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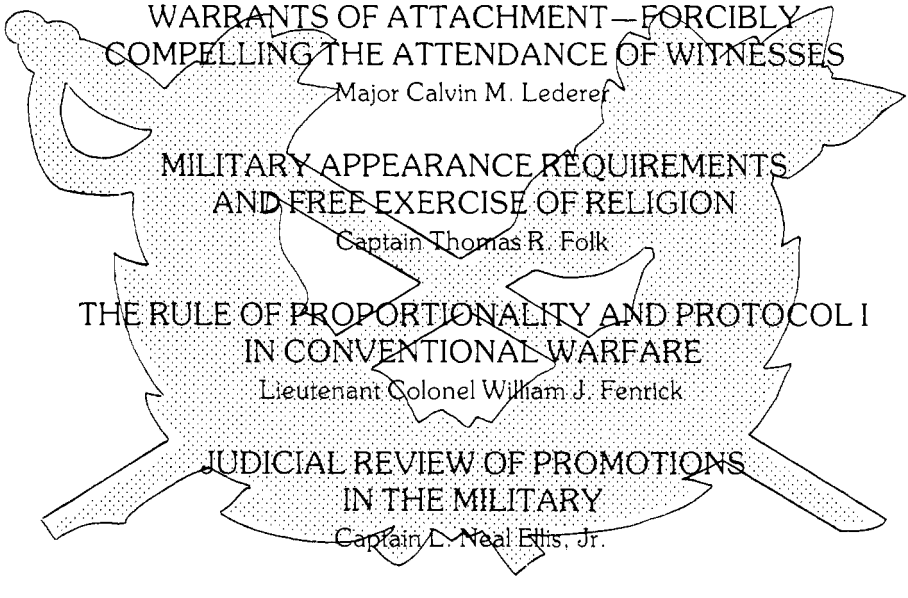
MILITARY LAW REVIEW



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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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WARRANTS OF ATTACHMENT—FORCIBLY COMPELLING THE ATTENDANCE OF WITNESSES

By Major Calvin M. Lederer*

It is a "longstanding principle" that "the public . . . has a right to every man's evidence."[1] This "ancient proposition of law"[2] underlies the concept of compulsory process.*However, there is a difference between the ability to subpoena a witness and the ability to ensure that the witness attend the trial. Whether and to what extent witnesses may be bodily brought to testify under the authority of the court is less certain, at least as a practical matter, than the right to have a court issue paper process.

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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[1] Branzburg v. Hayes, 408 U.S. 665, 688 (1972); 8 J. Wigmore, Evidence § 2192 (McNaughten rev. 1961).

[2] United States v. Nixon, 418 U.S. 683, 709 (1974). See *also* United States v. Smith, 27 F. Cas. 1192, 1197 (C.C.D. N.Y. 1806) (No. 16,342) ("The general rule is that all persons are bound to give testimony. I have no book from which to read this rule but I think it is written by the finger of God on the heart of every man.")

[3] Compulsory process dates from 1562 when "An Act for Punishment of such as shall procure or commit any wilful Pejury" was enacted in England. 5 Eliz. 1, c. 9, § 12 (1562). The statute provided that:

> if any person. . . upon whom any Process out of any of the Courts of Record . . . shall be served to testify or depose concerning any Cause or Matter depending in any of the same Courts, (2) and having tendered unto him or them, according to his or their Countenance or Calling, such reasonable Sums of Money for his or their Costa and Charges, as having Regard to the Distance of the Places is necessary to be allowed in that Behalf, (3) do not appear according to the Tenor of the said Process, having not a lawful and reasonable Let or Impediment to the contrary; (4) that then the Party making default, to lose and forfeit for every such Offence ten Pounds, and to yield such further Recompense to the Party grieved, as by the Discretion of the Judge of the Court. . . according to the Loss and Hindrance that the Party sustain, by reason of the Nonappearance of the said Witness or Witnesses; (5) the said several sums to be recovered by the Party so grieved against the Offender or Offenders, by Action of Debt, Bill, Plaint or Information, in any of the Queen's Majesty's Courts of Record, in which no Wager of Law. Essoin or Protection to be allowed.

