matter index, is the heart of the entire index. This part opens with a list of subject-matter headings newly added in this volume. It is followed by the listing of articles in alphabetical order by title under the various

subject headings. The subject matter index is followed by part IV, a list of all the writings in this volume in alphabetical order by title.

The fifth and last part of the index is a book review index. The first part of this is an alphabetical list of the names of all authors of the books and other publications which are the subjects of formal book reviews published in this volume. The second part of the book review index is an alphabetical list of all the reviews published herein, by book title, and also by review title when that differs from the book title. Excluded are items appearing in "Publications Received and Briefly Noted," above, which has its own index.

All titles are indexed in alphabetical order by first important work in the title, excluding *a*, *an*, and *the*.

In general, writings are listed under as many different subject-matter headings as possible. Assignment of writings to headings is based on the opinion of the editor and does not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any governmental agency.

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