

MILITARY LAW REVIEW VOL. 92

Introduction: Criminal Law Symposium

ARTICLES

Privileges Under the Military Rules of Evidence

Inconsistent Defenses in Criminal Cases

Gustavus Adolphus and Military Justice

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

VOLUME INDEX

Pamphlet)
No. 27-100-92)

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., *Spring 1981*

MILITARY LAW REVIEW—VOL. 92

(USPS 482-130)

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MILITARY LAW REVIEW (USPS 482-130)

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This issue of the *Review* may be cited 92 Mil. L. Rev. (number of page) (spring 1981).

INTRODUCTION: CRIMINAL LAW SYMPOSIUM

Three articles on diverse aspects of military justice are presented in this issue of the *Military Law Review*. This is the fourth criminal law symposium issue that the *Review* has presented since the symposium series commenced with volume 80, spring 1978. Previous issues devoted to criminal law are volume 84, spring 1979; volume 87, winter 1980; and volume 88, spring 1980.

In the opening article, Captain Woodruff discusses section V of the new Military Rules of Evidence. These Rules, replacing chapter XXVII of the Manual for Courts-Martial, govern the use of all types of testimony, documents, and physical evidence, as evidence in court-martial proceedings. The Military Rules, which become effective on 1 September 1980, are largely based upon the Federal Rules of Evidence, promulgated in 1975 for use by United States district courts and magistrates. The text and analysis of the Military Rules may be found in Appendix 18, Manual for Courts' Martial, added to the Manual by Change 3.

Section V of the Military Rules of Evidence sets forth rules governing use of privileged communications as evidence. Examples of such communications include confidential discussions between lawyer and client, priest and penitent, and husband and wife. Others less obvious include the Government's privilege of protecting the identity of clandestine criminal informants, the political vote privilege, and the secrecy of deliberations of courts and juries. Information which has been given a security classification or is otherwise considered sensitive by the Government is also subject to privilege.

An article concerning section V should be especially helpful to judge advocates practicing in the field. While most provisions of the Military Rules are similar to if not identical with the Federal Rules, section V represents a major exception. The drafters of the Federal Rules originally proposed an extensive codification of the law of privileges. However, this part of their work proved extremely controversial for many unrelated reasons. Congress disapproved the proposed section V and substituted a short provision that simply preserves prior law intact.

Section V in the Military Rules is based in part on the rejected section V of the Federal Rules. During the past several years a con-

siderable body of case law and scholarly commentary has grown up around the portions of the Federal Rules which were approved, and all this law is available for use by military attorneys. Unfortunately, little or no such guidance concerning the section V privileges has evolved, except for a few portions taken more or less intact from the Manual for Courts-Martial.

Captain Woodruff's ground-breaking article is followed by "Inconsistent Defense in Criminal Cases," by Major James F. Nagle. Criminal defendants occasionally present two or more defenses which may seem to contradict one another. The defense may contend, for example, that the defendant did not commit the crime, but that if he did, he was entrapped by government agents, or committed an act of violence in self-defense, or took a piece of property under the reasonable but mistaken belief that it belonged to him.

Such defense contentions are not always as illogical as at first they may seem. The defendant may present one theory, and the government's evidence may raise another entirely different defense. It is clearly in the defendant's best interests to use both theories if at all possible. In other cases, such as denial of guilt and assertion of insanity, the defenses are not truly inconsistent. Further, some courts have felt that, in the case of a defense such as entrapment, the public policy considerations behind the defense are so strong that it should be permitted even if inconsistent with another defense.

Major Nagle provides an extensive review of the federal, state, and military case law on use of inconsistent defenses. He sorts out the various jurisdictions according to the extent, if any, that their appellate courts have permitted presentation of such defenses. He concludes that inconsistent defenses are generally permitted in American jurisprudence, but that there are still some major inconsistencies in treatment of such defenses between the various jurisdictions, which should be rectified.

Our concluding article by Lieutenant Colonel Norman G. Cooper is a note on military legal history. Modern western military criminal law and procedure are descended in part from the Swedish Articles of War of 1621, promulgated by King Gustavus II Adolphus (1595-1632). This monarch's reputation is based upon his military genius during the Thirty Years' War, a complex religious and economic conflict which tore northern Europe apart in the early seventeenth century. Gustavus Adolphus initiated extensive

reforms in the recruitment, training, leadership, and support of soldiers, and not the least important were his efforts at modernization of disciplinary practices. Lieutenant Colonel Cooper discusses the relationship between the Articles of 1621 and our present Uniform Code of Military Justice.

The *Military Law Review* is pleased to present these articles on criminal law and procedure and legal history. All of them are valuable additions to the growing body of military legal literature.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

PRIVILEGES UNDER THE MILITARY RULES OF EVIDENCE*

by Captain Joseph A. Woodruff**

The Military Rules of Evidence became law in 1980 by executive order of the President. The new rules are based largely upon the Federal Rules of Evidence, signed into law in 1975, and upon former chapter XXVII of the Manual for Courts-Martial. Captain Woodruff's article focuses on section V of the Military Rules. This section states rules concerning privileged communications, such as statements made to an attorney by a client.

Captain Woodruff reviews section V, rule by rule, and compares its text with that of the previous Manual provisions, and with the text of the privilege rules proposed by the drafters of the Federal Rules of Evidence but rejected by Congress. He concludes that for the most part the new rules do not represent a drastic change from prior military law, and that in certain respects they improve significantly upon that law.

I. INTRODUCTION

This article reviews the military law of privileged communications. Statements made by certain persons within protected relationships are protected by the law from forced disclosure on the witness stand, at the option of one of the participants in the relationship.¹ Well-known examples include statements made in the

*This article is based upon an essay submitted by the author in partial fulfillment of the requirements for the degree of Juris Doctor at the University of Alabama School of Law.

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

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¹Black's Law Dictionary 1078 (5th ed. 1979).

context of an attorney-client relationship, or between priest and penitent, or husband and wife, and sometimes doctor and patient.

In civilian proceedings, the law of privileged communications is generally part of the common law, varying from state to state. At the federal level, an ambitious attempt was made to codify the law of privileged communications in section V of the Federal Rules of Evidence.² This attempt was rebuffed by Congress when the proposed rules were enacted in 1975.³ Section V as it now reads is a

²See the Notes of the House and Senate Committees on the Judiciary, the text of which is reproduced after Rule 501 of the Federal Rules of Evidence, 28 U.S.C. app., at 556-58 (1976).

Article V or section V of the Rules consists of Rule 501 above. As originally proposed by the United States Supreme Court, that section contained thirteen proposed rules. Nine different non-constitutional privileges were defined. These were: required reports privileged by statute, the lawyer-client privilege, the physician-patient or psychotherapist-patient privilege, the husband-wife privilege, the clergyman-penitent privilege, a political vote privilege, a trade secrets privilege, a privilege for secrets of state and other official information, and identity of criminal informants. The Congress disapproved the proposed section V. See discussion in footnote 3, *infra*.

Extensive information about the proposed but rejected rules may be found in the two editions of the Federal Rules of Evidence Manual by Professors Kenneth R. Redden and Stephen A. Saltzburg of the University of Virginia School of Law. The 1975 edition sets forth the text of a Library of Congress research report at pages 114-28 prepared by a Mr. Charles Doyle in 1973 for the House Judiciary Committee. The 1977 edition includes the text of the rejected rules themselves. The 1977 edition and its 1980 supplement are reviewed by Lieutenant Colonel Herbert J. Green at 89 Mil. L. Rev. 96 (1980) and are briefly noted at 89 Mil. L. Rev. 130 (1980).

The Federal Rules of Evidence were prepared chiefly by an Advisory Committee on Rules of Evidence appointed by Chief Justice Earl Warren in 1965. The Committee's initial draft, completed in 1969, was made available for comment by the bench and bar and was extensively revised before it was approved by the Supreme Court and was submitted to Congress in 1973. Following congressional approval, President Ford signed the Federal Rules into law on January 2, 1975, as Pub. L. No. 93-595, 88 Stat. 1926, effective 180 days later. K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 3-5 (1975).

³According to the Notes of the House and Senate Committees on the Judiciary, section V as originally written was rejected by Congress because it was too controversial. Most of the proposed provisions were vigorously attacked by critics, for many different reasons; no concise summary of objections is possible. The congressional committees concluded that section V would have to be sacrificed to make possible the passage of the remainder of the Federal Rules of Evidence. Apparently no other section of the proposed rules was changed so drastically by Congress. K. Redden & S. Saltzburg, *supra* note 2, at 130.

relatively short statement that 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."⁴

In military practice, the law of privileged communications was formerly set forth in chapter XXVII of the Manual for Courts-Martial,⁵ replaced in 1980 by the Military Rules of Evidence.⁶ Since 1950, military courts have been obliged by statute to conform their procedures and modes of proof to those recognized in the trial of criminal cases in the United States district courts.⁷ Accordingly, large portions of the Military Rules of Evidence were taken with little or no change from the Federal Rules of Evidence.⁸ As an exception, section V of the Military Rules differs drastically from section V in the Federal Rules. The military section V is an elaborate

⁴Fed. R. Evid. 501. In civil actions in which the rule of decision is found in state rather than federal law, state law, not federal law, controls any privileges asserted. *Id.*

⁵Manual for Courts-Martial, United States, 1969 (Rev. ed.), ch. XXVII (hereinafter cited in text and footnotes as MCM or as Manual). The text of the Military Rules of Evidence may be found in the new Appendix 15 to the Manual for Courts-Martial, added by Change 3, dated 1 September 1980; and also in West's Military Justice Reporter, at 8 M.J. LXVII through CCXXXIX (1980).

⁶Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). This order was signed by President Carter on March 12, 1980, effective prospectively from September 1, 1980. For discussion of the Military Rules of Evidence and comparison between them and the old chapter XXVII of the Manual for Courts-Martial, note 5, *supra*, see the symposium issue, May 1980, of *The Army Lawyer*, the monthly companion to the quarterly *Military Law Review*. See note 8, *infra*.

⁷10 U.S.C. § 836(a) (1976), or U.C.M.J. art. 36(a). The Uniform Code of Military Justice, 64 stat. 108 (1950), as amended, in 140 numbered articles, is codified at 10 U.S.C. §§ 801-940 (1976).

Cases in which the Court of Military Appeals has changed military evidentiary law to conform to federal practice include *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977), concerning admissibility of statements against penal interest as an exception to the hearsay rule; and *United States v. Miller*, 23 C.M.A. 247, 49 C.M.R. 380 (1973), concerning admissibility of laboratory reports as business entries.

⁸Comparison of the texts of the Federal and Military Rules of Evidence reveals that the texts of sections I, II, IV, VI, VII, VIII, IX, X, and XI are similar. Many rules in these sections are identical or nearly so. The others are at least analogous. Sections III and V, however, differ greatly as between the two sets of rules. Section V is the subject of this article.

Section III in the Federal Rules of Evidence consists only of two articles on presumptions and the applicability of state law in civil actions and proceedings. Fed. R. Evid. 301, 302. Such provisions of course have no relevance to military practice, which does not encompass civil trials. Instead, section III of the Military Rules

codification of the law of privileged communications,⁹ and is similar in many respects to the proposed codification which Congress rejected for the Federal Rules.¹⁰

This article focuses on section V of the Military Rules, comparing its twelve rules with prior military law and practice on the subject, and with the privilege rules proposed by the framers of the Federal Rules but rejected by Congress. In addition to the privileges themselves, waiver of privileges and involuntary disclosure of privileged information are briefly discussed. Mention is made also of the problems of comment by an adverse party on his or her opponent's assertion of a privilege, and adverse inferences drawn by a jury from such assertion.

of Evidence codifies and imposes order upon the federal common law of exclusions constitutionally mandated by the fourth and fifth amendments to the U.S. Constitution. For a discussion of the fourth amendment aspects of the M.R.E., see Eisenberg, *Fourth Amendment Practice and the Military Rules of Evidence*, *The Army Lawyer*, May 1980, at 30. For a discussion of the Military Rules' fifth amendment aspects, see Basham, *Suppression Motions Under the Military Rules of Evidence*, *The Army Lawyer*, May 1980, at 17, and Schlueter, *Bodily Evidence and Rule 312, M.R.E.*, *The Army Lawyer*, May 1980, at 35. The May 1980 issue of *The Army Lawyer* is a symposium issue containing seven short articles on the Military Rules written by members of the faculty of The Judge Advocate General's School, Charlottesville, Virginia. Note 6, *supra*.

Section III of the Military Rules is entitled, "Exclusionary Rules and Related Matters Concerning Self-Incrimination, Search and Seizure, and Eyewitness Identification." It consists of fourteen separate numbered rules and is one of the largest sections. The many topics covered include, but are not limited to: self-incrimination (Mil. R. Evid. 301), confessions and admissions (Mil. R. Evid. 304), rights warnings (Mil. R. Evid. 305), unlawful searches and seizures (Mil. R. Evid. 311), probable cause (Mil. R. Evid. 314, 315), and eyewitness identification (Mil. R. Evid. 321). (The rules in section III as published are not numbered consecutively: nos. 307-310 and 318-320 are reserved for future use.)

⁹Section V of the Military Rules of Evidence consists of twelve numbered rules. Like section III, it is one of the largest sections in the Military Rules.

¹⁰The lawyer-client privilege (Mil. R. Evid. 502), the privilege for communications to the clergy (Mil. R. Evid. 503), the husband-wife privilege (Mil. R. Evid. 504), the privilege protecting the identity of informants (Mil. R. Evid. 507), and the political vote privilege (Mil. R. Evid. 509) are all similar to or analogous with privileges found among the section V rules proposed for the Federal Rules by the Supreme Court but rejected by Congress. The rule on classified information (Mil. R. Evid. 505) and that on government information other than classified information (Mil. R. Evid. 506) are loosely analogous with the proposed privilege for secrets of state and other official information. The Military Rules include no provision for required reports privileged by statute, an extremely limited physician-patient privilege, and no privilege for trade secrets. Concerning the physician-patient privilege, see Mil. R. Evid. 501(d), and also notes 14 through 28 and accompanying text, *infra*. The Rules do include a privilege for deliberations of courts and juries (Mil. R. Evid. 509) not found among the proposed Federal Rules.

II. RULE 501: GENERAL PROVISIONS

Rule 501 states the nature and scope of evidentiary privileges allowed under the new rules.¹¹ Neither its limited incorporation of federal rules¹² nor its provision describing the kinds of assertions available to a privilege holder¹³ are significant departures from prior practice.

¹¹Rule 501 reads as follows:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to the assertion by any person of a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the federal government, a State, or political subdivision thereof or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Mil. R. Evid. 501.

¹²Mil. R. Evid. 501(a)(4). *Id.* Note, however, Rule 1102 of the Military Rules, which automatically incorporates into those rules any amendment to the Federal Rules of Evidence. Amendment of the Military Rules under this provision takes effect 180 days after the effective date of amendment of the Federal Rules, in the absence of contrary action by the President.

¹³Mil. R. Evid. 501(b).

Subdivision (d) is a reiteration of the military's longstanding nonrecognition of any physician-patient privilege.¹⁴ In *United States v. Wright*,¹⁵ the Army Court of Military Review held that so long as the medical officer was engaged in his professional capacity as a physician, and was not acting as an investigator, all statements made to him by the accused were nonprivileged and could be received into evidence. The physician in *Wright* was a doctor on duty at the base hospital whom the accused had sought out voluntarily. That fact distinguishes *Wright* from cases involving compulsory psychiatric evaluations or sanity boards.¹⁶ The argument was made that during such compulsory examinations the physician had an investigative or quasi-judicial function; therefore statements by the accused merited protection, as surely as if he or she were being interrogated by a CID investigator.

This issue was resolved in a series of cases. In *United States v. Shaw*,¹⁷ a 1958 decision of the Army Court of Military Review, the court found that if a physician-patient privilege existed, the accused had waived it at trial by failing to object and by introducing similar evidence himself. Having thus disposed of the case, the court did not reach the issue of whether a privilege attached. In the 1959 case of *United States v. Burke*,¹⁸ the defense alleged that sec-

¹⁴The former paragraph 151(d) of the Manual for Courts-Martial stated:

(2) *Communications to medical officers and civilian physicians.* It is the duty of medical officers to supply medical services to members of the armed forces, to make periodical physical examinations as required by regulations, and to examine persons for appointment and enlistment, and medical officers may be specifically directed to observe, examine, or attend members of the armed forces. This observation, examination, or attendance is official and the information thereby acquired is official. Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to this information or to statements made to them by patients.

¹⁵8 C.M.R. 850 (A.C.M.R. 1953).

¹⁶See M.C.M., *supra* note 5, para. 121.

Paragraph 121 of the Manual, note 5, *supra*, has been extensively revised in section 11 of Exec. Order No. 12,198, to set forth a new test for insanity and to make clear that the results of compulsory psychiatric or sanity evaluations are indeed privileged. For the text of the new paragraph 121, see 8 M.J. CCXXXIII (1980). For an explanation of the change, see the analysis following Rule 302, at 8 M.J. XCV (1980).

¹⁷8 C.M.A. 267, 26 C.M.R. 47 (1958).

¹⁸28 C.M.R. 604 (A.C.M.R. 1959).

tion 4244 of Title 18, United States Code,¹⁸ applied in the military. This statute prevents admission into evidence on the issue of guilt of statements made by an accused during a sanity or competency examination. The then-Army Board of Review opined that section 4244 was not applicable to trials by courts-martial, but stated that it was not forced to so hold since the government psychiatrist did not testify to any statements made by the accused.

The question was finally put to rest in 1966 in *United States v. Wimberley*,²⁰ where the Court of Military Appeals held that the privilege established by section 4244 was not applicable to military criminal practice. The Court reasoned that paragraph 121 of the Manual²¹ was the military equivalent of section 4244 in that it established a preliminary proceeding to determine mental capacity. Therefore, paragraph 151c(2) of the Manual²² was dispositive of the privilege provision.

Rule 501(d) does not disturb these precedents. Rule 302, however, gives the accused a privilege to prevent any statement made by him during a mental examination, ordered under paragraph 121, from being received into evidence.²³

The privilege created by Rule 302 goes further than the section 4244 privilege. Section 4244 restricted the admission of such statements on the issue of guilt. Rule 302 prevents their use both on

¹⁸18 U.S.C. para. 4244 reads in pertinent part:

No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

²⁰16 C.M.A. 3, 36 C.M.R. 159 (C.M.A. 1966).

²¹Note 16, *supra*.

²²Note 14, *supra*.

²³Rule 302(a), Mil. R. Evid., reads as follows:

(a) *General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under paragraph 121 of this Manual and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by rule 305 at the examination.*

the merits and in sentencing.²⁴ Subdivision (b) of Rule 302 creates an exception to the privilege when the accused first introduces such statements into evidence.²⁵

Subdivision (c) establishes a mechanism whereby the government may gain access to such statements. If the accused opens the door by offering expert testimony concerning his or her mental condition, the military judge may order release of the examination report to the prosecution, with the accused's statements excised. And should the defense offer a portion of the accused's statements into evidence, the military judge may, in the interest of justice, order the release of all such statements.²⁶

The 1966 holding in *Wimberley* has not been repealed, however, and section 4244 has not been made applicable to courts-martial. Rules 302 and 501(d), taken together, replace paragraph 151(d)(2) of the Manual. As explained above, Rule 302 is a privilege of broader application than its § 4244 counterpart. And neither the federal cases nor the Federal Rules of Criminal Procedure have fashioned any exceptions to § 4244 which correspond to those found in Rule 302(c).

What has occurred, however, is of great significance to military practitioners. The new rules retain the traditional nonrecognition of a physician-patient privilege, but they create a limited privilege for statements made by an accused during the course of a pretrial mental examination.

²⁴ *Id.*

²⁵ Rule 302(b), Mil. R. Evid., reads thusly:

(b) Exceptions.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused, but such testimony may not extend to statements of the accused except as provided in (1).

²⁶ Rule 302(c), Mil. R. Evid., is as follows:

(c) Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to paragraph 121 of this Manual. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

III. RULE 502: THE ATTORNEY-CLIENT PRIVILEGE

Of all the confidential relationships for which evidentiary privileges may be granted, those of husband and wife, and of attorney and client are two whose roots penetrate so far into the history of the common law that their protection is almost assumed as a matter of course. Of course, any evidentiary privilege is an impediment to the judicial search for truth and must be justified by sound policy. The attorney-client privilege rests on three stout pillars. First is the salutary purpose of encouraging frank and open discussion between the lawyer and his client. The second justification is that the attorney, by his representation of his client, is in effect his client's alter ego, and the attorney-client privilege is a vicarious extension of the privilege against self-incrimination. Finally, the privilege is a reflection of the lawyer's duty to preserve the confidences of his client.²⁷ This third consideration has found expression in the American Bar Association's Code of Professional Responsibility.²⁸

The military justice system recognized the necessity of the attorney-client privilege and expressly incorporated it into the

²⁷For a discussion of the background and policy of the privilege, see Radin, *The Privilege of Confidential Communications between Lawyer and Client*, 16 Calif. L. Rev. 487 (1928). For a discussion of the privilege in military practice, see Oldham, *Privileged Communications in Military Law*, 5 Mil. L. Rev. 17 (July 1959), and Fontanella, *Privileged Communications: The Personal Privilege*, 37 Mil. L. Rev. 155 (Jan. 1967).

A recent article discussing the lawyer-client privilege in military law is *The Attorney-Client Privilege under Military Rule of Evidence 502*, by Captain Kenneth Gale, JAGC, U.S. Army, published at 12 *The Advocate* 335 (1980). Captain Gale concludes that Rule 502 is an improvement over prior law, combing the best of the old Manual provisions and the best of the proposed Federal Rule. *Id.* at 352. Captain Gale is assigned to the Defense Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia.

²⁸Canon 4 of the ABA Code of Professional Responsibility states, "A Lawyer Should Preserve the Confidences and Secrets of a Client." This is given substantive content by the texts of Ethical Considerations 4-1 through 4-6, and Disciplinary Rule 4-101. Rule 1.7, Confidential Information, of the ABA Model Rules of Professional Conduct (1980), deals in part with the privileged nature of lawyer-client communications.

Manual.²⁹ As was the case in civilian courts, the privilege extended to "[c]ommunications between a client or his agent, and his attorney or the agent of the attorney, if made while the relationship of client and attorney was in existence, made in connection with that relationship, and under circumstances not indicating a lack of confidentiality."³⁰ Thus stated, the rule was subject to two important exceptions. First, no privilege attached where the communication "clearly contemplated the future commission of a fraud or crime."³¹ Second, when a person outside the privileged relationship gained knowledge of the confidential matter by either accident or design, the right to invoke the privilege was lost.³²

Since the privilege is designed to protect the relationship that exists between attorney and client, one of the threshold requirements is that such a relationship must exist. Whether such a relationship exists is a question of fact. The military courts have held that the mere designation by a convening authority of appointed counsel does not create an attorney-client relationship in the absence of an acceptance of the appointment by the accused.³³ Likewise, the existence of the relationship has been held not to depend upon the legal qualifications of counsel,³⁴ and the privilege may attach even though the counsel is not a lawyer.³⁵ Similarly, the existence of the

²⁹ Communications between a client or his agent and an attorney or his agent, such as the attorney's clerk, stenographer, or other associate, are privileged when made while the relationship of client and attorney existed in connection with that relationship, unless the communications clearly contemplated the future commission of a fraud or crime, for instance, perjury or subornation of perjury

Manual for Courts-martial, note 5 *supra*, para. 151b(2), page 27-60.

³⁰J. Munster & M. Larkin, *Military Evidence*, § 8.6.c.1, at page 312.

³¹Note 29, *supra*.

³²*Id.*

³³*United States v. Brady*, 8 C.M.A. 456, 24 C.M.R. 266 (1957).

³⁴*United States v. Bennett*, 28 C.M.R. 650 (N.C.M.R. 1959).

³⁵There is no requirement that legally qualified defense counsel be appointed for an accused at a summary court-martial, Art. 27, U.C.M.J., 10 U.S.C. § 827 (1976). Defense counsel at special courts-martial may be nonlawyers if military exigencies are such that legally qualified counsel are not available. M.C.M., note 5, *supra*, para. 8c.

Discussion of who is and is not a "lawyer" may be found at Mil. R. Evid. 502(b)(2):

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial

privilege does not depend upon the kind of proceeding that occasioned the establishment of the attorney-client relationship.³⁶

Rule 502 of the Military Rules of Evidence does not substantially alter the traditional attorney-client privilege, and, except for expressly extending the privilege to nonlawyer counsel, it is a mirror image of proposed Federal Rule 503. As written, the rule creates a privilege held by the client protecting against disclosure "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."³⁷ The rule goes on to create five exceptions to the privilege, one of which, the future crimes exception, had a counterpart in prior practice. Of the re-

case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

³⁶Rule 502(b)(2) defines "lawyer" to include a commissioned officer or member of the armed forces who represents a person "in a court-martial case or in any military investigation or proceeding." Mil. R. Evid. 502(b)(2)(a). The military investigations or proceedings contemplated by the rule include administrative elimination boards, see Army Reg. No. 635-200, Enlisted Personnel (21 Nov. 1977); investigations conducted to determine pecuniary responsibility for lost property, see Army Reg. No. 735-11, Accounting for Lost, Damaged, and Destroyed Property (15 Oct 1978); and other fact-finding investigations, see Army Reg. No. 15-6, Procedure for Investigating Officers and Boards of Officers Conducting Investigations (24 Aug. 1977). Although the above references are to Army regulations, every branch of the service has equivalent regulations establishing essentially similar investigations or proceedings.

³⁷Rule 502(a), Mil. R. Evid., states:

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

maining exceptions, some are codifications of prior waiver rules and others are completely new.⁵⁸

The second exception, concerning opposing nonclient parties who both claim through a common deceased client, has no parallel in pre-rule case law. The Advisory Committee Comments on the proposed Federal Rule imply that this exception is applicable when an attorney is called as a witness in a dispute between two parties who both claim the right to assert the privilege as representatives of the witness attorney's deceased client.⁵⁹ The applicability of such an exception to a military criminal trial is doubtful since the government will never be in a position to assert, by representation, the privilege of a deceased.

This does not mean, however, that relevant testimony cannot be adduced from the attorney of a deceased witness. For example, assume the following situation: A, the accused, is on trial. The government calls L, the lawyer of D, a deceased witness, who will testify as to certain relevant information that was communicated to

⁵⁸Rule 502(d), Mil. R. Evid., is as follows:

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) *Crime or fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

⁵⁹Fed. R. Evid. 503(d)(2) [not enacted], Advisory Committee's note.

L as part of his duties as an attorney. If D had waived his personal privilege before he died,⁴⁰ the attorney would be free to testify because A would have no privilege to assert.⁴¹

The third exception to the general rule of attorney-client privilege exempts from protection communications relating to an alleged breach of the attorney's duty to his client.⁴² This exemption is closely related to the earlier rule of waiver for a client who charges his attorney with incompetence.⁴³ Whereas the exception is narrow in scope, applying only to conversations relevant to the issue of breach of duty, the waiver provision removed the privilege from all attorney-client communications.⁴⁴ It is doubtful that military courts will substitute the (d)(3) exception for the former waiver rule, because waiver by allegation of incompetence is a longstanding and well-recognized feature of the attorney-client privilege.⁴⁵

Subsection (d)(4) exempts from the ambit of the rule testimony by an attorney who was an attesting witness to a document which is in issue. This exemption may be likened to the holding of the Court of Military Appeals in the case of *United States v. Marrelli*.⁴⁶ In its opinion the Court distinguished between actions by an attorney which are legal in nature and those which are not, protecting the former but not the latter.⁴⁷ Clearly a lawyer may render purely legal service to a client in the drafting of a document and still perform the nonlawyer act of attestation. According to *Marrelli* the only nonprivileged evidence would be that which related to the process of attestation. According to the M.R.E. there is no privilege as to any issue "concerning an attested document,"⁴⁸ presumably including the advice given during the drafting process.

The final exception expressed in Rule 502 deals with communications made by opposing litigants to counsel they retained or con-

⁴⁰Since the attorney-client privilege is perpetual in duration, it survives the death of the client, in the absence of waiver.

⁴¹For the kinds of relationships covered by the rule, see Mil. R. Evid. 502(a)(1)-(5), *supra* note 37.

⁴²Mil. R. Evid. 502(d)(3), *supra* note 35.

⁴³*United States v. Allen*, 8 C.M.A. 504, 25 C.M.R. 8 (1957).

⁴⁴25 C.M.R. at 12.

⁴⁵*Hunt v. Blackburn*, 128 U.S. 464 (1888); C. McCormick, *Evidence* § 91 (2d ed. E. W. Cleary 1972).

⁴⁶4 C.M.A. 276, 15 C.M.R. 276 (1954).

⁴⁷15 C.M.R. at 287.

⁴⁸Mil. R. Evid. 502(d)(4), *supra* note 38.

sulted together.⁴⁹ By its terms the exception applies only when the testimony is offered "in an action between any of the clients."⁵⁰ This makes the rule wholly inapplicable to trials by court-martial since such trials are not actions "between" any of the clients. Representation of both the accused and the government by the same counsel in the same case is expressly forbidden,⁵¹ and where it occurs a presumption of prejudice to the accused arises, tainting all subsequent proceedings.⁵² Furthermore the communications between co-accused and their counsel are expressly embraced by the general rule of privilege.⁵³

Interestingly enough, the most striking change to the attorney-client privilege brought about by the M.R.E. is not found in Rule 502 at all. Rather it is Rule 511 which rids the privilege of the harsh and unfair exception for inadvertent or involuntary disclosure. Rule 511 makes evidence of privileged matter inadmissible if disclosure was erroneously compelled or made without an opportunity for the holder to assert his privilege.⁵⁴ This effectively reverses the provision of paragraph 151 b(2) of the Manual allowing eavesdroppers to testify as to communications presumed by the parties to be confidential.

IV. RULE 503: COMMUNICATIONS TO CLERGY

The development of an evidentiary privilege protecting confidential communications to clergy is a statutory as opposed to common

⁴⁹Mil. R. Evid. 502(d)(5), *supra* note 36.

⁵⁰*Id.*

⁵¹Art. 27(a), U.C.M.J.; 10 U.S.C. § 827.

⁵²See generally *United States v. Green*, 5 C.M.A. 610, 18 C.M.R. 234 (1955), concerning improper activities of defense counsel during Art. 32 proceeding tainting subsequent trial; and *United States v. Bryant*, 16 C.M.R. 747 (A.F.C.M.R. 1954), concerning improper participation by defense counsel in preparation of post-trial clemency recommendation tainting S.J.A. review. *But see United States v. Brown*, 20 C.M.R. 823 (A.F.C.M.R. 1955), holding that consideration by S.J.A. of the fact that clemency recommendation was prepared by unqualified officer cured any prejudice resulting from breach of attorney-client privilege.

⁵³Mil. R. Evid. 502(a)(3), *supra* note 36.

⁵⁴Paragraph (a) of Rule 511, Mil. R. Evid., states as follows:

(a) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

law phenomenon.⁵⁵ Nevertheless the same policy judgments justifying the traditional common law privileges apply to the relationship between the individual penitent and his or her spiritual advisor. Military law recognized the confidential nature of this relationship and fashioned an evidentiary privilege for communications between a person and a "chaplain, priest, or clergyman . . . made . . . as a formal act of religion or concerning a matter of conscience."⁵⁶ There is very little military case law in this area. In *United States v. Kidd*,⁵⁷ the court found no prejudice to the accused by the fact that a chaplain conducted the post-trial interview and rendered an adverse clemency recommendation, in the absence of any evidence indicating an unauthorized disclosure of confidential information.⁵⁸ Obviously there is no presumption of prejudice as is the case with defense counsel performing the same function. In *United States v. Henderson*,⁵⁹ no prejudice resulted from a chaplain refusing to testify as to words spoken to him by the accused, in

⁵⁵Wigmore, Evidence §§ 2394-96 (Rev. ed. McNaughton 1961).

⁵⁶M.C.M., note 5, *supra* para. 151b(2). The text of Rule 503, Mil. R. Evid., is as follows:

COMMUNICATIONS TO CLERGY

(a) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the person, by the guardian or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

⁵⁷20 C.M.R. 713 (A.F.C.M.R. 1955).

⁵⁸*Id.* at 719.

⁵⁹11 C.M.A. 556, 29 C.M.R. 372 (1960).

light of the fact that the chaplain later returned and testified fully. The court declined to speculate as to what result would have obtained had the chaplain remained silent. It should be noted, however, that the holder of the privilege is the penitent, not the cleric.⁶⁰ And in *United States v. Moore*,⁶¹ the court indicated its intent to construe the rule strictly when it declared that a letter written to a nun fell outside the privilege.

Rule 503 of the M.R.E. is a recodification of the Manual's statement of the privilege,⁶² plus an adoption of the definition of "clergyman" found in the proposed F.R.E.⁶³ The Advisory Committee pared this definition down further in its comments:

[I]t is not so broad as to include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or a minister of an established Protestant denomination though not necessarily on a full-time basis.⁶⁴

Like the other paragraph 151b(2) privileges, the priest-penitent communication was made subject to the eavesdropper exception. And like the attorney-client privilege discussed above, and the spousal privilege discussed below, Rule 511 of the M.R.E. cures the problem.

⁶⁰M.C.M. para 151b(2).

⁶¹30 C.M.R. 868 (A.F.C.M.R. 1963), *pet. denied*, 33 C.M.R. 436 (1963).

⁶²Rule 503 uses the "act of religion or . . . matter of conscience" language found in the Manual, instead of the "professional character as spiritual advisor" language of the Federal Rules of Evidence. Note 56, *supra*. The relevant portion of para 151b(2) of the Manual, at page 27-60, reads as follows:

Also privileged are communications between a person and a chaplain, priest, or clergyman, or assistant or other agent thereof, of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience.

⁶³"A 'clergyman' is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him." Fed. R. Evid. 506(a)(1) [not enacted]. The text of the military rule is identical except that the words "the clergyman" are substituted for "him." Rule 503(b)(1) note 56, *supra*.

⁶⁴Fed. R. Evid. 506 [not enacted] Advisory Committee Note.

One final aspect of this otherwise placid rule deserves comment. Rule 503 does not provide for closed sessions to minimize unnecessary disclosure when clerics are required to testify. Yet in the *Henderson*⁶⁵ case the judge closed the courtroom to the public when the chaplain returned to the stand. The Court found no prejudice or impropriety. However, this case was twenty years prior to the United State Supreme Court's decision concerning public access to criminal trials,⁶⁶ and *Henderson* may no longer be a foundation upon which a similar order may rest.

V. RULE 504: THE MARITAL PRIVILEGE

Traditionally the marital privilege has been divided into a spousal competency branch⁶⁷ and a confidential communications branch.⁶⁸ Both aspects have long been recognized in military law and both branches have been carried over, with certain modifications, to the M.R.E.⁶⁹ By contrast, the federal rule, as originally

⁶⁵Note 59, *supra*.

⁶⁶*Richmond Newspapers, Inc. v. Virginia*, . . . U.S. . . . 100 S. Ct. 2514 (1980).

⁶⁷Former para. 148*e* of the Manual states, "Interest or bias does not disqualify a witness Husband and wife are competent witnesses in favor of each other. Although husband and wife are also competent witnesses against each other, the general rule is that each is entitled to a privilege prohibiting the use of one spouse as a witness against the other."

⁶⁸Former para 151*b*(2) of the Manual states in relevant part, "Confidential communications between husband and wife, made while they were husband and wife and not living in separation under a judicial decree, are privileged. However, a confidential communication between husband and wife is not privileged when the marital relationship was a sham at the time the communication was made."

⁶⁹The first two of the three paragraphs of Mil. R. Evid. 504 read as follows:

(a) Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.

(b) Confidential communication made during marriage.

(1) *General rule of privilege.* A person has a privilege during and after the martial relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition.* A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

proposed, would have codified the holding in *Hawkins v. United States*,⁷⁰ a position that has been subjected to unfavorable criticism and has been rejected by the National Conference on Uniform State Laws.⁷¹ The proposed federal rule would have established a competency privilege running to the criminal accused but would not have created a privilege for confidential marital communications.⁷² The M.R.E. solution was to create a competency branch privilege consistent with the United States Supreme Court's decision in *Trammel v. United States*,⁷³ and a confidential communications branch similar to that suggested by the Uniform Rules of Evidence.

(3) *Who may claim the privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

⁷⁰358 U.S. 74, 79 S. Ct. 136 (1958); Fed. R. Evid. 505 (not enacted).

⁷¹For a discussion of the policy judgments underlying the confidential communications branch, see C. McCormick, *supra* note 45, at § 86.

The Advisory Committee's Notes for proposed Rule 505, F.R.E., state the committee's reasons for rejecting the confidential communications branch:

The rule recognizes no privilege for confidential communications. The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 Wigmore §§ 2228, 2241 (McNaughton Rev. 1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage. See Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929). Cf. McCormick § 90; 8 Wigmore § 2337 (McNaughton Rev. 1961); Fed. R. Evid. 505 [not enacted]; Advisory Committee Note.

⁷²Rule 504 of the Uniform Rules of Evidence eliminates the competency branch entirely and allows only a limited confidential communication privilege.

⁷³U.S. . . 63 L.Ed.2d 186, 100 S. Ct. 906 (1980).

The analysis following the text of Rule 504, Mil. R. Evid., explains as follows:

(a) Spousal incapacity. Rule 504(a) is taken generally from *Trammel v. United States*. U.S. . . 63 L.Ed.2d 126 (1980) and significantly

A. THE SPOUSAL COMPETENCY BRANCH

The former competency rule, as found in chapter XXVII of the Manual, was that spouses were competent witnesses in each other's behalf, and were also competent adverse witnesses, but that each spouse had the privilege of prohibiting such adverse testimony.⁷⁴ In other words both the witness spouse and the party spouse were considered to be equal holders of the privilege.⁷⁵ As was the case at common law,⁷⁶ this branch of the privilege was limited in duration by the existence of an actual state of marriage.⁷⁷ The termination of which extinguished the privilege. The privilege was further limited by what is best known as the "injury exception,"⁷⁸ which precluded the party spouse from asserting the privilege with respect to those injuries to the witness spouse which were deleterious to the marital relationship.⁷⁹ However, in *United States v. Moore*, the Court of Military Appeals declined to apply the injury exception to the privilege of the witness spouse as well.⁸⁰

changes military law in this area. Under present law, see present Manual paragraph 148e, each spouse has a privilege to prevent the use of the other spouse as an adverse witness. Under the new rule, the witness spouse is the holder of the privilege and may choose to testify or not to testify, as the witness spouse sees fit. *But see* Rule 504(c) (exceptions to the privilege).

Implicit in the rule is the presumption that when a spouse chooses to testify against the other spouse the marriage no longer needs the protection of the privilege. Rule 504(a) must be distinguished from Rule 504(b). Confidential communication made during marriage, which deals with communications rather than the ability to testify generally at trial.

Although the witness spouse ordinarily has a privilege to refuse to testify against the accused spouse, under certain circumstances no privilege may exist, and the spouse may be compelled to testify. *See* Rule 504(c).

⁷⁴M.C.M., para. 148e, note 67, *supra*.

⁷⁵D. Fontanella, Privileged Communications: The Personal Privilege, 37 Mil. L. Rev. 155 (1967).

⁷⁶C. McCormick, *supra* note 45, at § 66.

⁷⁷M.C.M., para. 148e, note 67, *supra*.

⁷⁸Since the basis for allowing the competency privilege is the preservation of marital harmony, it is altogether logical that an exception exists for crimes involving injury to the other spouse. *See* 8 J. Wigmore, Evidence § 2239 at p. 243 (Rev. ed. McNaughton 1961).

⁷⁹*United States v. Moore*, 14 C.M.A. 635, 34 C.M.R. 415 (1964). "Occasional or sporadic injury to one spouse by the act of the other does not mean that the marriage is necessarily a failure or so unstable that enforcement of the public policy for its preservation is no longer justified." *Id.*

⁸⁰*Id.* at 420. Distinguishing *United States v. Leach*, 7 C.M.A. 388, 22 C.M.R. 178 (1956), the *Moore* court held it was error for the trial court to compel the testimony of

The extent of the injury exception as found in the Manual was not exclusive,²¹ but the Courts did not engage in any kind of wholesale expansion.²² Furthermore, the injury had to be the result of the of-

the spouse of the accused, notwithstanding that the accused was charged with assault on his wife.

²¹J. Munster & M. Larkin, *Military Evidence* 276 (1978); *United States v. Parker*, 32 C.M.R. 482 (A.C.M.R. 1962).

²²The offenses listed in the former Manual provision as triggering the exception are: (1) an assault by one spouse upon the other, (2) bigamy, (3) unlawful cohabitation, (4) adultery, (5) abandonment or failure to support the spouse and children, (6) mistreatment of a child of the other spouse, and (7) forgery of one spouse's signature to a writing, thereby injuring the legal rights of the other. Manual, *supra* note 5, at para. 145e. The Manual provision continues:

Second, the privilege does not exist in favor of either spouse and, consequently, cannot be asserted by either—

(1) In a prosecution of the husband for any of the offenses set forth in chapter 117, title 18, United States Code, when the wife is the victim or for any offense involving the using or transporting of the wife for "white slave" or other immoral purposes, regardless of whether the offense was committed before or after the marriage.

(2) In a prosecution under Section 278 of the Immigration and Nationality Act (66 Stat. 230; 8 U.S.C. § 1328; Importation of alien for immoral purpose).

(3) When the marital relationship was entered into with no intention of the parties to live together as husband and wife, but only for the purpose of using the purported marital relationship as a sham, and that relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other.

(4) When, at the time the testimony or statement of one of the parties to the marriage is to be introduced in evidence against the other party, the witness-party is dead or the parties are divorced.

Id. The provisions of paragraphs (1) and (2), above, have been preserved in rule 504(c)(2)(C), Mil. R. Evid. That provision states that there exists no privilege of spousal incapacity under Rule 504(a) or confidential communications under Rule 504(b)—

(C) In proceedings in which a spouse is charged, in accordance with Articles 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of section 1328 of title 8, United States Code; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of sections 2421-2424 of title 18, United States Code; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

fense charged; the fact that the evidence tended to establish a separate uncharged offense against the spouse was not enough.⁸³

Under the new rule, both spouses are competent to testify but can prohibit each other's adverse testimony, as before. The new rule limits the duration of the privilege to a period of actual matrimony,⁸⁴ and denies the privilege when, at the time testimony is given, the marital relationship is a sham.⁸⁵

It is the injury exception that has been the most revised. Under the M.R.E., the injury exception applies only "[i]n proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse."⁸⁶ The focus of the injury seems to have shifted from an injury to the marital relationship to personal or property injury to the witness spouse. If this is indeed the case, then it is questionable whether such injuries to the marital relationship as adultery⁸⁷ will survive the adoption of the new rule. An argument could be made, however, based upon the underlying policy of the rule, to construe the kinds of personal in-

⁸³United States v. Massey, 15 C.M.A. 274, 37 C.M.R. 246 (1965).

⁸⁴Mil. R. Evid. 504(c)(1) reads as follows:

(1) *Spousal Incapacity Only.* There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

⁸⁵Mil. R. Evid. 504(c)(2)(B) states that there is no privilege of spousal incapacity under Rule 504(a) or confidential communications under Rule 504(b)—

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication.

⁸⁶Mil. R. Evid. 504(c)(2)(A).

⁸⁷United States v. Francis, 12 C.M.R. 695 (A.C.M.R. 1953). The accused was charged with adultery with his minor step-daughter in violation of Art. 134. The court held that no privilege existed for the accused to prevent his wife from testifying as a government witness.

juries contemplated to include the mental anguish resulting from such offenses.⁶²

The new formulation of the injury exception also appears to change the doctrine that the injury must be the result of the charged offense. The last phrase of the exception denies the privilege where the accused is charged with a crime against the person or property of another that arose out of the commission of "a crime" against the spouse. The rule does not require that the misconduct directed toward the spouse be part of the charges. Therefore if the evidence offered to prove the offense includes evidence of an injury to the spouse, then no privilege exists to shield that spouse's testimony.

Perhaps the most profound change in this branch of the privilege is the change in which spouse holds the privilege. The proposed F.R.E. 505 would have the party spouse as the holder, and the Manual gave the privilege to both spouses, but the United States Supreme Court, in the case of *Trammel v. United States*,⁶³ limited the privilege to the witness spouse only. The M.R.E. codifies the *Trammel* position. Rule 504(a) simply states, "A person has a right to refuse to testify against his or her spouse." In the majority opinion in *Trammel*, Mr. Chief Justice Burger wrote, "This modification—vesting the privilege in the witness spouse—furtheres the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."⁶⁴

Rule 504, M.R.E., contains no waiver provision, and the general waiver provision of Rule 510 applies only to confidential communications. It is unclear how the waiver mechanism for the spousal competency privilege operates. Under the old chapter XXVII of the Manual, the scope of cross-examination was limited

⁶²As Dean Wigmore wrote, "That adultery by one spouse is an offense against the other is conceded in good morals and ought to be plain in law." 8 J. Wigmore, Evidence § 2239, note 78, *supra*. The same argument could be extended to all sexual offenses involving third parties, as the Army Court of Military Review wrote in *United States v. Parker*, *supra* n. 15: "Nor is the injury contemplated limited to physical violence upon the witness-spouse but extends to mental suffering arising from violations of the marriage relationship as in the offenses of adultery and bigamy."

⁶³U.S. , 63 L.Ed.2d 186, 100 S. Ct. 906 (1980).

⁶⁴*Id.*, 63 L.Ed.2d at 196, 100 S. Ct. at 914 (1980).

generally to the matters covered by direct examination.⁸¹ Likewise a spouse who testified on behalf of the other was subject to cross-examination, provided the cross-examination was limited to the issues testified to on direct, and to the question of credibility.⁸² Rule 611(b) of the M.R.E. limits the scope of cross to the subject matters of direct examination, but allows the military judge to permit "inquiry into additional matters as if on direct."⁸³ In relation to the former practice, the new rule would seem to make waiver of the competency privilege occur when the witness spouse voluntarily testifies either as a favorable or adverse witness.

In sum, the spousal competency branch adopted in the M.R.E. is the privilege of a witness spouse to refuse to give testimony adverse to the accused spouse, during the existence of a bona fide marriage and limited by an injury exception that focuses upon personal or property injury rather than upon injury to the marital relationship.

B. THE CONFIDENTIAL COMMUNICATIONS BRANCH

The military version of this branch of the marital privilege, both before and after adoption of the M.R.E., is essentially the same privilege for interspousal confidences found at common law. Unlike the competency branch, which when properly invoked bars all adverse testimony, this branch shields only confidential disclosures or communications made while the parties were mar-

⁸¹"[Cross-examination] should, in general, be limited to the issues concerning which the witness has testified on direct examination and the question of his credibility." Manual for Courts-Martial, *supra* note 5, para. 149b(1), at page 27-54.