In the military, the accused, government, and court-martial have an equal right and opportunity to obtain witnesses.[4] Acting through the agency of the trial counsel, the parties can compel the appearance of material and necessary witnesses, military or civilian.[5] Compelling the

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The statute made compulsory process available in civil cases. In 1695, "An Act for regulating of Trials in Cases of Treason and Misprison of Treasons" afforded defendants accused of treason the right to compulsory process for witnesses in their own behalf for the first time. 7 Wm. III, c. 3, § 7 (1695). The Act, whose language is mirrored by U.S. Const. amend. VI, provided in pertinent part

> all Persons so accused and indicted for any such Treason. . . shall have the like Process of the Court where they shall be tried, to compel their Witnesses to appear for them at any such Trial or Trials, as is usually granted to compel Witnesses to appear against them.

This statute was followed closely in 1701 by "An Act for punishing of Accessories to Felonies, and Receivers of Stolen Goods, and to prevent the wilful burning and destroying of Ships", which required witnesses in felony cases to be sworn upon testifying. 1 Anne, c. 9, § 3. On the theory that the statute placed witnesses in felony cases on a par with witnesses in treason cases by extending the oath requirement to the former for the first time, the English courts concluded that compulsory process, earlier afforded only in the treason cases, had to extend to felonies in general.

In the United States, the federal courts were given the power to issue subpoenas early on. Judiciary Act of 1793, Ch. 22, § 6, 1 Stat. 336 (1793) (current version in Fed. R. Crim. P. 17(e)). Of course, the defendant's right to compulsory process is a part of the Constitution. U.S. Const. amend. VI. Army courts-martial were not extended the power to issue compulsory process to civilians with nationwide service until 1863. Act of Mar. 3, 1863, ch. 79, § 25, 12 Stat. 754. See notes 4, 7, 8 *infra*. See also Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1976) [hereinafter cited as UCMJ]; Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 115a [hereinafter cited as MCM, 1969].

[4] MCM, 1969, para. 115a provides:

> The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witness and other evidence. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions (Art. 46).

[5] MCM, 1969, para. 115a further provides:

> The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. . . . The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins. A request for a witness on the merits shall contain (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons that necessitate the personal appearance of the witness, and (3) any other matter showing that the expected testimony is necessary to the ends of justice. . . . The decision on a request for a witness on the merits must be made on an individual basis in each case by weighing the mate-

attendance of military witnesses does not present a problem because they are subject to trial by court-martial themselves for disobedience of an order to appear and testify.[6] Civilian witnesses do raise a problem.

Because the court-martial process is similar to that of the federal courts,[7] civilian witnesses may be subpoenaed.[8] However, the military

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riality of the testimony and its relevance to the guilt or innocence of the accused, together with the relative responsibilities of the parties concerned, against the equities of the situation.

The requirement that defense counsel obtain witnesses through the trial counsel has been specifically approved by the United States Court of Military Appeals. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). Specific prejudice resulting from interference with the right to compel the attendance of witnesses by the trial counsel may result in reversal. United States v. Arias, 3 M.J. 436 (C.M.A. 1977).

[6] MCM, 1969, para. 115b provides:

> The attendance of a person in the military service stationed at a place of the meeting of the court, or so near that travel at government expense will not be involved, will ordinarily be obtained by notification, oral or otherwise, by the trial counsel, to the person concerned of the time and place he is to appear as a witness. In order to assure the attendance of the person, the proper commanding officer should be informally advised so that he can arrange for the timely presence of the witness. If for any reason formal notice is required, the trial counsel will, through regular channels, request the proper commanding officer to order the witness to attend.
>
> If a military person, desired as a witness, is not present at the place where the courbmartial is convened and his attendance would involve travel at government expense, the appropriate superior will be requested to issue the necessary order.
>
> The attendance of military persons not assigned to active duty should be o b tained in the same manner as the attendance of civilian witnesses not in government employ.
>
> If practicable, a request for the attendance of a military witness will be made so that the witness will have notice at least 24 hours before starting to attend the meeting of the court.