⁸²"If an accused's spouse testifies in his favor, the privilege may not be asserted by either spouse upon cross-examination of the spouse who has so testified, provided the cross-examination is limited to the issues concerning which the spouse has testified on direct examination and the question of the credibility of the spouse." *Id.*, para. 148e. See also D. Fontanella, Privileged Communications: The Personal Privileges, 37 Mil. L. Rev. 155, 193 (1 July 1967).

⁸³Rule 611(b), Mil R. Evid., reads as follows:

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

ried, "the nature of which would betray conjugal confidence and trust."³⁴ A "communication" may be an utterance or a writing, but does not include conduct unless the conduct is intended as a substitute for an utterance.³⁵ Such confidential communications, under the Manual and the M.R.E., are privileged from disclosure for a duration unlimited by the continuance of a marital relationship.³⁶

The only exceptions or limitations placed upon the privilege by former chapter XXVII of the Manual were that: (1) an accused spouse could compel disclosures by the witness spouse notwithstanding the fact that the witness was the communicator and hence the theoretical holder of the privilege, and (2) a person outside the protected relationship could be compelled to testify concerning any presumably confidential communication he or she overheard, whether by accident or design.³⁷ Rule 504 expressly

³⁴United States v. McDonald, 32 C.M.R. 689 (N.C.M.R. 1962).

³⁵J. Munster & M. Larkin, *supra* note 81, § 8.6 at page 310.

³⁶"The privilege does not terminate upon a breach in the marital relation but lives on in perpetuity, as does the attorney-client privilege." Fontanella, *supra* note 92, at 182.

Mil. R. Evid. 504(b)(1) states in part: "A person has a privilege during and after the marital relationship to refuse to disclose . . . any confidential communication."

³⁷Para. 151 b(2) of the Manual, *supra* note 5, explained the two exceptions or limitations upon the privilege of confidential spousal communications as follows:

The privilege pertaining to confidential communications between husband and wife will not prevent allowing or requiring such a communication to be disclosed at the request of the spouse to whom the communication was made if that spouse is an accused, and this is so even when the spouse who made the communication objects to its disclosure.

The privilege pertaining to privileged communication between husband and wife, client and attorney, or penitent and clergyman, which is based on a recognition of the public advantage that accrues from encouraging free communication in these circumstances, will not prevent allowing or requiring a person outside the privileged relationship who either by accident or design gained knowledge of the communication to testify concerning it, nor will it prevent the reception in evidence of a writing containing the communication which was obtained by such a person either by accident or design. But see 152. However, this exception to the general rule does not apply if the person outside the privileged relationship who gained knowledge of the privileged communication or who obtained the writing containing it did so, as to a communication between husband and wife, with the connivance of the spouse to whom the communication was made, or, as to a communication between client and attorney or penitent and clergyman, with the connivance of the attorney or clergyman or agent thereof or in any other manner not reasonably to be anticipated by the client or penitent.

adopts the first of these two limitations⁹⁸ and by so doing effectively makes the accused spouse the holder of the privilege regardless of the accused's role in the communication.⁹⁹ However, the working of Rule 504(b)(1), taken together with Rule 511, apparently rejects the second limitation allowed by chapter XXVII.

According to the general provision of the rule, a person may not only refuse to disclose, but may also "prevent another from disclosing"¹⁰⁰ any confidential communication made to his or her spouse. Rule 511 states that, even if a holder of the privilege has disclosed the privileged matter to another, if such disclosure was "compelled erroneously or was made without an opportunity . . . to claim the privilege,"¹⁰¹ such disclosure does not constitute a waiver of the privilege. When considered in tandem, these two provisions clearly permit an accused to seal the lips of a stranger to the marriage who has overheard or obtained knowledge of the subject matter of a communication intended to be confidential.

Another change in the new rule is the creation of an injury exception for the confidential communications branch where none existed previously. In the old chapter XXVII, the injury exception was included only in the paragraph dealing with the competency of witnesses,¹⁰² and the courts treated this as creating no injury exception for the admissibility of confidential communications.¹⁰³ Rule 504(c), however, extends to the confidential communications branch the same injury exception which applies to the spousal competency privilege.¹⁰⁴

⁹⁸Rule 504(b)(3), Mil. R. Evid., *supra* note 69.

⁹⁹This represents a departure from the traditional construction of the privilege, which considered the communicator to be the holder regardless of whether he or she was the witness or accused. See C. McCormick, *supra* note 45, § 83; 8 Wigmore, *supra* note 78, § 2340.

¹⁰⁰Rule 504(b)(1), Mil. R. Evid., *supra* note 69.

¹⁰¹Rule 511(a), Mil. R. Evid., *supra* note 54.

¹⁰²Manual for Courts-Martial, *supra* note 5, at para. 148e. No injury exception to the privilege of confidential spousal communications is to be found in para. 151b(2), *supra* note 97.

¹⁰³C.M. 325 636, Devine, 74 B.R. 387 (1947); Oldham, Privileged Communications in Military Law, 5 Mil. L. Rev. 17 (1 July 1959).

¹⁰⁴Mil. R. Evid. 504(c)(2)(A), (B), & (C). For the text of these provisions, see notes 82 and 85 and the text at note 86, *supra*.

One unusual aspect of the marital privilege, under the old as well as the new practice, not found in either the F.R.E. or Uniform Rules of Evidence, deserves brief mention at this point. That feature is the proviso that the mere fact that the parties are not living together when the confidential communication is made does not change the privileged nature of the communication.¹³⁵ This provision is obviously a recognition of the fact that military service often requires periods of long separation of spouses, and that it is therefore neither fair nor logical to condition the marital privilege upon cohabitation.

The topic of waiver for confidential communications and the application of Rule 510 is discussed hereafter in depth in Part IX.

VI. RULES 505 AND 506: CLASSIFIED INFORMATION AND GOVERNMENTAL INFORMATION

The United States Supreme Court, in the *Reynolds* case,¹³⁶ held that an evidentiary privilege exists whereby the government may withhold or prevent the disclosure of military and state secrets. Like the privilege of concealment of the identity of police informants,¹³⁷ such a privilege in the hands of the party bringing a criminal prosecution is fraught with potential for abuse and must be carefully controlled. Most of the text of Rules 505 and 506 of the M.R.E. are devoted to the procedures to be employed in determining whether a claim of privilege is to be denied and, when a claim is denied, to the procedures applicable for controlling unnecessary disclosure of nonrelevant information. Accordingly, this section focuses both on the procedural aspects of the rules and the substantive nature of the privilege.

¹³⁵The Manual protected confidences between spouses "made while they were husband and wife and not living in separation under a judicial decree." M.C.M. para. 151b(2). The M.R.E. extends the privilege to confidential communications made "while they were husband and wife and not separated as provided by law." Mil. R. Evid. 504(b)(1).

¹³⁶*United States v. Reynolds*, 345 U.S. 1 (1953).

¹³⁷Mil. R. Evid. 507, discussed in part VII of the text of this article. *infra*.

A. THE NATURE OF THE PRIVILEGE

The 1969 Revised Edition of the Manual provided, "Official communications and documents containing military and state secrets . . . are privileged from disclosure in a court-martial proceeding where in the opinion of the head of the executive . . . agency concerned such disclosure would be detrimental to the national interest."¹⁰⁸ This rather broad privilege was strictly controlled by the requirement that nondisclosure of relevant classified material by the government required the government to abandon the prosecution.¹⁰⁹ The government could, however, elect to exclude the public from the trial and appoint members to the court, including counsel, who had sufficient security clearances.¹¹⁰ There was authority for the proposition that, whenever classified information related to the case, even if the document involved was only a classified investigative report, the convening authority had to appoint defense counsel who possessed the requisite security qualifications.¹¹¹

In *United States v. Reyes*,¹¹² the Air Force Court of Military Review held that the defense must be allowed to introduce classified evidence once it has established the relevance and admissibility of the evidence.¹¹³ The government could elect either to permit the introduction of the proffered evidence, or to cease prosecution of the charge to which it related.¹¹⁴ The Court of Military Appeals summed up the government's problem in the case of *United States v. Gagnon*,¹¹⁵ when it held that the military judge was without power to order that highly classified information be made available to defense counsel. As the court observed, "A judge who has made a determination that this hard choice is unavoidable can then recess the trial while the decision is weighed by the convening authority . . ."¹¹⁶

¹⁰⁸Manual for Courts-Martial, *supra* note 5, para. 151B(1). Note that lodging the privilege with the head of the governmental agency concerned is in accordance with *Reynolds*, 345 U.S. 1 at 8.

¹⁰⁹*United States v. Dobr*, 21 C.M.R. 451, 455 (A.C.M.R. 1956).

¹¹⁰*Id.*

¹¹¹*United States v. Craig*, 22 C.M.R. 466, 469 (A.M.C.R. 1956).

¹¹²30 C.M.R. 776 (A.F.C.M.R. 1960).

¹¹³*Id.*, at 787.

¹¹⁴*Id.*

¹¹⁵21 C.M.A. 158, 44 C.M.R. 212 (1972).

¹¹⁶44 C.M.R. at 219.

The M.R.E. deal in much greater detail with the problems involving this privilege. Whereas the Manual made no distinction between classified information and other kinds of privileged governmental information, the new rules do. Rule 505 creates a blanket privilege for classified information when disclosure would be detrimental to the national security.¹⁷ Rule 506 creates a privilege of nondisclosure for governmental information not otherwise required to be disclosed by act of Congress, if disclosure would be "detrimental to the public interest."¹⁸

Rule 505 is in keeping with the substance of the privilege as it has been applied prior to the new rules. By its terms it applies only to information relating to national defense and foreign relations¹⁹ that has been determined to require protection against unauthoriz-

¹⁷Rule 505(a), Mil. R. Evid., states:

(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security.

The government pays a price for the enjoyment of this privilege, however. The first paragraph of the official analysis following the text of Mil. R. Evid. 505 explains succinctly:

Rule 505 is based upon H.R. 4745, 96th Cong., 1st Sess. (1979), which was proposed by the Executive Branch as a response to what is known as the "graymail" problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. The Rule is also based upon the Supreme Court's discussion of executive privilege in *United States v. Reynolds*, 345 U.S. 1 (1953) and *United States v. Nixon*, 418 U.S. 687 (1974). The Rule attempts to balance the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information.

8 M.J. CLXXII (1980). For further discussion concerning graymail, see the article *Graymail and Grayhairs: The Classified and Official Information Privileges Under the Military Rules of Evidence*, by LTC Stephen A. J. Eisenberg, published in *The Army Lawyer* at 9 (Mar. 1981).

¹⁸Rule 506(a), Mil. R. Evid., states:

(a) General rule of privilege. Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

¹⁹This is indicated by the definition of "national security" found in Rule 505(b)(2), Mil. R. Evid.:

(2) *National security*. "National security" means the national defense and foreign relations of the United States.

ed disclosure,¹²⁰ pursuant to an executive order,¹²¹ statute,¹²² or regulation.¹²³ In other words, Rule 505 applies to documents or information that has been properly classified as confidential, secret, or top secret, and to restricted data as defined by the Atomic Energy Act.¹²⁴

By contrast, Rule 506 applies to official communications, documents, and other information, *not otherwise classified*, within the custody or control of the government.¹²⁵ The rule, however, ex-

¹²⁰See the definition of "classified information" in Rule 505(b)(1), Mil. R. Evid.:

(1) *Classified information.* "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in section 2014(y) of title 42, United State Code.

¹²¹Exec. Order No. 12,065, National Security Information, 43 Fed. Reg. 28,949 (1978). See also the executive orders cited in note 122, *infra*, implementing the National Security Act of 1947.

¹²²Several provisions concerning restricted data may be found in the Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 774, *as amended*, codified at 42 U.S.C. §§ 2011-2296 (1976). A definition of restricted data is provided at 42 U.S.C. § 2014(y), and various provisions on classification, declassification, and dissemination of restricted data are collected at 42 U.S.C. §§ 2161-2166.

The National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 496, *as amended*, codified at 50 U.S.C. §§ 401-412 (1976), deals indirectly with protection of governmental information against unauthorized disclosure. At 50 U.S.C. § 401, it is stated to be the intent of Congress, among other things, "to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security." This provision is implemented in part by Exec. Order No. 10,865, Safeguarding Classified Information Within Industry, 25 Fed. Reg. 1583 (1960); by Exec. Order No. 11,652, Classification and Declassification of National Security Information and Material, 37 Fed. Reg. 5209 (1972); and by the National Security Council Directive of May 17, 1972, Classification, Downgrading, Declassification and Safeguarding of National Security Information, 37 Fed. Reg. 10,053 (1972). The text of these and other executive orders and materials is set forth in the United States Code following 50 U.S.C. § 401 (1976).

¹²³See Dept. of Defense Directive No. 5200.1, DOD Information Security Program (Nov. 1978) (also designated DOD 5200.1-R). See also Army Reg. No. 380-5, Department of the Army Information Security Program Regulation (15 Aug. 1979), and the many references listed at Enclosure 1 thereto, pp. J-9 through J-11.

¹²⁴42 U.S.C. § 2014(y) (1976). See discussion at note 122, *supra*.

¹²⁵This is stated at Rule 506(b), Mil. R. Evid., which reads as follows:

(b) Scope. "Government information" includes official communications and documents and other information within the custody or control of the federal government. This rule does not apply to classified information (rule 505) or to the identity of an informant (rule 507).

tends protection only to communications, documents, and information not required by act of Congress to be divulged,¹²⁶ disclosure of which would be "detrimental to the public interest."¹²⁷ This "public interest" privilege is without a counterpart under chapter XXVII of the Manual, which only protected "military and state secrets."¹²⁸ Being without precedent, the "public interest" standard is difficult to pin down, and may involve some very grave constitutional problems.

The *Reynolds*¹²⁹ decision recognized a privilege only for "military and state secrets,"¹³⁰ yet Rule 506 purports to exclude material that is not related to national security. Perhaps the best description of Rule 506 is that it is an assertion of an executive privilege arising out of the implied powers of the President in the exercise of his authority under Article II of the United State Constitution.¹³¹ Such a privilege was asserted by the President and recognized by the Supreme Court in the case of *United States v.*

¹²⁶The statute most likely to apply is the so-called Jencks Act, 18 U.S.C. § 3500 (1976), which requires the government to deliver to the defense any statements or records made by its witnesses that relate to the case. A discussion of the Jencks Act, its history, provisions, and application in military law, may be found in Luedtke, *Open Government and Military Justice*, 87 Mil. L. Rev. 7, 47-51 and notes 188-205 (winter 1980).

¹²⁷Mil. R. Evid. 506(a). See note 118, *supra*.

¹²⁸ b. *Certain privileged communications.* (1) *Military and state secrets, and informants.* Official communications and documents containing military or state secrets, including diplomatic correspondence, are privileged from disclosure in a court-martial proceeding where in the opinion of the head of the executive or military department or government agency concerned such disclosure would be detrimental to the national interest.

Manual for Courts-Martial, *supra* note 5, para. 151811.

¹²⁹*United State v. Reynolds*, 345 U.S. 1 (1953).

¹³⁰345 U.S. at 7.

¹³¹In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court wrote concerning the tension between the search for truth and the need to preserve privileged communications that "[t]he public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common law, or statutory privilege." 408 U.S. at 688. The common law privileges are those involving protected relationships such as attorney-client and husband-wife. Rule 505 is a statutory privilege as it relates to the Atomic Energy Act and National Security Act. See note 122, *supra*. But Rule 506 defines categorization as anything other than assertion of an executive privilege arising out of the president's constitutional functions.

Nixon.¹³² The Court characterized the privilege as applying only to "communications between high Government officials and those who advise them,"¹³³ but added that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations a confrontation with other values arises."¹³⁴ Clearly the greatest problem facing the military judge is that of striking the balance between the due process guarantee of the fifth amendment and confrontation and compulsory process rights of the sixth amendment on the one hand, and the alleged detriment to public interest on the other hand. Certainly the first step is to determine what kind of public interest is involved.

In *United States v. Progressive Inc.*,¹³⁵ where the issue facing the court was whether to enjoin the publication of nuclear weapons design information, a United States district court found as a matter of fact that publication by the defendant of certain restricted data¹³⁶ would result in "direct, immediate, and irreparable damage to the United States."¹³⁷ The balance in that case was between harming the public interest and preserving first amendment guarantees. The guarantees of the fifth and sixth amendments are certainly no less jealously guarded. As the Supreme Court stated in *Nixon*, "[T]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."¹³⁸ Therefore, in order to sustain a claim of "public interest" privilege, the court must find palpable and irreparable damage to the public safety or to the proper conduct of an essential governmental function.¹³⁹

These rather difficult problems may possibly be vitiated by an interpretation of the rule which limits its scope narrowly. By its own

¹³²418 U.S. 683 (1974).

¹³³*Id.* at 705.

¹³⁴*Id.* at 706.

¹³⁵467 F. Supp. 990 (W.D. Wis. 1979).

¹³⁶Notwithstanding the fact that some of the information involved was in the public domain, the court determined that the aggregation and analysis of the information was within the definition of "restricted data" as set forth in the Atomic Energy Act at 42 U.S.C. § 2014(y) (1976). See note 122, *supra*.

¹³⁷467 F. Supp. 990, at 999.

¹³⁸*United States v. Nixon*, 418 U.S. 683, at 713 (1974).

¹³⁹*United States v. Nixon*, 418 U.S. 683 (1974); *Reynolds v. United States*, 345 U.S. 1 (1953).

provisions the rule does not protect information required to be disclosed by Act of Congress.¹⁴⁰ The Jencks Act¹⁴¹ requires the disclosure of prior statements of government witnesses. Thus material required to be disclosed by the Jencks Act is beyond the scope of the rule. In addition, evidence favorable to the defense is constitutionally required to be disclosed to the defense where such evidence is material to the issues of guilt or punishment.¹⁴² Rule 16 of the Federal Rules of Criminal Procedure¹⁴³ exempts from defense discovery only items not material and the work product of government counsel.¹⁴⁴ Finally, Rule 506 itself requires the government to produce material concerning which a claim of privilege has been made, if the requesting party has demonstrated its relevance.¹⁴⁵ The penalty for failing to produce the requested evidence is dismissal of the pertinent charge by the military

¹⁴⁰Mil. R. Evid. 506(a). See note 118, *supra*.

¹⁴¹18 U.S.C. § 3500. See note 126, *supra*.

¹⁴²See e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Augure*, 427 U.S. 97 (1976); cf. *United States v. Giglio*, 405 U.S. 150 (1972) (evidence relating to credibility required to be disclosed).

¹⁴³Fed. Rules Cr. Proc. 16, 18 U.S.C., Appendix. The Federal Rules of Criminal Procedure are applicable in courts-martial to the extent not otherwise provided by the Manual. U.C.M.J. art. 36, 10 U.S.C. § 836 (1976); see *United States v. Batchelor*, 19 C.M.R. 452 (A.C.M.R. 1955).

¹⁴⁴Under Rules 16(a)(1)(C) and (D), Fed. R. Crim. Proc., *supra* note 143, the defendant is guaranteed access to documents, tangible objects, and reports of examinations and tests "within the possession, custody or control of the government," if they "are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial." There is no requirement of materiality for access by the defendant to statements of the defendant or to the defendant's prior criminal record in the hands of the government, under Rules 16(a)(1)(A) and (B).

Under Rule 16(a)(2), the defendant is not authorized to discover or inspect "reports, memoranda, or other internal government documents made by the attorney for the government or other governmental agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500."

¹⁴⁵The standard is stated in Rule 506(i)(4)(B), Mil. R. Evid., as follows:

(B) *Standard.* Government information is subject to disclosure under this subdivision if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence of the accused and otherwise admissible in the court-martial proceeding.

Mil. R. Evid. 506(i) deals with in camera proceedings concerning government information other than classified information.

judge.¹⁴⁶ In light of these restrictions, the argument could be made that the exceptions, necessary to preserve its constitutionality, have swallowed up the rule.

What this indicates is that Rule 506 is not a rule of evidence or a privilege at all. Rather it is a procedural rule regulating the discovery of certain kinds of evidence. It establishes procedures to be followed in determining whether discovery is necessary,¹⁴⁷ regulating the manner of disclosure to the accused¹⁴⁸ and limiting

¹⁴⁶This is set forth in Rule 506(i)(4)(D), Mil. R. Evid.:

(D) *Sanction.* If the military judge makes a determination under this subdivision that permits disclosure of the information and the government continues to object to disclosure of the information, the military judge shall dismiss the charges or specifications or both to which the information relates.

¹⁴⁷The procedures to be followed for in camera proceedings are described in Rule 506(i)(4)(A), as follows:

(4) *In camera proceeding.*

(A) *Procedure.* Upon finding that the disclosure of some or all of the information submitted by the government under subsection (1) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the government shall provide the accused with notice of the information that will be at issue. This notice shall identify the information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. *The government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the specific information of concern to the government when the government has not previously made the information available to the accused in connection with pretrial proceedings.* Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to commencement of the relevant proceeding.

¹⁴⁸Disclosure is discussed in Rule 506(g), Mil. R. Evid.:

(g) Disclosure of government information to the accused. If the government agrees to disclose government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed.

the unnecessary revelation of sensitive information.¹⁴⁸

Rule 505 cannot be similarly characterized. As previously noted, a governmental privilege for state and military secrets is well

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) Regulating the making and handling of notes taken from material containing government information; or

(6) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

¹⁴⁸Procedures for protecting government information used as evidence are set forth in Rules 506(j) and (k). Mil. R. Evid., as follows:

(j) Introduction of government information subject to a claim of privilege.

(1) *Precautions by military judge.* In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph, with excision of some or all of the government information contained therein.

(2) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) *Taking of testimony.* During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and material to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(k) Procedures to safeguard against compromise of government information disclosed to courts-martial. The Secretary of Defense may prescribe procedures for protection against the compromise of government informa-

recognized. In addition, Rule 505 is distinguished from Rule 506 by the provisions of Rule 505 for alternatives to full disclosure,¹⁶⁰ and by the requirement that the military judge must find material prejudice to a substantial right to the accused before dismissal is allowed.¹⁶¹

B. PROCEDURAL REQUIREMENTS

Because the procedural implications of Rules 505 and 506 are nearly identical, this discussion will focus on Rule 505, pointing out those areas where the rules differ.

tion submitted to courts-martial and appellate authorities after a claim of privilege.

¹⁶⁰These provisions are set forth in Rule 505(i)(4)(D), as follows:

(D) *Alternatives to full disclosure.* If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the government elects not to contest the relevance, materiality, and admissibility of any classified information, the government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

¹⁶¹This provision appears at the end of Rule 505(f), Mil. R. Evid.:

(f) *Action after referral of charges.* If an claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the classified information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charge or specifications or both to which the information relates; or

(4) take such other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

Prior to the referral of charges,¹⁵² any request for discovery of classified information made by the accused must be answered by the convening authority if a claim of privilege is to be made.¹⁵³ Notwithstanding the provision of subparagraph (c), that the holder of the privilege (the convening authority) may authorize a witness or trial counsel to assert the government's claim,¹⁵⁴ prior to referral the convening authority must personally act. The rule not only allows the convening authority to withhold disclosure,¹⁵⁵ but also

¹⁵²"Referral" is the process of placing the charges before a court-martial for trial. Referral of the charges by competent authority (a commander exercising special or general court-martial convening authority) is a jurisdictional requirement. See Manual for Courts-Martial, *supra* note 5, at paras. 33j and 35s.

¹⁵³Mil. R. Evid. 505(d) states:

(d) Action prior to referral of charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. The convening authority may:

(1) Delete specified items of classified information from documents made available to the accused;

(2) Substitute a portion or summary of the information for such classified documents;

(3) Substitute a statement admitting relevant facts that the classified information would tend to prove;

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(5) Withhold disclosure if action under (1) through (4) cannot be taken without causing identifiable damage to the national security.

Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

¹⁵⁴This is explained at Mil. R. Evid. 505(c), as follows:

(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

¹⁵⁵Mil. R. Evid. 505(d)(5). See note 153, *supra*.

provides him or her with alternatives to full disclosure,¹⁵⁶ and empowers him to regulate disclosure so as to avoid compromise.¹⁵⁷

Rule 506 is substantially similar to Rule 505 in its pre-referral procedures. The only significant difference is that the personal action of the convening authority is not required. Instead, the rule is addressed only to "the government."¹⁵⁸ Apparently, an appropriate government representative, exercising the requisite authority, could take the actions allowed by this section. Such an official could be the staff judge advocate or chief of military justice.

Subdivision (e) of Rule 505, dealing with pretrial sessions, is applicable only after charges have been properly referred. Discussion of such sessions in this article will follow an examination of post-referral options.¹⁵⁹

After the charges have been referred, the convening authority still has the responsibility of taking action. Subdivision (f) allows

¹⁵⁶Mil. R. Evid. 505(d)(1)-(3). See note 153, *supra*.

¹⁵⁷Mil. R. Evid. 505(d)(4). See note 153, *supra*.

¹⁵⁸The text of Mil. R. Evid. 506(d) is as follows:

(d) Action prior to referral of charges. Prior to referral of charges, the government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The government shall:

(1) delete specified items of government information claimed to be privileged from documents made available to the accused;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in subdivision (g) of this rule; or

(5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the public interest.

See note 153, *supra*, for the text of the analogous provision of Rule 505.

¹⁵⁹Rule 506 arranges these subdivisions in reverse order from Rule 505. This might indicate a transpositional error. It is this author's opinion that Rule 505 could be corrected so as to present the material in a more orderly fashion.

the convening authority to dismiss the charges in lieu of disclosure,¹⁶⁰ or make the material available to the military judge¹⁶¹ so that a determination can be made as to the relevance and admissibility of the desired evidence¹⁶² as well as its relationship to national security.¹⁶³ Should the convening authority continue to withhold the evidence, and not dismiss the charges, then the military judge, upon a finding of material prejudice to a substantial right of the accused, may order the charges dismissed.¹⁶⁴ This

¹⁶⁰Mil. R. Evid. 505(f)(2) and (3). See note 151, *supra*.

¹⁶¹Mil. R. Evid. 505(f)(1). See note 151, *supra*.

¹⁶²The requirements for such a determination are set forth in Rules 505(i)(4)(B) and (C), Mil. R. Evid., as follows:

(B) *Standard.* Classified information is not subject to disclosure under this subdivision unless the information is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(C) *Ruling.* Unless the military judge makes a written determination that the information meets the standard set forth in (B), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the *in camera* proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

¹⁶³The requirement for this showing is set forth in Rule 505(i)(3), Mil. R. Evid., as follows:

(3) *Demonstration of national security nature of the information.* In order to obtain an *in camera* proceeding under this rule, the government shall submit the classified information for examination only by the military judge and shall demonstrate by affidavit that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

¹⁶⁴This power is given to the military judge at the end of Rule 505(f), Mil. R. Evid. See note 151, *supra*, for the text of the rule. The analogous provisions of Rule 506 differ from these provisions of Rule 505, in that the accused must demonstrate a specific need for the information. Mil. R. Evid. 506(i)(4)(B); see note 145, *supra*. The judge may dismiss the charges after a reasonable time has elapsed, without a showing of material prejudice:

(e) *Action after referral of charges.* After referral of charges, if a claim of privilege has been made under this rule with respect to government information that apparently contains evidence that is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i);

represents a broadening of the military judge's powers over the former practice wherein all decisions with respect to compliance or dismissal rested with the government.¹⁶⁵

Subdivision (e) requires that matters concerning claims of privilege under 505(a) be litigated at a pretrial session conducted in accordance with Article 39(a) of the Code.¹⁶⁶ The rule allows the military judge to hold such a hearing upon application of either party or upon his own motion.

Subdivision (g) empowers the military judge to regulate the manner and extent of disclosure agreed to be made by the government. Upon government motion the military judge may enter a protective order to safeguard the classified information from unauthorized disclosure,¹⁶⁷ or may make a determination to limit the amount of

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

Mil. R. Evid. 506(e). This difference in the threshold requirement substantiates the author's contention that 506 is more of a rule of discovery than a rule of privilege.

¹⁶⁵Unites States v. Gagnon, 21 C.M.A. 158, 44 C.M.R. 212 (1972).

¹⁶⁶Mil. R. Evid. 505(e), note 164, *supra*. An article 39(a) session is an out-of-court hearing at which the accused and counsel for both sides are present. Testimony may be taken and the proceedings are made part of the record. For detailed discussion of the procedures followed under Art. 39(a), see Manual for Courts-Martial, *supra* note 5, para. 53d(1).

¹⁶⁷Mil. R. Evid. 505(g)(1), which lists the measures which the military judge may take:

(g) Disclosure of classified information to the accused.

(1) *Protective order.* If the government agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;

governmental disclosure.¹⁶⁸ In this regard the judge's options include deletion or excision of portions of the classified material made available,¹⁶⁹ substitution of information summaries in lieu of the actual material,¹⁷⁰ or substitution of stipulations of fact in lieu of the actual material.¹⁷¹ In making his determination that limited disclosure is appropriate, the military judge may consider the government's motion, and any material submitted in support thereof, outside the presence of the accused. The material available to the judge would presumably include the classified material itself, provided by the convening authority in accordance with paragraph (f)(1) of the rule. The Supreme Court endorsed such in

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(D) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

¹⁶⁸Three types of limitations on disclosure are set forth in Mil. R. Evid. 505(g)(2), as follows:

(2) *limited disclosure*. The military judge, upon motion of the government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The government's motion and any materials submitted in support thereof shall, upon request of the government, be considered by the military judge in camera and shall not be disclosed to the accused.

¹⁶⁸Mil. R. Evid. 505(g)(2)(A), *id.*

¹⁶⁹Mil. R. Evid. 505(g)(2)(B), *supra* note 168.

¹⁷¹Mil. R. Evid. 505(g)(2)(C), *supra* note 168.

camera evaluation by the trial court in the *Nixon*¹⁷² case, and commented on the necessity of preserving the secrecy of nonrelevant material excised from the whole.¹⁷³

Rule 506(g) provides only for the issuance of protective orders by the military judge. It does not authorize limited disclosure, nor does it address Jencks Act¹⁷⁴ requests as provided in Rule 505(g)(3).

Rule 505(g)(3) provides that, whenever the government asserts a Rule 505 privilege in response to a Jencks Act request¹⁷⁵ by the defense, the military judge shall examine the privileged material in camera and outside the presence of the accused.¹⁷⁶ The military judge is required to determine, in his in camera examination, whether the material is properly classified¹⁷⁷ and whether the statement is consistent with the witness's in-court testimony. If the judge determines the classified portion to be consistent with the

¹⁷²United States v. Nixon, 418 U.S. 687 (1974).

¹⁷³ It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought.

418 U.S. at 714.

¹⁷⁴18 U.S.C. § 3500 (1976).

¹⁷⁵The Jencks Act makes statements prepared by government witnesses subject to discovery by the defense. See note 126, *supra*.

¹⁷⁶Mil. R. Evid. 505(g)(3)(B), which reads as follows:

(B) *Closed session.* If the privilege in this rule is invoked during consideration of a motion under section 3500 of title 18, United States Code, the government may deliver such statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. With such material excised, the military judge shall then direct delivery of such statement to the accused for use by the accused. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony, the government may move for a proceeding under subdivision (i).

¹⁷⁷Rule 505(g)(3)(B), *id.*, provides that the judge must find "that disclosure of any portion of the statement identified by the government as classified could reasonably

witness's in-court testimony, he may order excision of the classified portion prior to delivery to the defense. If the material is determined to be inconsistent with the in-court testimony, the government must litigate its claim in a closed Article 39(a), U.C.M.J., session as provided by Rule 505(i).¹⁷⁸

Before disclosing any classified material in connection with a court-martial, the defense must provide the government adequate notice.¹⁷⁹ Failure to comply with this notice requirement may result in the military judge prohibiting the introduction by the defense of

be expected to cause damage to the national security *in the degree required to warrant classification under the applicable executive order, statute, or regulation.*" (Emphasis added.)

Two inferences may be drawn from this language. First, the judge could determine that material that is not classified meets the criteria established for classification and is therefore the proper subject of a claim of privilege. And second, the military judge could determine that the material is improperly classified; that the criteria established by executive order, statute, or regulation, have not been met. As to the first inference, Rule 505(a), note 118, *supra*, and Rule 505(b)(1), note 120, *supra*, combine to negate it. Rule 505(a) creates a privilege only for "classified information," which is defined by 505(b)(1) as material "that has been determined . . . to require protection against unauthorized disclosure." Clearly this means that material must be classified to be subject to the privilege.

The second inference remains. The judge could, upon inspection, determine that the material is not properly classified and that the privilege does not apply. This apparently substitutes a judicial determination for an administrative one. Notwithstanding the problems associated with this blurring of the separation of the judicial and executive functions the wording of the rule clearly empowers the military judge to effectively declassify material he determines not to warrant classification.

This same language is used in Rule 505(i)(3) and will be dealt with again. See note 163, *supra*.

¹⁷⁸Mil. R. Evid. 505(g)(3)(B), note 176, *supra*. "In camera proceeding" is defined at Rule 505(i)(1) as follows:

(1) *Definition.* For purposes of this subdivision, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.

¹⁷⁹The notice requirement is set forth in Rule 505(h):

(h) Notice of the accused's intention to disclose classified information.

(1) *Notice by the accused.* If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision (e) or, if no time has been specified, prior to arraignment of the accused.

classified evidence or testimony.¹⁸⁰ Rule 506 merely prohibits defense disclosure until the government has been afforded an opportunity to assert its privilege.¹⁸¹

Subdivision (i) of each of the two rules provides for litigation on the merits of the government's privilege claim at an Article 39(a) session closed to the public. Before we examine the details of this provision, an examination of the constitutionality of such hearings is appropriate, in light of *Richmond Newspapers Inc. v. Virginia*.¹⁸² Later we will consider Rule 505(j)(5), which permits the exclusion of the public from in-court sessions involving the introduction of classified material.

In the *Richmond Newspapers* case, the Supreme Court was called upon to decide whether the public and press had a right to attend criminal trials.¹⁸³ The majority opinion distinguished the court's decision in *Gannett Co. Inc. v. DePasquale*¹⁸⁴ as dealing solely with the exclusion of the public from *pretrial* suppression hearings. Clearly if the closed article 39(a) session held under the provisions of M.R.E. 505(i) is the result of a pretrial assertion of the privilege, *Gannett* would say it was constitutionally permissible. The problems arise when the 505(i) hearing is held as a result of a motion

(2) *Continuing duty to notify.* Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) *Content of notice.* The notice required by this subdivision shall include a brief description of the classified information.

(4) *Prohibition against disclosure.* The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the government has been afforded a reasonable opportunity to seek a determination under subdivision (f).

(5) *Failure to comply.* If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

¹⁸⁰ Mil. R. Evid. 505(h)(5), *id.*

¹⁸¹ Mil. R. Evid. 506(h), *supra* note 179.

¹⁸² 464 U.S. 893, 65 L.Ed.2d 973, 100 S. Ct. 2814 (1980).

¹⁸³ *Id.*, 65 L.Ed.2d at 978, 100 S. Ct. at 2818.

¹⁸⁴ 433 U.S. 368 (1979), discussed at 65 L.Ed.2d 981.

raised after trial has commenced, and when the public is excluded from in-court proceedings under Rule 505(j).

Richmond Newspapers does not create an artificial litmus test by which public access to criminal trials is to be measured. In his historical review of the tradition of public trials, the Chief Justice was concerned with the trial as a whole and drew no distinction between sessions held with the jury present and sessions held without the jury.¹⁵⁵ Instead of propounding a test for public access, the Court concludes that the trials of criminal cases are *presumptively* open¹⁵⁶ and may be closed only when "the defendant's superior right to a fair trial, or . . . some other overriding consideration requires closure."¹⁵⁷ Protection of the government's well recognized privilege to safeguard military and state secrets is properly one of the "overriding considerations" justifying the conduct of a proceeding closed to the public.¹⁵⁸

The right of the public to an open trial is grounded in the first and fourteenth amendments.¹⁵⁹ Neither of those amendments mandate public access to governmental information.¹⁶⁰ The right of the accused to access to confidential government information is bottomed upon his rights under the fifth and sixth amendments. By its own terms the rule requires the government to produce or abate when those rights are materially impaired. Therefore while the accused may compel disclosure of confidential information in the in-

¹⁵⁵ U.S. . . , 65 L.Ed.2d 982-85, 100 S. Ct. 2621-2623 (1980).

¹⁵⁶ "[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Id.*, 65 L.Ed.2d at 984, 100 S. Ct. at 2623.

¹⁵⁷ *Id.*, 65 L.Ed.2d at 982, 100 S. Ct. at 2621. "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, but our holding today does not mean the First Amendment rights of the public and representatives of the press are absolute." *Id.*, 65 L.Ed.2d at 992, 100 S. Ct. at 2630, n. 18 (citations omitted).

¹⁵⁸ See *United States v. Nixon*, 418 U.S. 683 (1974); *Reynolds v. United States*, 345 U.S. 1 (1953).

¹⁵⁹ *Richmond Newspapers, Inc. v. Virginia*, . . . U.S. . . , 65 L.Ed.2d 973, 992, 100 S. Ct. 2814, 2829 (1980).

¹⁶⁰ *Houchkins v. KQED, Inc.*, 438 U.S. 1 (1978).

terest of a fair trial, the government may still protect itself from unreasonable compromise by closing the doors of the court to the public.

Before the military judge convenes an "in camera proceeding" under Rule 505(i), the government must demonstrate to the military judge that its claim of privilege is properly taken.¹⁹¹ This requires, as does subdivision (g) concerning Jencks Act motions, that the military judge determine whether the information involved is properly classified.¹⁹² This not only calls for a substitution of the judge's assessment of the national security value of the information for the classifying authorities' assessment, it also requires the judge to make a determination for which his training may not have equipped him. Also raised, but not resolved, is the question of whether the military judge may determine that the nation's security is not implicated and may sua sponte order declassification.

Notwithstanding what the rule does not resolve, it clearly does give the military judge the authority to make the following determinations: He may determine the information to be irrelevant to an element of the offense or to a legally cognizable defense, and exclude the evidence. He may determine the evidence to be relevant but inadmissible. He may conclude that the evidence is relevant, admissible, and properly classified (therefore privileged). Or he may determine that the evidence is relevant and admissible but not properly classified (therefore not privileged).¹⁹³ It is with these last two options that we are concerned.

If the relevant and admissible evidence is privileged, the military judge may permit the government to elect an alternative to full disclosure¹⁹⁴ unless the interest of fairness requires otherwise.¹⁹⁵ If the relevant and admissible evidence is not privileged, then no alternatives to full disclosure are available. Should the judge determine that full disclosure is required, and the govern-

¹⁹¹ Mil. R. Evid. 505(i)(4)(A).

¹⁹² Note 177, *supra*.

¹⁹³ Mil. R. Evid. 505(i)(4)(A), *supra* note 191. Mil. R. Evid. 505(i)(4)(B), *supra* note 162.

¹⁹⁴ Mil. R. Evid. 505(i)(4)(D), *supra* note 150. The government may submit a stipulation of fact or summary of the information to be used in lieu of the actual information.

¹⁹⁵ *Id.*

ment does not comply, a variety of sanctions are available to him, including dismissal of charges.¹⁹⁶ Rule 506 does not have any corresponding provisions allowing for alternatives to full disclosure.¹⁹⁷ Nor does it provide for sanctions other than dismissal.¹⁹⁸

In addition to allowing for closed trial sessions,¹⁹⁹ subdivision (j) contains other provisions designed to prevent the unnecessary compromise of privileged matter, the most important of which is (j)(3),²⁰⁰ an exception to the best evidence rule.²⁰¹ This provision permits the military judge to allow introduction into evidence of proof

¹⁹⁶The permissible sanctions are described in Rule 505(i)(4)(E), Mil. R. Evid., as follows:

(E) *Sanctions.* If the military judge determines that alternatives to full disclosure may not be used and the government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

- (i) striking or precluding all or part of the testimony of a witness;
- (ii) declaring a mistrial;
- (iii) finding against the government on any issue as to which the evidence is relevant and material to the defense;
- (iv) dismissing the charges, with or without prejudice; or
- (v) dismissing the charges or specifications or both to which the information relates.

Any such order shall permit the government to avoid the sanction for non-disclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

¹⁹⁷Mil. R. Evid. 506(i)(4)(C), *supra* note 162.

¹⁹⁸Mil. R. Evid. 506(i)(4)(D), *supra* note 150.

¹⁹⁹This is provided in Rule 505(j)(5), as follows:

(5) *Closed session.* If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.

²⁰⁰The text of rule 505(j)(3) is as follows:

(3) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

²⁰¹The best evidence rule as it appears in the Military Rules of Evidence is Rule 1002, which reads as follows:

of the content of a privileged writing, recording, or photograph without requiring introduction of the original. The previous chapter XXVII of the Manual allowed the head of an executive agency or military department to substitute a summary in lieu of the original if a determination was made that disclosure of the original would result in "detriment to the public interest."²⁰² The authority to determine whether a summarized exhibit will be admitted under the M.R.E. now rests instead with the military judge.

Rule 506(j) is substantially similar to 505(j) and also adopts an exception to the best evidence rule.²⁰³ It does not allow for closed trial

REQUIREMENT OF AN ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, this Manual, or by Act of Congress.

The official analysis following the text of the rule is set forth here in part:

Rule 1002 is taken verbatim from the Federal Rule except that "this Manual" has been added in recognition of the efficacy of other Manual provisions. The Rule is similar in scope to the best evidence rule found in para. 143a(19) of the present Manual except that specific reference is made in the rule to recordings and photographs. Unlike the present Manual, the Rule does not contain the misleading reference to "best evidence" and is plainly applicable only to writings, recordings, or photographs.

²⁰²The former Manual provision states in relevant part:

(d) *Summaries of official records.* If the head of an executive or military department or independent governmental agency determines that it would be detrimental to the public interest to disclose the text or informational source of a certain official record kept under the authority of the department or agency, a properly authenticated (143b(2)(f)) certificate or statement signed by him, or by his deputy or assistant, setting forth a summary of the record is as admissible in evidence as the record itself, provided that the certificate or statement contains a statement to the effect that the above-mentioned determination was made.

Manual for Courts-Martial, *supra* note 5, at para. 143a(2)(d).

²⁰³This exception is set forth in Rule 506(j)(2):

(2) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

sessions nor does it permit the record of trial to be classified.²⁰⁴

In sum, the new classified information privilege confers upon the military judge greater authority and flexibility than he or she enjoyed under the former practice. Along with this expanded authority comes the threat of blurring the separation between the judicial and executive functions by substituting the judgment of one for the other. The procedures established in the M.R.E. are an excellent attempt to balance the competing interests of the government and accused. Yet the military judge should be mindful of the public's right to open access to criminal trials and he should consider that right before ordering that the proceedings be closed.

Rule 506 does not really establish a public interest privilege for the government. Rather it provides the judge and the accused with procedures to be followed when sensitive, nonclassified information is sought to be discovered. It also provides guidelines to determine when the government will be forced to produce such evidence or abate the prosecution.

VII. RULE 507: INFORMERS

American jurisprudence has long recognized the need to shield the identity of police informants to encourage free disclosure to law

²⁰⁴In contrast, Rule 505 does provide for both steps. Closed sessions are authorized by Rule 505(j)(5), note 199, *supra*. Classification of trial records is covered by Rule 505(j)(6), as follows:

(6) *Record of trial.* The record of trial with respect to any classified matter will be prepared under paragraph 82*d* of this Manual.

Para 82*d* of the Manual, *supra* note 5, reads as follows:

d. Security classification. When the record contains information which is required to be classified by the security regulations of the armed force concerned, the trial counsel will take appropriate action in accordance with pertinent regulations to assign a proper security classification to the record. However, convening authorities, staff judge advocates, and legal officers will be on the alert to downgrade or declassify a record of trial which does not contain data requiring security protection. If the papers accompanying the record of trial include classified matter which is not material to the inquiry, this matter should be withdrawn from the papers to be bound with the record if the withdrawal will permit downgrading or declassification of the record. If the accompanying papers include classified matter which is material to the inquiry, action should be taken to have this matter declassified or downgraded when that action is possible and will permit downgrading or declassification of the record.

enforcement authorities.²⁰⁵ As originally expressed this privilege extended not only to the identity of the informer but to all communications between the informer and the police.²⁰⁶ When the Manual was first published it adopted this view and granted to informants' communications a status equal to that of the deliberations of courts and juries, and of diplomatic correspondence.²⁰⁷ But as the policy underlying the rule, to protect the informant from future dire consequences,²⁰⁸ came into clearer focus, the courts began to shrink the scope of the privilege so that eventually only the informant's *identity* was protected.²⁰⁹

In *Roviaro v. United States*,²¹⁰ the Supreme Court denied the privilege of withholding an informant's identity at trial when the informer was a material participant in the crime²¹¹ or was a witness whose testimony was necessary for a fair determination of the case.²¹² Declining to enunciate a fixed rule, the Court adopted a balancing test in which the need for secrecy is weighed against the defendant's right to prepare his defense, by considering the crime

²⁰⁵*Vogel v. Gruaz*, 110 U.S. 311 (1884).

²⁰⁶*Id.* at 315.

²⁰⁷The 1951 edition of the Manual for Courts-Martial states the following concerning informant's communications:

b. Certain privileged communications.—(1) State secrets and police secrets.—Communications made by informants to public officers engaged in the discovery of crime are privileged. The deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged. Diplomatic correspondence is privileged and, in general, so are all oral and written official communications the disclosure of which would, in the opinion of the head of the executive or military department or independent governmental agency concerned, be detrimental to the public interest.

The privilege that extends to communications made by informants to public officers engaged in the discovery of crime may be waived by appropriate governmental authorities. This privilege does not warrant the exclusion from evidence of statements of informants which are inconsistent with, or might otherwise be used to impeach, their testimony as witnesses. See 153b [Impeachment of witnesses].

Manual for Courts-Martial, United States, 1951, para. 151 d(1). See *United States v. Hawkins*, 6 C.M.A. 136, 19 C.M.R. 261 (1955).

²⁰⁸See *C. McCormick*, *supra* note 45, at § 111.

²⁰⁹*Scher v. United States*, 305 U.S. 251 (1938).

²¹⁰353 U.S. 53 (1957).

²¹¹*Id.* at 55.

²¹²*Id.* at 60.

charged, possible defenses, significance of the informer's testimony, and other relevant factors.²¹³ And in *McCray v. Illinois*,²¹⁴ the Court held that, where the issue raised by the defense was the reliability of an informant who served merely as a conduit of information establishing probable cause for a police search, the identity need not be disclosed.²¹⁵ "so long as the magistrate is informed of some underlying circumstances supporting the [officer's] conclusion and his belief that the informant involved whose identity need not be disclosed . . . was credible . . . [or] reliable."²¹⁶

In the 1969 revision of the Manual, paragraph 151 b was rewritten to provide a privilege to the government to withhold disclosure of both an informant's identity and the communications of the informant "to the extent necessary to prevent disclosure of [the informant's] identity."²¹⁷ This change in the Manual reflects not only the evolution of the privilege as expressed in the Supreme Court

²¹³ *Id.* at 62.

²¹⁴ 386 U.S. 300 (1967).

²¹⁵ *Id.* at 305.

²¹⁶ *Id.* at 311, quoting *Aguilar v. Texas*, 378 U.S. 108 (1964).

²¹⁷ See note 128, *supra*, for the opening sentences of the 1969 version of para. 151 b(1) of the Manual. The remainder of that provision, which concerns primarily informants, is as follows:

The deliberations of courts and of grand or petit juries are privileged, but the results of their deliberations are not privileged. The identity of persons supplying information to public officials engaged in the discovery of crime is privileged against disclosure, and the communications of these informants imparting the information are also privileged to the extent necessary to prevent disclosure of the informant's identity.

The privilege pertaining to the identity and communications of informants may be waived by appropriate governmental authorities. This privilege is no longer applicable once the identity of the informant has been disclosed to those who would have cause to resent his communication. Also, the privilege is not applicable with respect to an informant the disclosure of whose identity is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend upon the particular circumstances of each case, taking into consideration the offense charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors. When the prosecution used an informant as a prosecution witness, the privilege pertaining to communications made by informants is waived by the Government with respect to statements or reports of the informant which relate to the subject matter of the testimony of the witness, and therefore the privilege cannot be applied in opposition to an attempt by the defense to discover or disclose such a statement or report of the informant. See 153 b (Impeachment of witnesses). The principles expressed above, however, cannot be applied in opposition to a proper invocation of the privilege pertaining to diplomatic cor-

cases discussed above, but also as followed by military courts.²¹⁸ Subsequent discussion of this topic will focus upon the provisions of Rule 507 of the M.R.E., including a discussion of the general rule and its exceptions, waiver, and the procedures established.

A. THE GENERAL RULE

1. The Nature of the Privilege.

The privilege expressed in Rule 507 is essentially a recapitulation of the holding in *Roviaro*,²¹⁹ that the government has a privilege to withhold disclosure of an informant's identity.²²⁰ The

response or to communications the disclosure of which would, in the opinion of the head of the executive or military department or independent governmental agency concerned, be detrimental to the public interest. In this connection, it should not be considered that the mere fact of disclosure of the communications or identity of informants is, of itself and regardless of the nature of the disclosure, detrimental to the public interest.

However, it should be recognized that invocation of such privilege might, depending upon the circumstances of the case, make it impossible to proceed with the trial where to do so would prejudice the substantial rights of the accused. See 33*f*.

²¹⁸The privilege may be limited only to protect the identity of the informant: *United States v. French*, 10 C.M.A. 171, 27 C.M.R. 245 (1959). The privilege does not extend to situations wherein the informant was an active participant, or when the informant's testimony is necessary for a fair trial: *United States v. Ness*, 13 C.M.A. 18, 32 C.M.R. 18 (1962); *United States v. Skywalk*, 37 C.M.R. 944 (A.C.M.R. 1967). Disclosure is not required where the informant is a mere conduit for information: *United States v. Miller*, 43 C.M.R. 671 (A.C.M.R.), *pet. denied*, 43 C.M.R. 413 (1971).

²¹⁹353 U.S. 53 (1957).

²²⁰The privilege is set forth in Rule 507(a), Mil. R. Evid., as follows:

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information resulting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

The rule is explained as follows in the official analysis:

(a) Rule of privilege. Rule 507(a) sets forth the basic rule of privilege for informants and contains the substance of present Manual paragraph 151b(1). The new Rule, however, provides greater detail as to the application of the privilege than does the present Manual.

rule with respect to communications is stated in the negative: "The communications of an informant are not privileged except to the extent necessary to prevent disclosure of the informant's identity."²²¹ This does not reflect any substantive change in the rule as it has evolved.

One curious aspect of the original statement of the privilege was the definition of the word "informant." The rule as originally published stated, "An 'informant' is a person who has furnished information *resulting in an investigation* of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime."²²² Both the proposed F.R.E. and the Uniform Rules of Evidence define an informant as one who "furnished information relating to or assisting in an investigation."²²³ A question of interpretation was clearly raised.

On the one hand it could be argued that this choice of words bodes nothing new. None of the leading decisions concerning the privilege have focused on whether an investigation was in progress at the time the information was provided. Furthermore, even if a person supplies information to law enforcement officials which is part of a broader inquiry, such information will result in a separate investigation of the facts contained therein. Therefore the M.R.E. merely uses different words to express the same concept.

It could be argued, however, that this definition merely distinguishes an informant or conduit of information from an active participant in the crime, shielding the former but not the latter. This argument would seem to have two weaknesses. First, such a definitional distinction seems to be unnecessary in the face of *Roviaro*²²⁴ and *McCray*.²²⁵ Secondly, such a definitional resolution

The privilege is that of the United States or political subdivision thereof and applies only to information relevant to the identity of an informant. An "informant" is simply an individual who has supplied "information resulting in an investigation of a possible violation of law" to a proper person and thus includes good citizen reports to command or police as well as the traditional "confidential informants" who may be consistent sources of information.

²²¹ *Id.*

²²² *Id.* [Emphasis added.]

²²³ Fed. R. Evid. 510(a) (not enacted); Unif. R. Evid. 509(a).

²²⁴ 363 U.S. 63 (1967).

²²⁵ 386 U.S. 300 (1967).

eliminates the need for an exception dealing with informants whose testimony concerns an issue of guilt or innocence.²²⁶

The counter argument is that the intent of the drafters is clear on the face of the rule. Since this is a privilege held by the state, the rule should be strictly construed against the state. Therefore the only "informant" is a person who provides information where there is no on-going investigation, since only then can the disclosure "result in an investigation." All other police sources of information are "witnesses" and do not have the need for confidentiality. An alternative definition was available in the Uniform Rules and proposed Federal Rules; yet it was rejected in favor of the version at hand. The consequences of such a definition were potentially disastrous.

The problem was brought to the drafter's attention and corrective action has been taken.²²⁷

2. Exceptions

An exception to the government's privilege is made when the informant's identity "is necessary to the accused's defense on the

²²⁶This exception is set forth at Mil. R. Evid. 507(c)(2), as follows:

(2) *Testimony on the issue of guilt or innocence.* If a claim of privilege has been made under this rule, the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

²²⁷On July 3, 1980, the author discussed this problem with Major Fredric I. Lederer, JAGC, then of the Criminal Law Division, Office of The Judge Advocate General, Department of the Army, at the Pentagon. Major Lederer, now an instructor at the Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Va., was at that time a member of the committee that prepared the new military rules.

Major Lederer stated that the intention of the drafters was to mirror the proposed Federal Rule as to the functional definition of "informant." He advised the author that the argument raised was valid and unanticipated, and would have to be ad-

issue of guilt or innocence."²²⁸ This would include not only factual defenses, as implied by the rule, but affirmative defenses as well,²²⁹ and other situations where a full and fair resolution of the case would be made possible by disclosure.²³⁰ In determining whether the necessity exists the military judge is required to apply the balancing test prescribed in *Roviaro*.²³¹ Like all balancing tests this one relies upon uncertain standards, but the more recent cases indicate that something more than mere speculation by the defense is required to trigger this exception to the privilege.²³² Therefore the burden of proving the necessity of disclosure is on the defense, and a claim of necessity must be supported by some credible evidence.

Another exception is created for situations wherein the testimony of the informant is required to determine whether sufficient probable cause existed for the search that resulted in the evidence offered by the government.²³³ This exception is tied procedurally to

dressed by the committee. During a subsequent conversation between the same parties on July 7, 1980, Major Lederer informed the author that, as a result of the 3 July discussion, the committee had included a proposed change to Rule 507(a) in the draft of the then unpublished executive order amending and correcting Exec. Order No. 12,198, *supra* note 6. On Sep. 1, 1980, the president signed Exec Order No. 12,233, 45 Fed. Reg. 58,503 (1980), which amended Rule 507. In substance, the amendment deletes the word "resulting," and substitutes therefor the words "relating to or assisting" in the second sentence of rule 507(a). The text of the amendment is as follows:

1-111. Rule 507(a) of the Military Rules of Evidence is amended by deleting "information resulting in an investigation" and substituting therefor "information relating to or assisting in an investigation" in the second sentence of that rule.

²²⁸Mil. R. Evid. 507(c)(2), *supra* note 226.

²²⁹*United States v. Hawkins*, 6 C.M.A. 135, 19 C.M.R. 261 (1955) (affirmative defense of entrapment required disclosure of informant's identity); compare *United States v. Skywalk*, 37 C.M.R. 944 (A.F.C.M.R.), *pet. denied*, 38 C.M.R. 441 (1967) (evidence of entrapment held insufficient to warrant disclosure).

²³⁰*Roviaro v. United States*, 353 U.S. 53 (1957).

²³¹*Id.* at 62.

²³²*United States v. Bennett*, 3 M.J. 903 (A.C.M.R. 1977), *pet. denied*, 4 M.J. 254; *United States v. Marshall*, 532 F.2d 1279 (9th Cir. 1976). The proposed federal rule would have required the judge before taking action to find "a reasonable probability" that the informant's identity would assist the defense. Fed. R. Evid. 510(c)(2) (not enacted). Although the M.R.E. does not create such a standard, some of the cases suggest that some quantum of evidence has to be offered in support of the defense request for disclosure. See *United States v. Skywalk*, note 229, *supra*.

²³³Mil. R. Evid. 507(e)(3). The text of this provision is set forth below:

motions made under Rule 311 to suppress evidence resulting from unlawful searches. When such a motion has been made the government must show by a preponderance of the evidence that the search was lawful.²³⁴ If the government cannot meet this burden without disclosing the informant's identity, and stands upon its privilege, then the evidence is suppressed.²³⁵ If the government has met its

(2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(3) *Legality of obtaining evidence.* If a claim of privilege has been made under this rule with respect to a motion under rule 311, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the Constitution of the United States as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

The official analysis of this rule explains as follows:

(3) *Legality of obtaining evidence.* Rule 507(c)(3) is new. The Rule recognizes that circumstances may exist in which the Constitution may require disclosure of the identity of an informant in the context of determining the legality of obtaining evidence under Rule 311; *see, e.g., Franks v. Delaware*, 438 U.S. 154, ___ S. Ct. 2674, 2684 (1978); *McCray v. Illinois*, 386 U.S. 300 (1967) (both cases indicate that disclosure may be required in certain unspecified circumstances but do not in fact require such disclosure). In view of the highly unsettled nature of the issue, the Rule does not specify whether or when such disclosure is mandated and leaves the determination to the military judge in light of prevailing case law utilized in the trial of criminal cases in the Federal district courts.

²³⁴This requirement is set forth at Mil. R. Evid. 311(e)(1), as follows:

(e) Burden of proof.

(1) *In general.* When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that evidence was not obtained as a result of an unlawful search or seizure.

²³⁵That is to say, the evidence is assumed to have been unlawfully obtained and is treated accordingly. This results from the application of Rule 311(a), Mil. R. Evid.:

(a) General rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

burden, it seems to be upon the defense to demonstrate that disclosure is necessary. In light of the Supreme Court's decision in *McCray*,²³⁶ the defense must offer some evidence to show that the informant was an "active participant in or witness to the crime charged,"²³⁷ in order to vitiate the privilege. The burden imposed on the defense to overcome the policy supporting nondisclosure in such cases has been characterized as heavy.²³⁸

B. WAIVER

Since the government is the holder of the privilege,²³⁹ certain actions by the government can abrogate the privilege.²⁴⁰ Although the M.R.E. classify these actions as exceptions to the privilege, they are more properly viewed as types of waiver. The acts that constitute waiver are (a) the disclosure of the identity of the informant to "those who would have cause to resent" the informant,²⁴¹ and (b) calling the informant as a prosecution witness.²⁴² These same waivers are found both in paragraph 151*b* of the Manual and in the proposed Federal rules.

The disclosure contemplated by the first branch of the waiver rule is a revelation of the informant's identity to the persons from

²³⁶386 U.S. 300 (1967).

²³⁷*United States v. Skeens*, 449 F.2d 1066, 1071 (D.C. Cir. 1971).

²³⁸*Id.* at 1070.

²³⁹Mil. R. Evid. 507(b). This rule reads as follows:

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the United States, regardless of whether the information was furnished to an officer of the United States or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

²⁴⁰These actions or events are described at Rule 507(c)(1), Mil. R. Evid.:

(c) Exceptions.

(1) a *Voluntary disclosures; informant as witness*. No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or (B) if the informant appears as a witness for the prosecution.

²⁴¹Mil. R. Evid. 507(c)(1)(A), *id.*

²⁴²Mil. R. Evid. 507(c)(1)(B), note 240, *supra*.

whom the informant was intended to be protected. As the Advisory Committee observed in the Federal rules, "disclosure . . . to another law enforcing agency is not calculated to undercut the objects of the privilege."²⁴³ Therefore the fact that the police have shared their information with other law enforcement authorities is not a waiver.

It is interesting to note that disclosure to a hostile person by the informant is binding on the government as a waiver, notwithstanding that it is the government, not the informant, that is the holder of the privilege. The underlying reasoning is perfectly sound. Once an informer has revealed his identity, no policy justification exists for prolonged governmental silence.

The witness branch of the waiver rule is grounded upon the determination that the defense interest in full and fair disclosure is served by the ability to cross-examine all government witnesses. In *Harris v. United States*,²⁴⁴ the Ninth Circuit stated that the defense interest in inquiring into the credibility of adverse witnesses outweighed the government's desire to conceal the fact that its witness was a paid informant. Since the fact of a person serving as an informant bears upon his credibility as a witness, the government waives its privilege by calling him.

C. PROCEDURES

Subdivision (d) of Rule 507 directs the military judge to report to the convening authority for appropriate action the refusal of the government to reveal an informant's identity after the military judge has determined the revelation to be necessary.²⁴⁵ In determin-

²⁴³Fed R. Evid. 510 (not enacted), Advisory Committee's Note.

²⁴⁴371 F.2d 365 (9th Cir. 1967).

²⁴⁵The procedures applicable under Rule 507 are described at Mil. R. Evid. 507(d):

(d) Procedures. If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hear-

ing whether revelation is necessary, the military judge may hold an out-of-court hearing under Article 39(a).²⁴⁶ When insufficient or inconclusive evidence is produced in the 39(a) session, disclosure of the informant's identity may be the only means of determining whether the government claim of privilege is well taken.

This presents a procedural difficulty for the military judge. Article 39(a) requires the presence of the accused and of counsel from both sides.²⁴⁷ Disclosing the informant's identity to the judge in the presence of the accused is hardly a satisfactory way of preserving the government's privilege. Therefore some kind of *in camera* proceeding may be required. This is not the same kind of *in camera* hearing provided for in Rules 505 and 506, however. As previously discussed, those rules define an *in camera* hearing as a 39(a) session that is closed to the public,²⁴⁸ but at which the accused and his counsel are still present.

There is substantial federal case authority for the judge to hold an inquiry in chambers wherein he or she compels disclosure of the informant's identity out of the hearing of the accused.²⁴⁹ This procedure would have been required in federal district courts had the proposed Federal Rule 510 been enacted.²⁵⁰ Given the mandate of Article 36 of the Uniform Code,²⁵¹ to conform military practice to accepted federal practice, this *in camera* procedure could probably be successfully urged upon a military court.

VIII. RULES 508 AND 509: POLITICAL VOTE AND JURY DELIBERATIONS

Rule 508 creates a privilege for which there is no counterpart in prior military practice. The rule provides that the tenor of a per-

ing if requested by either party, may dismiss the charges or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

²⁴⁶ U.C.M.J. art. 39(a), 10 U.S.C. § 839(a)(1976).

²⁴⁷ *Id.*

²⁴⁸ Mil. R. Evid. 505(i)(1), note 178, *supra*.

²⁴⁹ *United State v. Jackson*, 384 F.2d 825 (3d Cir. 1967); *United States v. Day*, 384 F.2d 464 (3d Cir. 1967) (concurring opinion); *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973); *United States v. Fischer*, 531 F.2d 783 (5th Cir. 1976).

²⁵⁰ Fed R. Evid. 510(c)(2) (not enacted).

²⁵¹ U.C.M.J. art. 36, 10 U.S.C. § 836 (1976).

son's political vote is privileged unless the vote was cast illegally.²⁵² No such provision is contained in the superseded chapter XXVII. The new military rule and the proposed federal rule are substantially identical.²⁵³

The likelihood that the rule would find an occasion for application is remote. A person's vote would be relevant should anyone be tried by court-martial for violation of 10 U.S.C. § 593.²⁵⁴ In such a case the tenor of the witness's vote would be relevant to the issue of whether the accused improperly prevented the witness from exercising his franchise.

²⁵²The text of Mil. R. Evid. 508, Political Vote, is as follows:

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

The official analysis explains the source, as follows:

Rule 508 is taken from proposed Federal Rule of Evidence 507 and expresses the substance of 18 U.S.C. § 596 (1976) which is applicable to the armed forces. The privilege is considered essential for the armed forces because of the unique nature of military life.

²⁵³Fed. R. Evid. 507 (not enacted).

²⁵⁴10 U.S.C. § 593. This statute, entitled "Interference by armed forces," reads as follows:

Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

Rule 509, which extends a privilege to the deliberations of courts and juries, is a recodification of a similar privilege in the Manual.²⁵⁵ There is an extremely important exception to this privilege however. That exception, Rule 606, is that a jury member may testify as to whether extraneous prejudicial information or unlawful outside or command influence was involved in the deliberative process.²⁵³

Although the Manual did not expressly provide for such an exception, the case law clearly indicates its existence. Article 37,

This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district. June 25, 1948, c. 645, 62 Stat. 719.

Trial by court-martial would be possible, assuming no intervening jurisdictional defects were present, if the offense was alleged as a violation of art. 134, U.C.M.J., 10 U.S.C. § 934 (1976).

²⁵⁵Manual for Courts-Martial, para. 151b(1), *supra* note 217. The text of Rule 509 is as follows:

DELIBERATIONS OF COURTS AND JURIES

Except as provided in rule 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

²⁵³The exception is spelled out in Rule 606(b), Mil. R. Evid., as follows:

(b) Inquiry into validity of findings or sentence. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

The official analysis explains as follows:

(b) Inquiry into the validity of findings or sentence. Rule 606(b) is taken from the Federal Rule with only one significant change. The Rule, retitled to reflect the sentencing function of members, recognizes unlawful command

U.C.M.J.,²⁵⁷ is a prohibition against unlawful exercise of command influence over the findings, sentences, or proceedings of courts-martial. When such influence appears, a presumption of prejudice to the accused is raised.²⁵⁸ The government may rebut this presumption with evidence that indicates that the actions of the command had no influence over the members.²⁵⁹ In the case of *United States v. DuBay et al.*,²⁶⁰ the Court of Military Appeals established the procedure to be followed in resolving allegations of command influence:

In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned. . . . That convening authority will refer the record to a general court-martial for another trial. Upon convening the court, the law officer will order an out-of-court hearing, in which he will hear the respective contentions of the parties on the question, *permit the presentation of witnesses and evidence in support thereof*, and enter findings of fact and conclusions of law based thereon.²⁶¹ [Emphasis added.]

Presumably the Rule 606 exception would apply at such a hearing.

influence as a legitimate subject of inquiry and permits testimony by a member on that subject. The addition is required by the need to keep proceedings free from any taint of unlawful command influence and further implements Article 37(a) of the Uniform Code of Military Justice. Use of superior rank or grade by one member of a court to sway other members would constitute unlawful command influence for purposes of this Rule under para 74 d(1). Rule 606 does not itself prevent otherwise lawful polling of members of the court, *see generally*, *United States v. Herdon*, 6 M.J. 171, 174 (C.M.A. 1979) and does not prohibit attempted lawful clarification of an ambiguous or inconsistent verdict. Rule 606(b) is in general accord with present military law.

²⁵⁷10 U.S.C. § 837 (1976).

²⁵⁸*United States v. Berry*, 39 C.M.R. 541 (A.C.M.R. 1968).

²⁵⁹*But see* *United States v. Boeuchir*, 5, C.M.A. 15, 17 C.M.R. 15 (1954). In this case, the government did not rebut, yet the Court found in the defense affidavits an insufficient showing of command influence. The defense introduced the hearsay affidavit of a nonmember alleging that a member was overheard discussing the nature of the court's deliberations. Invoking the privilege against admitting such jurors' statements, the court held the affidavits inadmissible.

²⁶⁰17 C.M.A. 147, 37 C.M.R. 411 (1967).

²⁶¹37 C.M.R. at 413.

IX. RULE 510: WAIVER BY VOLUNTARY DISCLOSURE

Various kinds of waiver have been discussed in the sections dealing with the particular privileges,²⁶² but a discussion of the general rule of waiver by voluntary disclosure has been deferred until now. Traditionally, waiver is said to occur when one intentionally relinquishes a known right.²⁶³ But when one voluntarily discloses a confidential communication, lack of knowledge that the communication was privileged is irrelevant.²⁶⁴

Waiver by voluntary disclosure, and its counterpart, failure to object to disclosure by another, are well recognized in military case law²⁶⁵ and are mentioned in the Manual.²⁶⁶ Rule 510 does not significantly alter these provisions. It is instructive to note, however, that disclosure of "any significant part of the matter or communication" is a waiver of the whole, if the privilege is a section V privilege.²⁶⁷ Yet partial voluntary disclosure of statements

²⁶²Examples include waiver of the attorney-client privilege by allegation of incompetence; waiver of the government's informant identity privilege by action of the informant; and waiver of the spousal competency privilege by divorce.

²⁶³Johnson v. Zerbst, 304 U.S. 458 (1938).

²⁶⁴8 Wigmore, Evidence § 2327 (Rev. ed. McNaughton 1961).

²⁶⁵United States v. Reynolds, 19 C.M.R. 850 (A.F.C.M.R. 1955) (voluntary disclosure to third party as waiver of attorney-client privilege); United States v. Yzaguirre 19 C.M.R. 585 (C.G.C.M.R. 1955) (failure to object to wife's testimony as waiver of spousal privilege); United States v. Craig, 22 C.M.R. 466 (A.C.M.R. 1956) (disclosure of "Confidential" report to investigating officer as waiver of military secrets privilege).

²⁶⁶Manual for Courts-Martial, *supra* note 5, para. 151b(2). This former Manual paragraph has been discussed in part at note 97, *supra*. The waiver rules are stated negatively, as follows:

The general rule is that the disclosure of a privileged communication between husband and wife, client and attorney, or penitent and clergyman should not be required or permitted unless the person who is entitled to the benefit of the privilege consents to the disclosure of the communication or has otherwise waived the privilege, as when he has consented to a disclosure of the communication at a previous trial or hearing.

Unless he voluntarily testifies concerning the communications, an accused who testifies in his own behalf, or a person who testifies under a grant or promise of immunity, does not, merely by reason of so testifying, waive any privilege pertaining to communications between husband and wife, client and attorney, or penitent and clergyman to which he may be entitled.

²⁶⁷This is provided in Rule 510(a), which reads as follows:

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person

privileged by Rule 302 does not automatically constitute a waiver as to all such statements.²⁶⁸

The primary exception to this kind of waiver is that, if the disclosing communication is itself subject to a privilege, than no waiver has occurred.²⁶⁹ A second exception, contained in subsection (b), provides that "an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity" does not, merely by testifying, waive any privilege pertaining to confidential matter or communications.²⁷⁰ These provisions parallel the old waiver rules in the Manual, except that the Manual's provision applied only to the attorney-client, clergy-penitent, and husband-wife privileges.²⁷¹ Rule 510(b) applies to all section V privileges, many of which did not fall within the ambit of paragraph 151 b(2).²⁷²

X. RULE 511: INVOLUNTARY DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS

Subdivision (a) of Rule 511 effectively abrogates the rather harsh result of inadvertent or involuntary disclosure of otherwise privileged communications mandated by paragraph 151 b(2) of the Manual. How these sections operate with regard to the attorney-client, husband-wife, and priest-penitent privileges has been

or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

²⁶⁸Mil. R. Evid. 302 deals with the privilege concerning mental examination of an accused. The defense may offer expert evidence on the mental condition of the accused, and may withhold statements of the accused which are part of that evidence. Rule 302(c), note 26, *supra*.

²⁶⁹See the last sentence of Rule 510(a), note 267, *supra*.

²⁷⁰This is set forth in para. (b) of Rule 510, Mil. R. Evid.:

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

²⁷¹Manual for Courts-Martial, para. 151 b(2), note 266, *supra*.

²⁷²The privileges described in Rules 505, 506, 507 and 509 find their prior practice

discussed in the sections addressing the individual rules. The net effect of Rule 511(a) is to preserve the privileged nature of confidential communications that have been compromised by compulsion or under circumstances that do not allow for assertion of the privilege. The rule thus prevents involuntary waiver.

This subsection is virtually a verbatim adaptation of proposed Rule 512, F.R.E. As the Advisory Committee observed, the kind of compulsion contemplated by the drafters as necessary to trigger the rule does not require the holder of the privilege to exhaust all legal recourse. To require such a standard would, in the words of the committee, "[e]xact of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess."²⁷³ Exactly how much compulsion is enough the committee did not say. The courts can be expected, except perhaps in self-incrimination cases, to require at least some overburdening of the individual's will.

Subdivision (b) of the military rule is an express revocation of the former provision that held all communications made by wire or radio to be nonprivileged.²⁷⁴ Notwithstanding the rather draconian

parallels in paragraph 151(b)(1). See notes 128 and 217, *supra*. Rule 508 has no counterpart in the Manual.

²⁷³Fed. R. Evid. 512 (not enacted), Advisory Committee Notes. The text of Mil. R. Evid. 511(a) is as follows:

(a) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

The official analysis explains thus:

Rule 511(a) is similar to proposed Federal Rule of Evidence 512. Placed in the context of the definition of "confidential" utilized in the privilege rules, see, e.g., Rule 502(b)(4), the Rule is substantially different from present military law inasmuch as present law permits utilization of privileged information which has been gained by a third party through accident or design. See present Manual paragraph 151(b)(1). Such disclosures are generally safeguarded against via the definition of "confidential" used in the new Rules. Generally, the Rules are more protective of privileged information than is the present Manual.

²⁷⁴The former Manual provision was set forth in para. 151(c)(1):

c. Certain nonprivileged communications. (1) *Communications by wire or radio.* Communications are not privileged because transmitted by wire or radio and the information concerning them that comes to the knowledge of

phrasing of this paragraph of the Manual, it did not serve as a license for wholesale wiretapping and electronic eavesdropping. Paragraph 152 of the Manual, a codification of the exclusionary rule, prohibited the introduction of evidence obtained in contravention to either 18 U.S.C. § 2515,²²⁵ or the Communications Act of

operators, either military or civilian, of any such means of transmission is likewise not privileged by reason of the means of transmission used. Wire or radio operators, military and civilian, may be ordered or subpoenaed to testify before courts-martial as to wire or radio communications, and telegrams and radiograms may be brought before courts-martial by the usual process. But see 151 b(1) and the next to the last paragraph of 152.

²²⁵The former Manual provision, near the end of para. 152, reads thus:

Evidence is inadmissible against the accused if it was obtained under such circumstances and in such a place that its use against him would be prohibited by section 2515, title 18, United States Code, pertaining to the prohibition of the use as evidence of certain intercepted wire or oral communications, or by section 605 of the Communications Act of 1934 (82 Stat. 223; 47 U.S.C. § 605), as amended, pertaining to the unauthorized divulgence or publication of wire or radio communications.

The Statute at 18 U.S.C. § 2515 (1976) was enacted in 1968, as part of title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211, codified at 18 U.S.C. 2510-2520 (1976). Entitled "Prohibition of use as evidence of intercepted wire or oral communications," it states:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The current counterpart of the former Manual provision at para. 152 is Mil. R. Evid. 317. A detailed analysis of its application is beyond the scope of this inquiry. However, for the convenience of the reader, the text of Rule 317, entitled "Interception of Wire and Oral Communications," is set forth below:

(a) General rule. Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of rule 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) Authorization for judicial applications in the United States. Under section 2518(1) of title 18, United States Code, the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of title 18, United States Code, an order authorizing or approving the interception of

1934.²⁷⁶ Therefore, nonprivileged, confidential communications obtained by illegal wiretapping were inadmissible. However, this still left as admissible supposedly confidential communications obtained in the course of otherwise legal electronic surveillance.²⁷⁷ The new rule eliminates this gap by preserving the privileged nature of

wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of enforcing the Uniform Code of Military Justice.

(c) Regulations. Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes except as follows:

(1) in the United States, under subdivision (b); and

(2) outside the United States, under regulations issued by the Secretary of Defense or the Secretary concerned.

The official analysis of Rule 317 is as follows:

(a) General rule. The area of interception of wire and oral communications is unusually complex and fluid. At present, the area is governed by the Fourth Amendment, applicable federal statute, DOD directive, and regulations prescribed by the Service Secretaries. In view of this situation, it is preferable to refrain from codification and to vest authority for the area primarily in the Department of Defense or Secretary concerned. Rule 317(c) thus prohibits interception of wire and oral communications for law enforcement purposes by members of the armed forces except as authorized by 18 U.S.C. § 2516, Rule 317(b), and, when applicable, by regulations issued by the Secretary of Defense or the Secretary concerned. Rule 317(a), however, specifically requires exclusion of evidence resulting from non-compliance with Rule 317(c) only when exclusion is required by the Constitution or by an applicable statute. Insofar as a violation of a regulation is concerned, compare *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) with *United States v. Caceres*, 440 U.S. 741 (1979).

(b) Authorization for judicial applications in the United States. Rule 317(b) is intended to clarify the scope of 18 U.S.C. § 2516 by expressly recognizing the Attorney General's authority to authorize applications to a federal court by the Department of Defense, Department of Transportation, or the military departments for authority to intercept wire or oral communications.

(c) Regulations. Rule 317(c) requires that interception of wire or oral communications in the United States be first authorized by statute, see Rule 317(b), and interceptions abroad by appropriate regulation. See the Analysis to Rule 317(a), *supra*. The Committee intends Rule 317(c) to limit only interceptions that are nonconsensual under chapter 119 of title 18 of the United States Code.

²⁷⁶47 U.S.C. § 605 (1976). This is a lengthy provision. See the summary in the portion of para. 152 of the Manual quoted in note 275, *supra*.

²⁷⁷Munster & Larkin, note 81, *supra*, observe that the military will only infrequently

confidential communications notwithstanding the person's use of telephonic or wireless means of communication.²⁷⁸

XI. RULE 512: COMMENT UPON OR INFERENCES FROM CLAIM OF PRIVILEGE

A strong argument can be made that to allow an adverse party to comment upon, or to allow a jury to draw an adverse inference from the assertion of an evidentiary privilege is to diminish the value of that privilege to the holder. The drafters of both the F.R.E. and

be faced with determining the legality of electronic surveillance. They recommend consultation of Federal decisions interpreting 18 U.S.C. §§ 2516-2518 (1976).

For Department of the Army policy and procedures for the lawful gathering of electronic evidence, see Army Reg. No. 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (1 Nov. 1978).

²⁷⁸The text of Mil. R. Evid. 511(b) is as follows:

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

The official analysis explains thus:

Rule 511(b) is new and deals with electronic transmission of information. It recognizes that the nature of the armed forces today often requires such information transmission. Like present Manual paragraph 151 b(1), the new Rule does not make a nonprivileged communication privileged; rather, it simply safeguards already privileged information under certain circumstances.

The first portion of subdivision (b) expressly provides that otherwise privileged information transmitted by telephone remains privileged. This is in recognition of the role played by the telephone in modern life and particularly in the armed forces where geographical separations are common. The Committee was of the opinion that legal business cannot be transacted in the 20th century without customary use of the telephone. Consequently, privileged communications transmitted by telephone are protected even though those telephone conversations are known to be monitored for whatever purpose.

Unlike telephonic communications, Rule 511(b) protects other forms of electronic communication only when such means "is necessary and in furtherance of the communication." It is irrelevant under the Rule as to whether the communication in question was in fact necessary. The only relevant question is whether, once the individual decided to communicate, the *means* of communication was necessary and in furtherance of the communication. Transmission of information by radio is a means of communication that must be tested under this standard.

Uniform Rules of Evidence appear to have been persuaded by this argument since both sets of rules prohibit such comments or adverse inferences.²⁷⁹ Although not specifically addressed in the Manual,²⁸⁰ military practice has allowed adverse inferences to be drawn from the failure of one side to produce evidence that is not available to both sides.²⁸¹ While there exists no dispositive case,²⁸² there is some military case authority permitting such an inference where the failure to produce evidence is the result of invocation of a privilege,²⁸³ provided that the privilege asserted does not have constitutional stature.²⁸⁴

Federal courts have extended the "no comment or inference" rule to include nonconstitutional evidentiary privileges raised by the accused.²⁸⁵ Until now, however, the military had chosen to follow its own version of the rule.²⁸⁶ Rule 512 of the M.R.E. prohibits both comments by the military judge or counsel when the accused claims a privilege, and also adverse inferences based upon such claims.²⁸⁷ This clearly eliminates any discrepancy between the former military rule and accepted federal practice.

²⁷⁹Fed. R. Evid. 513 (not enacted); Unif. R. Evid. 512.

²⁸⁰Presumptions and permissible inferences were discussed at para. 138a of the Manual for Courts-Martial, *supra* note 5. No mention was made there concerning failure to produce evidence.

²⁸¹United States v. Braden, 14 C.M.R. 617 (A.F.C.M.R. 1954) (failure of the defense to call the accused's wife as a witness allows the inference that her testimony would be unfavorable to accused); United States v. Hamil, 34 C.M.R. 533 (A.C.M.R. 1964), *aff'd*, 35 C.M.R. 82 (failure of defense to call corroborating alibi witness allows adverse inference); United States v. Vigeault, 3 C.M.A. 245, 12 C.M.R. 3 (1953) (adverse inference not allowed where evidence was available to both sides).

²⁸²See Oldham, *Privileged Communications in Military Law*, 5 Mil. L. Rev. 17, 55 (1 July 1959).

²⁸³United States v. Braden, 14 C.M.R. 617 (A.F.C.M.R. 1954).

²⁸⁴Griffin v. California, 380 U.S. 609 (1965) (refusal of the accused to testify on his own behalf in exercise of his privilege against self-incrimination held not to be the proper subject of comment or adverse inference).

²⁸⁵United States v. Pariente, 558 F.2d 1186 (5th Cir. 1977); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968) (rule applied to exercise of spousal capacity privilege).

²⁸⁶See J. Munster & M. Larkin, *supra* note 81, at § 10.5(a)2, page 471.

²⁸⁷This prohibition is set forth in Rule 512(a)(1), Mil. R. Evid., as follows:

(a) Comment or inference not permitted. (1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a

The M.R.E. also prohibit any comment upon the claim of a privilege by witnesses other than the accused, but allow adverse inferences to be drawn when "determined by the military judge to be required by the interests of justice."²⁸⁹ This represents a considerable narrowing of the previous rule, and probably eliminates any constitutional objections from the face of the rule. Military judges, however, must be wary of allowing adverse inferences to be drawn from the assertion of a privilege by any defense witness who could arguably be said to be vicariously raising a privilege held by the accused. Under cases such as *Courtney v. United States*²⁸⁹ and *United States v. Pariente*,²⁹⁰ one can argue that to draw such an adverse inference would be tantamount to infringing upon the accused's fifth amendment protections.

The remaining subdivisions of Rule 512 are direct adaptations of proposed Rule 513(b) & (c) of the F.R.E., which in turn is identical

proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

The official analysis states in part:

(a) Comment or inference not permitted. Rule 512(a) is derived from proposed Federal Rule 513. The Rule is new to military law but is generally in accord with the Analysis of Contents of the present Manual; United States Department of the Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, 1969, Revised Edition, 27-33, 27-38 (1970).

Rule 512(a)(1) prohibits any inference or comment upon the exercise of a privilege by the accused and is taken generally from proposed Federal Rule of Evidence 513(a).

²⁸⁹This is provided in Rule 512(a)(2), as follows:

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

The official analysis continues:

Rule 512(a)(2) creates a qualified prohibition with respect to any inference or comment upon the exercise of a privilege by a person not the accused. The Rule recognizes that in certain circumstances the interests of justice may require such an inference and comment. Such a situation could result, for example, when the government's exercise of a privilege has been sustained, and an inference adverse to the government is necessary to preserve the fairness of the proceeding.

²⁸⁹390 F.2d 521 (9th Cir. 1968). See the articles cited at note 8, *supra*.

²⁹⁰558 F.2d 1186 (5th Cir. 1968). See the articles cited at note 8, *supra*.

with Rule 512(b) & (c) of the Uniform Rules of Evidence. Subdivision (b) requires that proceedings be conducted "so as to facilitate the making of claims of privilege without the knowledge of the members."²⁹⁷ In *San Fratella v. United States*,²⁹² the Fifth Circuit found reversible error in the fact that the prosecutor called the defendant's wife to the stand and caused her to claim her fifth amendment privilege after she had informed the court without the jury present of her intention to do so. Although the privileges addressed in section five of the M.R.E. do not rise to constitutional level, such cases as *San Fratella* can serve as the authority for arguing that they must nevertheless be jealously guarded.²⁹³ Here again the military judge should carefully weigh any decision to permit a witness to claim a privilege in the hearing of the jury rather than in an out-of-court hearing.

Subdivision (c) of the rule permits a party to request a special instruction that no inference may be drawn from a witness's claim of a privilege.²⁹⁴ Whether in the absence of comment by opposing counsel it is advisable for a party to request such an instruction is problematical. Little is to be gained by raising in the court

²⁹⁷The text of Mil. R. Evid. 512(b) is as follows:

(b) Claiming privilege without knowledge of members. In a trial before a court-martial with members, proceedings shall be conducted, to the extent practical, so as to facilitate the making of claims of privilege without the knowledge of the members. This subdivision does not apply to a special court-martial without a military judge.

The official analysis states:

(b) Claiming privilege without knowledge of members. Rule 512(b) is intended to implement subdivision (a). Where possible claims of privilege should be raised at an Article 39(a) session or, if practicable, at sidebar.

²⁹²340 F.2d 560 (5th Cir. 1965).

²⁹³As the Advisory Committee wrote concerning proposed Federal Rule 513, "While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and entitled to maximum effect." Fed. R. Evid. 513 (not enacted). Advisory Committee Notes.

²⁹⁴Mil. R. Evid. 512(c) reads thus:

(c) Instruction. Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

The official analysis states:

members' minds an unfavorable inference that may have escaped them initially.²⁹⁸

XII. CONCLUSION

The Military Rules of Evidence have been a subject of prime importance to military criminal practitioners for quite some time and will no doubt continue to be so. They represent the single most far-reaching revision of court-martial practice since the Code was enacted over three decades ago. With the automatic amendment provision of the Rule 1102, they promise to be a vibrant and evolutionary feature of substantive military law. The privileges section is no exception.

For the first time a limited physician-patient privilege is created which applies to statements made by an accused during a mental evaluation. The attorney-client, priest-penitent, and husband-wife privileges for confidential communications are no longer subject to an exception for eavesdroppers. In keeping with recent constitutional litigation, the spousal competency privilege has been placed in the hands of the witness spouse, and, in keeping with good sense, the injury exception has been extended to confidential interspousal communications.

The military judge has been given greater authority and an expanded role to play in determining the applicability of the government's privilege to safeguard state secrets. Additional alternatives have been created so that the government no longer faces the prospect of automatic dismissal if it stands on its privilege. Rule 506 emerges as a rule which, if improperly invoked as a device for concealing governmental information from the accused, faces the government with the prospect of constitutional defect in the proceedings. However, if it is properly employed as a discovery procedure, the government and defense may both find it highly useful.

The M.R.E. codifies a privilege for the identity of police informants that is in keeping with accepted federal practice. The text

(c) Instruction. Rule 512(c) requires that relevant instructions be given "upon request." Cf. Rule 105. The military judge does not have a duty to instruct *sua sponte*.

²⁹⁸ See Oldham, *Privileged Communications in Military Law*, 5 Mil. L. Rev. 17, 58 (1 July 1959).

of the rule was marred, however, by an unfortunate defect in the definition of "informant," a defect which survived several stages of review prior to the adoption of the rule. Due to the research of the author of this article, however, the problem has been brought to the drafter's attention and corrective action, by way of an amending Executive Order, has been taken.

Also eliminated from military practice is the harsh provision which held all electronic communications to be nonconfidential. This is a recognition not only of the societal impact of technological advances, but also of the extent of an individual's right to privacy.

Practice under the Military Rules of Evidence will be more demanding and will require the best that counsel can give. At the same time, the new Rules will reward creativity and afford counsel the opportunity to utilize fully their professional abilities. . . . It should be an exciting time to be in the courtroom.²³⁶

²³⁶Lederer, *The Military Rules of Evidence: An Overview*, 12 *The Advocate* 117 (1980). Major Lederer was one of the drafters of the Military Rules of Evidence. Note 227, *supra*.

INCONSISTENT DEFENSES
IN CRIMINAL CASES*

by Major James F. Nagle**

Occasionally a criminal defendant will respond to charges with two or more theories which may seem to contradict each other. He or she may say, in effect, "I did not shoot the victim, but if I did so, it was in self-defense." Civilian courts have taken many different positions on the extent to which this type of pleading is permissible, and military courts have permitted it in some cases but not others.

Major Nagle has extensively reviewed the case law on the subject. He examines the decisions of state and military courts, but concentrates on the United States courts of appeals, where most of the authoritative positions on inconsistent defenses have been developed. Major Nagle notes that in some cases the defenses used are not truly inconsistent, in the sense that factual proof of one does not necessarily imply disproof of the other. Insanity and self-defense provide one example. In other cases, such as a claim of en-

*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.

This article grew out of the author's work on a case which he briefed and argued before the U.S. Army Court of Military Review, Falls Church, Virginia. The author gratefully acknowledges the assistance of Captain Robert L. Gallaway, JAGC, who offered helpful suggestions for the improvement of the article. Captain Gallaway, assigned since 1978 to Defense Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia, is the author of *Due Process: Objective Entrapment's Trojan Horse*, 88 Mil. L. Rev. 103 (1980).

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trapment coupled with denial of guilt, there may be policy reasons for permitting such defenses even if they are inconsistent on the facts.

Major Nagle concludes that use of inconsistent defenses is generally permitted in American jurisprudence. He feels, however, that so many variations in treatment of inconsistent defenses exist between jurisdictions as to result in significant unfairness to some defendants. The United States Supreme Court has not acted to resolve some of the glaring inconsistencies of treatment among the various federal circuits, nor has the Court of Military Appeals done all that it could to clarify the state of military law on the subject. Major Nagle argues that it is time for corrective judicial action.

I. INTRODUCTION

One wants to say to the defense, "Shorn of technicality, what do you really want? Which way would you have it . . . Either position is legitimate, but choose. It ill behooves you to try to have it both ways."¹

These words, written by a Maryland appellate judge, demonstrate the natural frustrations that courts often experience when confronted with the logical absurdity known as inconsistent defenses. Such defenses arise when the accused, in effect, argues, for example, "I didn't shoot him, but if I did, it was in self-defense."²

Such a tactic is clearly not a preferred stratagem. Inconsistent defenses have been described as: likely to mislead the jury,³

¹Bartram v. State, 37 Md. App. 115, 364 A.2d 1119 (1976), *aff'd*, 280 Md. 616, 374 A.2d 114 (1977).

²See text above notes 81-90, *infra*.

³"Inconsistent defenses" in this article means those defenses which, when asserted by a single defendant, are inconsistent with one another, such as denial and self-defense. It does not refer to those situations which arise in joint trials when the co-defendants each allege a different defense which is inconsistent with that alleged by the other, nor those situations in which one lawyer represents two clients who assert inconsistent defenses.

⁴Newmann v. State, 166 Fla. 98, 156 So. 237 (1934).

fraught with great risk,⁴ multifarious and confusing,⁵ "hunting always with a shotgun, never with a rifle,"⁶ a device sure to destroy the defendant's credibility,⁷ and a tactic no competent attorney would utilize.⁸ Despite such criticisms, inconsistent defenses have specifically been permitted to some extent in seven federal circuits,⁹ 26 states,¹⁰ and the military,¹¹ and seem to be a generally accepted principle in American jurisprudence.¹²

The reasons given for such acceptance have varied; most prominent are:

1. It is improper to force a defendant to admit certain essential facts (usually the commission of the "criminal" act) in order to avail himself of a defense such as self-defense or entrapment.¹³

While such an analogy certainly has analytic merit, one distinguishing factor is that in *Simmons* the Supreme Court was dealing with forced choices between two clear constitutional rights. However, affirmative defenses such as entrapment are not perceived as constitutionally based. See Groot, *The Serpent Beguiled Me and I*

⁴People v. Johnson, 47 App. Div.2d 893, 386 N.Y.S.2d 198 (1975).

⁵People v. Jersky, 377 Ill. 261, 36 N.E.2d 261 (1941).

⁶Kain v. State, 48 Wis.2d 212, 179 N.W.2d 277 (1970).

⁷Ramney, *The Entrapment Defense - What Hath the Model Penal Code Wrought*, 16 Duquesne Law Rev. 157, 164 (1977).

⁸United States v. Kaiser, 138 F.2d 219 (7th Cir. 1943).

⁹First Circuit: Gorin v. United States, 313 F.2d 641 (1963); but see Sylvia v. United States, 312 F.2d 145 (1963), cert. denied, 374 U.S. 809 (1963). Second Circuit: United States v. Swiderski, 539 F.2d 854 (1976); but see United States v. DiDonna, 276 F.2d 956 (1960). Fourth Circuit: United States v. Harbin, 377 F.2d 78 (1967). Fifth Circuit: Sears v. United States, 343 F.2d 139 (1965); but see Longmire v. United States, 404 F.2d 326 (1968). Sixth Circuit: United States v. Baker, 373 F.2d 28 (1967); but see United States v. Mitchell, 514 F.2d 758 (1975). Ninth Circuit: United States v. Demma, 523 F.2d 981 (1975). D.C. Circuit: Johnson v. United States, 138 U.S. App. D.C. 651 (1970), cert. denied, 401 U.S. 846 (1970).

¹⁰See the appendix at the end of this article.

¹¹United States v. Garcia, 1 M.J. 26 (C.M.A. 1975). See discussion in text above notes 204-207, *infra*.

¹²See 22 C.J.S. *Criminal Law* § 54 (1961); 21 Am. Jur.2d *Criminal Law* § 141 (1965).

¹³People v. Perez, 62 Cal.2d 769, 44 Cal.Rptr. 326, 401 P.2d 934 (1965). It has been argued that such "forced admissions" violate the rationale of the Supreme Court's rulings in *Simmons v. United States*, 390 U.S. 377 (1968). In that case the Court ruled that a defendant could not be required to admit ownership of an item (and thereby give up his fifth amendment rights) in order to contest on fourth amendment grounds the validity of the search which uncovered the item.