Should a military witness be ordered to testify and refuse, the service member may be charged with violating Article 90, UCMJ for willful disobedience of a lawful order of a superior commissioned officer.

[7] Fed. R. Crim. P. 17(e)(1) provides that "[a] subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." Article 46, UCMJ, provides:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in Court-martial cases to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

[8] MCM, 1969, para. 115d(1) provides in part

> The trial counsel is authorized to subpoena as a witness, at government expense, any civilian who is to be a material witness and who is within any part of the United States, or the Territories, Commonwealths, and possessions, and *can* compel the attendance of such a civilian (Art. 46). As to employment of expert witnesses, see 116.
>
> A subpoena normally is prepared, signed, and issued in duplicate on the official

court's power over the civilian witness is less than that over the military witness. The civilian witness is not directly subject to military discipline and is frequently far removed, physically and mentally, from the military environment and the trial situs. The sense of obligation and fear of sanction are likely to be directly proportional to the prior exposure of the witness to the military. The average civilian with no prior military experience is, therefore, unlikely to feel compelled to respond to a military subpoena.

When the civilian witness defies military process, two remedies are available. Upon willful failure to appear, the witness may be prosecuted in the federal courts for this nonfeasance.[9] Alternatively, a warrant of attachment, the military equivalent of a bench warrant,[10] may be issued by the trial counsel under the authority of the convening authority, directing either a military or civil officer to seize the witness and produce

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forms provided. . . . If a subpoena requires a witness to bring with him a document or an exhibit to be used in evidence, each document or exhibit will be described in sufficient detail to enable the witness to identify it readily.

If practicable, a subpoena will be issued in time to permit service to be made or accepted at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena.

[9] Article 47. UCMJ, provides in pertinent part:

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial . . . or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce evidence which that person may have been legally subpoenaed to produce;

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court. . . . Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months, or both.

[subsections (c) and (d) omitted]

[10] "A bench warrant is 'generally understood to mean a process issued by the court itself, or from the bench for the attachment or arrest of a person to compel his attendance before the court to answer to a charge of contempt. . . . or for the failure of a witness to attend in response to a subpoena which has been duly served." Silvagni v. Superior Court, 157 Cal. App. 2d 287, 290, 321 P.2d 15, 17 (1958), cited in Allison v. County of Ventura, 68 Cal. App. 3d 689, 701-702, 137 Cal. Rptr. 542, 550 (1977). See also note 50 infra. A military warrant of attachment differs from a bench warrant in that the former is issued by the trial counsel rather than by the court.

him or her before the court-martial." Federal prosecution is less a remedy than an incentive to the witness to testify. Because a witness will most times be unaware of the possibility of prosecution, ita effectiveness as a deterrent to disobedience to process is minimal. Ita utility both as deterrent and as remedy is further undercut by the likelihood that prosecution of the witness will never occur once the court-martial to which the witness has been called has ended.[12] Even if the witness is prosecuted, successful prosecution for contempt offers little comfort to the parties to the court-martial if the witness' testimony is lost to them at the time of trial.

The warrant of attachment is therefore the only device that affords immediate and effective assistance. However, it is perhaps the least used procedure in military criminal law.[13] Since the mechanics for ita issue are set out with a fair degree of specificity in the Manual for Courts-Martial, it is not a lack of an available procedure for attachment that explains why it is not used. And certainly, civilian witnesses occasionally decline to appear at trial, deposition, or court of inquiry. A failure to resort to attachment can only be explained by a lack of familiarity with the device and a lack of confidence in the authority of a military trial counsel to issue an order that authorizes force to be used against a civilian for a military purpose. This reluctance is magnified if the reluctant witness is across the country from the venue of the court-martial. Whereas a

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[11] MCM, 1969, para. 115(d)(3). At this writing, the Manual for Courts-Martial is undergoing revision. Para. 115(d)(3) of the current Manual would be replaced by Proposed Rule of Court-Martial (R.C.M.) 703(e)(2)(G) (7 May 1982 draft) (unless otherwise indicated, references to the Proposed R.C.M. hereinafter are to the 7 May 1982 draft). The draft discussion which follows Proposed R.C.M. 703(e)(2)(G) defines the warrant of attachment as "a legal order addressed to an official directing that official to have the person named in the order brought before a court."