2. The defendant should be accorded every reasonable protection in defending himself against prosecution.¹⁴

3. Inconsistent defenses often aid in the search for the truth by presenting different facts and theories to the fact finder and thereby enabling the fact finder to attach credibility to whatever facts and theory it believes.¹⁵

A fourth justification might well be that it is, under certain circumstances, an indispensable tool for the defense counsel. Consider the following example: The client tells his counsel that he did not kill the victim and, in fact, was 100 miles away at the time. The prosecution, however, has four eyewitnesses who positively identify the client as the assailant. They testify further that the victim was advancing with a knife on the client. If the counsel must rely solely on the client's version, then he is relying on an alibi defense that will be obliterated by the prosecution evidence. Conversely, he is presented with a classic example of self-defense which, if he is allowed to present it, could save the client's life. If inconsistent defenses are permitted, he may argue both denial and self-defense to the fact finder.¹⁶

While many jurisdictions have accepted the theory of inconsistent defenses, that acceptance has varied greatly. The United States Supreme Court has not rendered a decision on the subject of inconsistent defenses.¹⁷ Consequently it is unclear whether a defen-

(Without Science) Did Eat - Denial of Crime and the Entrapment Defense, 1973 U. of Ill. Law Forum 254, 273 (1973); and Comment, *The Assertion of Inconsistent Defenses in Entrapment Cases*, 56 Iowa Law Rev. 656, 690 (1971).

¹⁴United States v. Demma, 523 F. 2d 961, 985 (9th Cir. 1976).

¹⁵Henderson v. United States, 237 F.2d 169 (5th Cir. 1956); State v. Burns, 516 P.2d 748 (Or. App. 1973).

¹⁶Another justification advanced for inconsistent defenses in entrapment cases is that it is unsound public policy to let police misconduct go unnoticed because the defendant who must either admit the "crime" and claim entrapment or deny the crime, chooses the latter. See Comment, note 13 *supra*; Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 Duke L.J. 39.

¹⁷Thompson v. United States, 155 U.S. 271 (1899), comes close. In *Thompson*, the defendant had entered pleas of not guilty and former jeopardy. Mr. Justice Shiras, writing for the Court, said the defenses might stand together because they were not inconsistent. The former jeopardy plea, however, being a plea in bar, must be disposed of first. The case of *Sorrells v. United States*, 287 U.S. 435 (1932), while not dealing with inconsistent defenses, has been the basis of a great deal of discussion in the area of inconsistent defenses in entrapment cases. See pages 24-25 *infra*.

dant has a constitutional right to present evidence which raises inconsistent defenses.¹⁸ Furthermore, decisions diverge greatly on, first, what inconsistent defenses will be accepted. Self-defense and denial are generally accepted,¹⁹ but entrapment and denial are not.²⁰ Second, decisions vary on how the defenses may be raised. Can the defendant himself testify to both, or must the state's own evidence raise one of the defenses?²¹

II. DEFINITION

This divergence of views is readily apparent when one seeks to find a common definition for "inconsistent defenses." Rarely will a court attempt to give any specific meaning to the phrase. Usually the courts will merely say the defenses are inconsistent and then permit them or not. This lack of specificity has caused a division of the tactic into three separate meanings—alternative defenses, truly inconsistent defenses, and antithetical defenses.

Apparently the courts feel that the word "inconsistent" is clear enough to require no further clarification. In civil cases it is said that "the test of inconsistency of defenses is whether proof of one necessarily disproves the other."²² This rule seems to have been adopted in criminal cases so that "mutually exclusive defenses" is often used as a substitute for "inconsistent defenses."²³

Confusion has resulted, however, because there is a subjective dividing line between what is permissibly and impermissibly inconsistent. Some courts²⁴ have stated that inconsistent defenses are allowed as long as they are not *too* inconsistent or as long as proof of one does not necessarily disprove the other.²⁵ This seems

¹⁸For a survey of cases which might lead to that conclusion, see Imwinklereid, *Chambers v. Mississippi*, ___ U.S. ___ (1973), *The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973).

¹⁹See notes 81 and 86, *infra*, and text thereof.

²⁰See discussions in sections VII, VIII, and IX of this article, *infra*.

²¹See *Sears v. United States*, 434 F.2d 139 (5th Cir. 1965); *State v. Randolph*, 496 S.W.2d 257 (Mo. 1973) (*en banc*).

²²*Shuffelberger v. Hopkins*, 177 Kan. 513, 280 P.2d 933 (1955).

²³See, e.g., *State v. Burns*, 516 P.2d 748 (Or. App. 1973).

²⁴*Stripling v. State*, 349 So.2d 187 (Fla. App. 1977); *United States v. Greenfield*, 554 F.2d 179 (5th Cir. 1977).

²⁵*Greenfield*, *supra* note 24.

to be a contradiction in terms and illustrates the extent of the confusion on the subject. Other courts have utilized analysis of the facts involved to determine that defenses, which on the surface appear to be inconsistent, are not so.²⁶

To provide a framework for analysis, the subject of inconsistent defenses can conveniently be divided into three levels.

The first level consists of the inconsistent defenses which are merely alternative because they can coexist at the same time and proof of one does not disprove the other. For example, alibi and insanity might at first glance appear to be inconsistent but upon analysis they clearly are not. A person can be 100 miles away from the scene of the crime and still be insane.²⁷

It is difficult to draw an exact logical line of demarcation between the second and third levels because of the conflicting decisions that have been issued in this area. An arbitrary distinction, however, can be drawn on the basis of the traditional way courts have viewed certain defenses.

The second level comprises those cases which appear factually inconsistent but which have historically been viewed by the courts as not so repugnant as to be impermissible. Two prime examples of this have been accident and self-defense,²⁸ and denial and self-defense.²⁹

The third level of antithetical defenses consists of those defenses which the courts have viewed as so inconsistent as to be insupportably repugnant. While some courts have, quite logically, applied this prohibition to cases involving alibi,³⁰ it has most commonly

²⁶Henderson v. United States, 237 F.2d 169 (5th Cir. 1956); Hansford v. United States, 12 U.S. App. D.C. 359, 303 F.2d 219 (1962).

²⁷State v. Lora, 305 S.W.2d 452 (Mo. 1957). They might be inconsistent if the defense of insanity was based on the actions of the perpetrator at the scene, as in the following example: "My client was 100 miles away at the time. Furthermore, because the perpetrator, you should find him to be insane." See also note 64, *infra*.

²⁸See text above notes 70 through 77, *infra*.

²⁹See notes 81 and 86, *infra*, and text thereat.

³⁰United States *ex rel.* Crosby v. Brierly, 404 F.2d 790 (3rd Cir. 1968) (alibi and self-defense not allowed). *Contra*, Phillips v. State, 131 Ga. 426, 62 S.E. 239 (1908); Peo-

been used involving entrapment and denial in which the traditional rule has been that entrapment is not available to one who denies committing the crime.³¹ This rule, however, has been the subject of a considerable amount of scholarly criticism³² and appears to be declining. Some courts have rejected it totally,³³ while others have parsed the relevant facts to show that the defenses are not necessarily inconsistent under the circumstances.³⁴

III. HISTORICAL DEVELOPMENT

The modern doctrine has been the result of a long development stemming from the early days of the Republic. The early cases dealt with pleas in bar or pleas in abatement and it was only at the turn of the century that affirmative defenses began to be discussed.

The first such embryonic step took place in *Commonwealth v. Myers*,³⁵ an 1812 Virginia case. Myers was charged with murder and pled double jeopardy (*autrefois acquit*) and not guilty. The court stated that, although a person indicted for a capital offense may not enter two pleas in abatement which are deemed by law repugnant, pleas in bar which are only somewhat repugnant may be accepted if two conditions are met. First, the court must be satisfied of their truthfulness, and second, they must not directly contradict each other. In this case, the court considered that the conditions were satisfied and permitted these two pleas to be advanced.

ple v. Doody, 343 Ill. 194, 175 N.E. 436 (1931); *Brown v. Commonwealth*, 308 Ky. 486, 214 S.W.2d 1018 (1948).

³¹ See the annotation at 61 A.L.R.2d 677 (1958) for general background information on this rule. The rule is discussed in the text at sections VII, VIII, and IX of this article, *infra*.

³² See Comment, *supra* note 13; Comment, *United States v. Demma: Assertion of Inconsistent Defenses in Entrapment Cases Allowed*, 1975 Utah L. Rev. 962; Groot, *supra* note 13; Orfield, *supra* note 16, at 65-66.

³³ *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975); *People v. Perez*, 62 Cal. 2d 769, 44 Cal. Rptr. 326, 401 P.2d 934 (1965); *People v. Chambers*, 56 Misc.2d 683, 289 N.Y.S.2d 604 (1968).

³⁴ *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956); *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965); *Hansford v. United States*, 12 U.S. App. D.C. 359, 303 F.2d 219 (1962).

³⁵ 1 Va. Cas. (8 Va.) 188 (1812).

The defense argument, accepted by the court and un rebutted by the prosecution, was that in England it was the absolute right of a prisoner to enter as many pleas as were necessary and proper for his defense. The defense counsel specifically challenged any lawyer "to produce a single dictum of the worst of the English courts, in the worst of times, to prevent a prisoner from pleading doubly in bar of prosecution."³⁶

Virginia broadened that rule a year later³⁷ to permit two pleas in abatement. Alabama, in 1837, followed Virginia's lead and announced in *State v. Greenwood*³⁸ that a defendant could not be compelled to select one of several pleas submitted by him.

The development was slowed somewhat by *State v. Potter*.³⁹ In *Potter*, the defendant pled not guilty and also former conviction. The North Carolina court ruled that "former conviction" is manifestly inconsistent with a plea of not guilty. Therefore, the defendant must rely upon only one of the pleas or the court would treat the latter plea as a waiver of the former. (*Potter* may not have been too great an aberration since the court in *Myers* had used a former conviction and a not guilty plea as an example of an extremely repugnant set of pleas.)

The first federal case to deal with the subject was *United States v. Richardson*⁴⁰ in 1886. In *Richardson*, the court stated that, in this country, two or more pleas in abatement, not repugnant to one another, had been allowed to be pled together.

A major leap forward occurred in the 1888 case of *State v. Stevens*.⁴¹ In that case, the Supreme Court of Missouri permitted the defendant to assert both accident and self-defense, because "any number of defenses may be made, whether consistent or not."⁴² More importantly, the court, in dicta, stated that, under a plea of not guilty, all defenses, such as self-defense, insanity,

³⁶*Id.* at 211-212. Also see *Richardson v. City of Tuscaloosa*, 22 Ala. App. 604, 118 So. 496 (1925) (plea of not guilty and defense of former jeopardy not inconsistent).

³⁷*Commonwealth v. Long*, 2 Va. Law (4 Va.) 318 (1821).

³⁸5 Port. 474, 7 Ala. Rep. 475 (1837), followed in *State v. Allen*, 1 Ala. 442 (1840).

³⁹61 N.C. (Phil.) 337 (N.C. 1867).

⁴⁰28 F. 67 (D. Me. 1886).

⁴¹96 Mo. 637, 10 S.W. 172 (1888).

⁴²*Id.* at 178.

misadventure, or alibi, are available to the defendant regardless of their consistency with one another.⁴³ Although no citation of authority was given for this broad unequivocal statement, it represents a significant breakthrough in the evolution of the law concerning inconsistent defenses.

Indiana, in 1895, permitted a defendant to plead the inconsistent defenses of denial and self-defense. In *Reed v. State*,⁴⁴ the accused had testified that the victim had advanced on him to attack him but that a third party had thrown the rock that killed the victim. The trial judge felt self-defense had been raised, considering all the evidence, and instructed on self-defense over the objection of the defendant. The appellate court agreed that, if the defense had been raised, it should be the subject of instruction. A similar result was achieved in Kentucky, three years later, although the *Reed* case was not cited.⁴⁵

In *State v. Jackett*, in 1909, Kansas permitted denial and self-defense. The court based its rationale on the practice followed in civil cases,⁴⁶ especially the fact that one sued for defamation could assert that he did not utter the defamatory comments and that, even if he did, they were true. The court noted that, under a plea of not guilty, the defendant can utilize all ordinary defenses.

Georgia, in 1902, refused to permit accident and self-defense to be asserted simultaneously.⁴⁷ Despite this temporary reluctance to adopt the rule announced in *State v. Stevens*, discussed above, those defenses were permitted the next year, 1903, in the New York case of *People v. Gaimari*⁴⁸ (again with no citation of authority). Kentucky followed in 1908,⁴⁹ Texas in 1911,⁵⁰ and finally Georgia in

⁴³*Id.*

⁴⁴141 Ind. 116, 40 N.E. 525 (1895).

⁴⁵*Morris v. Commonwealth*, 46 S.W. 491 (Ky. 1898).

⁴⁶Reliance on civil cases is also apparent in *State v. Bidstrup*, 237 Mo. 272, 140 S.W. 904 (1911). In this case, the court permitted mistake and self-defense to be asserted. The court noted that "distinguished counsel" had been unable to find any case directly on point.

⁴⁷*Dunn v. State*, 116 Ga. 515, 42 S.E. 772 (1902).

⁴⁸176 N.Y. 84, 68 N.E. 112, 115 (1903). "He clearly had the right to rely on inconsistent defenses but it is significant that only one could rest on truth."

⁴⁹*Gatliff v. Commonwealth*, 32 Ky. Law Rptr. 1063, 107 S.W. 739 (1908). The court's rationale is interesting. The court stated that, even if the defendant gave false testimony, it would not deprive him of any defenses he might truthfully have. Therefore both defenses should be presented to the jury for their consideration.

1922.⁵¹

Numerous other cases⁵² covering a variety of defenses followed in rapid succession. By 1912, in *People v. Conte*,⁵³ a California court could state, without citation, that the rule permitting inconsistent defenses was "well settled" both in criminal and civil law.

The types of inconsistent defenses commonly asserted have changed dramatically since World War II. Before that time, most inconsistent defenses were raised in connection with crimes of violence and usually consisted of accident and self-defense or denial and self-defense. Since World War II, with the increase in narcotics prosecutions, the most prevalent set of inconsistent defenses has been entrapment and denial.

IV. ALTERNATIVE DEFENSES

Some cases said to involve inconsistent defenses actually present only alternative defenses. In these cases, the defendant usually has pled insanity or intoxication. Both defenses can co-exist with virtually any other defense,⁵⁴ usually with no element of inconsistency. The reason for this harmonious relationship with other defenses is clear: Although there is some authority to the contrary,⁵⁵ the

⁵¹*Carden v. State*, 62 Tex. Cr. R. 607, 138 S.W. 306 (1911).

⁵²*Jordan v. State*, 154 Ga. 390, 114 S.E. 349 (1922).

⁵³*Broughton v. State*, 9 Ga. App. 820, 72 S.E. 276 (1911) (denial and self-defense); *Wiley v. State*, 3 Ga. App. 120, 39 S.E. 438 (1907) (denial and insanity); *Green v. State*, 7 Ga. App. 803, 68 S.E. 318 (1910) (denial and self-defense); *Phillips v. State*, 131 Ga. 426, 62 S.E. 239 (1908) (alibi and self-defense); *State v. Bradley*, 120 La. 248, 45 So. 120 (1907) (self-defense and insanity); *State v. Wade*, 161 Mo. 441, 61 S.W. 800 (1901) (self-defense and insanity); *Montgomery v. State*, 68 Tex. Cr. R. 78, 151 S.W. 813 (1912) (insanity and self-defense); *State v. Sloss*, 149 Iowa 489, 128 N.W. 842 (1910) (denial and self-defense); *Love v. State*, 16 Ala. App. 44, 75 So. 189 (1917) (alibi and provocation); *Ward v. State*, 4 Ala. App. 112, 58 So. 788 (1912) (denial and defense of reasonable apprehension of harm - a statutory defense). *Contra*, *State v. Kinchen*, 126 La. 39, 52 So. 185 (1910).

⁵⁴17 Cal. App. 771, 122 P. 450 (1912).

⁵⁵As might be expected, they have also been asserted together. *Goforth v. United States*, 108 U.S. App. D.C. 111, 269 F.2d 778 (1959); *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951).

⁵⁶Several courts have characterized insanity as a plea in confession and avoidance which concedes commission of the act. Such views, however, have been expressed in dicta in cases that contained no denial by the defendant. *See People v. Wells*, 33 Cal.2d 330, 202 P.2d 53 (1949), cert. denied, 338 U.S. 836 (1949); *State v. Sapp*, 356

defenses of insanity or intoxication do not involve an implicit confession that the defendant committed the act. These defenses focus solely on the defendant's mental responsibility at the time of the crime without necessarily admitting certain acts while in that state. Consequently, those defenses are not mutually exclusive when coupled with a denial of the crime. If the Government could prove that the defendant was sane, that would not necessarily prove that he committed certain acts. Conversely, proof of the commission of certain acts does not necessarily disprove the defendant's contention of insanity. Therefore, as the District of Columbia Circuit has said, there is no logical inconsistency. The defendant is merely claiming he was not mentally responsible, while still requiring the Government to meet its burden of proof.⁵⁶

Despite the seeming persuasiveness of the District of Columbia Circuit's logic, some courts have viewed alibi as inconsistent with intoxication, yet allowed their assertion since inconsistent defenses were permitted in those jurisdictions.⁵⁷ Alternatively, at least one other court⁵⁸ has reached the same conclusion as the District of Columbia Circuit, holding that alibi and insanity are not truly inconsistent, since proof of one does not disprove the other.

Although the Michigan Court of Appeals has permitted denial to be asserted with the defense of intoxication, it views such defenses as inconsistent.⁵⁹ Most other courts have adopted the rule that

Mo. 705, 203 S.W.2d 425 (1947); *People v. Dumas*, 51 Misc.2d 929, 274 N.Y.S.2d 764 (1966). Also see *State v. Forcier*, 96 N.H. 341, 63 A.2d 235 (1948). In *Forcier*, because of the wording of the New Hampshire statute, the court prohibited the defendant from entering pleas of not guilty and not guilty by reason of insanity. See generally 22 C.J.S. *Criminal Law* § 448 (1961).

The appellant in *People v. Ford*, 39 Ill.2d 318, 235 N.E.2d 576 (1968), attempted to utilize this rationale to her advantage. She argued that she was denied her right not to be a witness against herself because, by raising the defense of insanity, she was admitting commission of the offense. The court was not persuaded by such logic. It held that there was no reason a defendant could not deny commission of the crime and still claim insanity. The court compared this to the situation in which a defendant denies making incriminating statements and also challenges their voluntariness.

⁵⁶*Whittaker v. United States*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960).

⁵⁷*People v. Conte*, 17 Cal. App. 771, 122 P.450 (1912); *People v. Hansma*, 84 Mich. App. 308, 269 N.W.2d 504 (Mich. 1978).

⁵⁸*State v. Lora*, 305 S.W.2d 452 (Mo. 1957). See note 27, *supra*.

⁵⁹*People v. McClean*, 52 Mich. App. 162, 217 N.W.2d 138 (1974).

there is no inconsistency between a denial and insanity or intoxication.⁶⁰

A more difficult question arises, however, when the defendant wishes to claim insanity and self-defense. Although the two defenses have been labeled "inconsistent,"⁶¹ most courts which have faced the question have held they are not inconsistent,⁶² since proof of one does not necessarily disprove the other. The latter position seems correct. While self-defense requires by definition an intentional act of reasonable force,⁶³ insanity would not necessarily deprive an individual of his ability to perceive an attack upon himself and to act accordingly; nor would it deprive him of his common law right of self-defense in such circumstances.⁶⁴

Two examples of cases presenting alternative defenses not involving insanity or intoxication are *Stalling v. State*⁶⁵ and *People v. Lee*.⁶⁶ *Stalling* was charged with failing to stop and render aid to an individual his vehicle had struck. His main defense was alibi. He attempted to utilize a "fallback" theory, to the effect that, even if he did do it, the state had not shown that he knew his vehicle had struck anyone because the accident occurred on a cloudy night.

⁶⁰See *Wiley v. State*, 3 Ga. App. 120, 59 S.E. 438 (1907); *Womack v. United States*, 119 U.S. App. D.C. 40, 336 F.2d 959 (1964); *State v. Kills Small*, 269 N.W.2d 771 (S.D. 1978); *People v. Genovese*, 65 Ill. App.3d 819, 382 N.E.2d 872 (1978); *Lovell v. State*, 525 S.W.2d 511 (Tex. Cr. App. 1975). *Contra*, *United States v. Ervin*, 436 F.2d 1331 (5th Cir. 1971). In the *Ervin* case, court said that insanity is the very antithesis of denial, and compared the two defenses to denial and entrapment.

⁶¹*State v. Morris*, 248 S.W.2d 847 (Mo. 1952).

⁶²*State v. Bradley*, 120 La. 248, 45 So. 120 (1907); *State v. Porter*, 213 Mo. 43, 111 S.W. 529 (1908); *State v. Wade*, 161 Mo. 441, 61 S.W. 800 (1901); *Flake v. State*, 156 Ark. 34, 245 S.W. 174 (1922); *Montgomery v. State*, 68 Tex. Cr. R. 78, 151 S.W. 813 (1912); *Warren v. State*, 555 S.W.2d 831 (Tex. Cr. App. 1978).

⁶³W. LaFave & A. Scott, *Handbook of Criminal Law* § 53 (1972).

⁶⁴*State v. Bradley*, 120 La. 248, 45 So. 120 (1907). The degree of inconsistency will depend on the test for insanity adopted in the particular jurisdiction. The ALI-Model Penal Code test would not appear to increase the likelihood of inconsistency because it speaks in terms of appreciating the criminality of one's conduct, or of conforming one's conduct to the law. The M'Naghten test, however, because one of its tenets is that the defendant did not know what he was doing, seems to involve a greater likelihood of inconsistency when asserted with self-defense. See W. LaFave & A. Scott, *supra* note 63, at § 37, 38 (1972).

⁶⁵90 Tex. Cr. 310, 234 S.W. 914 (1921).

⁶⁶248 Ill. 64, 93 N.E. 321 (1910).

Such knowledge was an essential element of the charge under the applicable statute. The trial judge refused to submit this fallback theory to the jury because it was inconsistent. The Texas appellate court reversed, saying that, although the defendant had relied on alibi, this did not deprive him of using any other "defense theory" sanctioned by the evidence.

In *Lee*, the defendant was charged with intending to kill by mingling carbolic acid with beer. Lee denied placing the acid in the beer but also attempted to produce evidence showing that the amount of acid in the beer was not sufficient to produce death. The trial judge did not permit such evidence because it was inconsistent with Lee's denial. The appellate court reversed, saying that a plea of not guilty renders competent any evidence that tends to prove or disprove any issue involved even if one defense is inconsistent with another.

While both decisions seem correct, their reasoning has certain flaws. Certainly by claiming alibi or denying the commission of the crime, the accused is not thereby relieving the state of its burden to prove all the elements of an offense beyond a reasonable doubt. Furthermore, there is no logical inconsistency between asserting alibi or denial (or insanity or intoxication⁶⁷), and still claiming that the state has not successfully carried its burden of proof, because those defenses do not necessarily involve an admission that the "criminal" act occurred.

A thornier problem develops, however, if the defense asserted is self-defense, accident, or entrapment. Such defenses are based on the assumption that an act occurred which, absent the defense, would be criminal. Therefore, an inconsistency may occur if the accused asserts such a defense and simultaneously contests that the act occurred or that he committed it.⁶⁸ Such defenses are then truly inconsistent and will be discussed *infra*.

A final example of alternative defenses is found in murder prosecutions when the defendant asserts the affirmative defense of

⁶⁷See note 60, *supra* and accompanying text.

⁶⁸An inconsistency would not arise if the accused contested only one of the elements of the offense, and if that element were not implicitly assumed in his affirmative defense. For example, the defendant in a murder case who claimed he shot the victim in self-defense may still contest the allegation that his shot was the cause of death. See *Harrison v. State*, 461 P.2d 1007 (Okla. Cr. 1969). This rule, however, is not

self-defense and simultaneously claims that his actions constitute the lesser included offense of voluntary manslaughter rather than murder. Beginning as early as 1909, the courts ruled that such defenses were not necessarily inconsistent because the fear which might prompt an individual to act in self-defense might also produce the heat of passion necessary for voluntary manslaughter.⁶⁸ It was for the jury to decide which was more applicable.

V. CONTRADICTORY DEFENSES

"Contradictory defenses" are those defenses which are truly inconsistent, i.e., mutually exclusive, but which traditionally have been permitted. The most common examples of these are accident/self-defense and denial/self-defense.

Accident and self-defense are *usually* inconsistent. Self-defense requires a voluntary, intentional act in response to some type of attack. For example, the defendant shoots the victim intentionally because the victim is trying to stab him. The defense of accident (or misadventure), however, requires the doing of a lawful act, free from negligence, which has unintended results.⁷⁰ For example, the defendant is lawfully hunting in a woods. Despite using due care, he trips and, as he falls, his weapon fires and strikes his companion. Accident does not require an impending attack nor does it require the operative act to be intentional. In the hunting situation above, the "act" of shooting was not intentional.⁷¹

generally applicable in cases involving denial and entrapment. See note 168-182, *supra*, and accompanying text.

⁶⁸ See *State v. Crawford*, 66 W.Va. 114, 66 S.E. 110 (1909); *Batchelor v. State*, 18 Ga. App. 756, 90 S.E. 487 (1918); *Kinard v. United States*, 96 F.2d 522, 526 (D.C. Cir. 1938); *Addison v. State*, 124 Ga. App. 467, 184 S.E.2d 186 (1971). See also *Stevenson v. United States*, 162 U.S. 313 (1896); *State v. Burnell*, 298 Mo. 672, 252 S.W. 709 (1923); *McClerkin v. Commonwealth*, 221 Ky. 689, 299 S.W. 570 (1927) (denial, self-defense, and manslaughter defenses permitted).

⁷⁰ 21 Am.Jur.2d *Criminal Law* § 83 (1965); para. 216b, *Manual for Courts-Martial, United States*, 1969 (Revised edition). The Manual provision describes accident or misadventure as an excuse, and states, "A death, injury, or other event which occurs as the result of an accident or misadventure in doing a lawful act in a lawful manner is excusable."

⁷¹ Some courts have referred to accident as an involuntary act by definition. See, e.g., *State v. Peal*, 463 S.W. 2d 840 (Mo. 1971). This appears to be incorrect. The act might be voluntary but the results were unforeseen and unwanted, as illustrated by the

The defense of accident or misadventure is complicated somewhat by the fact that courts often do not specify whether they are discussing the affirmative defense of accident which renders a homicide excusable, or are using "accident" in its ordinary sense, which does not. Consider the following example: Defendant enters a crowded room and, to show off his dexterity, begins to twirl a loaded pistol. The pistol fires during this exhibition and kills an onlooker. Certainly in this case the defense of accident or misadventure is not applicable, because the defendant was not doing a lawful act in a non-negligent way. Therefore the homicide would not be excusable. The killing, however, was nonetheless "accidental" in the sense that there was no intent to kill or even to injure. Consequently, the defendant's claim of "accidental" shooting would tend to negate any element of intent and would serve as a defense to premeditated murder or voluntary manslaughter. It will not, however, serve as a defense to any other degree of homicide which did not require specific intent.

*People v. Gaimari*⁷² and *People v. DeRosa*⁷³ are two examples of a situation in which the two defenses are not necessarily inconsistent. *Gaimari* and *DeRosa* might be called "two-shot" cases. Both were murder prosecutions in which the defendant fired two shots into the victim in the course of a struggle. In each case, the defendant asserted that the first shot was fired accidentally but the second shot was fired in self-defense. In such cases, the defenses are clearly not inconsistent because they are based on two different (although closely related) events. Proof that one shot was fired accidentally does not necessarily disprove the notion that the second shot was fired in self-defense and vice versa.⁷⁴ Both courts, however, referred to the defenses as inconsistent.⁷⁵

following example: A defendant on a lawful hunting trip fires at a deer. The bullet ricochets in a totally unforeseen manner and strikes his companion. Clearly the act of shooting was voluntary but the results were unintended.

⁷²176 N.Y. 84, 68 N.E. 112 (1903).

⁷³378 Ill. 557, 39 N.E.2d 1 (1941).

⁷⁴A similar "two-shot" case with a unique twist was *Scott v. State*, 239 Ga. 46, 235 S.E.2d 523 (1977). In that murder case the facts as developed showed that, if the first shot killed the victim, then the defenses of accident and self-defense were raised. If the second shot was the fatal one, then self-defense and voluntary manslaughter were in issue. The trial judge, to be safe, instructed on all three issues to provide the jury with sufficient guideposts for their deliberations.

⁷⁵Neither court specified whether they were referring to the affirmative defense of accident (misadventure) or meant that the shooting was accidental in its normal sense.

A case that provides an excellent vehicle to illustrate that the two defenses are not inconsistent is the military case of *United States v. Perry*.⁷⁶ In *Perry*, the accused was tried for unpremeditated murder. He testified that he punched the decedent in self-defense. The victim fell and later died from head injuries. The United States Court of Military Appeals held that the act of throwing one punch in response to a threatened attack was an act of permissible self-defense. Such a permissible act of self-defense would constitute a lawful act done in a lawful manner. Therefore, the defense of accident or misadventure was available and the homicide would be excusable if the court believed the accused's testimony.⁷⁷

Obviously the defenses in *Perry* are not contradictory. Quite the contrary, they complement each other and are vital to full defense to the charge.

Such cases illustrate that despite the definitional difference, many inconsistent defenses, upon analysis of the facts, are not mutually exclusive but rather alternative defenses.

In the absence of such severable factual bases, however, accident and self-defense are inconsistent and courts have traditionally viewed them as such. Despite this perception, the defenses have been permitted,⁷⁸ as have the similar sets of the defense of accident

⁷⁶16 C.M.A. 221, 36 C.M.R. 377 (1968).

⁷⁷*But see* State v. Carter, 26 N.C. App. 84, 214 S.E.2d 611 (1975). This was a murder prosecution in which the defendant was convicted of voluntary manslaughter. His defense was self-defense, in that he shot the victim while the victim was trying to stab him. He claimed, however, that he had not intended to shoot the victim in the chest but only in the leg.

The appellate court said accident (misadventure) was not raised. However, the defense probably was raised under the *Perry* theory that the act of firing at the knife-wielding victim was a permissible act of self-defense. Therefore the unintended fatal results would be excusable under a theory of accident or misadventure. Even assuming that accident or misadventure was not applicable because the act of shooting was not reasonable under the circumstances, it would appear that the defendant's testimony raised the partial defense of lack of intent to kill.

⁷⁸Jordon v. State, 238 Ark. 398, 382 S.W.2d 185 (1964); Jordan v. State, 154 Ga. 390, 114 S.E. 349 (1923); People v. Woods, 131 Ill. App.2d 54, 268 N.E.2d 246 (Ill. 1971); People v. Smythe, 132 Ill. App.2d 685, 270 N.E.2d 431 (1971); Gatliff v. Commonwealth, 32 Ky. 1063, 107 S.W. 739 (1908); Commonwealth v. Barton, 367 Mass. 515, 326 N.E.2d 886 (1975); United States v. Williams, 604 F.2d 277 (4th Cir. 1979); People v. Jew, 21 Mich. App. 408, 175 N.W.2d 544 (1970); State v. Randolph, 496

and defense of others,⁷⁹ and accident and defense of habitation.⁸⁰

Denial and self-defense are clearly inconsistent, but the general rule has been that the combination of these defenses is permissible,⁸¹ as are alibi and self-defense,⁸² which represent an even greater extreme. The rule had its start before the turn of the century⁸³ and continues unabated to the present.⁸⁴

The *ratio decidendi* of the decisions has been that, even if the defendant denies the act, if self-defense is raised by the other evidence, it should be the subject of instruction because the jury

S.W.2d 257 (*en banc*) (Mo. 1973); *State v. Herrill*, 496 S.W.2d 321 (Mo. App. 1973); *State v. Grier*, 218 N.C. 660, 12 S.E.2d 236 (1940); *State v. Adams*, 2 N.C. App. 282, 163 S.E.2d 1 (1968); *State v. Rodriguez*, 110 Ohio App. 307, 13 Ohio Op. 2d 79, 169 N.E.2d 444 (1959); *State v. Burns*, 516 P.2d 748 (Or. App. 1973); *Harris v. State*, 101 Tex. Cr. 33, 274 S.W. 568 (1925); and *Carden v. State*, 62 Tex. Cr. R. 607, 138 S.W. 396 (1911).

State v. Flint, 142 W.Va. 509, 96 S.E.2d 677 (1957), *cert. denied*, 356 U.S. 903 (1957). This was an interesting case in which accident was defendant's theory. The prosecution specifically requested an instruction on self-defense, over the defense's disclaimer. The judge instructed on both.

⁷⁹*State v. Adams*, 2 N.C. App. 282, 163 S.E. 2d 1 (1968). In this case, the North Carolina Court said accident, self-defense, and defense of others should have been subjects of instruction. *See also Lester v. State*, 280 N.W. 334, 228 Wis. 631 (1938) (accident and heat of passion).

⁸⁰*State v. Mitcheson*, 560 P.2d 1120 (Utah 1977). In this case, the court noted that the defenses are not necessarily inconsistent, and stated that they should be permitted even if they were.

⁸¹40 Am.Jr.2d *Homicide* § 521 (1968). 41 C.J.S. *Homicide* § 375 (1944). *But see United States v. Bellamy*, 47 C.M.R. 319 (A.C.M.R. 1973).

⁸²*See cases cited in note 30, supra.*

⁸³*See text above notes 44-53, supra.*

⁸⁴*Davis v. State*, 20 Ala. App. 131, 101 So. 171 (1924); *Gibson v. State*, 135 Ark. 520, 205 S.W. 896 (1918); *People v. Keel*, 91 Cal. App. 599, 267 P. 161 (1928); *Green v. State*, 7 Ga. App. 803, 65 S.E. 318 (1910); *Reed v. State*, 141 Ind. 116, 40 N.E. 525 (1895); *People v. Gill*, 7 Ill. App. 3d 24, 286 N.E.2d 516 (1972); *State v. Sloah*, 149 Iowa 469, 128 N.W. 842 (1910); *State v. Jackett*, 81 Kan. 168, 105 P. 689 (1909); *Morris v. Commonwealth*, 46 S.W. 491 (Ky. 1898); *Combs v. Commonwealth*, 196 Ky. 804, 246 S.W. 132 (1922); *State v. Wright*, 352 Mo. 66, 175 S.W.2d 866 (1943); *Ickes v. State*, 42 Ohio App. 446, 182 N.E. 48 (1931); *Graham v. State*, 98 Ohio St. 77, 120 N.E. 232 (1918); *Harrison v. State*, 461 P. 2d 1007 (Okla. Cr. 1969); *State v. Anderson*, 207 Or. 675, 298 P.2d 195 (1956); *State v. Taylor*, 261 S.C. 437, 200 S.E.2d 387 (1973); *Scott v. State*, 150 Tex. Crim. 529, 202 S.W.2d 669 (1947). *Contra Smith v. State*, 22 Okla. Crim. 383, 212 P. 1012 (1922); *Commonwealth v. Mains*, 374 N.E.2d 576 (Mass. 1978).

need not believe the defendant.⁵⁵ In other words, "[i]t would be perfectly proper for him to say: (a) I did not fire the shot, but (b) whatever I did, I did in my own self-defense."⁵⁶

Similarly incongruous are the defenses of denial or alibi and voluntary manslaughter. It is certainly contradictory for a defendant to argue "I didn't stab him but, if I did, it was intentional and in the heat of passion." Yet the same principle that has permitted denial and self-defense has permitted the simultaneous assertion of these two defenses also.⁵⁷

The obvious problem with the assertion of such defenses is that it frequently wreaks havoc with the defendant's credibility, at the least, and insults the intelligence of the jury (and thereby raises its ire) at worst.

Such an effect was noted in *Johnson v. United States*.⁵⁸ Johnson was charged with rape and contended that he did not have intercourse with the girl. Because of evidence in the government's case, the defense counsel argued that the victim consented, "but I don't concede one second that the act of intercourse took place."⁵⁹ An *en banc* District of Columbia Circuit permitted such inconsistent defenses to be argued, noting that it was a tactical decision to be made at trial. The court added, however, that it would not be surprising if such a position reflected unfavorably on the defendant's credibility.⁶⁰

⁵⁵Davis v. State, 20 Ala. App. 131, 101 So. 171 (1924); Gibson v. State, 135 Ark. 520, 205 S.W. 898 (1918).

⁵⁶Graham v. State, 98 Ohio St. 77, 120 N.E. 232, 233 (1918).

⁵⁷People v. Smith, 121 Ill. App.2d 105, 257 N.E.2d 261 (1970); People v. Williams, 26 Mich. App. 218, 182 N.W.2d 347 (1970); McClerkin v. Commonwealth, 221 Ky. 689, 299 S.W. 570 (1927).

⁵⁸138 U.S. App. D.C. 174, 426 F.2d 651 (D.C. Cir. 1970) [*en banc*, cert. denied 401 U.S. 848 (1970)].

⁵⁹426 F.2d at 653 n. 3.

⁶⁰The *Johnson* case is in marked contrast to *Anderson v. State*, 104 Ind. 467, 4 N.E. 63 (1885), in which the defendant in a rape case was not permitted to claim both consent and lack of intercourse.

VI. ANTITHETICAL DEFENSES

The "inconsistent" defenses which have faced the greatest difficulty in gaining judicial acceptance have been entrapment and any type of denial such as alibi, general denial, lack of knowledge, and lack of intent. Why the judiciary would be so unwilling to accept the simultaneous assertion of denial and entrapment,⁹¹ yet permit denial and self-defense is unclear.⁹²

Certainly it cannot be explained totally by the principle of *stare decisis*. The first cases which refused to permit the simultaneous assertion of entrapment and denial were *People v. Murn*⁹³ in the state courts, and *Nutter v. United States*⁹⁴ in the federal courts. Both courts simply stated that the defenses were inconsistent and refused to permit them, without giving any citation of authority. During the same era, however, and equally available as citation of authority had successor courts been willing, were *Scriber v. United States*⁹⁵ and two Missouri cases, *State v. Decker*⁹⁶ and *State v. Murphy*,⁹⁷ all of which indicated that the combination of denial and entrapment should be available.

Scriber was a bribery case in which the defendant had admitted the act of taking the money but denied any criminal intent and thereby denied the crime. He also claimed that he had been entrapped. The trial judge refused to submit entrapment to the jury because it was inconsistent. The Sixth Circuit stated, in dicta, "it would seem that a defendant should have the benefit of the defense, even though such inconsistency exists . . . [A] jury might conclude that the defendant's claim of good intent was untrue and that he really intended to keep the money but might also conclude he was entrapped and therefore not guilty."⁹⁸

Two years later the United States District Court for Nebraska in *United States v. Washington*⁹⁹ permitted alibi and entrapment to be

⁹¹See 21 Am. Jur.2d *Criminal Law* § 144 (1965); 22 C.J.S. *Criminal Law* § 45(1) (1961). Annot., 61 A.L.R.2d 677 (1958).

⁹²See 40 Am. Jur.2d *Homicide* § 521 (1968); 41 C.J.S. *Homicide* § 375 (1944).

⁹³220 Mich. 555, 190 N.W. 666 (1922).

⁹⁴289 F. 484 (4th Cir. 1923).

⁹⁵4 F.2d 97 (6th Cir. 1925).

⁹⁶321 Mo. 1163, 14 S.W.2d 617 (1929).

⁹⁷320 Mo. 219, 6 S.W.2d 877 (1928).

⁹⁸*Scriber v. United States*, 4 F.2d 97, 98 (6th Cir. 1925).

⁹⁹20 F.2d 160 (D. Neb. 1927).

asserted without discussing the consistency of the two. (In *Washington*, the defendant claimed she was in St. Louis at the same time that she was allegedly making an illegal sale of liquor in Omaha.)¹⁰⁰

Perhaps the real but never pronounced reason for the courts' aversion to such combinations of defenses is the fact that entrapment is not a traditional common law defense. It is a relatively recent invention¹⁰¹ which permits an individual to escape what would otherwise be "his just desserts" by showing that the police were overzealous in their methods. Consequently, the defense was viewed essentially as a possibly undeserved legal windfall for the defendant. He would be set free not because he himself was clearly innocent, but because, for public policy reasons, this mischievous type of police conduct could not be permitted to go unabated.¹⁰² However, to allow the defendant to cry entrapment and also to contest the commission of the crime was to permit him to have "two bites at the apple."

Although the prohibition against these defenses has clearly been the prevailing view of 40 years,¹⁰³ the rule has been soundly criticized in law reviews¹⁰⁴ and appears now to be steadily declining. The

¹⁰⁰ *Washington* is typical of the early cases involving denial and entrapment in that it involves the illicit sale of liquor. Before the 1950's and the deluge of narcotics convictions, this offense was the one most frequently encountered in the area. See Annot. 55 A.L.R.2d 1322, 1343 (1957).

¹⁰¹ See Orfield, note 16, *supra*.

¹⁰² This is essentially the view expressed by Mr. Justice Roberts in his concurring opinion in *Sorrells v. United States*, 287 U.S. 436 (1932).

It is not the position of the Supreme Court that the purpose of allowing the entrapment defense is to deter police misconduct, although several justices have espoused the position in concurring or dissenting opinions. The police misconduct rationale is sometimes called the "objective" test for entrapment, and is contrasted with the "subjective" test, which focuses on the motivation of the defendant or accused to commit a crime independently of police inducement. The view of the various justices, expressed in *Sorrells* and later in *Sherman v. United States*, 356 U.S. 369 (1958), *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976), are discussed in an article by Captain Robert L. Gallaway, *Due Process: Objective Entrapment's Trojan Horse*, 88 Mil. L. Rev. 103, 104-116 (spring 1980).

¹⁰³ See Annot., 61 A.L.R.2d 677 (1958).

¹⁰⁴ See Groot, note 13, *supra*; Comment, note 13, *supra*; Orfield, note 16, *supra*; Comment: *United States v. Demma: Assertion of Inconsistent Defenses in Entrapment*

present status of the jurisdictional landscape on the simultaneous assertion of entrapment and denial of the crime is divided into three separate and distinct layers. The first is a group of cases which permit these defenses to be asserted without reservation.¹⁰⁵ Second, some cases refuse to permit them to be asserted under any circumstances.¹⁰⁶ Third, other cases permit the assertion of such defenses under certain circumstances depending mainly on the degree of denial.¹⁰⁷

Before examining the state of the law in various jurisdictions, however, we will benefit from analyzing the subject overall to discover some of the fundamental differences that exist.

Some courts have refused to allow denial and entrapment because, in order to assert entrapment, one must *admit* commission of the crime.¹⁰⁸ Other courts have ruled that entrapment will not be available to one who *denies* commission of the offense.¹⁰⁹ The difference, if intentional, would be substantial. If the defendant may not deny the commission of the offense, then he can still retain his right to remain silent and simply not testify. If the defendant must "admit" the commission of the offense then he must take the stand (or enter into stipulation) and judicially confess.

Although in either case the Government must have established a *prima facie* case at the conclusion of its own evidence to overcome a motion for a finding of not guilty, it is obvious that compelling a defendant to confess judicially eliminates any difficulty the

Cases Allowed, 1975 Utah L. Rev. 962; Murcheson, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 Miss. L. J. 573, 609 (1976); Comment: *Entrapment: A Critical Discussion*, 37 Mo. L. Rev. 633, 658 (1972); Hardy, *Traps of Entrapment*, 3 Am. J. Crim. Law 165, 174 (1974).

¹⁰⁵ See section VII of this article, *infra*.

¹⁰⁶ See section VIII, *infra*.

¹⁰⁷ See section IX, *infra*.

¹⁰⁸ E.g., *United States v. Watson*, 469 F.2d 504 (3rd Cir. 1973); *United States v. Prieto-Olivas*, 419 F.2d 149 (5th Cir. 1969); *Johnson v. United States*, 426 F.2d 112 (7th Cir. 1970); *Chisum v. United States*, 421 F.2d 207 (9th Cir. 1970); *Reeves v. State*, 244 So. 2d 5 (Miss. 1971); *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1976).

¹⁰⁹ E.g., *United States v. Badia*, 490 F.2d 296 (1st Cir. 1973); *United States v. Pickle*, 424 F.2d 529 (5th Cir. 1970); *Munroe v. United States*, 424 F.2d 243 (10th Cir. 1970); *McCarroll v. State*, 294 Ala. 87, 312 So.2d 382 (1975); *Ivory v. State*, 173 So. 2d 759 (Fla. 3rd D.C.A. 1965); *People v. Gonzalez*, 24 Ill. App.3d 259, 320 N.E. 2d 197 (1974).

Government might have had in meeting the standard of proof beyond a reasonable doubt. Such a prerequisite to an assertion of entrapment certainly puts the defendant in a quandary. Should he forego the entrapment defense and hope that the Government has not convinced the jury beyond a reasonable doubt, or should he assert entrapment and take the stand and confess, thereby effectively relieving the Government of its burden of proof?

Requiring an individual to judicially confess has two substantial flaws. First, to require an individual to confess in order to avail himself of a defense seems a clear violation of an individual's fifth amendment rights against self-incrimination.¹⁰ Second, such a requirement would seem to frustrate the entire purpose of the entrapment defense, which is to deter unlawful and overzealous officials from preying upon innocent citizens. This requirement would insulate the police from judicial scrutiny, because the defendant, rather than judicially confess, would forsake the entrapment defense.¹¹

Some courts¹² have applied that rule literally and required the defendant to take the stand and confess before he could assert entrapment. Despite this, it appears that the two expressions, "admit" and "must not deny," were meant to be used interchangeably. This construction is based on several considerations.

First, it is obvious why such a misunderstanding could arise. In the vast majority of entrapment cases that reach an appellate court, the evidence which raises entrapment was the defendant's own testimony. Consequently, faced with this *fait accompli*, the courts have stated in effect that, once the defendant takes the stand and discusses the offense, he must admit complicity since he gave up his right to remain silent. Once he is on the stand and subject to cross-examination, the difference between "must admit" and "may not deny" becomes non-existent.

¹⁰See note 13, *supra*.

¹¹See Orfield, note 16 *supra* at 65-66; Groot, note 13 *supra* at 269 et seq. Concerning the view of the United States Supreme Court on the purposes of the entrapment defense, and the distinction between the subjective and objective tests for entrapment, see note 102, *supra*.

¹²See *United States v. Hart*, 546 F.2d 796 (9th Cir. 1976); *United States v. Staggs*, 540 F.2d 1010 (9th Cir. 1976). See also Judge Hufstедler's dissent in *United States v.*

Second, various jurisdictions have used both terms in stating the requirement,¹¹³ indicating they viewed the terms as interchangeable.

Third, in *Gorin v. United States*¹¹⁴ and *United States v. Groessel*,¹¹⁵ the defendants did not take the stand, yet the courts permitted them to assert denial and entrapment if other evidence raised entrapment. In *Gorin*, the court specifically stated that it would have been inconsistent for the accused to take the stand and deny commission of the offense and then assert entrapment. However, it was not fatally inconsistent for him to claim entrapment but also to keep silent in the hope that the jury would find that the Government had not proved its case beyond a reasonable doubt. The law would permit that much inconsistency. Such a holding seems eminently correct, in light of the majority opinion in *Sorrells v. United States* which held that entrapment could be raised under a plea of not guilty.¹¹⁶

Fourth, other courts have specifically noted in dicta that a defendant claiming entrapment may not take the stand and deny commission of the crime.¹¹⁷ Such decisions imply agreement with *Gorin* and *Groessel* that if the defendant merely remains silent he may contest the state's case and still assert entrapment.

Fifth, certain jurisdictions have adopted the converse of the proposition that in order to assert entrapment, one must admit or not deny the commission of the crime. They have ruled that by asser-

Paduano, 549 F.2d 145, 151 (9th Cir. 1977), for a discussion of this "manifest error" which "impaired a defendant's constitutionally secured rights."

¹¹³See *United States v. Pickle*, 424 F.2d 529 (5th Cir. 1970); *United States v. Prieto-Olivas*, 419 F.2d 149 (5th Cir. 1969); *United States v. Badia*, 490 F.2d 296 (1st Cir. 1973); *United States v. Caron*, 588 F.2d 851 (1st Cir. 1978); and *State v. Mendoza*, 109 Ariz. 445, 511 P.2d 627 (1973).

¹¹⁴313 F.2d 641 (1st Cir. 1963).

¹¹⁵440 F.2d 802 (5th Cir. 1971), cert. denied, 403 U.S. 933 (1970).

¹¹⁶*Sorrells v. United States*, 287 U.S. 435, 452 (1932). See also *State v. Nelson*, 228 N.W.2d 143 (S.D. 1975); but see *State v. Vitale*, 530 P.2d 394 (Ariz. App. 1975). *Vitale* seems to say, in direct contravention of the 1932 decision of the United States Supreme Court in *Sorrells*, that a not-guilty plea is inconsistent with a defense of entrapment.

¹¹⁷*United States v. Cunningham*, 349 F.Supp. 1115 (M.D. Fla. 1972); *United States v. Rodriguez*, 446 F.2d 859 (9th Cir. 1971).

ting entrapment, the defendant has admitted the offense as charged.¹¹⁸ Consequently, in such jurisdictions, it is unnecessary to judicially compel the defendant to take the stand and confess.

In short, it does not appear that courts mandate a judicial confession. The courts have used such intemperate language, which might lead to the contrary conclusion, because the defendant's testimony is usually present. They have apparently meant that one cannot affirmatively deny the offense by testimony. The defendant's silence on the issue will be permitted, especially in those jurisdictions where the invocation of entrapment serves as an admission of the commission of the offense.¹¹⁹

A more fundamental problem, however, is that virtually all jurisdictions have stated as the rule that, in order to assert entrapment, one "must admit or may not deny" the commission of the crime.¹²⁰ Such a statement is faulty for two reasons.

The first reason is that it appears these jurisdictions have a conception of entrapment based on the concurring opinion of Justice Roberts in *Sorrells v. United States*¹²¹ rather than on the majority opinion in that case.

¹¹⁸Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955); United States v. Ramirez, 533 F.2d 138 (5th Cir. 1976), cert. denied, 429 U.S. 884 (1970); United States v. Garcia, 562 F.2d 411 (7th Cir. 1977); United States v. Georgiou, 333 F.2d 440 (7th Cir. 1964), cert. denied, 379 U.S. 901 (1964); People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), cert. denied, 390 U.S. 991 (1976); State v. Williams, 84 S.D. 547, 173 N.W.2d 889 (1977); Warren v. State, 565 S.W.2d 931 (Tex. Cr. App. 1978).

¹¹⁹For a good discussion of this issue, see United States v. Hawke, 505 F.2d 817 (10th Cir. 1974); United States v. Shameia, 464 F.2d 629 (6th Cir. 1972); Harris v. United States, 400 F.2d 264 (5th Cir. 1968); McCarthey v. United States, 379 F.2d 285 (5th Cir. 1967), cert. denied, 389 U.S. 929 (1967).

¹²⁰E.g., Sylvia v. United States, 312 F.2d 145 (1st Cir.), cert. denied, 374 U.S. 809 (1963); United States v. Watson, 489 F.2d 504 (3d Cir. 1973); Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955); United States v. Mitchell, 514 F.2d 758 (6th Cir. 1975); Munroe v. United States, 424 F.2d 243 (10th Cir. 1970); McCarrol v. State, 394 Ala. 87, 312 So.2d 382 (1975); State v. Bean, 119 Ariz. 412, 581 P.2d 257 (1978); Crosby v. State, 295 A.2d 708 (Del. Supr. 1972); People v. Dillard, 68 Ill. App.3d 897, 386 N.E.2d 920 (1979); State v. Bruno, 204 N.W.2d 879 (Iowa 1973); State v. Farmer, 212 Kan. 163, 510 P.2d 180 (1973); Tomita v. Tucker, 18 Mich. App. 559, 171 N.W.2d 564 (1969); Reed v. State, 421 S.W.2d 116 (Tex. Cr. App. 1967); State v. Gray, 69 Wash.2d 432, 418 P.2d 725 (1966).

¹²¹287 U.S. 435, 453-459 (1932).

Chief Justice Hughes, writing for the majority, held that a person who is entrapped into committing a crime is not guilty of that crime.¹²² Consequently the defense of entrapment is not a plea in bar which would require assumption that the crime charged was committed, but a defense which could be raised by a plea of not guilty.¹²³ Entrapment, therefore, is a negation of the crime.¹²⁴

Justice Roberts, however, had a fundamentally different viewpoint. His focus was on entrapment as a deterrent against unlawful inducement by Government officials. In his view, entrapment was not a negation of the crime. The crime was committed and the defendant committed it. To deter such unlawful government conduct, however, the defendant would be released.¹²⁵ Because of his view of the nature of entrapment, Justice Roberts contended that a pretrial motion was the proper vehicle for its assertion since it was in the nature of a plea in bar.¹²⁶ Such a vehicle would mean that the court, for purposes of considering the defense, would assume that the crime had been committed.¹²⁷

Consequently, when modern courts require admission or non-denial of a crime or necessarily assume as a prerequisite to the assertion of entrapment that the crime was committed, they are relying on Justice Roberts' opinion. Considering the majority opinion in *Sorrells*, one would more accurately speak in terms of "what, absent entrapment, would be a crime."¹²⁸

¹²²*Id.* at 452.

¹²³*Id.*

¹²⁴As the Ninth Circuit stated in *United States v. Demma*, 523 F.2d 961 (9th Cir. 1975), the effect of *Sorrells* was to make non-entrapment an element in all prosecutions once entrapment is raised.

¹²⁵287 U.S. at 453-55.

¹²⁶In *Hawthorne v. State*, 43 Wis. 82, 168 N.W.2d 100 (1969), the defendant seemed to rely upon Justice Roberts' theory. He argued that, because there was an inconsistency between the pleas of not guilty and that of not guilty by reason of entrapment, he should be allowed to raise entrapment prior to trial. The Wisconsin court was unable to find any cases directly on point but concluded that, since the appellant was able to present both defenses at his trial, he was not prejudiced. *Also see* Comment, *United States v. Demma: Assertion of Inconsistent Defenses in Entrapment Cases Allowed*, 1975 Utah Law Rev. 962, 968. In that article, the author suggests that the proper methods of handling entrapment could be either use of a bifurcated trial, or leaving the issue solely to the judge.

¹²⁷287 U.S. at 453-55.

¹²⁸*See* Groot, note 13 *supra*, for an excellent discussion of the *Sorrells* case. *Also see* Comment, *supra* note 126, at 968; and *Brooke v. United States*, 385 F.2d 279 (D.C. Cir. 1967).

The second reason why use of the word "crime" is inappropriate is closely related to the first. While the first reason dealt with the nature of entrapment as a matter of law, the second reason concerns the factual and legal nature of the "crime" with which the defendant is charged and, specifically, what elements of that crime he was entrapped into committing.

Crimes can be divided into two classes: Those which consist solely of a physical act and those which require a physical act in conjunction with some form of intent or knowledge. Going through a red light is an example of an offense requiring proof only of the physical act. The defendant's intent or knowledge is irrelevant to the issue of guilt or innocence. If he were somehow entrapped into that physical act, he was entrapped into committing a crime. Therefore, if the defendant denies the act, he is making a *complete denial* of the crime.

Narcotics violations, however, as a general rule, require more than a physical act. They require that the defendant know that what he was possessing, transferring, or selling was contraband. Consequently, if an individual were entrapped into delivering a package to a third party, he was not entrapped into committing a *crime* unless he knew narcotics was in the package. It would appear logical that he could, therefore, simultaneously assert entrapment as to the physical act but also deny the crime. Despite the seeming logic of that position, jurisdictions have divided over whether such defenses would be permissible.¹²⁸ The best way to illustrate this division, and also to introduce the more specific sections dealing with the various jurisdictions, is to examine how the same fact pattern has been treated by the different courts.

United States v. King,¹²⁹ *United States v. Greenfield*,¹³¹ and *Munroe v. United States*¹³² were all cases in which physicians were charged with illegal sale of drugs. The doctors defended on the grounds that they committed no crime by dispensing the drugs

¹²⁸See *Sylvia v. United States*, 312 F.2d 145 (1st Cir.), cert. denied, 374 U.S. 809 (1963); *United States v. DiDonna*, 276 F.2d 956 (2nd Cir. 1960); *United States v. Baker*, 373 F.2d 28 (6th Cir. 1967); *United States v. Barrios*, 457 F.2d 680 (9th Cir. 1972).

¹²⁹587 F.2d 956 (9th Cir. 1978).

¹³¹554 F.2d 179 (5th Cir. 1977).

¹³²424 F.2d 243 (10th Cir. 1970) (en banc).

because doing so was in the course of their professional duties and involved no intent to commit a crime. They argued further that there was no crime because they were entrapped by the police into dispensing the drugs to them. .

The Ninth Circuit permits inconsistent defenses, specifically including denial and entrapment, to be asserted. Therefore the defendant in *United States v. King* was allowed to present both defenses.

The Fifth Circuit will permit entrapment to be asserted with a denial of the crime only if the defendant admits sufficient elements. In *United States v. Greenfield*, the court ruled that the defendant had admitted sufficient acts so that the defense of entrapment was not "too inconsistent" and therefore was permitted.

The Tenth Circuit, however, normally will not permit entrapment to be asserted with any degree of denial.¹³³ Therefore in *Munroe v. United States*, it held that, since the doctors denied any illegal intent, they denied the crime and were not entitled to an entrapment defense.

With that background and introduction, the positions of each of the three types of jurisdictions may now be viewed in detail.

VII. JURISDICTIONS ALWAYS PERMITTING INCONSISTENT DEFENSES

One of the first cases allowing the defenses to be asserted without reservation was the 1956 California decision in *People v. West*.¹³⁴ The rule in California up to that time had clearly been that denial and entrapment were fatally inconsistent and would not be permitted. In *West*, the California Superior Court held that a defendant has a right to assert inconsistent defenses, and, therefore, the defendant in that case could deny the essential elements of the of-

¹³³See *Rowlette v. United States*, 392 F.2d 437 (10th Cir. 1968); and *United States v. Gibson*, 446 F.2d 719 (10th Cir. 1971), in which the entrapment defense was not permitted in a bribery case because the accused claimed lack of scienter; but see *McCarthy v. United States*, 399 F.2d 708 (10th Cir. 1968), in which the defendant asserted entrapment but also contended that the Government had not met its burden of proof that the substance sold was LSD. Without discussion, the McCarthy court permitted both defenses.

¹³⁴139 Cal. App.2d Supp. 923, 293 P.2d 166 (1956).

fense yet have the benefit of evidence that she was entrapped into committing the crime.

West represented a distinctly minority view, especially when it was decided in 1956. Its position, however, was soundly reinforced by no less a judicial giant than Chief Justice Roger Traynor nine years later. In *People v. Perez*,¹³⁵ the California Supreme Court overruled a series of earlier cases that prohibited the assertion of entrapment together with a denial. Chief Justice Traynor's logic is persuasive. First, he stated that a defendant may deny that he committed every element of the offense charged but still properly assert that such acts as he did commit were the results of entrapment.¹³⁶ Second, he may contend that the evidence shows unlawful police conduct amounting to entrapment without conceding that it shows guilt beyond a reasonable doubt. Third, since entrapment is designed to deter unlawful police conduct, it cannot be restricted by requiring the defendant to incriminate himself as a precondition. Such a policy "would frustrate the assertion of the defense itself and would thus undermine its policy."¹³⁷ He compared it to a search and seizure wherein the defendant may challenge the legality of the search without asserting a proprietary interest in the premises entered.¹³⁸ This decision and its logic would be frequently cited in years to come.

¹³⁵82 Cal.2d 769, 44 Cal. Rptr. 326, 401 P.2d 934 (1965).

¹³⁶Such an argument had been advanced in *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956), to be discussed *infra*, at the text above notes 159-161.

¹³⁷*People v. Perez*, 401 P.2d at 938.

¹³⁸See note 13, *supra*, for a discussion of "forced admissions" in the context of the Supreme Court's decision in *Simmons v. United States*, 390 U.S. 377 (1968).

It should be noted that the United States Supreme Court has recently invalidated the so-called "automatic standing" rule whereby a criminal defendant may challenge the legality of a search without regard to whether he or she had an expectation of privacy in the premises searched. This occurred in *United States v. Salvucci*, U.S. , 100 S.Ct. , 48 U.S.L.W. 4881 (1980) (also found at 65 L.Ed 2d 619 and 27 Crim. L. Rep. 3241).

Overruling *Jones v. United States*, 362 U.S. 257 (1960), the Court stated that a defendant is no longer faced with the dilemma of having to give self-incriminating testimony in order to establish his standing to challenge a search and seizure. This dilemma was resolved by *Simmons v. United States*, 390 U.S. 377 (1968), in which the Court held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial.

Further, contrary to the *Jones* case, it is now the rule that a prosecutor may, without legal contradiction, simultaneously maintain that a defendant criminally

The District of Columbia Circuit in *Hansford v. United States*¹³⁹ reached a similar result by applying different logic. In *Hansford*, the court held that the defenses of denial and entrapment were alternative, not inconsistent, defenses. The rationale was that it was consistent for a defendant to deny taking part in a crime yet urge that, if the jury believed that the crime did occur, then the Government's evidence as to how it occurred indicated entrapment.¹⁴⁰

The use of the phrase "alternative, not inconsistent" is curious. It would seem at first glance better to have said "alternative but inconsistent," because clearly a general denial (as was present in *Hansford*) is totally inconsistent with entrapment. The defenses are only "alternative" in the sense that the jury has a choice as to which of the inconsistent defenses to believe. On further analysis, however, *Hansford* explains the fundamental nature of many instances of inconsistent defenses. In many cases, such as *Hansford*, the defendant is not "speaking out of both sides of his mouth" by asserting inconsistent defenses. He has one theory of defense and adheres to it. However, clear evidence of another defense is presented during the trial, often by the Government's evidence.

Consequently, to hedge his bets but not to abandon his prime defense, the defense's final argument runs something like this: "Our defense is that the accused did not commit the crime. We realize, however, that the state has built a significant case and it is conceivable you might believe its evidence. While we certainly do not admit commission of the offense, if you do believe the state's evidence that the accused committed the crime, then we urge you to believe these aspects of the case which show that the perpetrator was entrapped." Under those circumstances, the defenses are not inconsistent but merely alternative. The defendant never departs

possessed seized goods but was not subject to a deprivation of his fourth amendment rights through their seizure. The Court cited *Rakas v. Illinois*, 439 U.S. 128 (1978), for this portion of the *Salvucci* holding.

This of course does not affect the validity of the California court's holding in *Perez*. The issues raised in that case were quite different from those involved in *Jones and Salvucci*.

¹³⁹12 U.S. App. D.C. 359, 303 F.2d 219 (1962).

¹⁴⁰*Hansford* could be of particular significance because now-Chief Justice Burger concurred in the opinion, thus giving some hint as to his view on the subject should such a case reach the Supreme Court.

from his defense of denial but views realistically the possibility that the fact finder might not believe him and plans (and argues) accordingly.

The Fourth Circuit in *Crisp v. United States*¹⁴¹ also referred to denial and entrapment as alternative defenses but did not expound as sophisticated an explanation as had the District of Columbia Circuit. However, the Fourth Circuit later, in *United States v. Harbin*,¹⁴² did expand this base and reached the conclusion (as did the California court in *West*) that, even if the defenses are inconsistent, the defendant still may assert them.

The next year, 1968, New York adopted the *West/Harbin* rule and announced that "the propriety of receiving inconsistent defenses is a principle now firmly imbedded in the criminal and civil law . . . [A] defendant may deny the commission of the crime" and still plead entrapment.¹⁴³

The most significant convert in the area of inconsistent defenses has been the Ninth Circuit. That circuit had long been the most vocal and persistent opponent of the simultaneous assertion of denial and entrapment.¹⁴⁴ The rule there had clearly been that the defendant must admit he committed the crime charged before entrapment would be the subject of an instruction.¹⁴⁵ In 1973, the Circuit in its *en banc* decision in *United States v. Demma*¹⁴⁶ overruled this nineteen-year precedent and clearly espoused the right of the defendant to present inconsistent defenses. Judge Hufstедler's opinion presented an articulate justification for inconsistent defenses. "The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be

¹⁴¹262 F.2d 68 (4th Cir. 1958).

¹⁴²377 F.2d 76 (4th Cir. 1967). In that case, however, the court found that entrapment was not raised by the evidence.

¹⁴³*People v. Chambers*, 56 Misc.2d 683, 289 N.Y.S.2d 804, 806 (1968). In *People v. Johnson*, 47 App. Div.2d 893, 366 N.Y.S.2d 198 (1975), the court followed *Chambers* and noted that an instruction which stated that, by raising entrapment, the defendant conceded guilt, was "prejudicial error beyond peradventure."

¹⁴⁴See Orfield, *supra* note 16, at 65-66.

¹⁴⁵As the Court succinctly put it in *Ortega v. United States*, 348 F.2d 874, 876 (9th Cir. 1965), "perhaps it's semantics but we believe that the defense of entrapment ('I only did it because the government agent induced me to do it') is inconsistent with the defense of 'I didn't do it.'"

¹⁴⁶523 F.2d 981 (9th Cir. 1975).

accorded every reasonable protection in defending himself against Government prosecution."¹⁴⁷

The *Demma* decision rested on three separate bases. First, the old rule, symbolized by the case of *Eastman v. United States*,¹⁴⁸ conflicted with the Supreme Court's decision in *Sorrells v. United States*. In *Sorrells*, the Court had rejected the Government's contention that a claim of entrapment necessarily involved an admission of guilt and was in the nature of a plea in bar, such as double jeopardy, rather than an affirmative defense. The Court had held that the defense of entrapment could be raised notwithstanding a not-guilty plea. Judge Hufstедler stated that the *Sorrells* rule was that "non-entrapment is an essential element of every federal crime,"¹⁴⁹ once entrapment is raised. Consequently, the *Eastman* rule relieved the Government of its burden and therefore conflicted with *Sorrells*.

Second, the court explained that the defenses are only inconsistent when the defendant *himself* denies the crime. Judge Hufstедler pointed out however that, if the defendant declines to testify, then he has not denied the crime. Entrapment may still become an issue if the Government introduces evidence bearing upon it, or if a defense witness raises it. In such cases there is simply no inconsistency. Defense counsel could argue, first, that the government has not proven its case beyond a reasonable doubt; and, second, that the state has not shown that the acts were not the result of entrapment. These are not inconsistent but "merely garden-variety alternative contentions."¹⁵⁰ The Ninth Circuit, in using this rationale, relied on *United States v. Groessel*,¹⁵¹ in which the Fifth Circuit ruled that, since the defendant had not taken the stand to deny he committed the crime, there was no evidentiary inconsistency with the defense of entrapment that had been raised. Consequently, the defendant was entitled to utilize the entrapment defense and still argue that the Government had not met its burden of proof.

¹⁴⁷*Id.* at 985.

¹⁴⁸212 F.2d 320 (9th Cir. 1954).

¹⁴⁹523 F.2d at 983.

¹⁵⁰*Id.* at 984.

¹⁵¹440 F.2d 602 (5th Cir. 1971), *cert. denied*, 408 U.S. 933 (1970). See text above note 115, *supra*.

Finally, the Ninth Circuit held there was no justification for not allowing application to entrapment cases of the "well established" rule permitting inconsistent defenses. In fact, there was a compelling reason why it should. Entrapment's primary function "is to safeguard the integrity of the law enforcement and prosecution process"¹⁵² and should not be so unduly restricted.

Having advanced all these compelling theoretical justifications, the Ninth Circuit then stated the tremendous practical obstacle to the assertion of these or any "inconsistent" defenses. "Inconsistent testimony by the defendant seriously impairs and potentially destroys his credibility,"¹⁵³ thereby making it highly unlikely that he would choose to so testify.

Such a consideration is crucial in entrapment cases because it is usually the defendant himself who must take the stand to produce the evidence of entrapment. For the accused to argue, "I did not do it and, if I did, the government talked me into it," would be an act of judicial suicide.

The Ninth Circuit acknowledged that continual adherence to *Eastman* would have generated "serious constitutional problems"¹⁵⁴ by conditioning the assertion of inconsistent defenses on the defendant's yielding his presumption of innocence, his right to remain silent, and his right to have his guilt proven beyond a reasonable doubt. Having said that, however, the court then specifically stated that its decision did not rest on constitutional grounds. On the contrary, the decision avoided this.

The *Demma* case marked a significant turning point in the field. Since *Demma*, more jurisdictions have permitted denial and entrapment to be asserted together,¹⁵⁵ or at least permitted it under certain circumstances.¹⁵⁶ The decision, however, was not a

¹⁵²523 F.2d at 985.

¹⁵³*Id.* at 985.

¹⁵⁴*Id.* at 986.

¹⁵⁵*State v. Taylor*, 599 P.2d 496 (Utah 1979); *State v. McBride*, 599 P.2d 499 (Or. 1979); *State v. Harrington*, 332 So.2d 764 (La. 1976).

¹⁵⁶*United States v. Brown*, 544 F.2d 1155 (2d Cir. 1976); *State v. Branam*, 161 N.J. Supr. 53, 390 A.2d 1186 (1978); *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976).

unanimous one. Subsequent decisions¹⁵⁷ of that court have attempted to limit *Demma's* application. However, considering the *en banc* nature of the decision, it appears that *Demma* will remain the law in the Ninth Circuit for some time.

The Oregon Supreme Court, relying on *Demma*, was able to say, after citing the general rule against inconsistent defenses, "Recently, however, courts have begun to re-examine this rule and the trend of the law appears to be toward allowing the defendant to both deny the crime and assert the entrapment defense."¹⁵⁸

VIII. JURISDICTIONS SOMETIMES PERMITTING INCONSISTENT DEFENSES

The second significant segment of jurisdictions will permit a defendant to assert entrapment and denial only if he admits various elements of the offense.

A starting place for an analysis of the theoretical basis of this concept is the seminal decision of the Fifth Circuit in the case of *Henderson v. United States*.¹⁵⁹

Henderson was charged with conspiracy in operating an illicit still. At trial he had requested an instruction on entrapment. This was refused because entrapment was inconsistent with his denial of the crime, although he had admitted certain physical acts.

The fifth Circuit reversed and gave two reasons for its decision.

First, while the Federal Rules of Civil Procedure specifically allow inconsistent defenses, no similar provision was found in the criminal rules. Such a provision was not needed, however, because all possible defenses not raised by appropriate motion were included within a plea of not guilty. Consequently Henderson had a right under the rules to assert defenses inconsistent in some degree.

¹⁵⁷*United States v. Paduano*, 549 F.2d 145 (9th Cir. 1977). See especially Judge Hufstедler's concurring/dissenting opinion at 549 F.2d 150-152.

¹⁵⁸*State v. McBride*, 599 P.2d 449, 451 (Or. 1979). A similar view had been expressed 13 years earlier in *Orfield*, *supra* note 16, at 65. Apparently the process of change is very slow.

¹⁵⁹237 F.2d 169 (5th Cir. 1956).

Second, the goal of a trial is to ascertain the truth. Inconsistent defenses should be permitted as long as they aid in the truth-discovery process. The *Henderson* court added that inconsistent defenses would be permitted depending on the degree of inconsistency. Presumably if the proof of one necessarily disproved the other, the defenses would be repugnant and not permitted. As viewed by the present author, this latter aspect of the rationale seems self-defeating. Even if the defenses are repugnant, it would appear that both should be presented under proper instructions to the jury for resolution. An arbitrary prohibition of such inconsistent defenses, which would presumably force the accused to rely on only one of them, would limit the jury in its deliberations.

In consideration of these two reasons, the Court held that *Henderson* could admit operating the illegal still, deny being a party to the conspiracy, and still assert that such overt acts as he did commit were done as a result of entrapment. The defendant could assert, as the court said, in what is probably the most oft-repeated quote on the subject, "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped."¹⁶⁰ The court felt that, in such circumstances, the two defenses were not mutually exclusive. (The court specifically reserved judgment on whether a greater degree of inconsistency would be permitted.)

The *Henderson* rule, therefore, required some admission of culpability by the defendant and would not be applied in cases of complete denial.¹⁶¹

Nine years after *Henderson* the Fifth Circuit again permitted denial and entrapment to be asserted but for a completely different reason. In *Sears v. United States*,¹⁶² the court was again confronted with a conspiracy case in which entrapment and denial were involved. The court recognized the traditional rule against such assertions. It indicated that it would be inconsistent and confusing to

¹⁶⁰*Id.* at 173.

¹⁶¹See *Marko v. United States*, 314 F.2d 595 (5th Cir. 1963); *United States v. Newcomb*, 488 F.2d 190 (5th Cir. 1974), *cert. denied*, 417 U.S. 931 (1974); *United States v. O'Leary*, 529 F.2d 1203 (5th Cir. 1976).

¹⁶²343 F.2d 139 (5th Cir. 1965). Also see *Hansford v. United States*, 12 U.S. App. D.C. 359, 303 F.2d 219 (1962), where a similar result was reached. The *Hansford* decision is discussed in the text above notes 139 and 140. *supra*.

allow a defendant "to contend in one breath that he did not commit the crime and in the next breath that he was entrapped into committing it."¹⁶³ In *Sears*, however, the defendant had not taken the inconsistent position of offering evidence of entrapment. All such evidence came from the government case. The court ruled that, when such evidence of entrapment is injected as part of the government case, it was not impermissibly inconsistent to permit the defendant to assert both defenses.

Because *Sears* and *Henderson* both were conspiracy cases, later cases would attempt to limit their rationale solely to conspiracies.¹⁶⁴ Such a restrictive approach was not successful. The *Henderson/Sears* approach is now consistently applied in many jurisdictions in which the defendant, while not admitting all the elements of the offense, has admitted a sufficient number so that his position is not "too inconsistent" with the defense of entrapment. The rationale has been employed to allow denial and entrapment as long as the defendant admits the physical act but denies knowledge¹⁶⁵ or intent.¹⁶⁶ The more extensive the admission, the greater the likelihood that entrapment will be permitted and vice versa.¹⁶⁷

IX. JURISDICTIONS NEVER PERMITTING INCONSISTENT DEFENSES

As has been noted, there are also jurisdictions which never permit entrapment to be asserted with any type of denial. To introduce the thinking of those jurisdictions, and to contrast these views with

¹⁶³348 F.2d at 143.

¹⁶⁴See, e.g., *Stripling v. State*, 349 So.2d 187 (Fla. App. 1977).

¹⁶⁵*United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970); *United States v. Baker*, 373 F.2d 28 (6th Cir. 1967); *People v. Jones*, 73 Ill. App.2d 55, 219 N.E.2d (1966).

¹⁶⁶*United States v. Greenfield*, 554 F.2d 179 (5th Cir. 1977); *United States v. Cohen*, 431 F.2d 830 (2nd Cir. 1970); see also *Beasley v. State*, 282 P.2d 249 (Okla. Cr. 1955). This was a pre-*Henderson* case in which a police officer denied that he was guilty of the crime of accepting a bribe, on the grounds that he had no criminal intent. He also claimed entrapment. Both defenses were permitted.

¹⁶⁷*State v. Einhorn*, 218 Kan. 271, 515 P.2d 1036 (1973). The court in *United States v. Caron*, 588 F.2d 851 (1st Cir. 1978), permitted entrapment and denial to be asserted only after concluding that the defendant had admitted sufficient facts to warrant a finding of guilty even though he made "repeated, persistent, and perhaps, perverse refusals to admit" guilt. 588 F.2d at 852. See also *State v. Wright*, 84 N.M. 3, 498 P.2d 695 (1972).

those of the jurisdictions which do permit these defenses (varying with the degree of denial), two specific areas will be examined: the procuring agent defense in drug cases,¹⁶⁶ and those cases in which the defendant admits completely all necessary acts but contends that the statute itself does not make his conduct criminal.

The Supreme Court of Missouri was presented with the agency defense in 1964, in *State v. Taylor*.¹⁶⁹ Taylor was charged with sale of narcotics. He admitted all the acts charged but claimed that, since he was acting only as an agent, the acts did not constitute a sale. The Missouri court recognized the general rule not permitting denial and entrapment to be asserted together, but the court, relying on *Henderson* and *West*, said that the defenses were not so repugnant that the proof of one necessarily disproved the other. Consequently, entrapment was permitted to be raised. When the First Circuit¹⁷⁰ and Kansas¹⁷¹ faced the question, they determined that the defenses of entrapment and agency were not inconsistent or contradictory at all; the defendant could maintain that he was merely a procuring agent and was entrapped into performing even that perfunctory service.

A different result is found in the jurisdictions which prohibit denials of any sort to be asserted with entrapment. Prior to *Demma*, both Michigan¹⁷² and the Ninth Circuit¹⁷³ held that, by

¹⁶⁶See Dunn, *The Agency Defense in Drug Cases*, 16 A.F. Law Rev. 46 (1974); Lamb, *The Procuring-Agent Theory as a Defense in Drug Sale Prosecutions*, 27 JAG Journal 99 (1972).

¹⁶⁹375 S.W.2d 56 (Mo. 1964).

¹⁷⁰*United States v. Rodriguez*, 433 F.2d 760 (1st Cir. 1970).

¹⁷¹*State v. Fitzgibbons*, 211 Kan. 563, 507 P.2d 313 (1973); *State v. Einhorn*, 213 Kan. 271, 515 P.2d 1036 (1973). Also see *United v. Smith*, 407 F.2d 202 (5th Cir. 1969); *Henderson v. United States*, 261 F.2d 909 (5th Cir. 1959). One other affirmative defense which has been permitted to be asserted with entrapment is coercion. In *State v. Amundson*, 69 Wis.2d 554, 230 N.W.2d 775 (1975), the court said coercion and entrapment were not inherently inconsistent since it was not impossible to reconcile them. Also see *United States v. Canatelli*, 5 M.J. 838, 840 (A.C.M.R. 1978), and Vogel, *Duress: An Affirmative Defense to Criminal Prosecutions*, 29 JAG Journal 85, 94 (1976). An interesting question was raised, but not answered, by *United States v. Henry*, 417 F.2d 267 (2nd Cir. 1969). At trial, the defendant raised entrapment and insanity. The judge instructed on insanity but not on entrapment. The Second Circuit said his refusal was correct since entrapment was not sufficiently raised. Permissibility of inconsistent defenses was not discussed at all.

¹⁷²*People v. Hagle*, 67 Mich. App. 808, 242 N.W.2d 27 (1976); *People v. Davis*, 53 Mich. App. 94, 218 N.W.2d 787 (1974).

¹⁷³*Dunbar v. United States*, 342 F.2d 979 (9th Cir. 1965).

asserting the defense of agency, the defendant was contending that he did not commit the crime charged. They then applied, strictly and literally, the rule that entrapment is not available to one who denies commission of the offense.

Finally, the clearest dichotomy occurred in the Illinois case of *People v. Jensen*,¹⁷⁴ and the Sixth Circuit case of *United States v. Mitchell*.¹⁷⁵ Jensen was charged with operating a vehicle on a highway while his driving license was suspended. Jensen had not factually disputed what had occurred. His denial was based solely on his view that what he was driving on was not a "highway" as required by the statute. In these circumstances, the Illinois court held, in 1976, that he was entitled to argue entrapment simultaneously with denial, since a sufficient admission had been made.

A different result was reached in *Mitchell* in 1975. Mitchell was charged with obstruction of justice by trying to influence, intimidate, or impede a government witness. The obstruction was alleged to have occurred during a conversation in which the killing of a witness was discussed. Mitchell admitted the conversation but argued that whether or not this constituted obstruction of justice under the statute was for the jury to decide. Stating that, in order to claim entrapment, a defendant must admit *all* elements of the offense, the Sixth Circuit refused to allow the entrapment defense to be the subject of instruction to the jury.¹⁷⁶

¹⁷⁴37 Ill. App.3d 1010, 347 N.E.2d 371 (1976).

¹⁷⁵514 F.2d 758 (6th Cir. 1975). The overall position of the Sixth Circuit is unclear on this subject. In *United States v. Baker*, 373 F.2d 28 (6th Cir. 1967), the court permitted the assertion of denial and entrapment because Baker had admitted the physical acts but denied the necessary knowledge. In *United States v. Shameia*, 464 F.2d 629 (6th Cir. 1972), the court had prohibited their assertion because the defendant's plea was a complete denial. In dicta, however, the court seemed to lean towards permitting the defenses in certain circumstances. *Mitchell* is the most recent decision from that circuit. It is clearly inconsistent with *Baker*, and it certainly does not follow the trend suggested by *Shameia*.

¹⁷⁶See also *United States v. Blanket*, 391 F.Supp. 16 (W.D. Okla. 1975). The defendant was charged with selling feathers of certain migratory birds in violation of a federal statute. He argued that the statute did not apply to his case because (a) he obtained the feathers prior to the effective date of the statute, and (b) the statute did not cover these particular birds. Initially he also asserted entrapment, but abandoned that contention because, the court noted, admission of guilt is required before entrapment may be asserted. 391 F.Supp. at 17.

As shown by the above examples, the remaining jurisdictions are those that strictly and literally will not allow entrapment if the defendant denies, for any reason or in any degree, that he committed the offense charged. In fact, these jurisdictions go so far as to refuse to permit the defense in the face of a denial, even if it is raised by other evidence.¹⁷⁷

After the Ninth Circuit's change of direction in *United States v. Demma*, the Seventh Circuit is now the most persistent opponent of the concept,¹⁷⁸ and has specifically held that assertion of entrapment necessarily implies admission of guilt of the offense *including whatever mental state is necessary to constitute the offense*.¹⁷⁹ A

¹⁷⁷*Ivory v. State*, 173 So.2d 756 (Fla. 3rd D.C.A. 1965). See also *Chisum v. United States*, 421 F.2d 207 (9th Cir. 1970); *Brown v. United States*, 261 F.2d 848 (9th Cir. 1958). Both *Chisum* and *Brown* were overruled by *United States v. Demma*, 323 F.2d 981 (9th Cir. 1975). However, the reasoning in the two cases is typical of courts or jurisdictions limiting the availability of the entrapment defense.

¹⁷⁸*United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), cert. denied, 320 U.S. 801 (1943); *United States v. Georgiou*, 333 F.2d 440 (7th Cir. 1964), cert. denied, 379 U.S. 901 (1964); *Johnson v. United States*, 426 F.2d 112 (7th Cir. 1970).

¹⁷⁹*United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977). The position of the other federal circuits is unclear. Certainly, as has been seen, the First, Fourth, Fifth, Ninth, and D.C. Circuits will permit the defenses to be asserted together, at least under some circumstances. For a discussion of the uncertain status of the Sixth Circuit, see note 175, *supra*.

There is a dearth of Third Circuit cases from which to detect a trend. However, in *United States v. Watson*, 489 F.2d 504 (3rd Cir. 1973), and in *Berry v. United States*, 286 F.Supp. 816 (E.D. Penn. 1968), the defenses were not allowed. (In *Berry* the defendant had no recollection and did not know if he had committed the offense.)

The Second Circuit at first permitted the defenses in *United States v. Becker*, 62 F.2d 1007 (2nd Cir. 1933). The *Becker* opinion was prepared by Judge Learned Hand and did not discuss the inconsistency of the defenses. The two defenses were then disallowed in *United States v. DiDonna*, 276 F.2d 956 (2nd Cir. 1960). Now the Second Circuit appears to have adopted the *Henderson* rationale and will seek ways to find no logical inconsistency. *United States v. Swiderski*, 539 F.2d 854 (2nd Cir. 1976); *United States v. Brown*, 544 F.2d 1155 (2nd Cir. 1976).

The Eighth Circuit also had an early case in which the defenses were permitted, *Robinson v. United States*, 32 F.2d 505 (8th Cir. 1928), but seemed to reverse course by disallowing the defenses in *Robinson v. United States*, 262 F.2d 845 (8th Cir. 1959), and in *Ware v. United States*, 259 F.2d 442 (8th Cir. 1958). The case of *Kibby v. United States*, 372 F.2d 598 (8th Cir. 1967), cert. denied, 387 U.S. 931 (1966), appears to put the circuit in a neutral state regarding the issue.

With the exception of *McCarthy v. United States*, 399 F.2d 708 (10th Cir. 1968), in which the defendant claimed entrapment but was also allowed to contest whether the Government had proven the substance was LSD, the Tenth Circuit seems clearly allied with the Seventh Circuit in disallowing the defenses. *Munroe v. United States*,

number of states have adopted the same rule.¹⁸⁰

The thinking behind such holdings is typified by *State v. Vitale*.¹⁸¹ The defendant was charged with attempting to receive stolen property. He asserted a *Henderson* type argument that he did not know the items were stolen, and that he was entrapped. The Arizona court gave little heed to such an argument. It stated that, by denying the requisite knowledge, he was denying the criminal intent and thereby proclaiming he was not guilty. Such a position was totally inconsistent with the defense of entrapment, and "[i]t would appear that the appellant is semantically going in circles"¹⁸² by proffering such contradictory arguments.

X. THE MILITARY EXPERIENCE

Despite the fact that inconsistent defenses were first presented to military appellate courts twenty-five years ago, there are relatively few cases dealing with them. While the military, up to 1975 at least, has been very restrictive in permitting inconsistent defenses, the military courts have usually sidestepped the issue altogether either by saying that one of the inconsistent defenses had not been raised when in fact it had,¹⁸³ or by permitting the trial defense counsel to

424 F.2d 243 (10th Cir. 1970); *United States v. Gibson*, 446 F.2d 719 (10th Cir. 1971); *Wolford v. United States*, 401 F.2d 331 (10th Cir. 1968).

¹⁸⁰Arizona (*State v. Vitale*, 23 Ariz. App. 37, 530 P.2d 394 (1975)); Iowa (*State v. Bruno*, 204 N.W.2d 879 (Iowa 1973)); Michigan (*People v. Hagle*, 67 Mich. App. 608, 242 N.W.2d 27 (1976)); Mississippi (*Reeves v. State*, 244 So.2d 5 (Miss. 1971)). There are numerous other states which have disallowed the defenses but because of the scarcity of such cases within those jurisdictions and because the denials in the existing cases have usually been complete denials, it is impossible to determine their degree of flexibility on the subject. Examples include *McCarroll v. State*, 294 Ala. 87, 312 So.2d 382 (1975); *State v. Avery*, 152 Conn. 582, 211 A.2d 165 (1965); *Crosby v. State*, 295 A.2d 708 (Del. Supr. 1972); *McKibben v. State*, 155 Ga. App. 598, 155 S.E.2d 449 (1967); *State v. Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *State v. Boles*, 246 N.C. 83, 97 S.E.2d 476 (1957); *State v. Hsie*, 36 Ohio App.2d 299, 65 Ohio Op.3d 99, 303 N.E.2d 64 (1973).

¹⁸¹23 Ariz. App. 37, 530 P.2d 394 (1975).

¹⁸²*Id.* at 400.

¹⁸³See *United States v. Rina*, 18 C.M.A. 421, 40 C.M.R. 133 (1979). In that case, the Court of Military Appeals refused to permit a self-defense instruction when the accused had denied the act. Judge Ferguson, in dissent, said that self-defense was "unmistakably raised" and should have been the subject of instruction. Also see *United States v. Jones*, 20 C.M.R. 859 (A.F.B.R. 1955).

waive one of the defenses, even if raised.¹⁵⁴ The position in military practice prior to 1975 seemed to be that, if the accused denied the act charged, he was virtually barred from pursuing any affirmative defense such as entrapment, self-defense, accident, or coercion. This made the military rule much more restrictive than that followed in any civilian jurisdiction.

The first military case to deal with the subject was apparently *United States v. Jones*¹⁵⁵ decided in 1955. In *Jones*, the accused presented defenses of denial and mistake, which the Air Force Board labeled as not merely alternative defenses but inconsistent ones. The board hastened to add that such inconsistent defenses *might* be permissible in the military. It specifically noted that, although there were conflicting opinions in the civilian jurisdictions, the general rule appeared to be that inconsistent defenses were permissible. The board, however, was able to avoid squarely facing the issue by ruling that mistake had not been raised by the evidence.

The next cases to deal with the subject were *United States v. Desroe*¹⁵⁶ and *United States v. Snyder*,¹⁵⁷ both decided in 1956. In these two cases, the issue was whether a defendant in a murder case

Such rulings seem in conflict with the military rule that, if there is any evidence of a defense to which the court could attach credibility, it should be the subject of instructions. *United States v. Swain*, 8 C.M.A. 387, 24 C.M.R. 197 (1957). Furthermore, any doubt whether such defenses were raised should be resolved in favor of the accused. *United States v. Staten*, 6 M.J. 275 (C.M.A. 1979).

¹⁵⁴*United States v. Hubbard*, 13 C.M.A. 652, 33 C.M.R. 184 (1963); *United States v. Bowers*, 3 C.M.A. 615, 14 C.M.R. 33 (1954); *United States v. Crabtree*, 32 C.M.R. 652 (A.B.R., 1963).

In *United States v. Butler*, 39 C.M.R. 824 (N.B.R. 1960), the Navy Board of Review carried the rule one step further. The possible defenses in that case were accident and self-defense. In dicta the court said that, even if accident were raised by the evidence, it was not error for the law officer to instruct only on self-defense, which was the defense theory. For the law officer to instruct on accident would be to interject a defense which was diametrically opposed to the defense theory and which would possibly detract from their case. See also *United States v. Williams*, 24 C.M.R. 380 (A.B.R. 1956); *United States v. Waldron*, 9 M.J. 811 (N.C.M.R. 30 June 1980). The continued vitality of such a position is highly suspect after *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977). That decision clearly placed on the shoulders of the military judge the burden of deciding which defenses should be the subject of instruction.

¹⁵⁵20 C.M.R. 859 (A.F.B.R. 1955).

¹⁵⁶6 C.M.A. 681, 21 C.M.R. 3 (1956).

¹⁵⁷6 C.M.A. 692, 21 C.M.R. 14 (1956).

could assert both self-defense and voluntary manslaughter. The Court of Military Appeals stated that the well settled rule in military and civilian courts was that these defenses were permitted because they are not inconsistent. The heat of passion which reduces murder to voluntary manslaughter may certainly be engendered by the fear of an impending attack. Therefore, the defenses are merely alternative.¹⁸⁸

In *Snyder*, the court added, almost as an afterthought, "Of course, defending counsel may argue alternative and inconsistent theories," but noted that the judge (then law officer) could point out the potential dangers in such a practice.¹⁸⁹

In the 1957 case of *United States v. McGlenn*,¹⁹⁰ the Court of Military Appeals was faced with a general denial and a claim of entrapment. It adopted with little discussion the general rule that entrapment was not available to one who denies the commission of the offense.

The *McGlenn* rule was followed and broadened the next year in *United States v. Bowie*.¹⁹¹ *Bowie* adopted the *McGlenn* rationale and language, and added as a justification the oft repeated rule that the invocation of entrapment necessarily assumes that the act charged was committed. The *Bowie* court then adopted language from *United States v. Kaiser*: "It is difficult to conceive of a competent attorney arguing to a court and jury that the defendant did not make the alleged sale, but if so, he was entrapped."¹⁹²

¹⁸⁸Also see *United States v. Judkins*, 14 C.M.A. 452, 34 C.M.R. 232 (1964); *United States v. Roman*, 40 C.M.R. 561 (A.B.R. 1967); *United States v. Waldron*, 9 M.J. 611 (N.C.M.R. 30 June 1960).

The Court of Military Appeals applied a similar factual analysis in *United States v. Kuchinsky*, 17 C.M.A. 98, 37 C.M.R. 357 (1967). *Kuchinsky* was charged with larceny of funds. The defense proffered two theories, that the funds were taken by others, and that the funds were lost due to *Kuchinsky's* negligence. The Navy Board of Review termed the two defenses inconsistent but the Court of Military Appeals said no. The two defenses were obverse sides of the same coin, i.e., theft by others was made possible through appellant's negligence.

¹⁸⁹21 C.M.R. 14, at 22.

¹⁹⁰8 C.M.A. 286, 24 C.M.R. 96 (1957).

¹⁹¹9 C.M.A. 228, 26 C.M.R. 8 (1958).

¹⁹²*Id.* at 14; *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1944). Also see *United States v. Waddell*, 45 C.M.R. 725 (A.C.M.R. 1972).

The *McGlenn* principle influenced the acceptability of other defenses besides entrapment. In 1963 the Army Board of review in *United States v. Crabtree*¹⁹³ applied *McGlenn* in a case involving a denial and the defense of coercion or duress. The board held that, like entrapment, coercion or duress necessarily assumes the act charged was committed, and therefore the defense was not available to one who denies the commission of the offense.

This principle that a denial is fatally inconsistent with certain affirmative defenses was next extended to self-defense. In the 1963 case of *United States v. Duckworth*,¹⁹⁴ the court rules that self-defense is a plea in confession and avoidance and is not raised when the accused denies the act. Even though self-defense may seem to have been raised, the broad language of the case indicated that, under any circumstances, self-defense would not be permitted if the accused denied the act. Such a ruling placed the military in a distinct minority among criminal jurisdictions.¹⁹⁵ Notwithstanding this minority view, *Duckworth* was followed six years later in *United States v. Rine*¹⁹⁶ where the accused again denied the act (stabbing), but self-defense was raised by other evidence ("unmistakeably raised," in the opinion of Judge Ferguson in his dissent). The court ruled that, since there was a denial, there was no self-defense issue.

The application of that limiting principle reached its zenith in *United States v. Bellamy* in 1973.¹⁹⁷ In *Bellamy*, self-defense and denial were again not permitted, but the court went further and said that, even though there was some evidence tending to raise the defense of accident, that defense was not available either in light of the defendant's denial.¹⁹⁸

In *United States v. Rine*, however, in dicta, the court had observed that, in addition to self-defense instructions, the defense had requested instructions that the defendant was not mentally competent. The law officer had refused, saying such defenses were in-

¹⁹³32 C.M.R. 652 (A.B.R. 1963).

¹⁹⁴13 C.M.A. 515, 33 C.M.R. 47 (1963).

¹⁹⁵See note 79, *supra*, and accompanying text.

¹⁹⁶18 C.M.A. 421, 40 C.M.R. 133 (1969).

¹⁹⁷47 C.M.R. 319 (A.C.M.R. 1973).