[12] *See, e.g.*, Widmer v. Stokes, 464 F.2d 593 (5th Cir. 1972). Widmer appeared as a witness in the My Lai trial of Captain Ernest Medina but refused to testify despite a grant of immunity. The military initiated prosecution under Article 47, UCMJ but no information was filed. Widmer sued to attack the grant of immunity. Before either the Article 47 prosecution commenced or Widmer's civil complaint was adjudicated, the Medina case ended. Widmer was never prosecuted.

[13] The only reported instance of an executed warrant of attachment in this century a p pears in United States v. Shibley, 112 F. Supp. 734, 740 (S.D. Cal. 1953). In 1980, The Judge Advocate General of the Army received a recommendation that a warrant of attachment issue in a case at Fort Dix, New Jersey. He never acted on it because the witneas' eventual appearance made it unnecessary. DAJA-CL 1980/4615, 10 Jan. 1980. *See* note 104 *infra*. The Coast Guard also had considered issuance of a warrant of attachment in a case in New Orleans, Louisiana and had secured the agreement of the local U S. Marshal to execute the process. Again, the witness' appearance obviated the need for execution. *See* DAJA-CL 1980/4795, 12 May 1980. The Air Force has never issued a warrant of attachment, *id*, and the Navy has reported no recent instance of a warrant being served. *Id*. The Judge Advocate General of the Navy has observed that "problems in securing the voluntary attendance of civilian witnesses at naval courts-martial are exceedingly rare," attrib uting this in part to the threat of the attachment procedure. *Id*.

state court may attach a witness for several hours to enforce his or her appearance in a local court, the nationwide scope of military process allows and compels that a disobedient witness be seized and be made to travel for a substantial time and distance in order to testify in the court-martial to which he has been ordered. This is a real concern since it is the distant witness who likely would be least willing to respond voluntarily to a military subpoena.[14]

This doubt of authority suggests an unease that likely also accounts for the civilian's initial refusal to obey military process—a sense that there is something wrong with the exercise of military power over a civilian. This discomfort is traceable to the traditional separation between the military and civilian sectors of the American polity.

In 1768, Samuel Adams rhetorically asked:

> Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land? . . . Will the spirits of people as yet unsubdued by tyranny, unawed by the menaces of arbitrary power, submit to be governed by military force?[15]

Adams' denunciation of foreign military intrusion into American civil life has been repeated with frequency by subsequent writers rejecting the power of courts-martial over "non-military America."[16] Having become "a specialized society separate from civilian society,"[17] the military has benefited by its insularity at least to the extent that military criminal law has been protected against undue intrusion by the civilian courts. This separateness, at least in respect of the exercise of the power to attach civilian witnesses, however, has been a retardant because of the effort to keep soldier and civilian apart. But though history has yielded an "unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires,"[18] it is precisely the exigency created

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[14] *See, e.g.*, note 156 *infm*.

[15] 1 Wells, The Life and Public Services of Samuel Adams, 231, *cited in* Reid v. Covert, 354 U.S. 1, 27-28 (1957).

[16] Reid v. Covert, 354 U.S. 1, 30 (1957). In a series of cases, particularly those involving the jurisdiction of courts-martial and military commissions to try civilians, the Supreme Court has condemned the exercise of military authority over civilians. *See, e.g.*, McElroy v. United States *ex. rel.* Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex Parte* Quirin, 317 U.S. 1 (1942); Dow v. Johnson, 100 U.S. 158 (1880); *Ex. Parte* Milligan, 71 U.S. (4 Wall.) 2 (1886).

[17] Parker v. Levy, 417 U.S. 733, 758 (1973).

[18] Raymond v. Thomas, 91 U.S. 712, 716 (1876).

by the failure of a civilian witness to respond to properly issued military process that the exercise of military power over the witness is proper.