¹⁹⁸*Bellamy* seems at odds with the earlier case of *United States v. Williams*, 24 C.M.R. 380 (A.B.R. 1957), in which accident and denial were the defenses at trial and no criticism of their allowance was made at the appellate level.

consistent. The court, citing *United States v. Harbin*, and *Whittaker v. United States*, stated that such instructions would be permissible since inconsistent defenses are allowed.

A similar situation occurred in 1972 in *United States v. Walker*.¹⁹⁹ In that case, the defense counsel had requested instructions on self-defense and insanity. The court stated that such defenses are inconsistent because one contemplates a rational and volitional act, while the other assumes the inability to know and to adhere to lawful conduct.²⁰⁰ Nevertheless, the court stated, inconsistent defenses are permissible and proper.

The military had adopted the traditional rule that entrapment was not available to one who denies commission of the crime. However, in contrast with some jurisdictions,²⁰¹ military courts did permit a very limited form of denial to be asserted with entrapment, the procuring agent defense. These defenses have been permitted with no discussion of their consistency.²⁰² With that limited exception, the *McGlenn* principle stood "unassailed"²⁰³ until *United States v. Garcia* in 1975.²⁰⁴

¹⁹⁹21 C.M.A. 376, 45 C.M.R. 150 (1972).

²⁰⁰The military at that time utilized a variation of the M'Naghten rule. See paragraph 120*b*, Manual for Courts-Martial, United States, 1969 (Revised edition), and note 68, *supra*. The ALI-Model Penal Code rule was adopted in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977).

For discussion of the *Frederick* case and its implications for military trial practice, see V. Taylor, *Building the Cuckoo's Nest*, *The Army Lawyer* at 32 (June 1978), and V. Taylor, *Using the Cuckoo's Nest*, *The Army Lawyer* at 1 (July 1979). The author, Vaughan Taylor, is a JAGC major in the Army Reserve and practices law with the Charlottesville, Virginia, firm of Lowe and Gordon, Ltd. He was formerly an instructor in the Criminal Law Division at the J.A.G. School.

²⁰¹See notes 172 and 173, *supra*, and accompanying text.

²⁰²*United States v. Suter*, 21 C.M.A. 510, 45 C.M.R. 284 (1972); *United States v. Young*, 2 M.J. 472 (A.C.M.R. 1975).

²⁰³*United States v. Williams*, 4 M.J. 507, 509 n.1 (A.C.M.R. 1977).

²⁰⁴23 C.M.A. 403, 50 C.M.R. 285, 1 M.J. 26 (C.M.A. 1975). In this case the Court of Military Appeals affirmed a decision of the Air Force Court of Military Review which upheld the conviction of the accused by a special court-martial. The Government's principal witness was one Airman Bowman, who prior to his transaction with Garcia had been under investigation by Air Force narcotics agents. The agents recruited Bowman as an informer by agreeing to pay him for purchasing heroin and marijuana, and by telling him that he would receive lenient treatment as to the charges against him. The Court of Military Appeals was satisfied that the record supported the fact finder's apparent conclusions that Bowman did not give false testimony in return for payment and leniency, and that he did not offer any special inducement to Garcia to persuade the latter to sell marijuana to him.

United States v. Garcia is clearly the most important military case on inconsistent defenses. It is the most expansive treatment of the subject by the Court of Military Appeals, and indicates a willingness to analyze the defenses presented to determine if they, in fact, are inconsistent. The opinion, however, does have some confusing aspects. *Garcia* was convicted of violating an Air Force regulation by selling marijuana. His testimony raised the defense of alibi but in final argument the defense counsel also asserted the defense of entrapment, relying on the Fifth Circuit's 1965 decision in the *Sears* case. The judge interrupted the argument. He stated that entrapment was inconsistent with the defense of alibi, and he expressed doubt that the *Sears* case represented "good law." He therefore refused to allow the defense to argue entrapment.

Judge Cook, writing the opinion, noted that, on the surface, alibi and entrapment appear to be "antithetical defenses" because one expressly denies committing the crime, while the other necessarily admits the commission of the crime charged. Because of this "facial inconsistency," the *McGlenn* case and others had barred one or the other of the defenses.

The opinion stated that in *Snyder* and *Walker*, the Court of Military Appeals had recognized that inconsistent defenses are allowable and proper. Judge Cook next noted, however, the practical difficulty attending all inconsistent defenses, the devastating effect on the defendant's credibility. The opinion, however, then presented an example to show that the defenses may not be inconsistent at all but merely alternative. The example was as follows: Consider a defendant who establishes, by his testimony, an alibi defense. *Other defense witnesses* testify that they were present at the time and place of the sale and overheard the Government agent entrap the unidentified person into selling narcotics to him. The accused's complete defense thus appears to be, "I say I didn't do it but if you believe I did, then I should be acquitted on the basis of the evidence that I was entrapped."²⁰⁵

In such a case the two defenses are not so repugnant to each other "that disbelief of the first necessarily disproves the other."²⁰⁶ This

²⁰⁵This appears to be the same rationale applied in *Hansford v. United States*, 12 U.S. App. D.C. 359, 303 F.2d 219 (1962). *Hansford* is discussed in the text above notes 139 and 140, *supra*.

²⁰⁶1 M.J. at 28. See also *United States v. Houston*, 46 C.M.R. 380 (N.C.M.R. 1972).

sentence is particularly confusing because it misstates the general rule of inconsistent defenses, which is that they are mutually exclusive. (Apparently what Judge Cook meant to say was, "they are not so repugnant that *belief* of the fact finder in the first necessarily disproves the other.")

Having cited this example as an instance involving *other defense witnesses*, in which the two defenses would be permitted, the court then makes a significant withdrawal. It then assumes, without deciding, that if sufficient evidence of entrapment appears in *the Government case*, entrapment must be considered by the fact finder. To allow the entrapment defense only if raised by the Government is a significant retreat from the example that permitted the defendant to introduce evidence of entrapment through third parties.

The Court of Military Appeals left the *McGlenn* rule of 1957 hanging in limbo because it merely raised the issue.²⁰⁷ It avoided a direct confrontation with the rule by adopting the *Sears* rationale, and by then saying that entrapment was not raised in the case.

The fact that the entire discussion on inconsistent defenses appears to be pure dicta adds to the confusing status of the law on this point.

After *Garcia*, there have been few cases on the subject. In the 1977 case of *United States v. Miller*,²⁰⁸ the accused was charged with forcible sodomy. The defense attempted to introduce evidence of consent but was not permitted to do so, since consent was not perceived to be an issue in the case. The accused denied the act. The inconsistent defenses presented, therefore, were denial and consent, the same defenses asserted in *Johnson v. United States*, discussed above, decided by the District of Columbia Circuit in 1970. The court, however, did not address the inconsistent-defenses concept, but stated that proof of lack of consent was one of the elements of the offense the Government must prove. Therefore the evidence was relevant and should have been presented. Although it does not discuss inconsistent defenses, the decision clearly permits

²⁰⁷1 M.J. 26 at 28. The court merely stated, "Whether *McGlenn's* concept is still viable . . . need not detain us." *Id.*

²⁰⁸3 M.J. 292 (C.M.A. 1977).

the accused to present evidence and argue on the defenses of denial and consent.

Miller and *Garcia* were followed by the Army Court of Military Review later in 1977 in *United States v. Mason*,²⁰⁸ but that case did not involve any affirmative defenses. In *Mason*, the accused denied making an incriminating statement but declared that, even if made, the statement was inadmissible because Article 31 warnings had not been given. The court permitted such "inconsistent defenses."

The military position on the subject is presently unclear. Certainly inconsistent defenses, in general, are permitted²¹⁰ now despite an unusually restrictive past. The exact extent of the allowance of such defenses, specifically denial and entrapment, is uncertain and requires more definition in the light of *United States v. Garcia*.

XI. OBSERVATIONS AND CONCLUSIONS

Although virtually all these cases have focused on whether or not the defenses are inconsistent, this seems to be an unnecessary question. The all-important threshold question should be, "Are the defenses raised by the evidence?" If the answer is affirmative, the defenses should be argued and instructed upon regardless of consistency. This is the traditional rule,²¹¹ but it has not been followed regarding inconsistent defenses. Whether or not the judge believes the testimony which supports these defenses should be irrelevant. Credibility is the sole province of the fact finder.²¹² Once the evidence which raises the issue is presented, the judge should properly instruct the jury so they may have "lucid guideposts" by which to judge credibility and evaluate the evidence.

The issue, then, becomes, "Are there any limitations on the manner in which an inconsistent defense can be raised?" Certainly, as

²⁰⁸4 M.J. 588 (A.C.M.R. 1977).

²¹⁰*United States v. Lincoln*, 17 C.M.A. 330, 38 C.M.R. 128 (1967), and *Nunez*, SPCM 1980/4632, in which both accident and self-defense were specifically permitted. *But see United States v. Moyles*, 47 C.M.R. 82 (A.C.M.R. 1973), in which the defenses of culpable negligence and accident were not allowed because they were inconsistent; and *United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980).

²¹¹*Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951); *United States v. Swain*, 8 C.M.A. 387, 24 C.M.R. 197 (1957).

²¹²*United States v. Swain*, *supra* note 211.

Sears, Hansford, and Garcia illustrate, it is best if one of the defenses is raised by the Government's own evidence. That way the defendant can utilize any support derived from that source without the defense's evidence being internally inconsistent. Such government support is not always available, obviously. If not, it is best to rely on third-party defense witnesses to raise the inconsistent defense. This is so even though the witnesses' testimony might conflict with the testimony of the defendant himself. This may occur, for example, in cases in which the defendant has denied the shooting but presents witnesses to show that the victim was charging him at the time he fired. At least the defendant's testimony itself is internally consistent.

As might be expected, the worst situation is that in which the defendant himself serves as the basis of both inconsistent defenses. Such a tactic is often an act of judicial suicide, since it virtually destroys the defendant's credibility. Missouri has gone so far as to forbid the defendant himself from being the basis of both defenses.²¹³ The rationale is apparent. It would be the height of repugnancy to permit the defendant himself to claim in one breath that he did not fire the weapon and, in the next breath, to claim he fired it in self-defense.

Although the logic behind such a prohibition is tempting, there are cogent reasons why such a restriction should not be imposed. First, the general rule has been that, if a defense is raised by any evidence, it should be the subject of instruction.²¹⁴ Second, as courts have often realized, it is often difficult to distinguish clearly what an accused has denied from what he has admitted.²¹⁵ Criminal defendants do not testify in accordance with classic definitions of defenses. They often give rambling, stream-of-consciousness accounts of the episodes in question. The inconsistency in these accounts often comes about through the differing lines of questioning and emphasis on direct and cross-examination. These blurrings of

²¹³*State v. Randolph*, 496 S.W.2d 257 (Mo. 1973) (*en banc*). An interesting development occurred in *State v. Wright*, 175 S.W.2d 866 (Mo. 1943). In that case, the defendant denied the assault, but the State introduced his pretrial statement which contained elements of self-defense. The general rule in Missouri is that the defendant himself cannot be the basis for both defenses. However, because the evidence was part of the Government's case, the two defenses were allowed.

²¹⁴See cases cited at note 211, *supra*.

²¹⁵*State v. Farmer*, 212 Kan. 163, 510 P.2d 180, 184 (1973).

fact do not necessarily mean that the defendant is lying. As has been noted, "often the rush of events may be such that the memory is clouded in such a way as to blur the distinction between what might have and what did happen."²¹⁶

Third, and very much related to the other two reasons, is that the fact finder may accept one portion of the accused's testimony and reject another portion²¹⁷ Arbitrarily excluding from consideration one portion of the evidence or not giving proper instruction by which to evaluate that evidence reduces the ability of the jury to properly resolve a case.

The fourth observation is that inconsistent defenses are a double-edged sword. While they are sometimes viewed as a vehicle whereby the defendant gets "two bites at the apple," such is not always what the defendant wants. Often the defendant has one trial theory such as denial or insanity but, because of other evidence, the judge will instruct on self-defense or entrapment without the defendant's request or even over his objection.²¹⁸ Such a situation forces the defendant himself to complain on appeal that inconsistent defenses should not be permitted, or that entrapment cannot arise if the defendant denies committing the crime.²¹⁹

The double-edged nature of inconsistent defenses also applies to defense counsel. Convicted defendants have been known to raise the issue of inadequacy of counsel on appeal because their counsel did not raise inconsistent defenses.²²⁰ Usually the courts will view the matter as a tactical decision, not patently unsound, on the part of the defense counsel. In one case,²²¹ however, the court ruled that

²¹⁶State v. Burns, 516 P.2d 748, 750 (Or. App. 1973).

²¹⁷See Davis v. State, 20 Ala. App. 131, 101 So. 171 (1924); Gibson v. State, 135 Ark. 520, 205 S.W. 898 (1918); United States v. Head, 6 M.J. 540 (N.C.M.R. 1979).

²¹⁸E.g., Reed v. State, 141 Ind. 116, 40 N.E. 525 (1895); Graham v. State, 98 Ohio St. 77, 120 N.E. 232 (1915); Montgomery v. State, 68 Tex. Cr. R. 78, 151 S.W. 813 (1912); People v. Jew, 21 Mich. App. 408, 175 N.W.2d 544 (1970); United States v. Smith, 407 F.2d 202 (5th Cir. 1969); United States v. Houston, 46 C.M.R. 380 (N.C.M.R. 1972).

²¹⁹United States v. Smith, 407 F.2d 202 (5th Cir. 1969); People v. Ford, 39 Ill.2d 318, 235 N.E.2d 576 (1968). For discussion of the *Ford* decision, see note 55, *supra*.

²²⁰Stevens v. Nelson, 302 F. Supp. 968 (N.D. Calif. 1968); United States v. Stern, 519 F.2d 521 (9th Cir. 1975). See also Kain v. State, 48 Wis.2d 212, 179 N.W.2d 772 (1970).

²²¹Springer v. Collins, 444 F.Supp. 1049 (D. Maryland 1977).

the counsel had been inadequate by not raising insanity together with other defenses, specifically with the lack-of-intent defense. Defense counsel would, therefore, be well advised to consider the advisability of raising inconsistent defenses. If the determination is made not to raise them, because, for example, they might be counterproductive, an attempt should be made to place that tactical decision on the record at some point.

Inconsistent defenses are clearly a permitted tool in American jurisprudence. Confusion and dichotomy are widely prevalent, however, regarding the defenses of denial and entrapment. While this division exists in the state courts, it is especially pronounced in the federal courts. For several reasons, the Supreme Court should settle the issue of whether these two defenses may properly be used in combination.

First, the present state of the law shows a serious split among the circuits and also among the state courts on a fundamental right of any criminal defendant—the right to present evidence.²²² It is submitted that the present rule, which requires a *sub silentio* admission of guilt before entrapment may be raised, is a clear infringement of the defendant's Fifth Amendment rights. It conditions his assertion of the defense on his waiver of his right against self-incrimination.

Furthermore, the present division permits police misconduct to go unchallenged in those cases in which the defendant forgoes the entrapment defense rather than solidify a possibly weak Government case. It is a fundamental flaw in the American system of justice if an individual arrested in San Francisco in the Ninth Circuit can assert entrapment while still putting the Government to its burden of proof, while a defendant arrested in Chicago in the Seventh Circuit for the same offense or even as part of the same conspiracy can assert entrapment only at the expense of his constitutional rights. Such a dichotomy cries out for correction.

²²²See, e.g., *People v. Lee*, 248 Ill. 64, 93 N.E. 321 (1910). In this case the defendant was prohibited from presenting certain evidence because it was inconsistent with his denial. The case is discussed in the text accompanying notes 66 and 67, *supra*. See also the cases cited at notes 112 and 117, *supra*.

APPENDIX

The following states have specifically allowed inconsistent defenses in the decisions cited:

Alabama: *Love v. State*, 16 Ala. App. 44, 75 So. 189 (1917) (alibi and provocation); *but see* *McCarroll v. State*, 294 Ala. 87, 312 So.2d 382 (1975) (denial and entrapment).

Arkansas: *Gibson v. State*, 135 Ark. 520, 205 S.W. 898 (1918) (denial and self-defense); *but see* *Brown v. State*, 248 Ark. 561, 453 S.W. 2d 50 (1970) (denial and entrapment).

California: *People v. Perez*, 62 Cal.2d 769, 44 Cal.Rptr. 326, 401 P.2d 934 (1965) (denial and entrapment).

Georgia: *Green v. State*, 7 Ga. App. 803, 68 S.E. 318 (1910) (denial and self-defense); *but see* *McKibben v. State*, 155 Ga. App. 598, 155 S.E. 2d 449 (1967) (denial and entrapment).

Illinois: *People v. Woods*, 268 N.E.2d 246 (Ill. 1971) (accident and self-defense); *but see* *People v. Anthony*, 190 N.E.2d 837 (Ill. 1963) (denial and entrapment).

Indiana: *Reed v. State*, 141 Ind. 116, 40 N.E. 525 (1895) (denial and self-defense).

Iowa: *State v. Sloah*, 149 Iowa 469, 128 N.W. 842 (1910) (denial and self-defense).

Kansas: *State v. Jackett*, 81 Kan. 168, 105 P. 689 (1909) (denial and self-defense).

Kentucky: *Morris v. Commonwealth*, 46 S.W. 491 (Ky. 1898) (denial and self-defense).

Louisiana: *State v. Harrington*, 332 So.2d 764 (La. 1976) (denial and entrapment).

Maryland: *Bartram v. State*, 83 Md. App. 115, 364 A.2d 1119 (1976) (denial and provocation).

Massachusetts: *Commonwealth v. Barton*, 367 Mass. 515, 326 N.E.2d 885 (1975) (accident and self-defense); *but see Commonwealth v. Mains*, 374 N.E.2d 576 (Mass. 1978) (denial and self-defense).

Michigan: *People v. Hansma*, 84 Mich. App. 308, 269 N.W.2d 504 (Mich. 1978) (alibi and intoxication); *but see People v. Davis*, 53 Mich. App. 94, 218 N.W.2d 787 (1974) (denial/agency and entrapment).

Missouri: *State v. Wright*, 352 Mo. 66, 175 S.W.2d 866 (1943) (denial and self-defense); *but see State v. Sykes*, 478 S.W.2d 387 (Mo. 1972) (denial and entrapment).

New Jersey: *State v. Branam*, 161 N.J. Super. 53, 390 A.2d 1186 (1978) (denial and entrapment); *but see State v. Johnson*, 90 N.J. Super. 105, 216 A.2d 397, *aff'd*, 46 N.J. 289, 216 A.2d 392 (denial and entrapment).

New York: *People v. Chambers*, 56 Misc.2d 683, 289 N.Y.S.2d 804 (1968) (denial and entrapment).

North Carolina: *State v. Green*, 218 N.C. 660, 12 S.E.2d 238 (1940) (accident and self-defense); *but see State v. Boles*, 246 N.C. 83, 97 S.E.2d 476 (1957) (denial and entrapment).

Ohio: *State v. Rodriguez*, 110 Ohio App. 307, 13 Ohio Op.2d 79, 169 N.E.2d 444 (1959) (accident and self-defense); *but see State v. Hsie*, 36 Ohio App.2d 299, 65 Ohio Op.3d 99, 303 N.E.2d 89 (1973) (denial and entrapment).

Oklahoma: *Harrison v. State*, 461 P.2d 1007 (Okla. Cr. 1969) (denial and self-defense); *but see Smith v. State*, 22 Okla. Crim. 383, 212 P. 1012 (1922) (denial and self-defense).

Oregon: *State v. McBride*, 599 P.2d 449 (Or. 1979) (denial and entrapment).

South Carolina: *State v. Taylor*, 261 S.C. 437, 200 S.E.2d 387 (1973) (denial and self-defense).

South Dakota: *State v. Nelson*, 228 N.W.2d 143 (S.D. 1975) (denial and entrapment).

Texas: *Garcia v. State*, 492 S.W.2d 592 (Tex. Cr. App. 1973) (accident and self-defense); *but see Reed v. State*, 421 S.W.2d 116 (Tex. Cr. App. 1967) (denial and entrapment).

Utah: *State v. Taylor*, 599 P.2d 496 (Utah 1979) (denial and entrapment).

West Virginia: *State v. Knight*, 230 S.E.2d 732 (W.Va. 1976) (denial and entrapment).

Wisconsin: *State v. Amundson*, 69 Wis.2d 554, 230 N.W.2d 775 (1975) (coercion and entrapment); *but see Lester v. State*, 228 Wis. 631, 280 N.W. 334 (1938) (accident and voluntary manslaughter permitted but not self-defense).

GUSTAVUS ADOLPHUS AND MILITARY JUSTICE*

*By Lieutenant Colonel Norman G. Cooper***

The great warrior king of Sweden, Gustavus II Adolphus (1594-1632), is best known for his tactical and organizational genius, displayed during the Thirty Years' War and in other conflicts. An important part of his program of reform of the Swedish army was an emphasis on improved discipline, embodied in the Articles of War of 1621. Harsh and primitive by today's standards, the code represented in its time a great improvement over the arbitrary and cruel disciplinary practices which were commonly employed in European armies.

In this short article, Lieutenant Colonel Cooper reviews the achievements of Gustavus Adolphus, with emphasis on the Articles of War. He offers comments on the relationship between the Articles and today's Uniform Code of Military Justice.

I. GUSTAVUS ADOLPHUS: FATHER OF MODERN DISCIPLINE

Gustavus Adolphus is recognized as a brilliant figure in military history, a leader who revolutionized the organization and tactics of

*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.

This article is based upon a paper written in partial fulfillment of requirements of the resident course at the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, during academic year 1979-80.

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seventeenth century armies as "the true originator of the concept of the combined arms team, which is the basis of all modern tactics."¹ Less well known is the fact that he played an important role in the evolution of military justice. The military successes of this most famous of Swedish warrior kings were due not only to his skill in the employment of men and arms but to the discipline of his forces. Gustavus achieved his victories with armies whose members were disciplined strictly but fairly under express codal provisions and procedures, specifically those of the Swedish Articles of War of 1621. An examination of these articles and their impact on the evolution of military justice provide insight into our present system, a system under stress as it operates to maintain discipline in a modern volunteer army.²

Gustavus Adolphus was born December 9, 1594, in Stockholm, Sweden.³ He received an excellent education and as a youth was attracted to military affairs. In 1609, following a truce in the Dutch wars with Spain, many soldiers came to Sweden to offer their services.⁴ Before his seventeenth birthday Gustavus was leading Swedish troops against Danish invaders. Thereafter, with few in-

¹Lieutenant Colonel Cooper is the author of *The Sixth Amendment and Military Criminal Law: Constitutional Protections and Beyond*, 84 Mil. L. Rev. 41 (spring 1979); *O'Callahan Revisited: Severing the Service Connection*, 76 Mil. L. Rev. 165 (1977); *My Lai and Military Justice—To What Effect?*, 59 Mil. L. Rev. 93 (1973); and book reviews published at 82 Mil. L. Rev. 199 (1978), 75 Mil. L. Rev. 183 (1977), and 55 Mil. L. Rev. 253 (1972).

²Trevor Nevitt Dupuy, *The Military Life of Gustavus Adolphus: Father of Modern War*, at xviii (1969).

³John Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 (1977).

⁴The leading authority on Gustavus Adolphus is Michael Roberts, whose two-volume work, *Gustavus Adolphus: A History of Sweden, 1611-1632*, is the definitive history of Gustavus and his times. Walter Harte's *The History of Gustavus Adolphus, King of Sweden, Surnamed the Great (1607)*, reflects Protestant English hero worship of Gustavus but is replete with story and detail. Finally, Nils Ahnlund's *Gustavus Adolphus the Great (1940)*, translated by Michael Roberts, provides the best political analysis of Gustavus' reign.

⁵Gustavus was an avid student of the experiences of these soldiers, and trained for several months under Count Jakob P. de la Gardie (1588-1652), who was a distinguished soldier under Prince Maurice of Orange (1567-1625) as well as in Swedish service later. Nils Ahnlund, *Gustavus Adolphus the Great*, at 39 (1940), trans. by Michael Roberts.

In 1590 the Articles of War of the Free Netherlands were published and Gustavus was most likely aware of them. Gustavus was also apparently aware of the laws of war set forth by Grotius in *De Jure Belli ac Pacis*, as he was said to have kept a copy

terruptions, Gustavus Adolphus was engaged in extensive fighting in Russia, Poland, and finally Germany. He was wounded many times and ultimately slain in 1632 on the battlefield at Lutzen, the scene of one of his most famous victories in the Thirty Years War. Well before his campaigns in the European heartland, Gustavus Adolphus promulgated his Articles of War to maintain order in his armies, armies which were remarkable for good behavior in the cruelest of wars,⁵ thereby earning Gustavus recognition as "the father of modern military discipline."⁶

II. THE ARTICLES OF WAR (1621)

In July 1621, Gustavus Adolphus embarked for the siege of Riga and, as part of his preparations, promulgated his famous Articles of War. The one hundred and sixty-seven provisions of the Articles of War were to govern Gustavus' troops during their numerous campaigns in the European continent. Gustavus' armies were notable in many ways, but especially in their disciplined behavior—"compared to his, other armies of the time were barbarians."⁷ Undoubtedly, this disciplined behavior stemmed from Gustavus' own charismatic leadership. He was the embodiment of the civilized warrior, aggressive to the point of recklessness, experienced, innovative, and manifesting a noble presence.

Gustavus not only authored his own disciplinary rules, but apparently saw to their enforcement on one occasion. Article 84 of the Articles of War forbade dueling upon penalty of death. This did not deter two officers from requesting permission of Gustavus to carry out a duel as a matter of honor. After severely berating the two, Gustavus relented and said he would personally attend the affair. At the time and place specified Gustavus arrived with a small body of infantry and summoned his 'provost martial' or executioner.

of this book with him during the Thirty Years War. Peter Karsten, *Law, Soldiers, and Combat* 19 (1978).

⁵See C. V. Wedgwood, *The Thirty Years War* (1961). The Articles of War of 1621 are also discussed briefly in *The Court-Martial: An Historical Survey*, 87 *Mil. L. Rev.* 129, 132-35 (winter 1980), by Major David A. Schlueter.

⁶George B. Davis, *A Treatise on the Military Law of the United States*, at iv (1906).

⁷J. Snedecker, *A Brief History of Courts-Martial* 9 (1954). The king of Poland, Sigismund III, who was a cousin of Gustavus, had been king of Sweden until his forcible dethronement in 1600, and tried for many years to regain his lost title.

Bidding the two officers to begin their duel, he instructed the executioner to dispatch the victorious duelist on the spot. This had the desired chilling effect and the two officers were reconciled immediately.⁸

The Thirty Years War was a period of savage excess in warfare. It was also a time of religious fervor, and Gustavus personally and publicly supported the latter. In his forces, daily prayer services were held and "Gustavus Adolphus was the first leader to commission chaplains."⁹ The preface to the Articles of War and the first sixteen Articles deal specifically with religious requirements and the regulation of chaplains. The first several articles of Gustavus' Code provided death as punishment for dishonor of God by deed or word, with other punishments falling upon soldiers and ministers alike who missed prayer services. The chaplains were held to good conduct under Gustavus' articles, but were not subject to command influence, in that they were appointed and discharged only with the approval of the King's own commission.¹⁰

Gustavus also saw to the physical well-being of his troops and is credited as the creator of field hospitals.¹¹ The Articles of War reinforced Gustavus' concern for his troops, providing, for example, for discharge upon proper application due to sickness or injury, and for punishment for commanders who withheld subsistence from their troops. Finally the Articles of War encouraged discipline by prohibiting plunder, abuse of "churches, colledges, Schooles or Hospitals," or mistreatment of noncombatants.¹² From the moment that Gustavus Adolphus personally promulgated the Articles of War to govern his forces, "[I]nternal discipline was and remained, very high."¹³

⁸This story originates in the 3d edition of Walter Harte's *The History of Gustavus Adolphus, King of Sweden, Surnamed the Great* 154 (1807). The story, whether true or apocryphal, aptly illustrates a major difference between Gustavus' code and the provisions for the earlier Court of Chivalry: "Whereas the latter sanctioned trial by combat—the innocent being the victor—the former expressly forbade dueling (foot-note omitted)." Schlueter, *supra* note 5, at 135.

⁹J. Snedecker, *supra* note 7, at 8.

¹⁰Code of Articles of King Gustavus Adolphus of Sweden (1621), translated and printed in Ward's "Animadiversions of Warre," London, 1639, cited in William Winthrop, *Military Law and Precedents* 907 (2d ed. 1920).

¹¹C.R.L. Fletcher, *Gustavus Adolphus and the Struggle of Protestantism for Existence* 126 (1890).

¹²W. Winthrop, *supra* note 10, at 907.

¹³Michael Roberts, *Gustavus Adolphus and the rise of Sweden* 109 (1973).

III. COURTS-MARTIAL

Gustavus Adolphus' Articles of War are cited by legal historians as providing "the rudiments of what would become a regular judicial process for the ascertainment of guilt and the assessment of punishment through tribunals denominated as courts or councils of war, or courts-martial."¹⁴ Of course, the origins of courts-martial have roots deep in military history. The Romans had specific laws to govern their legions, the feudal system provided for military jurisdiction in the form of a Court of Chivalry,¹⁵ and various European sovereigns had written codes with forms of courts-martial.

In England, after the Court of Chivalry ceased to function as a military tribunal, military law was exercised under special commissions granted by the king. These commissions authorized commanders to enact ordinances to govern their troops, and officers were appointed to sit as judicial tribunals. These military courts had plenary powers. However, they could be convened legally only in times of war.

From 1625 to 1628, King Charles I of England sought to bring certain offenses under military law and courts-martial otherwise, but was forced to relent under Parliamentary pressure.¹⁶ During this critical period of conflict between Crown and Parliament, Gustavus Adolphus' Articles of War were published in London, in 1639. Gustavus' code was to serve as a model for future English military codes, partly because so many British soldiers had served with Gustavus on the continent and were satisfied with the effects of the Articles of War of 1621.¹⁷

¹⁴Joseph W. Bishop, Jr., *Justice Under Fire* 5 (1974).

¹⁵The Earl Marshal was one of the military officials who presided over the Court of Chivalry in England; in 1521 it became known as the Marshal's Court. Hence, the origin of the term "court-martial," according to one authority. Snedeker, *supra* note 7, at 13-14.

Major Schlueter in his recent article on the history of courts-martial correctly points out that the exact origin of the term is open to some interpretation. Schlueter, *supra* note 5, at 139 n. 34.

¹⁶J. Snedeker, *supra* note 7, at 15-16. Charles I tried to use courts-martial as a means to obtain supplies from his subjects. Ultimately, Parliament forced his assent to a Petition of Right (1628) in which he agreed not to impose court-martial jurisdiction upon his subjects. Schlueter, *supra* note 5, at 139-40.

¹⁷In 1632, thirty-two colonels, fifty-two lieutenant colonels, and fourteen majors (mostly Scots) were serving with Gustavus' forces. See George MacMann, *Gustavus Adolphus: The Northern Hurricane* 129 (n.d.).

IV. THE ARTICLES OF WAR (1621) AND
THE UNIFORM CODE OF MILITARY JUSTICE

Gustavus Adolphus' Articles of War of 1621 are considered "a recognizable ancestor of the British Articles of War and the American Uniform Code of Military Justice."¹⁸ They provided regular procedures for the maintenance of discipline. Offenses were set out in detail and punishments were specified. Many offenses, of course, were peculiar to the times. For example, "weapon-turners," those who claimed the power to insure invulnerability through magic, were punished under Gustavus' code.¹⁹

Of more significance is that the Articles of War contain provisions which are critical features of modern military justice. Gustavus' code addressed offenses which, although not specifically enumerated, were "repugnant to Military Discipline"²⁰ Today's Uniform Code of Military Justice²¹ contains similar language, wherein "all disorders and neglects to the prejudice of good order and discipline in the armed forces"²² are punishable by courts-martial. Such a broad general article for punishing otherwise unspecified offenses contrary to military discipline was an essential part of the British Articles of War.²³ It was adopted in the American military codes, surviving constitutional attacks on its vagueness.²⁴

General George S. Patton, Jr. noted that [W]hen Gustavus Adolphus revitalized and modernized war, the first thing he did was to get each of his regiments a colored scarf so that people knew that the soldiers of the yellow scarf were Montgomery's, the green Hepburn's, etc." Letter to General McNair, May 2, 1942, cited in Blumen-son, *The Patton Papers 1940-1942*, at 67 (1974).

¹⁸J. Bishop *supra* note 14, at 4.

¹⁹N. Ahnlund, *supra* note 3, at 121.

²⁰Article 116, Code of King Gustavus Adolphus of Sweden (1621), cited in W. Winthrop, *supra* note 10, at 914.

²¹10 U.S.C. § 801-940 (1976).

²²10 U.S.C. § 934 (1976).

²³Article LXIV, Articles of War of James II (1688), cited in W. Winthrop, *supra* note 10, at 920. See also Charles M. Clode, *Administration of Justice Under Military and Martial Law* 12 (2d ed. 1874). Clode notes that, in the British codes of 1639 and 1642, "the last clause in each code was . . . for punishing indefinitely crimes for which no special order has been set down."

²⁴*Parker v. Levy*, 417 U.S. 733, 743 (1974). In this case, the Supreme Court recognized that "the military is, by necessity, a specialized society separate from civilian

Although Gustavus' code was undoubtedly harsher in terms of punishment (a quarter of the offenses being punishable by death²⁵) than our present military code, it reflected the needs of the time. "The severe military punishments . . . largely had their origin in the penalties devised by the free companies for their own protection against the vagaries of the more boisterous and unscrupulous of their number."²⁶ Nevertheless, Gustavus' code was tailored to balance punishments against the offenses committed. Thus, ordinary punishments included bread and water, confinement, and shackles, but no flogging, while serious offenses such as violence to women and plunder were punishable by death.²⁷ The Uniform Code of Military Justice is likewise restrictive as to punishment, flogging and other "cruel and unusual punishments" being specifically prohibited.²⁸ The Uniform Code of Military Justice even parallels Gustavus' concern with dueling, in providing for punishment for one who "fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority."²⁹

Not only did Gustavus' code delineate specific offenses and punishments, but it provided orderly procedures for the administration of military justice. The Articles of War established "a regimental court-martial, of which the regimental commander was present, and 'assessors' elected by the regiment were members."³⁰ A permanent general court-martial was also created, with the Swedish royal marshal presiding and high ranking officers sitting as members.³¹ Provost Marshals could arrest and bring offenders

society," in sustaining the provisions of the general article, Article 134, Uniform Code of Military Justice.

²⁵C. Wedgewood, *supra* note 5, at 265.

²⁶G. MacMann, *supra* note 17, at 87.

²⁷J. Snedecker, *supra* note 7, at 9. That there was no flogging *per se* in Gustavus' code is somewhat without meaning because other punishments, such as "riding the horse" or running the Gate-lope," subjected one to the whip. That is, the miscreant was whipped while lashed to a sawhorse in the first instance, and lashed by his fellow soldiers while running between two rows of his regiment in the later case. See Schlueter, *supra* note 5, at 134, and W. Winthrop, *supra* note 10, at 914.

²⁸10 U.S.C. § 855 (1976).

²⁹10 U.S.C. § 915 (1976).

³⁰J. Snedecker, *supra* note 7, at 8.

³¹*Id.*

to court, but could not execute anyone except for resisting arrest.³² Finally, the system provided that "an appeal could be had to the higher court if the lower court was suspected of being partial"³³ and "accused men had the right of . . . final appeal to the monarch."³⁴

Gustavus' dual system of courts, "a high Court and a lower Court,"³⁵ is essentially paralleled today in the forms of special and general courts-martial, the former of limited jurisdiction with the latter reserved for more serious offenses.³⁶ Also, the Uniform Code of Military Justice provides that "[N]o court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President,"³⁷ providing a last appeal similar to that in Gustavus' code.

One major difference between Gustavus' code and our present Uniform Code of Military Justice is that civil cases were heard by Gustavus' courts-martial, while application of the modern code is limited to criminal cases. Specifically, under Gustavus' code, "the regimental court-martial tried cases of theft, insubordination, cowardice, and all minor offenses; the standing court-martial tried cases of treason and other serious offenses, and heard civil cases within the army."³⁸ Otherwise, Gustavus' courts and modern courts-martial have many similar procedures, including provisions for oaths³⁹ and the keeping of records.⁴⁰ Finally, Gustavus' code provided that every regimental commander read the Articles of War to his troops once a month,⁴¹ while today provisions of the *Uniform Code of Military Justice* must be explained to soldiers.⁴²

³²*Id.*

³³Schluter, *supra* note 5, at 134 n. 13.

³⁴Lynn Montross, *War Through the Ages* 267 (3d ed. 1960).

³⁵Article 138, Code of King Gustavus Adolphus of Sweden (1621), cited in W. Winthrop, *supra* note 10, at 915.

³⁶10 U.S.C. § 818, 819 (1976).

³⁷10 U.S.C. § 871 (1976).

³⁸J. Snedecker, *supra* note 7, at 9.

³⁹Articles 144-146, Code of King Gustavus Adolphus of Sweden (1621), cited in W. Winthrop, *supra* note 10, at 916. Compare 10 U.S.C. § 842 (1976).

⁴⁰Article 147, Code of King Gustavus Adolphus of Sweden (1621), cited in W. Winthrop, *supra* note 10, at 916. Compare 10 U.S.C. § 828 (1976).

⁴¹R. Ernest Dupuy and Trevor Dupuy, *The Encyclopedia of Military History from 3500 B.C. to the Present* 529 (Rev. ed. 1977).

⁴²10 U.S.C. § 937 (1976).

V. GUSTAVUS ADOLPHUS: PROGENITOR OF MODERN MILITARY JUSTICE

Gustavus Adolphus' fame as perhaps the greatest leader in the revolutionary development of warfare in the seventeenth century⁴³ overshadows his more permanent contribution to the development of modern armies, that of a disciplinary code which gives meaning to command and control. Gustavus' Articles of War of 1621 "inaugurated the history of modern military justice."⁴⁴ They, in effect, formalized recognition of the "four moral virtues necessary to any army: order, discipline, obedience, and justice."⁴⁵ Gustavus Adolphus was not only a great soldier, but a true military genius whose Articles of War of 1621 are the foundation upon which is structured military justice today.

⁴³See Michael Roberts, *The Military Revolution 1560-1660* (1956).

⁴⁴J. Bishop, *supra* note 14, at 5.

⁴⁵Barbara W. Tuchman, *A Distant Mirror* 576 (1978).

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 IV, 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, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV 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. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Baker, A.D., III, transl., and Jean Labayle Couhat, ed., *Combat Fleets of the World 1980/81: Their Ships, Aircrafts, and Armament* (No. 6.)

- Binkin, Martin, and Irene Kyriakopoulos, *Paying the Modern Military* (No. 1).
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- Conry, Tom, and Science Action Coalition, *Consumer's Guide to Cosmetics* (No. 3).
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- Couhat, Jean Labayle, ed., and A. D. Baker III, transl., *Combat Fleets of the World 1980/81: Their Ships, Aircraft, and Armament* (No. 6).
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- Dunning, John H., John M. Stopford, and Klaus O. Haberich, *The World Directory of Multinational Enterprises* (No. 22).
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- Zimmer, Michael J., Charles A. Sullivan, and Richard F. Richards, *Federal Statutory Law of Employment Discrimination* (No. 23).

III. TITLES NOTED

- Bankruptcy Practice for the General Practitioner, by Judge W. Homer Drake, Jr., and A. L. Mullins, Jr. (No. 7).
- Chiefs of Naval Operations, by Professor Robert William Love, Jr. (No. 11).
- Civil Litigation Manual, by Thomas H. Oehmke (No. 14).
- Combat Fleets of the World 1980/81: Their Ships, Aircraft, and Armament, edited by Jean Labayle Couhat and translated by A. D. Baker III (No. 6).
- Comparative Law: Cases—Text—Materials, 4th edition, by Professor Rudolf B. Schlesinger (No. 19).
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- Divorce Manual (alternate title: Michigan Divorce Manual), by *Wilson S. Hurd*, author, and *Thomas H. Oehmke*, editor (No. 9).
- Encyclopedia of Governmental Advisory Organizations, edited by *Linda E. Sullivan* (No. 24).
- Fall of South Vietnam: Statements by Vietnamese Military and Civilian Leaders, by *Stephen T. Hosmer*, *Konrad Kellen*, and *Brian M. Jenkins* (No. 8).
- Federal Courtroom Evidence, by *Joseph W. Cotchett* and *Arnold B. Elkind* (No. 5).
- Federal Statutory Law of Employment Discrimination, by *Charles A. Sullivan*, *Michael J. Zimmer*, and *Richard F. Richards* (No. 23).
- Governmental and Judicial Ethics in the Bible and Rabbinic Literature, by *Professor James E. Priest* (No. 15).
- Income Taxation of Estates and Trusts, by *Arthur M. Michaelson* and *Jonathan G. Blattmachr* (No. 13).
- Judicial Controls and the Civil Litigative Process: Motions, by *Paul R. J. Connolly* and *Patricia A. Lombard* (No. 2).
- Jury Selection, by *Walter E. Jordan* (No. 10).
- Law and Legal Information Directory, edited by *Paul Wasserman* and *Marek Kaszubski* (No. 27).
- Lessons of Vietnam, edited by *Professor W. Scott Thompson* and *Colonel Donaldson D. Frizzell* (No. 25).
- Libel, Slander, and Related Problems, by *Robert D. Sack* (No. 17).
- Milestones in Naval Aviation, 1910-1980. A Pictorial Calendar for 1981, by *U.S. Naval Institute* (No. 26).

- Naval Ceremonies, Customs, and Traditions, 5th edition, by *VADM William P. Mack and LCDR Royal W. Connell* (No. 12).
- Nonproliferation and U.S. Foreign Policy, by *Joseph A. Yager, editor* (No. 30).
- Paying the Modern Military, by *Martin Binkin and Irene Kyriakopoulos* (No. 1).
- Proceedings, Seventh International Congress, San Remo, 23-28 September 1976, The Rights of Man in the Armed Forces, by the *International Society for Military Law and the Law of War* (No. 20).
- Recueils, Septieme Congres International, San Remo, 23-28 Septembre 1976, Les Droits de l'Homme dans les Forces Armees, by the *Societe Internationale de Droit Renal Militaire et de Droit de la Guerre* (No. 20).
- Rench Book: Trial Tactics and Strategy, by *Stephen C. Rensch* (No. 16).
- Seventh International Congress, Proceedings, San Remo, 23-28 September 1976, The Rights of Man in the Armed Forces, by the *International Society for Military Law and the Law of War* (No. 20).
- Silent Children: A Parent's Guide to the Prevention of Child Sexual Abuse, by *Linda Tschirhart Sanford* (No. 18).
- World Armaments and Disarmament: SIPRI Yearbook 1980, by *Stockholm International Peace Research Institute* (No. 21).
- World Directory of Multinational Enterprises, by *John M. Stopford, John H. Dunning, and Klaus O. Haberich* (No. 22).
- Yearbook of Procurement Articles, Volume 16, 1979, edited by *Professor John Wm. Whelan* (No. 28).

IV. PUBLICATION NOTES

1. Binkin, Martin, and Irene Kyriakopoulos, *Paying the Modern Military*. Washington, D.C.: The Brookings Institution, 1981. Pages: xi, 84. Price: \$3.95 (paper). Statistical appendix. Publisher's

address: Director of Publications, The Brookings Institution, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036.

One of the major problem areas of contemporary American defense policy is compensation for military personnel. Faced by serious problems of retaining skilled technicians and managers in the non-commissioned officer ranks, and by enormously large costs for military retirement, the military services and civilian policy-makers in Congress and the executive branch have offered many proposals for changing pay and benefits to increase the attractiveness of service life while holding the line on costs.

This recent addition to the Brookings Institution series, *Studies in Defense Policy*, proposes that pay and rank be separated, and that pay be correlated instead with occupation. The result would be that enlisted servicemembers in critical skills would receive more pay than other servicemembers who have the same or higher ranks but who are working in noncritical skills. According to the authors, such a pay reform would be a step toward reform of the retirement system, which at present wastefully encourages all military members to retire after only twenty years' service.

The book is organized in six chapters. Chapter 1, "The Central Issues," provides an overview of problems of recruitment and retention facing the armed services today. The second chapter, "The Current System," describes military compensation as it now is, based upon rank and length of service, with annual cost-of-living raises. Chapter 3, "Flaws in the System," explains the problems created by this system. Essentially, the present system dates from a time when skill requirements were simpler than at present, and when rank and length of service were in fact reasonably related to skill level. This picture is no longer accurate, with more and more complex weaponry, communications equipment, automatic data processing systems, and the like, in use by all the services.

Chapter 4, "Paying the Modern Military," presents the crux of the authors' argument. Reliance on bonuses for reenlistment and other purposes has not sufficed to correct imbalances between military compensation and the marketability of scarce skills in the civilian sector of the economy. The pay system is still based predominately on rank, when it should be based on skill if the military services are ever to compete effectively with private industry as attractive employers. The fifth chapter presents the

authors' views on ways and means of modernizing military retirement. They argue that past assumptions which justified the present military retirement system are no longer valid. In their view, the military retirement system should be made substantially similar to the federal civil service retirement system. Under that system, one can begin receiving a pension as early as age fifty-five if one has worked at least thirty years, or later if one has worked fewer years. Chapter 6 is a short summary of the authors' contentions.

For the use of readers, the book offers an explanatory foreword, a table of contents, and a list of twenty-seven statistical tables set forth in the text and the appendix. Text and tables are abundantly footnoted, and the notes are placed at the bottoms of the pages to which they pertain. The tables in the appendix provide information about occupational and age distribution of military enlisted personnel and equivalent civilian sector workers, and current military enlisted pay rates.

Martin Binkin is a senior fellow in the Brookings Foreign Policy Studies program, and has several previous publications to his credit. Irene Kyriakopoulos is a research associate in the same program. Both authors were also co-authors of *Youth or Experience? Manning the Modern Military*, a Brookings publication noted at 86 Mil. L. Rev. 163-65 (fall 1979).

The Brookings Institution, founded in 1927, describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally. Its principal purposes are to aid in the development of sound public policies and to promote public understanding of issues of national importance." The organization is headed by a president, Bruce K. MacLaury, and its policies are set by a board of trustees chaired by Robert V. Roosa.

2. Connolly, Paul R. J., and Patricia A. Lombard, *Judicial Controls and the Civil Litigative Process: Motions*. Washington, D.C.: Federal Judicial Center, 1980. Pages: xiv, 76. Three appendices. Publisher's address: The Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005.

Because of the crowding of trial court dockets, resulting sometimes in years-long delays before cases are heard, any part of the trial procedures which contributes to delay is worth examining

in search of opportunities to improve courtroom efficiency. The report on motions procedures here noted sets forth the conclusions of an efficiency study conducted by the publisher, the Federal Judicial Center. Motions procedures in six different United States district courts are described, compared and analyzed in a series of statistical tables.

The report is the third in a series prepared by Center personnel. The first, published in 1977, dealt with case management and court management in general. The second report focused on discovery procedures and was published in 1978. All three reports were based on data concerning a large sample of cases which terminated in 1975.

The report here noted is organized in three chapters. Chapter I, "Court Classification," divides the six courts studied according to whether they process motions by designating certain days as motion days, or by taking motions as they come, motion by motion, rather than on designated days. The courts are further sorted according to the extent to which the judges used oral or written proceedings, and the amount of effort expended by judges on drafting opinions in deciding motions.

Chapter II, "Motion Management Analysis," discusses overall ruling times, that is, the number of days required by judges to issue rulings. The various methods of processing motions are compared. Not surprisingly, jurisdictions which designate motion days, use oral rather than written proceedings, and refrain from drafting opinions, have significantly shorter motion ruling times than do other jurisdictions.

In Chapter III, "Choosing Motion-Handling Procedures," the authors suggest that use of written submissions can yield rulings as quickly as use of motion days, but more conscious effort must be put into administering a written submissions system. The major factor in delay, according to the authors, is not so much the choice between these two methods of proceedings, as the extent to which judges draft opinions.

The report makes use of twenty-five statistical tables, some in the text, and others divided among three appendices on methodology, case coding, and motion activity in general. A detailed outline table

of contents is provided, with a list of tables and an explanatory foreword. Extensive textual footnotes are provided.

The Federal Judicial Center is an official agency of the judicial branch of the United States Government. It describes itself as "the research, development, and training arm of the federal judicial system" and was established by act of Congress in 1967. The Center's governing board is chaired by the Chief Justice of the United States. The Center is headed by a director, currently A. Leo Levin. It is organized in four divisions, Continuing Education and Training; Research; Innovations and Systems Development; and Inter-Judicial Affairs and Information Services. The authors of the report here noted, Paul R. J. Connolly and Patricia A. Lombard, are associated with the Research Division. The director of the Continuing Education and Training Division is Colonel Kenneth C. Crawford, JAGC, retired, who served as commandant of the Judge Advocate General's School from 1967 to 1970.

3. Conry, Tom, and Science Action Coalition, *Consumer's Guide to Cosmetics*. Garden City, New York: Anchor Press /Doubleday, 1980. Pages: viii, 376. Price; \$3.95. Paperback. Index. Publisher's address: Doubleday & Company, Inc., 501 Franklin Avenue, Garden City, N.Y. 11530.

This work is one of the latest of a series of Anchor paperbacks and other publications produced by Doubleday which are oriented toward activist consumers and environmentalists. Others noted in recent issues of the *Review* have been *The Pesticide Conspiracy*, by Robert van den Bosch, 89 Mil. L. Rev. 138 (summer 1980), and *Environmental Ethics: Choices for Concerned Citizens*, by Albert J. Fritsch with the Science Action Coalition, 88 Mil. L. Rev. 164 (spring 1980). A related Dolphin/Doubleday paperback is *Getting What You Deserve: A Handbook for the Assertive Consumer*, by Stephen Newman and Nancy Kramer, 87 Mil. L. Rev. 202 (winter 1980).

Consumer's Guide to Cosmetics is an encyclopedic reference work providing information about every ordinary type of cosmetic preparation used on the hair or skin. The aim is not to classify or evaluate all the different brand-name products, but rather to provide the reader with information which he or she can use to carry out his or her own classification and evaluation. Many brand-name

products are mentioned and their ingredients listed, but only as examples of typical products in particular categories.

The book uses much technical terminology in discussing the chemical ingredients of cosmetics. Despite the frequent use of polysyllabic tongue twisters, the text is eminently readable, made so in part by some non-scientific characterizations of chemicals. For example, in a table of miscellaneous shampoo ingredients, formaldehyde is described as "awful." Concerning hair dyes which contain benzidine and other carcinogens, the book states flatly, "No product containing any of these chemicals should ever be used." Concerning hair sprays, it is stated, "The most important point to remember in selecting a temporary waving product is *never* to buy an aerosol," because of the dangers of lung disease and of explosion of aerosol cans.

Consumer's Guide to Cosmetics is organized in twenty-one chapters and three major sections. The introductory section consists of two chapters on the history, psychology, and economics of cosmetics. Section II, Hair, contains ten chapters, and Section III, Skin, the remaining nine. Sections II and III each open with a description in layman's language of what its subject—hair or skin—is, and how it normally functions. The remaining chapters in each section are devoted to particular categories of cosmetics affecting the hair or skin—shampoos, hair straighteners, bleaches, dyes, dipilatories, skin creams, eye and face makeup, antiperspirants, deodorants, fragrances, and several others. The book closes with five appendices.

Several reader aids are provided. The book has a table of contents and a subject-matter index. There are many footnotes, collected together between the appendices and the index, and numbered consecutively within each chapter separately. The first of the five appendices mentioned above is an essay discussing differences between skin irritation and allergy. Appendix Two explains how to report a cosmetic problem to the manufacturer and the Food and Drug Administration. The third appendix discusses how to read a cosmetic ingredient label; the fourth is a glossary of terms used in the text; and the fifth, a dictionary of ingredients found in cosmetics, with comments about their harmful effects.

Tom Conry served as general editor for the book, and was assisted chiefly by David Fry, Nancy Fry, and Alan Okagaki. They

are affiliated with the Science Action Coalition, a nonprofit research group in Washington, D.C. Some of the authors worked on another Anchor Press publication, *Household Pollutants Guide*.

4. Cooper, G. Michael, III, editor, and National College for Criminal Defense, *Death, Penalty Reporter*. Houston, Texas: National College for Criminal Defense, 1980. Periodical, published monthly. Pages in volume 1, number 1: 36. Price: \$50.00 for one-year subscription. Publisher's address: National College for Criminal Defense, Bates College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

This monthly periodical commenced publication with its September 1980 issue. The *Death Penalty Reporter* takes an advocate's position against the death penalty, and is addressed to defense counsel. The journal's perspective is indicated by a quotation from Charles L. Black, Jr., appearing in the masthead: "Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be."

The leading article in volume 1, number 1 of the *Reporter* is entitled, "Anthony Amsterdam Analyzes New Mexico Death Penalty Statute." Mr. Amsterdam is Montgomery Professor of Clinical Legal Education at Stanford University Law School, and has done much work on the defense of death penalty cases during the past twenty years. In nine pages he analyzes a recent state statute and suggests courses of action for attorneys defending under this statute. The article is in fact a brief for the defense, with notes and citations strewn throughout the text. The statute itself is set forth in an appendix at the end of the article.

As explained in its advertisement, "the *Death Penalty Reporter* will digest all the important death penalty cases of the previous month. It will also include procedural developments, advice about trial tactics, legislative news, and other information you need to know if you defend death penalty cases." Professor Amsterdam's article comprises section 1 of the September 1980 issue.

Section 2, "Recent Cases," is a collection of notes summarizing the holdings of various state courts in some twenty recent death penalty cases. This is followed by section 3, "Death Notes," which sets forth news stories concerning the death penalty in general or

particular cases. Also presented is a table showing the number of death row inmates in the United States by ethnic identity and gender. This section includes as well a note concerning a recent Georgia case involving codefendants who received different sentences, life imprisonment and death. The note argues for establishment of a rule requiring uniform sentences in such cases, that is to say, a rule according to which neither defendant would receive the death penalty if both did not, in the absence of clear proof that the role of one in the charged crime is much greater than the role of the other.

Section 4, "Death Row," is a state-by-state list of the names and ethnic identities of all death-row prisoners in the United States as of the time of publication. The total number of such prisoners was 652. Among the states, Florida had the largest share with 151, and Texas came second, with 125. Georgia was in third place with 80, and California followed next with 41. Section 5, "Executions," lists the names of three prisoners executed during the past four years. The sixth and last section, "Sample Petition," reproduces a series of motions and other documents filed in an actual Illinois case, for use by other attorneys who may be faced with similar cases.

The Reporter is printed on pages 8 1/2 inches by 11 inches, and is designed to be kept in a standard three-ring binder. The style of language is informal and conversational rather than scholarly. No table of contents or index appears in the first issue, but presumably a cumulative index will be published in the future.

5. Cotchett, Joseph W., and Arnold B. Elkind, *Federal Courtroom Evidence*. Los Angeles, California: Parker & Son Publications, 1976, 1978, and 1980. Pages: 249. Looseleaf. Supplement for 1980. Index. Publisher's address: Parker & Son Publications, Inc., Box 60001, Los Angeles, CA 90060.

This looseleaf work is a guide for trial lawyers on the application of the Federal Rules of Evidence in court. Rule by rule, the authors provide comments on the purposes and application of the rules, supported by case citations. The emphasis is practical, not theoretical. This work is a handbook intended to be carried into courtrooms, and not a scholarly treatise or textbook. The book was first published in 1976, and updating supplements have been issued in 1978 and 1980.

The Federal Rules of Evidence were first issued by the United States Supreme Court, and were enacted into law by Congress in 1975. They are the fifth of the seven sets of rules which comprise the Title 28 Appendix, United States Code (1976). The Federal Rules of Evidence are important to military attorneys because, with some changes, they were adopted for use before courts-martial in March 1980, as the Military Rules of Evidence, replacing chapter XXVII of the Manual for Courts-Martial.

A brief comparison of the military and civilian rules is found in a review by Lieutenant Colonel Herbert J. Green of the book *Federal Rules of Evidence Manual* by Professors Saltzburg and Redden, at 89 Mil. L. Rev. 96 (summer 1980). More extensive treatment of the new military rules is found in the May 1980 symposium issue of *The Army Lawyer*. See also the article by Captain Woodruff, "Privileges Under the Military Rules of Evidence," elsewhere in this volume.

The Cotchett and Elkind book is organized in thirty-three chapters. It follows the organization of the Federal Rules of Evidence themselves through chapter 28. The five concluding chapters deal with points of procedure, with citation to other rules. The chapters are further grouped according to the nine titles of the Federal Rules of Evidence. That is to say, chapters 1 through 3, dealing with Rules 101 through 106, are grouped under the heading, "General Provisions;" chapter 4, on Rule 201, comes under "Judicial Notice;" and so on.

The five concluding chapters form the tenth and last major grouping of chapters, under the heading, "Procedure." They concern use of depositions and interrogatories; introduction of documentary, demonstrative, and experimental evidence; introduction of expert testimony; and threshold or "robing room" motions.

Reader aids include a page summarizing the highlights of the 1980 supplement, an introductory comment by U.S. District Court Judge Kevin T. Duffy of New York, a table of contents, and an explanatory note explaining abbreviations and terms used in the text. There are no footnotes or bibliography, but extensive citations to rules and cases appear in the text. The thirty-three chapters are tabbed. The book closes with a short subject-matter index and a page of instructions for adding the 1980 supplement to the text.

Joseph W. Cotchett is a California attorney. Arnold B. Elkind received his undergraduate and legal education at New York University and was admitted to the New York bar in 1939. He is a member of the firm of Elkind & Lampson.

6. Couhat, Jean Labayle, ed., and A. D. Baker, III, transl., *Combat Fleets of the World 1980/81*. Annapolis, Maryland: Naval Institute Press, 1980. Pages: xiii, 794. Index. Publisher's address: Marketing Department, Naval Institute Press, U.S. Naval Institute, Annapolis, MD 21402.

This large book is an encyclopedia of technical information about all the world's naval forces. Considerable space is devoted to the Soviet and American navies. However, every country possessing any type of naval force is included, even if, as in the case of several nations, that force consists exclusively of one or more small coastal and riverine boats and launches.

This work, published every two years, is a translation of the French *Flottes de Combat*, published since 1897, currently by Editions Martimes et d'Outre-Mer of Paris. The U.S. Naval Institute staff has prepared this translation and two previous ones, the 1976/77 edition and the 1978/79 edition. The purposes of the work are similar to those of the better-known annual, *Jane's Fighting Ships*.

The book consists of entries for one hundred thirty-nine countries, arranged in alphabetical order. Each entry opens with information providing a general overview of the navy under consideration. Minor information is also provided concerning the country's merchant marine. There follows statistical information on the country's naval vessels, organized by type and class of vessel, usually moving from larger to smaller vessels. Names and numbers of vessels, crew strength, weight dimensions, electronic equipment, power plant, and other information are all provided where known.

An important part of the book is the introduction. Only six pages long in translation, this essay is a concise commentary on and evaluation of the navies of the United States, the Soviet Union, Britain, France, Japan, West Germany, and several other countries with large fleets. The author, Mr. Couhat, is one of the world's experts on naval power, and his views therefore carry some weight.

Mr. Couhat observes that the American navy, while still the world's most powerful, has declined in strength so that it is now weaker than at any time in the last forty years. The author cites the lack of a clear concept of its duties as one major problem faced by the U.S. Navy. Constant changes in shipbuilding plans, usually cutbacks because of the immense cost of ship construction, have forced the American navy to rely upon a decreasing number of aging and obsolete vessels. The Soviet navy, in sharp contrast, exhibits an almost opposite trend toward increase in the numbers and types of vessels and improvements in their quality. Yet the Soviets still have problems with logistical support for their ships, an area in which the United States is very successful.

For the convenience of the reader, the book offers a table of contents, two prefaces, a list of terms and abbreviations used, and a set of metric conversion tables. Photographs and some drawings of many ships are reproduced. The book closes with an index of the names of the hundreds of ships described in the text, followed by an updating addendum.

Jean Labayle Couhat, the editor and author of the French original of this work, has prepared many articles and books on naval topics, among them works on the French warships of World Wars I and II, and the 1974, 1976, and 1978 editions of *Flottes de Combat*. Mr. Couhat worked for many years with the French Navy Department Staff, and is now retired. In 1979 he was elected a member of the Academie de Marine, a great honor. Founded in 1752, the Academie is a society of outstanding scholars, naval officers, engineers, historians, and writers who have made significant contributions to the French navy.

The translator of this book, A.D. Baker, III, is a member of the staff of the U.S. Naval Institute.

7. Drake, W. Homer, Jr., Judge, and A. L. Mullins, Jr., *Bankruptcy Practice for the General Practitioner*. New York, N.Y.: McGraw-Hill Book Company 1980. Pages: approximately 700. Tables of authorities cited; index; appendices. Publisher's address: Shepard's/McGraw-Hill, P.O. Box 1235, Colorado Springs, CO 80901.

This large looseleaf publication sets forth information about the law of bankruptcy and reorganization and related topics.

Bankruptcy law is federal law, found in Title 11 of the United States Code. The law in this area recently underwent revision in the Bankruptcy Code of 1978, which replaced the Bankruptcy Act of 1898 and its amendments. This book offers comparison between the two Codes for attorneys who occasionally do bankruptcy work.

The work is organized in fourteen chapters with two large appendices. Chapter 1, "Background of Code," sets forth a brief history of federal bankruptcy law from the 1898 act through the major revision of 1938, up to the present. The second chapter offers a couple of pages on the Rules of Bankruptcy Procedure. Such rules were promulgated by the Supreme Court in 1973 but were rendered obsolete in part by the legislation of 1978. New rules are being drafted; until then, interim rules are in effect.

Chapter 3, "Obtaining Relief from a Bankruptcy Court," describes what types of administrative and adversary remedies are available to bankruptcy litigants. Pleadings, discovery, findings, and other matters are discussed. The fourth chapter discusses jurisdiction and venue of bankruptcy courts, and how to take appeals from their decisions. Chapter 5 discusses the debtor's estate, what it consists of, its transfer to a custodian or trustee, and how debtor transactions may be avoided by the trustee, with other topics. The sixth chapter considers the duties and benefits of debtors, and the seventh, creditors and proof and allowances of their claims.

Chapter 8 is the first of several chapters dealing with administration of the debtor's estate as an ongoing entity. This chapter reviews a number of statutory provisions for such estate administration. Chapter 9 discusses powers of the trustees, and chapter 10, the various officers of the estate, especially the trustees, his eligibility, qualifications, duties, compensation, and other matters.

The eleventh chapter examines straight bankruptcy, or liquidation. Included are discussion of commencement of the proceedings, the creditors' committee, dismissal of the case, status and rights of general partners, denial of discharge to debtors, and related items. Chapter 12 reviews reorganization; duties and powers of the debtor-in-possession, the trustee, and other officers; the plan of reorganization, and its review and confirmation; and so forth. Chapter 13 considers debt repayment for an individual with a

regular income under chapter 13 of the Bankruptcy Code. The text closes with discussion of a pilot program, the United States trusteeship.

The text is followed by a forms section, 225 pages in length. Next comes Appendix A, containing the text of the Bankruptcy Reform Act of 1978. Appendix B sets forth the interim rules of bankruptcy procedure, mentioned above. The appendices and forms section are an important part of this work, comprising approximately half its bulk.

For the convenience of users, the book offers a preface, summary table of contents, and short reference list. The text is divided into numbered sections, and is extensively footnoted. As mentioned previously, this is a looseleaf publication, intended to be updated semiannually with replacement pages. The book closes with tables of cases, statutes, and court rules cited, and a subject-matter index.

W. Homer Drake, Jr., is a United States bankruptcy judge for the Northern District of Georgia, at Atlanta. A. L. Mullins, Jr., is a member of the Atlanta firm of Swift, Currie, McGhee, and Hiers.

8. Hosmer, Stephen T., Konrad Kellen, and Brian M. Jenkins, *The Fall of South Vietnam: Statements by Vietnamese Military and Civilian Leaders*. New York, N. Y.: Crane, Russak & Company, Inc., 1980. Pages: 267. Price: \$14.50. Tables and index. Publisher's address: Crane, Russak & Company, Inc., 3 East 44th Street, New York, N.Y. 10017.

Much has been written about the collapse of the South Vietnamese government in 1975 and the events of several decades leading to that event. The book here noted adds to this literature a collection of statements of twenty-seven former high-ranking military officers and civilian officials of the South Vietnamese government. Thus, the book presents an exclusively and seemingly candid South Vietnamese point of view concerning the debacle of 1975. The book is based on personal interviews conducted by Rand Corporation staff members in 1976 under contract with the Historian, Office of the Secretary of Defense.

Not surprisingly, one of the major causes for the fall of the South Vietnamese government is said to have been the cessation of

American military support, together with excessive reliance by the South Vietnamese on the continuation of that support after conclusion of the Paris Accords. But other less dramatic problems are also mentioned: the pervasive corruption throughout all levels of South Vietnamese government and society, technical incompetence on the part of Vietnamese military leaders, the persistent and at times ludicrous failures of communication between Vietnamese commanders and their American counterparts, and other problems.

The book is organized in two parts. Part I is entitled, "The Setting Before the 1975 Enemy Offensive," and consists of seven chapters discussing the Paris Accords, the general political situation in South Vietnam, relations between Vietnam and the United States, morale, strategy, and other topics. The second part, "The Collapse," provides views concerning the loss of Phuoc Long and Ban Me Thuot, the disastrous withdrawal from Pleiku and Kontum, and the successive collapse of II Corps Tactical Zone and I Corps. The book closes with a short essay, "The Collapse in Retrospect: Some Final Questions."

As an aid to readers, the book provides a table of contents; a chronology of the final collapse, covering the first four months of 1975; and a list of Vietnamese personalities mentioned in the text. These are followed by a preface, a summary, and an introduction. There are no footnotes, but the text is full of direct quotations, excerpts from question-and-answer transcripts, and summaries of interviews. For the most part, the Vietnamese personalities are not identified, presumably to preserve confidentiality. The book closes with a subject-matter index and a list of other Rand Corporation books available.

The three authors, Stephen T. Hosmer, Konrad Kellen, and Brian M. Jenkins, are described as senior staff members of the Rand Corporation. The book is described as a Rand Corporation research study.

9. Hurd, Wilson S., author, and Thomas H. Oehmke, editor, *The Divorce Manual* (alternative title: *Michigan Divorce Manual*, 3d ed.). Detroit, Michigan: American Law Research Institute, 1979. Pages: xv, 400. looseleaf. Price: \$70.00, plus \$5.00 for shipping and handling. Index. Three-ring binder. Publisher's address: American Law Research Institute, 517 East Larned St., Detroit, MI 48226.

This looseleaf work is offered by its publisher as a practical tool for trial attorneys engaged in the litigation of domestic relations matters before federal or state courts. It is not a scholarly treatise or casebook, but a collection of checklists, sample trial documents, forms, pleadings, and the like, with instructions for their use. It is presented in a standard three-ring binder, with pages sized eight and one-quarter inches by eleven inches.

The publisher, American Law Research Institute, advises that the *Divorce Manual* can be used in any state, and not just Michigan. Thus, users of the book should not be misled by the frontispiece, which bears the title, "Michigan Divorce Manual," and by the countless references to Michigan law and procedure, and to Wayne County (where Detroit is located) scattered throughout the text. The first and second editions of the work, by Mr. Hurd and others, were entitled "Michigan Divorce Manual," and were published by the Michigan Law Research Institute, Incorporated. Apparently, when work on the third edition was substantially completed, a decision was made to make the book available to a wider readership. Doubtless the detailed procedural requirements imposed by divorce courts in Wayne County, Michigan, do not apply in other jurisdictions. However, the general principles of how to conduct a divorce proceeding are probably similar throughout much of the United States, making allowances for differences in grounds recognized, availability of no-fault proceedings, and the like.

The book is organized in thirty-eight numbered chapters, which are further grouped in eight parts. Part I, "Instructions," consists of five chapters explaining how to use the manual, how to deal with clients, preparation of pleadings, points of tax law to be considered, and various post-divorce matters, such as child support, alimony, visitation rights, and property awards. Parts II and III set forth checklists of steps to be taken by plaintiff and defendant at various stages of the proceedings, a list of items for discovery, and a "master information list" of data to be recorded for the files of the attorney-user.

Part IV of the book consists of three long chapters setting forth sample form letters for use by either party, examples of various printed forms used in Wayne County, and dozens of sample pleadings, court orders, motions, affidavits, and other documents. The fifth part sets forth optional paragraphs for use in divorce pleadings, and Part VI shows what the "model simple divorce," or

uncontested divorce, looks like on paper, with all pleadings, forms, and other documents set forth, both filled in and blank.

The seventh part reproduces many provisions of the Michigan Compiled Laws affecting divorce. Included are provisions governing no-fault divorce, alimony, property rights, child support and custody, and paternity. Part VIII does the same for provisions of the Michigan General Court Rules pertaining to divorce. Included are rules concerning pleadings, service of process, motions, parties, joinder, trials, judgments, post-trial matters, various special proceedings and appeals.

For the convenience of users, the book offers a summary table of contents and an extensive detailed table of contents. Each of the eight parts also opens with a table of contents. The parts are separated by tabs. As mentioned above, this is a looseleaf binder; it is intended that users will insert their own notes or other material. The book closes with a subject-matter index. The text is divided into numbered sections. There is extensive use of checklists, tables, and samples. Pages are numbered by chapters, i.e., pages 9-1 is page 1 of chapter 9.

The editor, Thomas H. Oehmke, is a trial attorney practicing law in Detroit, Michigan. Born in 1947, he received his undergraduate and legal education at Wayne State University, Detroit, Michigan, and was admitted to the bar in 1973. At time of publication of *The Divorce Manual*, he was managing partner of Oehmke Legal Associates, P.C. Mr. Oehmke has written several other manuals as well, including ALRI's *Civil Litigation Manual*.

10. Jordan, Walter E., *Jury Selection*. Colorado Springs, Colorado: Shepard's/McGraw-Hill, 1980. Pages: xvii, 368. Price: \$50.00, plus \$1.00 for postage and handling. State law appendix, table of cases, bibliography, and index. Publisher's address: Shepard's/McGraw-Hill, P. O. Box 1235, Colorado Springs, CO 80901.

The jury, one of the most conspicuous and distinctive features of Anglo-American trial procedures, is an intriguing institution. That twelve, or sometimes six, ordinary people, often uneducated, can make life-or-death decisions in complex cases, without having any training or experience to qualify them for the task, utterly defies logic and common sense. Yet the system works, and, despite occa-

sional problems such as beset any institution, works quite well, and has done so for centuries. The book here noted deals with the fascinating subject of how the jury system works from the point of view of the parties' counsel.

This is a practical, how-to-do-it treatise on the challenges and pitfalls of selecting a jury in any type of case. It is addressed to the practicing trial attorney, whether beginner or veteran. Written by a trial judge of many years' experience, the book shows clearly how cases can often be won or lost even before opening arguments through skillful or inept jury selection and voir dire.

The book is organized in nine chapters and further divided into dozens of numbered sections. The opening chapter provides an overview of the jury trial in general, its history in England and America, and its constitutional basis. Chapter 2, "Preliminary Contact with the Panel," discusses the need for judges or counsel to put the jury at ease. The views of various judges are presented concerning preliminary instructions and other matters. The third chapter deals at some length with the important subject of voir dire, how to question potential jurors prior to selection. The duties of judge and counsel are reviewed, with suggestions as to what types of questions are better left to the judge. A long list of "Dos and Don'ts" is provided for the trial attorney.

The fourth and fifth chapters consider the subject of challenges to jurors, both challenges for cause and peremptory challenges. Various grounds for challenge are examined, such as preconceived opinions, acquaintance with parties, witnesses, or attorneys, various types of prejudice, and so forth. The next three chapters apply the principles of the earlier chapters to negligence cases, civil cases not based on negligence, and criminal cases. Question-and-answer scripts are provided for use in particular types of cases, together with suggested paragraphs for inclusion in opening arguments and at other times. Chapter 9, "New Approaches to Jury Selection," contains comments on use of psychologists, psychiatrists, and other social science professionals in selecting jurors. Communicative behavior of jurors, including body language, verbal cues, and the like, are discussed.

For the convenience of readers, the book offers a preface, a summary table of contents, a detailed table of contents, a table of cases cited, a bibliography, and subject-matter index. Peremptory

challenge rules are summarized, state by state, in an appendix following the last chapter. Footnotes are used, and are placed at the bottoms of the pages to which they pertain. The text is divided into numbered sections, which are referenced instead of page numbers in the index and tables of contents.

The author, Walter E. Jordan, has been a Texas state trial judge since 1963, and practiced as a trial attorney for sixteen years before his elevation. In preparing the book here noted, he has drawn from his own experience as well as those of other lawyers and judges.

11. Love, Robert William, Jr., Professor, *The Chiefs of Naval Operations*, Annapolis, Maryland: Naval Institute Press, 1980. Pages: xxiii, 448. Index. Publisher's address: Naval Institute Press, United States Naval Institute, Annapolis, MD 21402.

This work of naval history is a collection of short biographies of the nineteen men who have held the Navy's highest post from 1915 through 1974. From the first of the Chiefs, Admiral William Shepherd Benson, through the famous and controversial Admiral Elmo R. Zumwalt, Jr., their careers and achievements are outlined against the backdrop of the great historical events of the century.

It may seem odd that the United States had no chief of naval operations until the First World War. However, during the first century of American history and beyond, there existed a strong fear of prejudice against anything that looked militaristic. These feelings made politically impossible the establishment of a European-style general staff for the Navy until the pressure of events compelled it. The history of the chiefs of naval operations is an account of tensions between civilian politicians and military experts struggling for control of the country's naval forces.

This is not to suggest that ultimate civilian control has ever been in doubt. However, there are many areas in both long-term policymaking and day-to-day administration where the balance between technical expertise and the requirements of the body politic is and will continue to be precarious. The several authors of the biographies discuss these problems faced by the various chiefs, decade by decade.

The book opens with an introductory essay which provides an overview of the history of American naval organization at the

highest level. Too often in the past, as represented by Professor Love, the story has been one not of organization but of disorganization, obscured by the shining achievements of brilliant naval officers in sea commands. This problem has been greatly reduced since the creation of the office of chief of naval operations, especially with the further development of that office during World War II. However, for better or worse, the office is still not as strong as some would like it to be.

The introduction is followed by the nineteen biographies. Each opens with a photograph of the subject. The lengths of the biographies vary widely, from ten or twelve pages, up to forty or fifty. Each biography is extensively footnoted, and all notes are collected together in one section following the last of the biographies.

The editor, Robert William Love, Jr., is an assistant professor of history at the U.S. Naval Academy, Annapolis, Maryland. He earned his Ph.D. at the University of California at Davis, and is also the editor of *Changing Interpretations and New Sources in Naval History*. As well as serving as editor for the entire book here noted, he has also written the biography of Admiral Ernest Joseph King, who served as chief of Naval Operations through the latter part of World War II.

12. Mack, William P., VADM, and LCDR Royal W. Connell, *Naval Ceremonies, Customs, and Traditions* (5th ed.). Annapolis, Maryland: Naval Institute Press, 1980. Pages: xi, 386. Price: \$16.95. Appendices, bibliography, index. Publisher's address: Marketing Department, Naval Institute Press, U.S. Naval Institute, Annapolis, MD 21402.

This book provides a fascinating account of the origins and present usage of a great variety of social and ceremonial practices in the United States Navy today and in the past, and in other navies with similar traditions. The work should be of interest to members of the Navy, civilian scholars, Navy buffs, and many general readers. This is more than a handbook of miscellaneous information like *The Officers Guide*. It is a serious work of history, copiously footnoted, with a long bibliography.

The book is organized in four parts and ten chapters, supplemented by eleven appendices. Part I, "Customs, Ceremonies, Traditions, and Usage," opens with an introductory chapter which

presents arguments justifying the continuation of practices which many not familiar with the inner dynamic of military life may find strange and unnecessary. This chapter is followed by an historical account of military justice in the Navy, and disciplinary standards and practices.

Part II, "Sea Manners and Shore Manners," consists of three chapters. The first chapter, "Honors, Salutes, and Ceremonies," treats of change-of-command formations, shipboard visits by foreign dignitaries, and related topics. Next comes "Naval Social Customs," which deals chiefly with behavior in the wardroom, or officers' mess, the procedures for making toasts, and other points of etiquette. This chapter concludes with a short discussion of that elusive concept, "officer and gentlemen." The second part concludes with "Social Usage—Prescribed and Proscribed," which examines good manners in general, with mention of use of titles, official calls, calling cards, and the like.

Part III, "Symbols of Great Tradition," contains two chapters. "The Flag of the United States" discusses the national flag, its history, and its correct use. Salutes are considered at length. Other flags, pennants, ensigns, and unit standards are mentioned. "The Golden Age—The Naval War of 1812-1815" is an historical chapter describing a conflict in which the American Navy established itself as a great fighting force. Many American naval traditions date from those years, or were fostered by commanders who played major roles in that war.

The fourth and last part, "The Sea," opens with a chapter devoted to the U.S. Marine Corps, with emphasis on highlights of its combat history. The next chapter is "Some Traditions, Ceremonies, Customs, and Usages of the Service." This discusses such diverse topics as burial at sea, piping of senior officers aboard vessels, and preparations for Neptune parties for initiation of new sailors into the ranks of the "shellbacks." The tenth and last chapter is a long anecdotal discussion of nautical words and naval expressions.

The eleven appendices contain extremely varied materials. Appendix A, "Some Makers of Tradition," is a series of biographical sketches of great American naval officers of the past. The other appendices include the Navy and Marine Hymns, various rules of eti-

quette, a note on the use of the homeward bound pennant, and other matters.

This fifth edition was written by Vice Admiral William P. Mack and Lieutenant Commander Royal W. Connell. Admiral Mack, now retired, served as commander of the U.S. Seventh Fleet during the latter part of the Vietnam War, and became superintendent of the U.S. Naval Academy in 1972. Commander Connell has been a naval aviator and at time of publication was an instructor at the Naval Academy. The previous four editions of the book were written by Vice Admiral Leland P. Lovette, retired.

13. Michaelson, Arthur M., and Jonathan G. Blattmachr, *Income Taxation of Estates and Trusts* (11th edition). New York City, N.Y.: Practising Law Institute, 1980. Pp. xi, 227. Table of cases, statutes, and administrative materials; index. Price: \$35.00. Publisher's address: Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019.

This treatise discusses the statutes, regulations, and case law governing the taxation of income received by inter vivos and testamentary trusts of various types, and by estates in the process of administration. Emphasis is placed upon changes in the law produced by the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763. The eleventh edition, like the tenth edition published in 1978, was written by Jonathan G. Blattmachr. Arthur M. Michaelson, presently with the New York City firm of Miller, Singer, Michaelson & Raives, wrote and updated the first nine editions, published between 1955 and 1974.

The eleventh edition is organized in five chapters. The opening chapter provides a brief introduction, defining the types of trusts discussed in the later chapters. Chapter 2, which fills approximately half the book, is entitled "Ordinary Trusts; Estates in the Process of Administration." This chapter discusses various types of distributions, deductions from income, the "throwback rule" for taxation of delayed distributions, the computation of net taxable income and credits, the preparation of tax returns, and other topics.

The third chapter considers "grantor trusts," trusts which are revocable by, revert to, or are otherwise significantly controlled by the grantor or settlor. Discussion emphasizes revocable trusts subject to the rule of *Helvering v. Clifford*, 309 U.S. 331 (1940). This is

followed by a short chapter on foreign trusts with American grantors and beneficiaries. The substantive portion of the book closes with chapter 5, "Special Trusts," which examines alimony trusts, charitable remainder trusts, and other types.

For the convenience of users, the book offers a table of contents, two explanatory prefaces, and tables of cases, statutes, and administrative materials cited. The text is extensively footnoted. The book concludes with a detailed subject-matter index.

The author, Jonathan G. Blattmachr, is a member of the New York City law firm of Milbank, Hadley & McCloy, and is a lecturer-in-law at the Columbia University School of Law. He is active on bar association committees concerned with the law of trusts and estates and other topics. Mr. Blattmachr is the co-author of the book *Carryover Basis Under the 1976 Tax Reform Act* (The Journal of Taxation, 1977), and has written for professional journals.

14. Oehmke, Thomas H., *The Civil Litigation Manual*. Detroit, Michigan: American Law Research Institute, 1980. Pages: approximately 200. Price: \$75.00, plus \$8.00 for shipping and handling. Index. Looseleaf binder. Publisher's address: American Law Research Institute, 517 East Larned Street, Detroit, MI 48226.

This looseleaf work is offered by its publisher as a practical tool for use by trial attorneys engaged in the litigation of civil matters before federal or state courts. It is not a treatise or casebook, but a collection of checklists, sample briefs, questionnaires, and the like, with instructions for their use. It is presented in a standard three-ring binder, with pages sized eight inches by eleven inches.

The book is organized in sixteen numbered chapters, which are further grouped in eight parts. Part I, "Instructions," consists of three chapters. The first of these explains the "systems approach" to civil litigation used in the book. Chapter 2 sets forth a long "master checklist for civil litigation," and the third chapter consists of a bibliography on all aspects of civil litigation.

The second part, "Pretrial Preparation," is comprised of four chapters on preparation of the facts and the law of a case for trial, use and preparation of joint pretrial statements, and the choice between a jury trial or a trial by a judge sitting alone. Part III consists of one long chapter on jury selection, including challenges and voir

dire. Several checklists are presented. The fourth part discusses the opening statement, with presentation of checklists and sample statements.

Part V, "Presenting Evidence at Trial," includes three chapters. Chapter 10, "Presenting Evidence at Trial," is followed by "Cross Examination of Witnesses," and finally by "Motions During Trial." Part VI discusses the closing argument and the principles for its preparation and delivery. The seventh part, "Jury Instructions," discusses standard instructions, drafting of requested instructions, and objections and exceptions, with outlines, samples, and checklists. The eighth and last part consists of chapter 15, "Verdicts, Findings, and Judgments," which considers general and special verdicts, methods of attacking or changing a verdict, and motions for a new trial. The index is the sixteenth and last "chapter."

For the convenience of users, the book offers a summary table of contents and a detailed table of contents. Each of the eight parts also opens with a table of contents. The parts are separated by tabs. As mentioned above, this is a looseleaf binder; it is intended that users will insert their own notes or other material.

The text is divided into numbered sections. There is extensive use of checklists in tabular form and of samples. Pages are numbered by chapters, i.e., page 13-1 is page 1 of chapter 13. There are few footnotes, but chapter 3 is a bibliography. The book closes with a fairly detailed subject-matter index.

The author, Thomas H. Oehmke, is a trial attorney practicing law in Detroit, Michigan. Born in 1947, he received his undergraduate and legal education at Wayne State University, Detroit, Michigan, and was admitted to the bar in 1973. At time of publication of *The Civil Litigation Manual*, he was managing partner of Oehmke Legal Associates, P.C. Mr. Oehmke has written several other manuals as well. He served as editor for ALRI's *Divorce Manual (or Michigan Divorce Manual)*, written by Wilson S. Hurd and noted elsewhere in this issue.

15. Priest, James E., Professor, *Governmental and Judicial Ethics in the Bible and Rabbinic Literature*. New York: KTAV Publishing House, Inc., 1980. Pages: xvii, 313. Publisher's address: KATV Publishing House, Inc., 75 Varick St. (431 Canal St.), New

York, N.Y. 10013. Also: Pepperdine University Press, Malibu, CA 90265.

This work of legal history describes the legal system of the biblical Old Testament and the Jewish Talmud. The author shows how the teachings of this system have been applied in the determination of governmental policies and official actions in ancient Israel and elsewhere. The various concepts of law and its functions and the role of rabbis and other scholars in a theocratic state are examined. This scholarly work cites the Bible, the Talmud, and many ancient and modern commentaries and other writings in support of its conclusions about the major ethical precepts and trends in biblical and talmudic law.

The book is organized in seven chapters. An explanatory introduction sets forth the boundaries of the topic and explains its significance. The author's methodology is outlined. This is followed by Chapter I, "The Concept of Law in the Bible and Talmud" describing the divine origins of the early Jewish law and its importance as a structural prop for Jewish society. The law of government is discussed at length, with comments on the duties and responsibilities of judges and kings, the relationship between scripture and oral tradition, and other topics.

Chapter II, "The Governmental Legal System in Judaism," discusses the ethical content of Jewish law. Considered are the practical merger of ethics and law, distinctions between major and minor crimes, effect of social conditions on the application of law, concepts of guilt, punishment, and doubt, and other subjects. The third chapter, "Establishment of Judicial Ethics in Judaism," examines the basis for the authority of rabbis and scripture, the system of judges, rabbinic leadership, and other matters.

Chapter IV, "Reward and Punishment in Judicial Ethics," considers chiefly the death penalty, various methods for its imposition, and the principles behind capital punishment. The fifth chapter, "Judicial Ethics of Punishment Equal to the Crime," discusses chiefly the ancient principle of an eye for an eye, and its modification over time by substitution of monetary or other compensation in place of actual bloodshed.

The sixth chapter, "Ethics of Government in War and Peace," considers two major topics. First, the biblical equivalent of our

humanitarian law of war is considered. This of course was not international law, but a collection of rules drawn from Judaic law. These rules defined various types of warfare, theological justifications for or attitudes toward war, and examples of ethical and unethical conduct by war leaders. The second theme of Chapter VI is the importance of peace as an ideal in Jewish law. Chapter VII completes the main body of the book, with summaries of the first six chapters, and a short statement of the author's conclusions. Two appendices follow, "Political Power in Israel," and "Judicial and Governmental Ethics in the Bible and the Talmud: A Comparative Evaluation from Selected Illustrations."

For the convenience of the reader, the book offers a detailed table of contents, a table of the various biblical, talmudic, and other ancient writings cited in the text, a bibliography, and a three-part index of subjects, persons, and places discussed. The book closes with a short glossary of Hebrew terms.

The author, Dr. James E. Priest, is a professor of Bible and religious education at Slaver College, Pepperdine University, Malibu, California, and also a lecturer in the Pepperdine School of Law. He has previously published a book, "The Educational Work of the Church," and other writings.

16. Rench, Stephen C., *The Rench Book: Trial Tactics and Strategy*. Houston, Texas: The National College for Criminal Defense, 1980. Pages: 76. Price: \$30.00. Publisher's address: The National College for Criminal Defense, College of Law, University of Houston, Houston, Texas 77004.

This looseleaf book offers notes and suggestions to the practicing attorney on trial procedures and tactics to be used in defending criminal cases. The binder includes blank pages for attorney notes, and plenty of space for more pages to be added. A short preface suggests that additional printed pages may be made available in the future, but the implication is that the attorney is to write his own book, compiling notes from his own experience and other sources used by him.

The book is organized in twelve unnumbered chapters, arranged in chronological order of the steps one would take in handling a criminal case through closing argument. The book is opened with an introduction, "The Legal Materials System," which explains

that the book is not for the legal scholar but for the busy defense attorney, including public defenders, who does not have time to do all the legal research that he would like to. The printed pages of the book are intended to save time for the attorney by enabling him to focus his research more narrowly than would otherwise be necessary.

The first chapter is "Preparing the Winning Case." This is followed by "Psychology in Trial," "Client Interview," and "Preliminary Hearings." "The Strategic Use of Pre-Trial Motions" comes next, with "Voir Dire and Selection of Jury." These six chapters form a group, dealing with activities to be completed before the trial formally opens. The next six chapters concern the defense attorney's work before the jury. The seventh chapter is "Opening Statement," and is followed by "A Checklist of Winning Cross-Examination Concepts and Techniques," and "The Defendant's Case." The book continues with "Direct Examination" and "Strategy of Instructions," ending with "Closing Argument."

The book offers no table of contents or index, but this lack is compensated for by the use of twelve colored tabs which identify and separate the twelve chapters. There are no footnotes, bibliography, or other citations to authority, consistent with the book's aim not to deal with substantive law but with tactics and strategy. The binder is of the three-ring type, but smaller than the standard size; pages are six inches by nine inches.

The author, Stephen C. Rench, was formerly employed by the Office of the Colorado Public Defender. He received his J.D. degree from Georgetown University, Washington, D.C., and was admitted to the Colorado bar in 1959. He is associated with the firm of Hansen and Breit, of Denver, Colorado.

The National College for Criminal Defense publishes a number of books, reporters, digests, and periodicals dealing with the defense of persons accused of crimes, including a semi-annual law review, the *National Journal of Criminal Defense*. *The Rench Book* is a new publication.

17. Sack, Robert D., *Libel, Slander, and Related Problems*. New York City: Practising Law Institute, 1980. Pages: xxxii, 697. Price: \$50.00. Table of cases, index, five appendices. Publisher's address: Practising Law Institute, 810 Seventh Avenue, New York, New York 10019.

Freedom of the press and the right of individual privacy continue to be sources of lively controversy as the courts try to balance one against the other. By their nature, the issues raised by conflict between these two important bundles of rights are unlikely ever to be settled. The problems that can give rise to lawsuits are as varied as the multitude of constantly changing events and fact situations that can be the subjects of publication on paper or over the air waves.

The book here noted seeks to pull together the law on defamation of character as it stands today in American jurisprudence. While the emphasis is on defamation, i.e., libel and slander, other topics, such as tortious invasion of privacy, are also examined. The substantive law both past and present is reviewed, together with trial procedure.

The book is organized in fourteen chapters with numbered sections and subsections. Chapter I, "The Supreme Court and Constitutionalization of the Law of Defamation," provides an overview of the subject. The common law concepts of fair comment and actual malice are discussed, together with the distinction between public officials and public figures. The long second chapter, "The Cause of Action," reviews the elements of the various torts involved in defamation, the concept "defamatory," and what is meant by publication and republication. Pleading and proof of special damages for libel and slander per se are discussed, together with problems of relating the slander or libel to the plaintiff in the case.

Chapter III discusses the defense of truth, commonly said to be a "complete defense," but in fact conditioned by a requirement for a showing of publication "with good motives and for justifiable ends." Distinctions between public officials, public figures, and private figures are discussed. The burden of proof and problems of establishing truth are reviewed, along with the concept of "neutral reportage." The fourth chapter reviews the law on opinion, distinctions between fact and opinion, fair comment under the common law, and constitutional protection for opinion. Chapter V considers at length the standard of conduct to which the defendant is held in relation to public figures and officials. The standards of actual notice and known falsehood are considered, with their application to private figures.

Chapter VI examines the common law privileges of various public officials and others which serve as defenses against defamation claims. Some of these privileges are said to be absolute; others, only conditional. The seventh chapter discussed damages, both by type and amount, and other remedies. Chapter VIII reviews the law of retraction, both at common law and under various state statutes, which gives the defendant a means of reducing damages or showing a benign state of mind. The long ninth chapter discusses related causes of action, invasion of privacy, injurious falsehood, and other topics.

Chapters X, XI, and XII deal with procedural aspects of defamation suits. Problems of discovery, questions of jurisdiction and choice of law, and motions practice and appeals are reviewed in these chapters. The thirteenth chapter reviews insurance coverage available for authors and publishing firms from various insurance companies. The various insurance contract clauses are discussed. The fourteenth chapter mentions very briefly some unresolved issues involved in defamation litigation and exercise of first amendment rights.

Five appendices are provided. These discuss other sources of information about defamation law and criminal libel, and provide summaries of or quotations from state statutes setting time limits on initiation of claims, making provision for retraction of statements by defendants, and shielding news media organizations and personnel from prosecution.

For the convenience of readers, a detailed table of contents and an explanatory preface are provided. Following the appendices, a table of cases cited and a subject-matter index are made available. The text is heavily footnoted, and the footnotes are set forth at the bottoms of the pages to which they pertain. The text is divided into numbered sections and sub-sections.

The author, Robert D. Sack, is a member of the New York City law firm of Patterson, Belknap, Webb & Tyler. He has concentrated his practice in press law and communications law, and has published a number of articles on the subject.

18. Sanford, Linda Tschirhart, *The Silent Children: A Parent's Guide to the Prevention of Child Sexual Abuse*. Garden City, N.Y.: Anchor Press/Doubleday, 1980. Pages: xiii, 367. Price: \$12.95.

Publisher's address: Doubleday & Co., Inc., 501 Franklin Ave., Garden City, N.Y. 11530.

Several books on various aspects of domestic violence have been noted in recent issues of the *Military Law Review*. This topic, as disturbing as it is intractable, has furnished material for consideration by scholars and writers in various fields. A government publication, *Families Today: Family Violence and Child Abuse*, was noted at 89 Mil. L. Rev. 124 (summer 1980), and another work, *Behind Closed Doors: Violence in the American Family*, at page 136 of the same issue. In *Life for Death*, noted at 90 Mil. L. Rev. 189 (fall 1980), Michael Mewshaw tells the story of a young man who was driven by abuse to kill both his parents.

Ms. Tschirhart's book deals with a specialized aspect of child abuse. Children may be the victims of sexual abuse at the hands of relatives in the same household, or complete strangers. Physical violence is not necessarily directed at the child, nor is psychological abuse, although both may be part of the picture. Sexual abuse is in some respects in a class by itself, distinguishable from the more familiar childbeating and other types of mistreatment. Ms. Tschirhart is concerned about informing parents and other responsible people on how to deal with the special problems which child sexual abuse presents.

The book is organized in five parts. Part One, "The Family Atmosphere," discusses relations in general between parents and children. The chapter titles suggest the thrust of this part: "Feeling Good About Yourself is the Most Important Feeling in the World," "Children Need to Learn How Much Other People can Physically and Emotionally Ask from Them," and others. Part Two, "overview of the Crimes of Child Molestation and Incest," describes various types of offenders and their motivations, and the dynamics of several kinds of on-going relationships. The third part is "Discussing Child Sexual Abuse with the Child;" the fourth presents the author's conclusions; and Part Five, "Parents with Special Needs," is a collection of essays by psychologists and others about the relationship of ethnic identity, retardation, physical handicaps, and other characteristics, with child sexual abuse.