Nothing has been written on the subject of military attachment since Winthrop.[19] Analysis of the attachment power, however, yields the conclusion that the power to attach, narrowly tailored to its purpose and firmly rooted in both civilian and military legal antecedents, is a lawful and appropriate exercise of military power even today.

I. THE NATURE OF THE MILITARY WARRANT OF ATTACHMENT

Attachment of civilian witnesses is not explicitly authorized by the Uniform Code of Military Justice. Rather, it is set out in the Manual for Courts-Martial which provides:

> In order to compel the appearance of a civilian witness in an appropriate case, the trial counsel will consult the convening authority, the military judge, or the president of a special court-martial without a military judge, according to whether the question arises before or after the court has convened for trial of the case, as to the desirability of issuing a warrant of attachment under Article 46.
>
> When it becomes necessary to issue a warrant of attachment, the trial counsel will prepare it and, when practicable, effect execution through a civil officer of the United States. Otherwise, the trial counsel will deliver or send it for execution to an officer designated for the purpose by the commander of the proper army area, naval district, air command, or other appropriate command.[20]

Full discretion and responsibility for issuance of the warrant is placed in the trial counsel,[21] subject only to the requirement for consultation

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[19] W. Winthrop, Military Law and Precedents 202 n.46 (2d ed. 1920 reprint). Even Winthrop declined to address the subject in-depth as attachment was an unquestioned procedure in the civilian courts of his day and the exercise of military power in this limited fashion would not have been easily challenged by witnesses living where most of the Army served.

[20] MCM, 1969, para. 115d(3). Proposed R.C.M. 703(e)(2)(G) provides in place of para. 115d(3):

> *Neglect or refusal to appear.* A person authorized under this rule to issue a subpoena may, with the consent of the convening authority, issue a warrant of attachment to compel the attendance of a witness or production of documents or other objects under this rule.

[21] The trial counsel is the military prosecutor, appointed by the convening authority. *See* UCMJ art. 27; MCM, 1969, paras. 6, 44. Proposed R.C.M. 703(e)(2)(G) provides that the warrant shall be issued by "[a] person authorized under this rule to issue a subpoena." Ac-

with, rather than approval by, the convening authority,'* the military judge,[23] or the president [24] of a special court-martial [25] sitting without a military judge.[26] Placing the exclusive power to attach in the trial counsel has two procedural consequences. First, attachment can only occur after charges have been referred to a court-martial for trial because a trial counsel has no power with respect to a particular case until he or she is detailed to the case after referral." Second, since summary courts-martial [28] do not have a trial counsel, it would appear that summary

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cording to Proposed R.C.M. 703(e)(2)(C) that person would be "the *summary* court-martial or trial counsel of a special or general courbmartial" or "the president of a court of inquiry, or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively."

[22] The convening authority is a person who has the authority to bring a court-martial into being and to refer charges against an individual to trial by that court-martial. Courts-martial may be convened by the President, the service secretaries, and commanding officers of types of organizations specifically described in the UCMJ or who are given the power to convene courts-martial by the service secretary concerned or by the President. See UCMJ arts. 22, 25; MCM, 1969, para. 5.

[23] The military judge is a military officer who is a lawyer and who has been certified to act as a judge by the Judge Advocate General of the service of which he or she is a member. The convening authority details these certified military judges to serve in courts-martial convened under his or her authority. See UCMJ art. 26; MCM, 1969, para. 39.

[24] The president of a court-martial is the officer senior in rank among the members, see UCMJ art. 25; MCM, 1969, para. 41, of a court-martial. MCM, 1969, para. 40.

[25] There are three kinds of courts-martial: general, special, and *summary.* UCMJ art. 16. The difference between them is chiefly the degree of punishment that they can impose. See UCMJ arts. 17-20; MCM, 1969, paras. 14-16.

[26] Although a military judge must sit in general courts-martial, there is no statutory requirement for one in special courts-martial. UCMJ art. 26a.