One of the purposes of the book is to teach parents to be aware of the problem of child sexual abuse, and to pass along their

awareness to their children in an effective, non-threatening manner. Exercises are presented at the ends of the first three parts, consisting of lists of publications for additional reading, questions for use in exploring one's own personality, educational games to play with children, and so forth.

The book offers a detailed table of contents. Each of the parts, except the short conclusion, opens with an explanatory introduction. Footnotes are collected together at the end of the book.

The author, Linda Tschirhart Sanford, has written the book *In Defense of Ourselves*, about rape prevention, published by Doubleday. She was the founder and director of the Rape Prevention Forum in Seattle, Washington, and now lives at Woodstock, Vermont.

19. Schlesinger, Rudolf B., Professor, *Comparative Law: Cases-Text-Materials* (4th ed.). Mineola, N.Y.: The Foundation Press, Inc., 1980. Pages: 1x, 890. Price: \$24.00. Tables, author index, subject index. Publisher's address: The Foundation Press, Inc., 170 Old Country Road, Mineola, N.Y. 11501.

This textbook provides materials for use in a law school course on the comparative study of laws and legal systems. Comparative law is not a body of legal norms or rules, but a method for examining legal problems and institutions and entire legal systems. The author presents cases and notes which illustrate the application of this method in a variety of legal situations. Professor Schlesinger states that he decided to stay with the standard American casebook format rather than switch to a treatise format because students are more interested in dealing with concrete fact situations than abstract general theories.

The book is organized in three large sections, followed by a concluding caveat and an appendix. The first section is "The Nature of a Foreign Law Problem." In an introductory subsection, the comparative method is shown applied both to domestic legal problems, and to transactions across international boundaries. The comparative method is also discussed as a scientific approach in purely academic research. The place of foreign law in United States domestic courts is next examined. The pleading and proof of foreign law as a fact in American courts is discussed. The overall tactics of such litigation, and the pretrial and trial phases thereof

are considered. Proof of foreign law through testimony of experts is explained. The first section closes with a note on the treatment of foreign law in other legal systems.

The second major section of the text is "Common Law and Civil Law—Comparison of Methods and Sources." This section opens with an introductory subsection distinguishing the common and civil law jurisdictions in terms of their historical roots, the significance of national codification efforts, and the geographic expansion of the two systems of law. Next is discussed procedure in civil law countries. The course of a civil lawsuit is traced, and the lines of demarcation between civil law and other recognized types of law, such as commercial law, criminal law, and public law, are shown. This discussion is followed by consideration of substantive law under the major civil law codes, its organization and judicial interpretation. Various political, social, and moral elements expressed in the various codes are examined.

The third section is, "A Topical Approach to the Civil Law: Some Illustrative Subjects." This section takes the student through the fields of agency, corporations law, and conflicts of laws, showing how the civil codes and courts treat rights, obligations, powers, and other concepts pertaining to these subjects.

The book concludes with a short section entitled, "Caveat: The Special Hazards of Comparative Law," discussing the language barrier, differences in classification, and so forth. There follows an appendix, "A Brief Excursus on Comparative and Foreign Law Research: How to Find the Relevant Materials."

Reader aids include an explanatory preface, a note on explanations and abbreviations, and a detailed table of contents. A table of cases and an extensive author index precede the text. The book closes with a subject-matter index. Footnotes are very extensively used. Text and cases are organized through use of several layers of topic headings.

The author, Professor Rudolf B. Schlesinger, has been on the faculty of the Hastings College of Law of the University of California since 1975. Previously he taught at the Cornell University School of Law, from 1948 until his retirement therefrom in 1975. He received law degrees from both the University of Munich and Columbia University. Professor Schlesinger has published many

works on comparative law subjects. The first edition of the text here noted was published by the Foundation Press in 1950, and was followed by other editions in 1959 and 1970.

20. *Societe Internationale de Droit Penal Militaire et de Droit de la Guerre, Recueils, Septieme Congress International, San Remo, 23-28 September 1976, Les Droits de l'Homme dans les Forces Armees*. Brussels, Belgium: International Society for Military Law and the Law of War, 1978. Two volumes. Pages: vol. I, 1-457; vol. II, 458-1047. Paperback. In French, German, and other languages, with English translation of major portions of text. Publisher's address: Secretariat general, Societe internationale de droit penal militaire et de droit de la guerre, Palais de Justice, 1000 Bruxelles, Belgique; also, Secretariat, Revue de droit penal militaire et de droit de al guerre, Palais de Justice, 1000 Bruxelles, Belgique.

This large work reports the proceedings of the seventh triennial conference of the International Society for Military Law and the Law of War, held in September of 1976 at San Remo, Italy. The theme of this conference was human rights, or civil rights, of members of the armed forces. The two volumes contain several dozen "reports" or essays and comments prepared by scholars and officials, mostly from Western European countries, in response to a questionnaire previously issued by the Society. In these essays and comments, the authors explain how their governments have dealt with or viewed the tension between the needs of the individual for self-expression and the requirement of military organizations for discipline and obedience to commands.

Volume I sets forth, under the heading "Opening Ceremony," welcoming and introductory remarks by the Society's officers and by various officials and scholars prominent in the fields of military law and human rights. There follow three major essays, called general reports, on various aspects of the conference theme. In volume II, the text of the questionnaire is set forth. This is followed by essays submitted by delegations representing sixteen different countries, including the United States. The second volume closes with thirty-six "interventions" or short comments by various individuals, extending the comments of the national delegations. Most of the contents of volume I and about one-fourth of the contents of the second volume are translated into English. This note will consider the translated material only.

Among the introductory writings in volume I is an essay, "The European Convention on Human Rights, the United Nations Covenants, and the Armed Forces," by Arthur Henry Robertson, a professor at the University of Paris, and formerly Director of Human Rights of the Council of Europe. As he served as rapporteur for the conference, his essay is of special interest for the information it provides on the probable views and attitudes of the conferees as a whole.

Mr. Robinson opens by considering the question whether the full range of human rights (or civil rights) is applicable to military personnel. To answer this, he examines the Universal Declaration of Human Rights of 1948, the United Nations Covenant on Civil and Political Rights of 1966, and the European Convention on Human Rights of 1950. He concludes that, without question, such rights do apply fully to military personnel. However, Mr. Robertson acknowledges that, because of "the special situation of the military," the various rights apply differently to military members than to civilians. He illustrates this through discussion of several particular rights, and finally of a case called *Five Dutch Soldiers v. the Netherlands*. The discussion is continued in the "interventions" or extensions of remarks in volume II. This case was decided by the European Commission of Human Rights in 1974, and by the European Court of Human Rights in 1976. The soldiers complained of being punished for various military offenses and for political activities for which civilians could not be punished. Many issues were involved in this case, but the Commission and the Court held for the most part that the soldier's rights had not been violated. Mr. Robertson's point in choosing this case for discussion is two-fold: First, the case demonstrates that soldiers have the same rights as civilians. Second, it makes clear that, in a military context, reasonable limitations on personal freedom are not inconsistent with this position.

The next English-language portion of the work is "Presentation of the Congress' Theme," a translation of a keynote address by Mr. Henri Bosly, a deputy judge advocate general with the Belgian Court of Military Appeals. Mr. Bosly has been secretary-general, or executive director, of the Society since 1973, and served as editor of the Society's *Revue* from 1962 to 1978.

In his address, Mr. Bosly provided historical background information, and explained that the attention of the conference would

be focused on freedom of opinion and expression, freedom of peaceful assembly and association, and procedural protections guaranteed by law in case of arrest, detention or pursuit. He concludes with a description of the agenda for the conference.

All of the three general reports, or major articles, have been translated into English. The first of these is "Human Rights in the Armed Forces: Freedom of Opinion and Expression," by Dr. Otto Triffterer, a professor at the Justus Liebig University, at Giessen, West Germany.

Dr. Triffterer reviews and analyzes responses of the various national delegations to portions of the human rights questionnaire concerned with the extent to which military personnel in the various countries enjoy freedom to hold opinions and freedom to express opinions, two rights or groups of rights which Dr. Triffterer distinguishes from each other. The freedom to hold an opinion, he says, is an essential prerequisite to the freedom to express it.

The author considers first rules in national constitutions and non-constitutional legislation which ensure freedom of self-expression and freedom of opinion in general, including freedom of the press, academic freedom, the public's right to know, and related topics. The focus then shifts to limitations on expression and opinion, both affecting the general population and affecting military personnel in particular. Thereafter the author examines the positions of the various participating countries on the right of military personnel to vote, their eligibility to stand for election, and their right to petition for redress of wrongs or for other changes. Next, Dr. Triffterer examines responses to questions on whether and under what circumstances military necessity justifies particular restrictions. He concludes with some observations on the extreme difficulty in evaluating the responses of countries as diverse as, for example, the United States, Germany, Italy, Zaire, and Turkey, because of their very different histories.

The other two general reports are much shorter than that of Dr. Triffterer but are similarly structured. "Human Rights in the Armed Forces: Freedom of Reunion and Freedom of Association," was prepared by Mr. Maurice Danse, who has the title of *premier avocat general honoraire* before the Belgian military court. "Reunion" means "assembly." Mr. Danse distinguishes between assembly

and association in terms of duration. An assembly is a short-lived gathering of individuals, while an association is more permanent, having some formal organizational structure which persists from one meeting or "assembly" to the next. Mr. Frits Kalshoven, a professor of law at the University of Leydon, the Netherlands, prepared the last of the general reports, "Human Rights in the Armed Forces: Safeguards in the Case of Arrest, Detention, and Prosecution." He discusses the power of military commanders to order their subordinates into confinement or to impose punishment on them, the procedural safeguards available to a servicemember accused of crime, differences in processing of cases involving civilian-type crimes, as opposed to disciplinary offenses unique to the military, and general differences in treatment between civilians and military personnel in the criminal process as a whole. Both Mr. Danse and Mr. Kalshoven, like Dr. Triffterer, wrestle with the problem of reconciling systems which differ greatly from one country to another.

Volume II of the *Recueils* opens with the text of the questionnaire on human rights which served as the starting point for the 1976 conference. This is followed by sixteen national reports which were the raw material from which the three general reports in volume I were constructed. The Western European countries which participated in the conference are Belgium, West Germany, Denmark, Spain, France, Italy, the Netherlands, Austria, Switzerland, and the United Kingdom. One Eastern bloc country, Poland, was also represented, and two Middle Eastern States, Turkey and Israel. Others were Australia, Zaire, and the United States.

Seven of the sixteen national reports are available in English. The report of the United States is in two parts. The first part, "Freedom of Opinion and Expression and the Right to Petition," was prepared by then-Major, now-Lieutenant Colonel John B. Adams, JAGC, and by Captain Douglas F. Landrum, JAGC. Colonel Adams, a graduate of the 23d Advanced (Graduate) Class (1974-75), was assigned to the Administrative Law Division, OT-JAG, at the Pentagon from 1975 to 1979. After a year in Korea, he went to Fort Benning, Georgia, in June of 1980, where he serves as deputy staff judge advocate at the Infantry Center. Captain Landrum was assigned to the Sierra Army Depot, Herlong, California, during the time of the 1976 conference. He left the Army in 1978, completed an LL.M. in taxation at New York University in 1979,

and is an associate with the Los Angeles firm of Paul, Hastings, Janofsky, and Walker. He is a member of the JAGC Reserve.

The second part of the United States report is "Guarantees in Case of Arrest, Detention, and Prosecution." This was prepared by Captain James G. Dickinson, who at the time was assigned to the Criminal Law Division, OTJAG, at the Pentagon. He left the Army in 1977.

The United States report makes no mention of rights of assembly or association. This may have been because the question of unionization of the military, and other related civil rights questions left over from the Vietnam era, were then being hotly debated in the United States.

The second volume concludes with thirty-six "interventions," or extensions of remarks by various members of the national delegations and the delegation of the Council of Europe. A Canadian judge advocate gave a presentation on his country's approach to human rights for military members. Two members of the United States delegation, Captain Edward R. Cummings and Major General George S. Prugh, provided comments for the interventions section.

Captain Cummings wrote on the United States constitutional basis for limitations on the rights of American military personnel. He was assigned to the International Affairs Division, OTJAG, at the Pentagon, when the conference took place. While an excess leave student at the George Washington University School of Law, he published an article on the legal status of medical aircraft, at 66 Mil. L. Rev. 105 (1974). Subsequently he left the Army and, as of 1980, is a member of the JAGC Reserve in Washington, D.C.

Major General Prugh, who was The Judge Advocate General from 1971 to 1975, is well known to all Army judge advocates who were on active duty during those years. A biographical sketch of General Prugh appears at pages 256-257 of *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*. He has published articles at 20 Mil. L. Rev. 1 (1963) and at 44 Mil. L. Rev. 97 (1969). In the interventions, he discussed primarily restrictions on the liberty of military members accused of crimes. He presented a detailed checklist for evaluating the rights accorded to an accused at various stages of the criminal legal process from initial arrest

onward. Major General Prugh, now retired from military service, is an associate professor at Hastings College of the Law, University of California, San Francisco, California.

The primary reader aid provided in this two-volume paperback work is the translation of major portions of it, especially in the first volume, into English and other languages. Tables of contents appear at the end of each volume. In addition, volume II closes with an appendix listing, by country or organization, the names, titles, and addresses of the conference delegates.

The International Society for Military Law and the Law of War, or Societe Internationale de Droit Penal Militaire et de Droit de la Guerre, is better known among military lawyers in Western Europe than in the United States. It is a voluntary membership organization of practicing attorneys, public officials, and legal scholars. The Society was first organized at Strasbourg, France, in 1955, and formally incorporated there a year later. It grew out of a symposium on problems of protecting national defence secrets conducted by the Institut international de sciences criminelles et penitentiaires. Every three years the Society holds a major international conference on some aspect of military law or the law of war. The first such conference was held at Brussels, Belgium, in May of 1959; the most recent, the 1979 conference, took place at Ankara, Turkey. The published proceedings of these conferences are a major resource for schools.

Other than the conference proceedings, the major recurring publication of the Society is its law review, the *Revue de droit penal militaire et de droit de la guerre*, or Review of Military Law and the Law of War. This periodical has been published two or three times annually since it was first established in 1962. The first director, or editor, of the *Revue* was Mr. Henri Bosly, who since 1973 has also served as secretary-general of the society. In 1979, he was succeeded as editor by Mr. Fernand vander Vorst, who is an *avocat general* before the Belgian Military Court. Articles are published in the *Revue* in the language chosen by their authors.

21. Stockholm International Peace Research Institute, *World Armaments and Disarmament: SIPRI Yearbook 1980*; London, U.K.: Taylor & Francis, Ltd., 1980. Pages: xlvi, 514. Price: US \$49.50 or UK pounds 19.00. Address of U.S. distributor: Crane, Russak & Company, Inc., 3 East 44th Street, New York, N.Y. 10017.

This annual publication, the eleventh in a series of SIPRI year-books, provides an analysis of the worldwide arms race during 1979, and of efforts to halt or at least slow the pace of this arms race. All types of military weapons technology, production, marketing, and deployment are examined. Primary attention is given to nuclear weaponry and to attempts to limit its proliferation. Much attention is given to activities of the United States and the Soviet Union, but other countries are discussed also. Arms control agreements, especially SALT II and the Nuclear Non-Proliferation Treaty, are considered at length.

The book is organized in a long introduction and twenty chapters, with many small chapter appendices. The introduction is an important part of the book, stating the SIPRI staff's gloomy conclusions concerning major trends in world military spending, the arms trade, development of new nuclear weapons, arms control efforts, and related topics. The introduction is supplemented by two appendices setting forth statistics on modernization of strategic nuclear weapons and on the strength of United States and Soviet strategic nuclear forces year by year since 1971. The twenty chapters of the text provide statistical and other supporting data for and expanded discussion of the points made in the introduction.

The first three chapters review worldwide military expenditures and production of and trade in weapons. Chapter 4 focuses on "Eurostrategic" weapons. These four chapters provide a prelude to the later chapters, all of which deal with arms control agreements and disarmament.

Chapter 5 considers use of satellites to verify performance of states under arms control agreements. The sixth and seventh chapters analyze the various agreements which comprise the results of the SALT II negotiations, with emphasis on procedures for verification of compliance under those agreements. Chapter 8 concerns performance of the parties to the Nuclear Non-Proliferation Treaty during 1979. Chapter 9 discusses "negative security assurances," i.e., the lack of nuclear weaponry. The tenth chapter provides statistical information concerning nuclear explosions detonated by the United States, the Soviet Union, and other nations since 1945.

The next three chapters form a group in that all deal with specialized types of non-nuclear weapons. Chapter 11 discusses

chemical and bacteriological weapons; chapter 12, radiological weapons; and the thirteenth chapter, prohibitions on use of inhumane and indiscriminate weapons.

The fourteenth chapter opens a group of chapters dealing with disarmament. This chapter provides an overview through discussion of a comprehensive proposal of the United Nations Disarmament Commission. This is followed by the fifteenth chapter, on confidence-building measures in Europe, and the sixteenth, on disarmament before the U.N. General Assembly in 1979. Chapter 17 examines implementation of multilateral arms control agreements, and chapter 18 summarizes some two dozen bilateral agreements and statements by the Soviet Union and the United States concerning arms control. The nineteenth chapter covers United Nations peace-keeping operations in the 1970's, and Chapter 20 closes the book with a chronology.

For the use of the reader, the book offers a preface, a detailed table of contents, and a list of tables and figures used in the text. Several dozen charts and tables are provided, with appendices, explanatory notes, and short essays. List of references appear at the ends of most chapters. Some footnotes are used. The book closes with an errata page and a subject-matter index.

This book was prepared by the SIPRI staff under the supervision of Dr. Frank Barnaby, the director, or chief executive officer, of the organization. SIPRI describes itself as "an independent institute for research into problems of peace and conflict, especially those of disarmament and arms regulations." Financed by appropriations of the Swedish Parliament, SIPRI was established in 1966 to commemorate Sweden's 150 years of uninterrupted peace. The membership of the staff and of SIPRI's Governing Board and Scientific Council is international. SIPRI publications have often been noted in the *Military Law Review*, most recently in volumes 87, 89, and 90. The *SIPRI Yearbook 1979* was noted at 86 MIL. L. REV. 171 (fall 1979). The index volume for the first ten SIPRI Yearbooks, through the 1979 book, was noted at 89 MIL. L. REV. 135 (summer 1980).

22. Stopford, John M., John H. Dunning, and Klaus O. Haberich, *The World Directory of Multinational Enterprises*. New York: Facts on File, Inc., 1980. Pages: xii, 1186. Two volumes. Index. Statistical tables. Price: \$195.00. Publisher's address: Facts on File Publications, 119 West 57th Street, New York, N.Y. 10019.

This large publication offers profiles, or descriptions, of four hundred thirty major multinational enterprises, together with statistical information about foreign investment in general. The purposes of this work are similar to those of Moody, Standard and Poor, Dun and Bradstreet, and other financial information publications more familiar to American investors: to provide, in two or three pages, an overview of each firm described, its products, subsidiaries, sales, assets, and other statistics and indicators. The differences between the work here noted and the other publications named is stated in the preface; it "is the first directory of its type dealing exclusively with firms that control important foreign investments." The editors of the work state that the 430 firms profiled account "for over 80% of the world's stock of foreign direct investment."

The work opens with a two-part introduction. Part I, "The Scope and Pattern of Multinational Enterprise Activity in the Late 1970s," provides a statistical overview of foreign investment, by investing country. Not surprisingly, the United States, the United Kingdom, and West Germany are the leaders in foreign investment, with Japan, Switzerland, the Netherlands, and Canada not far behind. France, Sweden, Belgium, Luxembourg, and Italy account for most of the remaining foreign investment. Several charts set forth information about countries which receive investments, both developed and developing, and information about types of industries and about exports from parent firms to their own affiliates.

Part 2 of the introduction sets forth seven tables containing statistics about the 430 profiled firms as a group. Extensive explanatory notes are provided. The tables summarize the sizes of the firms, the extent of their overseas activities, direct exports of parent firms, sales of overseas subsidiaries, industrial diversification, and growth rates.

The introduction is followed by a short essay, "Criteria for Selection," explaining the guidelines followed by the editors in selecting firms for inclusion in the Directory. The criteria were, "The firm had 25% or more of the voting equity of manufacturing or mining companies in at least three foreign countries;" "The firm had at least 5% of its consolidated sales or assets attributable to foreign investments;" and "The firm had at least \$50 million sales originating aboard." The editors explain that firms qualified if

they met even one of these criteria, but that most met all three. In doubtful cases, abbreviated entries were prepared.

The profiles open with an italicized summary, followed by a brief description of the firm's structure and products. Notes on the background or history of the firm come next, followed by five-year statistical summaries of the firm's activities, in tabular form. Major shareholders and principal subsidiaries are listed as well. The book closes with extensive statistical tables providing further information about overseas activities, diversification, government ownership, and other characteristics of profiled firms.

Editor John M. Stopford is Academic Dean and Professor of International Business at the London Business School, and serves as a director of the Matrix Group. John H. Dunning is head of the Department of Economics and Professor of International and Business Studies at the University of Reading, in the United Kingdom. Klaus O. Haberich is an assistant professor at the Wharton School of the University of Pennsylvania, Philadelphia, Pa.

23. Sullivan, Charles A., Michael J. Zimmer, and Richard F. Richards, *Federal Statutory Law of Employment Discrimination*. Charlottesville, Virginia: Michie/Bobbs-Merrill Law Publishing, 1980; Pages: lxxxiv, 874. Price: \$45.00. Includes 1980 pocket supplement, 67 pages. Table of cases; index. Publisher's address: Michie/Bobbs-Merrill Law Publishing, P.O. Box 7587, Charlottesville, VA 22906.

The past two decades have seen considerable litigation concerning discrimination by potential employers against would-be employees based on the employees' race, color, religion, sex, or national origin. Much of this litigation is based upon Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, as amended, codified at 42 U.S.C. §§ 2000e *et seq.* Several other statutes also bear upon employment discrimination, including some from the Reconstruction era after the Civil War, but Title VII is the primary subject of this book. The statute and its practical operation are described at great length. Several related statutes are considered more briefly.

The book is organized in fourteen numbered chapters. Chapter 1, "Concepts of Discrimination Under the Federal Statutes," provides an overview of the statutes and a discussion of the types of

discrimination intended by the legislators to be covered by the law. Some techniques and problems of proof and persuasion in litigation are considered.

Chapters 2 through 9 examine Title VII specifically. The second chapter looks at the coverage of Title VII, and at special statutory exemptions such as the preference given to veterans in the United States Civil Service and in many other hiring situations. Special problems of gender discrimination, religion, and ethnic identity are considered, along with suits against state and local governments, the federal government, and labor unions, and other matters.

Chapter 3 considers Title VII enforcement procedures, especially private lawsuits. The fourth chapter discusses preliminary relief in discrimination actions. Chapter 5 examines the interrelationship between Title VII remedies, and other remedies which may be available, such as grievance procedures under collective bargaining agreements; and state-level administrative and judicial proceedings. The sixth chapter reviews Title VII class actions, and Chapter 7, "Complex Employment Discrimination Litigation," considers the problems of simultaneous private and public litigation.

In Chapters 8 and 9, Title VII is discussed in relationship to the general statutes surviving from the post-Civil War Reconstruction period. The authors refer to that time as the "First Reconstruction," the second being the pro-civil rights Supreme Court decisions and federal statutes of the 1960's. Chapter 10 is about the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), which is concerned primarily with gender discrimination. Chapter 11 deals with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), enacted in 1967.

The twelfth chapter considers the impact of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, on employment discrimination. This famous statute, first enacted in 1935 and amended many times, provides for union representation of workers in collective bargaining with employers. It does not explicitly deal with employment discrimination except discrimination on the basis of union membership and participation in related activities. The book closes with Chapters 13 and 14, on affirmative action, reverse discrimination, settlement of litigation, and consent decrees.

For the convenience of readers, the book offers an explanatory preface, a summary table of contents, a very detailed table of contents, and a subject-matter index. A table of cases cited is placed near the front of the book before the first chapter. The text is organized in numbered sections and subsections, and is profusely footnoted. Footnotes are placed at the bottoms of the pages to which they refer. The 1980 pocket supplement provides updating text, footnotes, and case citations for most chapters.

Authors Charles A. Sullivan and Michael J. Zimmer are professors of law at Seton Hall University School of Law, Newark, New Jersey. Richard F. Richards is a professor of law at the University of Arkansas, Fayetteville, Arkansas. All three have written many law review articles on topics of employment discrimination. Portions of the book here noted are based on these articles.

24. Sullivan, Linda E., editor, *Encyclopedia of Governmental Advisory Organizations* (3d ed.). Detroit, Michigan: Gale Research Company, 1980. Pages: xi, 782. Price: \$190.00. Extensive alphabetical and keyword index. Publisher's address: Gale Research Co., Book Tower, Detroit, Michigan 48226.

This large work provides information about no less than 3456 federal governmental advisory committees, past and present. While most are currently active committees, descriptions of several hundred defunct organizations are provided for historical reference. The history, program, and membership of each committee are described, together with reference to the legal authority for the committee's existence and operations, and information about the committee's staff and its schedule of meetings. This edition contains more entries and longer entries than the second edition, published in 1975.

The range of committees covered is great. Entry No. 3319, for example, is the Interdepartmental Committee on Civil International Aviation, which was terminated in 1938. Also included are such ephemeral entities as the Transpo '72 Air Show Review Board, which existed for four months in 1972, Entry No. 3436.

The Board of Visitors of the J.A.G. School is Entry No. 766. This entry is not completely up to date, as it does not reflect that the Board of Visitors was terminated in 1980 after a 26-year existence.

Also, the entry states that the recorder for the Board is Captain Joe Hely. Captain Hely, a former post judge advocate of the J.A.G. School, left Charlottesville and the Army for civilian life in 1976. But these are minor points, mentioned only to show that the *Encyclopedia*, like all indexes and directories, is not infallible. For the most part, the entry is correct, and the inclusion of such an obscure committee is an achievement in itself. Doubtless future editions will show Entry No. 766 as a historical item, like No. 763, the Board of Visitors of the Army Transportation School, Fort Eustis, Virginia, which was terminated in 1974.

The entries are organized in ten subject-matter sections or categories. These are agriculture; business, industry, economics, and labor; defense and military science; education and social welfare; environment and natural resources; health and medicine; history and culture; government, law, and international affairs; engineering, science, and technology; and transportation. A variety of subtopics are included under these major headings, and entries are grouped according to subtopic. Thus, the entry for the J.A.G. School Board of Visitors is in the section on defense and military science, and is grouped with other entries under "Education, Military," in alphabetical order.

The United States Congress has been concerned about the proliferation of committees, boards, commissions, and so forth, and in 1972 passed the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770, codified at 5 U.S.C. App. §§ 1-14 (1976), as amended. The text of this act is set forth in Appendix II of the *Encyclopedia*. The act requires the various departments and agencies of the federal government to appoint "Committee Management Officers." These officials are listed in Appendix I.

The volume closes with a very extensive index, listing all of the entries in alphabetical order by name and key word. For example, the TJAGSA Board of Visitors is listed under both "Board" and "Judge." Also listed are entities such as the General Accounting Office and the Senate Foreign Relations Committee which the uninformed might mistake for advisory committees. The *Encyclopedia* refers the user of the index to the *U.S. Government Manual* or to the *U.S. Congressional Directory*, as appropriate, for information about such agencies.

The Gale Research Company publishes various directories and encyclopedias. The *Law and Legal Information Directory*, edited

by Paul Wasserman and Marek Kaszubski, is noted elsewhere in this issue.

25. Thompson, W. Scott, Professor, and Colonel Donaldson D. Frizzell, editors, *The Lessons of Vietnam*. New York: Crane, Russak & Company, 1977. Pages: xii, 288. Price: \$19.50. Index. Publisher's address: Crane, Russak & Co., Inc., 3 East 44th Street, New York, N.Y. 10017.

This book sets forth a collection of papers presented and comments made at a colloquium entitled "The Military Lessons of the Vietnamese War," held in 1973 and 1974 at the Fletcher School of Law and Diplomacy. The famed Fletcher School is part of Tufts University, at Medford, Massachusetts. The two editors were among the thirty-one contributors and participants, among whom were such well-known Vietnam-era public figures as General William C. Westmoreland, Ambassador Henry Cabot Lodge, Admiral Elmo R. Zumwalt, and others.

Published in 1977, this is not a new book, but is being advertised anew by the publisher as a companion to a new work, *The Fall of South Vietnam: Statements by Vietnamese Military and Civilian Leaders*. Edited by Stephen T. Hosmer, Konrad Kellen, and Brian M. Jenkins, the new book is noted elsewhere in this issue. It presents a Vietnamese point of view, as *The Lessons of Vietnam* presents an American perspective.

The book is organized in fifteen numbered chapters or sections, each containing one or more essays or comments by different participants and contributors. In each chapter, the writings are woven together by use of introductory headnotes and concluding notes prepared by the editors. The opening chapter is "The Strategic Background," which is followed by "Patterns of the French and American Experience in Vietnam," and "The American Approach to the War." Chapter IV is "A Military War of Attrition," and the fifth chapter, "The Strategy of Attrition." Next come "Rear Bases and Sanctuaries," "Psychological Factors," and "Air Power: Mixed Results in the Early Years." The ninth chapter is "Air Power and Negotiation in 1972," and the tenth, "Tactics and Technology." Chapter XI, "Problems of Force Management," is followed by "Costing' the Vietnam War." The book closes with "Was There Another Way?" "Vietnamization and the Territorial Forces," and "Was Failure Inevitable? Some Concluding Perspectives."

For the use of readers, the book offers a detailed table of contents, a foreward, a preface, a glossary of abbreviations and acronyms used, and a checklist of contributions and participants. There is some use of maps, statistical tables, and footnotes. The book concludes with an afterword and an index.

W. Scott Thompson was at time of publication an associate professor of international politics at the Fletcher School, and Donaldson D. Frizzell was a colonel in the U.S. Air Force, and, in 1973-74, a research associate at the Fletcher School.

26. U. S. Naval Institute, *Milestones in Naval Aviation, 1910-1980, A Pictorial Calendar for 1981*. Annapolis, Maryland: U.S. Naval Institute, 1980. Pages: Approximately 150. Price: \$6.95. Publisher's address: Marketing Department, U.S. Naval Institute, Annapolis, Maryland 21402.

This attractively printed book is half a history of naval aviation, and half an appointment calendar. Throughout the book, each left-hand page bears pictures of aviators and aircraft, with extensive explanatory captions. Each right-hand page is part of the calendar. The pictures and captions begin with a reproduction of an old photograph of Captain Washington Irving Chambers, who was assigned in September 1910 to be the Navy's correspondent in matters of aviation. In this capacity, he founded American naval aviation. The pictures and captions move forward in chronological order to a conclusion with an aerial shot of a three-carrier task force in the Arabian Sea in 1980 during the problems in Iran and Afghanistan.

Each page of the calendar covers seven days, with space for notes. Anniversaries of events in the history of American naval aviation are noted; almost every day of the year is covered, and many days have two entries. The book is held together with a spiral ring, so that it lays flat when opened, a convenience for notemaking.

After the last week of December 1981, the book continues with a recapitulation of 1981, two months to a page, with space for small notes for each day. Complete calendars for 1981 and 1982 are presented next, and an alphabetical list of military, religious, patriotic, and historical holidays.

The United States Naval Institute is a voluntary membership association affiliated with the Navy Academy at Annapolis, Maryland. Anyone can belong; the members "are united by a common concern for nautical progress." The Institute publishes a monthly magazine, the *Naval Institute Proceedings*, the May issue of which is called the *Naval Review*. The Institute also maintains a library which includes one of the world's largest collections of U.S. Navy and Coast Guard ship and aircraft photographs.

The Institute publishes and sells books on naval themes. Noted elsewhere in this issue are *Chiefs of Naval Operations*, by Professor Robert W. Love, Jr.; *Combat Fleets of the World, 1980/81: Their Ships, Aircraft, and Armament*, edited in the French original by Jean Labayle Coubat and translated for the Institute by A. D. Baker III; and *Naval Ceremonies, Customs and Traditions*, 5th edition, by Vice Admiral William P. Mack and Lieutenant Commander Royal W. Connell.

27. Wasserman, Paul, and Marek Kaszubski, editors, *Law and Legal Information Directory*. Detroit, Michigan: Gale Research Co., 1980. Pages: xiv, 527. Price: \$94.00. Publisher's address: Gale Research Co., Book Tower, Detroit, MI 48226.

This large book provides addresses for and capsulized information about a great variety of entities and activities of interest to members of the American legal profession. Included are bar associations, law schools, legal periodicals, law book publishers, and many other subjects.

The book is organized in fourteen separate sections. The first section is "national and International Organizations," a list of organizations, mostly American, some foreign, which are concerned in some way with law or legal practice. Included are the International Society for Military Law and the Law of War, and the Judge Advocates Association. This section is followed by section 2, "Bar Associations." Listed here are all legal organizations with an explicitly geographical basis, i.e., state bar associations, and bar associates of cities, counties, or other localities. No federal or regional organizations, like the Federal Bar Association, are listed here; instead, these appear in section 1.

Section 3, "Federal Court System," contains addresses for all the United States courts of appeals and district courts, with descrip-

tions of their venues. The fourth section gives addresses and descriptions of federal regulatory agencies, the independent agencies first, and then executive agencies, department by department. Law schools are listed and their degree programs described, state by state, in section 5, and continuing legal education programs and agencies are discussed in detail in the sixth section.

Section 7 lists, state by state, all the institutions and organizations which offer some type of paralegal education, with descriptions of their course offerings. The eighth and ninth sections list and discuss scholarships, grants, awards, and prizes available in various fields of law. The next three sections do the same for law libraries connected with law schools, or operated by bar associations, government agencies, or other organizations; information systems and services such as FLITE; and research centers, both academic and commercial. The thirteenth section lists and describes a great variety of legal periodicals published by law schools, bar associations, special interest groups, and commercial firms. The fourteenth and last section provides addresses of publishers of law books and other publications.

For the convenience of the user, the *Directory* provides a table of contents, a preface, and an introduction explaining the use of each of the fourteen sections. Many of the sections are followed by alphabetical indices of the entries contained therein. This is useful especially for the sections in which entries are arranged primarily by state. Each entry is given a number, and this number is referenced in the relevant alphabetical index, rather than the page number.

The editors have stated in their preface that this work is modeled on the *Medical and Health Information Directory*, by Dr. Anthony T. Kruzas.

28. Whelan, John William, Professor, editor, *Yearbook of Procurement Articles, Volume 16, 1979*. Washington, D.C.: Federal Publications, Inc., 1980. Pages: xiv, 1089. Publisher's address: Federal Publications, Inc., One Lafayette Center, Washington, D.C. 20036.

The Annual *Yearbook of Procurement Articles* is a collection of all available articles dealing with government procurement or contract law published during the calendar year preceding the year of issuance of the volume. Because of publication delays experienced

by some periodicals, articles of earlier date may be included also. Thus, of the forty articles reprinted in volume 16, the current volume, twenty are dated 1979, and twenty, 1978.

The *Yearbook* is a publication of Federal Publications, Incorporated, a commercial publishing firm located in Washington, D.C., and headed by Mr. Henry B. Keiser.

As in previous volumes, the reprints are photographic copies of the articles in their original form, including original page numbers. *Yearbook* page numbers are added on the outside vertical margins, halfway up each page. Articles are separated by inserted title pages, which give the full citation to the original of the reprinted article, together with a very short scope note, from three to five lines in length. The articles themselves vary widely in length. The longest, an article by Major Roger Dean Graham, USAF, originally published at 20 *Air Force L. Rev.* 331 (1978), fills ninety-two pages. Most of the articles are far shorter, several being only five or six pages in length.

As in previous volumes, this volume opens with a commentary by the editor, Professor Whelan, on a topic selected by him. The volume 16 commentary deals with fraud in government contracting. The author reviews the various federal statutes concerning fraud. He finds the statutory scheme very complex and full of possibilities for unfair treatment of one party or the other, especially the contractor. Professor Whelan recommends simplification of the law, with clear separation between criminal and civil remedies.

The articles reprinted deal with every aspect of the law of federal government procurement. Some pertain to state and local procurement as well. Fifteen different journals and law reviews are represented among the forty articles reprinted. As in last year's volume, the *National Contract Management Quarterly Journal* is by far the most heavily represented, with fifteen articles. The *Air Force Law Review* and the Bar Association's *Public Contract Law Journal* are tied in second place, with five articles each. The *Military Law Review* is represented by three articles, and the *Federal Bar Journal*, by two.

The three *Military Law Review* articles are all from volume 86, a contract law symposium issue published in the fall of 1979. The first article is, "The Allowability of Interest in Government Con-

tracts: The Continuing Controversy," by Major Theodore F. M. Cathey and Major Glenn E. Monroe. This article was published at 86 Mil. L. Rev. 3 (fall 1979) and 16 Y.P.A. 889 (1980). Major Cathey is legal counsel for the Defense Supply Service—Washington, at the Pentagon, Washington, D.C. Major Monroe was a government trial attorney before the Armed Services Board of Contract Appeals, and is now with the Washington office of a private firm, Bryan, Cave, McPheeters, and McRoberts, based in St. Louis. Major Monroe was also author of an article on a procurement topic published in volume 80 of the *Military Law Review* and reprinted in volume 15 of the *Yearbook*. Both Major Cathey and Major Monroe were formerly members of the contract law faculty at The Judge Advocate General's School, Charlottesville, Virginia.

The second *Review* article is, "Use of Specifications in Federal Contracts: Is the Cure Worse than the Disease?" Published at 86 Mil. L. Rev. 47 (fall 1979) and 16 Y.P.A. 935 (1980), this article was written by Major Gary L. Hopkins and Major Riggs L. Wilks, Jr. Major Wilks is senior instructor in the Contract Law Division at The Judge Advocate General's School. Major Hopkins was formerly chief of that division, and now works for a private company, E-Systems, Dallas, Texas, as associate corporate counsel. Major Hopkins was also co-author of a procurement article published in volume 80 of the *Review* and reprinted in volume 15 of the *Yearbook*. The article on specifications here described was the subject of the 1979 Professional Writing Award given by the J.A.G. School Alumni Association. A story about this award appears in volume 90, fall 1980, of the *Review*.

The third and last *Review* article appearing in volume 16 is, "The Magic Keys: Finality of Acceptance Under Government Contracts," by Thomas E. Shea, Esquire. This article was published at 86 Mil. L. Rev. 111 (fall 1979) and reprinted at 16 Y.P.A. 1001 (1980). Mr. Shea is assistant district counsel for the Fort Worth District of the U.S. Army Corps of Engineers at Fort Worth, Texas. He is author of an article on a procurement topic published in volume 19 of the *Air Force Law Review* and reprinted in volume 15 of the *Yearbook*.

For the convenience of users, volume 16, like previous volumes, offers a detailed table of contents which reproduces the scope notes from the inserted title pages mentioned above. The table of contents is followed by a two-page "Guide to Use." At the end of the

volume, there appears an index of the authors of the reprinted articles, a table of leading cases cited, and a short subject-matter index.

The editor, John William Whelan, has been a professor of law at the Hastings College of Law of the University of California, at San Francisco, since 1975. Prior to that, he taught at the Davis campus, 1967-1975, and at Georgetown, 1959-1967, and at the University of Wisconsin, 1956-1959. Professor Whelan was formerly an Army judge advocate, serving as an instructor at The Judge Advocate General's School, Charlottesville, Virginia from 1951 to 1955, after which he was a member of the faculty of the University of Virginia School of Law for a year. He was a member of the JAGC Reserve until his retirement in 1971 as a lieutenant colonel. Professor Whelan is co-author, with Robert S. Pasley, of a casebook, *Federal Government Contracts*, published in 1975 by the Foundation Press, Mineola, New York.

Professor Whelan is assisted in his work on the *Yearbook* by Mr. William J. Ruberry as associate editor. Mr. Ruberry is an administrative law judge on the Armed Services Board of Contract Appeals, Alexandria, Virginia.

The 1978 volume, volume 15, was noted at 86 Mil. L. Rev. 173 (fall 1979) and mentioned at 85 Mil. L. Rev. 188 (summer 1979). Volume 14 was noted at 82 Mil. L. Rev. 225 (fall 1978).

29. Whitebread, Charles H., *Criminal Procedure: An Analysis of Constitutional Cases and Concepts*. Mineola, New York: The Foundation Press, Inc., 1980. Pages: xxii, 622. Price: \$24.00. Table of cases; index. Publisher's address: The Foundation Press, Inc., 170 Old Country Road, Mineola, N.Y. 11501.

This law school casebook is a recent addition to the well-known University Textbook Series, published for Foundation Press. The book is intended primarily for use by students in their second or third year of J.D. - or LL.B. - level studies, and by their professors. It deals with procedural matters such as search and seizure, the right to counsel, entrapment, and related topics, as opposed to substantive criminal law, which is usually dealt with in the first year of legal studies. This volume is a first edition for Foundation Press, although the author states in his preface that the basis for *Criminal Procedure* was his previous book, *Constitutional*

Criminal Procedure, published in 1978 by the American Academy of Judicial Education, Washington, D.C.

In his introduction, the author explains that the law of criminal procedure has been much affected by the liberal decisions of the Warren Supreme Court during the 1960's, and the moderately conservative shift of the Burger Court in the 1970's. The Burger Court, for example, while placing a high value on the rights to counsel and to a jury trial, has given low priority to protection against illegal searches and seizures, and to correction of certain types of self-incrimination situations. The Warren Court was deeply committed to upholding individual rights, at the cost, if necessary, of letting guilty persons go free. The Burger Court focuses on ensuring that the factually guilty are convicted and that the factually innocent go free. The importance of these differences in emphasis is that the law of criminal procedure has been significantly affected by them, and will continue to be for years to come.

The book is organized in twenty-nine chapters and seven parts. Part A, "The Fourth Amendment: Search and Seizure Law," is probably the heart of the book. Consisting of twelve chapters filling over one-third of the volume, it presents cases and discussion of the exclusionary rule, the law of arrest, search warrants and exceptions to the requirement therefor, consent searches, border searches, eavesdropping, and other topics. This is followed by Part B, "The Fifth Amendment's Privilege Against Self-Incrimination," with two chapters.

The third part, "The Pretrial Process," covers such matters as bail, grand juries, and plea bargaining. Part D, "Constitutional Issues Associated with Trial," discusses the rights to a jury trial and a speedy trial, and the defense of double jeopardy. Part E, "The Role of the Lawyer Under the Sixth Amendment," examines the right to counsel and the issue of effective assistance of counsel. The next part contains one chapter concerning the entrapment defense. The main body of the book closes with Part G, "The Relationship Between the Federal and State Courts," describing differences in criminal procedure between state and federal courts and the reasons for them. Two short appendices provide information about recent Supreme Court decisions which apparently could not be included in the main body.

For the convenience of users, the casebook offers an explanatory preface, a summary table of contents, a detailed table of contents.

and, at the back of the book, a table of cases cited and a subject-matter index. The text is copiously footnoted, and lists of bibliographic references are placed at the ends of the chapters. Footnotes are placed at page bottoms, and are numbered consecutively from the beginning of each chapter.

The author, Charles H. Whitebread, II, is a professor at the University of Virginia School of Law, Charlottesville, Virginia. Born in 1943, he received his undergraduate education at Princeton, and earned his LL.B. at Yale in 1968. He has published many articles and several books on criminal law subjects. Juvenile justice has been an area of particular interest to him. Professor Whitebread has taught at the FBI Academy, Quantico, Virginia.

30. Yager, Joseph A., editor, *Nonproliferation and U.S. Foreign Policy*. Washington, D.C.: The Brookings Institution, 1980. Pages: xiv, 438. Price: \$22.95 (cloth); \$8.95 (paper). Index. Publisher's address: Director of Publications, The Brookings Institution, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036.

Among the many pressing concerns of international relations is the spread of nuclear weapons through more and more countries. Peaceful uses of nuclear energy raise many problems, not the least of which is the production of fissionable material as a by-product. An increasing number of countries have taken the additional steps necessary to convert this material into nuclear weaponry. Still more countries have the technical capacity to do this if they choose to. So far, their domestic policies have excluded such action, but that could change.

Readers of these publications notes are aware that prevention of the spread of nuclear weapons is a prime concern of organizations such as the Stockholm International Peace Research Institute, or SIPRI, many of whose publications have been noted or reviewed in the *Military Law Review*. The Brookings Institution, responsible for publication of the volume here noted, has not been identified with this particular cause. That fact may imply greater impartiality in the Institution's conclusions.

Nonproliferation and U.S. Foreign Policy is a collection of essays by scholars associated with the Brookings Institution and other organizations, public and private. The essays were prepared as part of a project funded by the United States Departments of

Defense, Energy, and State. The book is organized in six parts and eighteen chapters. Each part was prepared by a different author or group of authors. The first five parts deal with specific geographic areas, and the sixth presents combined conclusions from the earlier parts.

Part One, Northeast Asia, was written by Editor Joseph A. Yager, a senior fellow in the Brookings Foreign Policy Studies program who has several other publications to his credit. This part focuses chiefly on Japan, but considers the situations of the Republic of Korea (or South Korea) and Taiwan as well. None of these countries has nuclear weapons of its own. (The United States forces in Korea have such weapons under their control.) All three, however, produce nuclear energy and thus could produce weapons if they wanted to. Mr. Yager reviews the various public programs of these countries concerning nuclear energy, and considers the various pressures and fears which could affect present and future nuclear policies there.

The second part, on India, Pakistan, and Iran, is by Richard K. Betts, also a member of the Brookings Foreign Policy Studies staff. This part presents an analysis similar in structure to that of Part One. Part Three, the Middle East, was prepared by Henry S. Rowen, a professor at the Stanford University School of Business, and by Richard Brody, then on the staff of Pan Heuristics. The fourth part, Brazil and Argentina, was written by William H. Courtney, a U.S. foreign service officer. Richard K. Betts did Part Five, South Africa, and the sixth part was prepared by all five authors.

For the convenience of readers, the book offers a foreward, a detailed table of contents, a short glossary of terms and acronyms, an explanatory introduction, and a subject-matter index. Fifteen statistical tables are scattered throughout the text. Footnotes are used, and are placed at the bottoms of the pages to which they pertain.

The Brookings Institution, one of a group of entities popularly called "think tanks," describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally. Its principal purposes are to aid in the development of sound public policies and to promote public understanding of

issues of national importance." Founded in 1927 through the merger of three slightly older organizations, the Institution is governed by a board of trustees, chaired by Robert V. Roosa. The current president of the Institution is Bruce K. MacLaury.

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I. INTRODUCTION

This index follows the format of the cumulative indices which were published as volume 91 (winter 1981) and as volume 81 (summer 1978) of the *Military Law Review*. Those indices are supplemented in this and succeeding volumes.

The purpose of 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 cumulative indices, and discover what else has been published under the same headings. Second, new subject-matter headings are most easily added, volume by volume, as the need for them arises. 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 four parts, of which this introduction is the first. Part II, below, is a list of 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.

All titles are indexed in alphabetical order by first important word 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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