[27] MCM, 1969, para. 115d(3) explains that the trial counsel is to consult with the military judge or convening authority depending on whether the need for the attachment arises before or after the court has "convened." Because "convening" the court is a term of art which occurs when the convening authority "refers" court martial charges to trial, use of this term in para. 115d(3) suggests that attachment could issue prior to referral of charges, as for example during the pretrial investigation pursuant to UCMJ art. 32b, 10 U.S.C. § 832(b) (1976). This result would be inconsistent with the fact that the trial counsel has no power with respect to the case, including the power to issue an attachment, until it has been referred to trial. "Convened" must therefore have been a poor choice of language and the drafters must have meant to provide guidance to the trial counsel depending on whether the court has been "called to order", see MCM, 1969, para. 61a, or whether the court has been "assembled". See MCM, 1969, para. 61j. This problem would be eliminated by proposed R.C.M. 703(e)(2)(G) which would require the consent of the convening authority to the issue of an attachment; whether the court-martial has assembled or not will become irrelevant. The proposed rule would be more stringent by requiring consent as opposed to the consultation as required by the current rule. Consultation with the military judge would be eliminated under the proposed rule in favor of obtaining convening authority consent.

[28] A *summary* court-martial is intended to deal with "relatively minor offenses under a simple form of procedure." MCM, 1969, para. 79a. The *summary* court-martial consists of one person who acta as judge, jury, and prosecutor.

courts may not attach witnesses despite language elsewhere in the Manual suggesting the opposite.[29]

When the warrant of attachment should issue is not entirely clear from the Manual. The operative provision ambiguously states that the warrant is to be used in an "appropriate case."[30] It is obvious, as the Manual itself imprecisely indicates, that the warrant should issue upon a "[n]eglect or refusal to appear."[31] The complete preconditions for its use must be devined from the guidance given to the trial counsel as to what information should be assembled "[t]o enable the officer [in whose custody the witness is placed] to make a full return in case a writ of habeas corpus is served upon him."[32]

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[29] Although MCM, 1969, para. 79b provides that a summary court-martial can compel the attendance of civilian witnesses and Article 46, UCMJ states that "the court-martial" shall have equal opportunity to obtain witnesses," para. 115d, by placing the sole authority to subpoena and to attach in the trial counsel for whom no provision is made in a summary courbmartial, implies that process, to include both subpoena and attachment, cannot be issued by a summary court. Withholding the power to attach from summary courts would be consistent with earlier practice in which summary courts could not subpoena witnesses. *See, e.g.*, A Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of Other Procedure Under Military Law 72 n.4 (rev. ed. 1901). The denial of compulsory process power to summary courts worked by the limitation of the exercise of the power to the trial counsel in para. 115d appears to have been inadvertent in light of the express language of para. 79b. On the other hand, the fact that summary courts may be able to issue subpoenas does not necessarily mean that they should have the power to attach, although the 'power of compulsory process normally includes the power to attach. Balancing the limited jurisdiction of the summary court and the substantial inconvenienceto the witness who is attached against the right of the accused to decline trial by summary court, *see* UCMJ art. 20, denying the power to attach to the summary court makes practical sense. Nevertheless, Proposed R.C.M. 703(e)(2)(G) would give the summary court-martial attachment authority.

[30] MCM, 1969, para. 115d(3).

[31] MCM, 1969, para. 115d(2), deals with the measures which can be taken short of attachment to obtain the appearance of a witness who does not respond to a subpoena and explains the preconditions to a prosecution in federal court under Article 47, UCMJ. It is entitled "(n)eglect or refusal to appear," followed by the phrase: "See Article 47 and *Warrant of attachment below*" (emphasis added), which suggests that the two phrases are meant to explain one another.

[32] MCM, 1969, para. 115d(3). The relevant portion continues:

> As the arrest of a person under a warrant of attachment involves depriving him of his liberty, the authority for this action may be inquired into by a writ of habeas corpus. To enable the officer to make a full return in the event a writ of habeas corpus is served upon him, the warrant of attachment should be accompanied by the orders convening the courbmartial, or copies thereof, a copy of the charges in the case, including the order referring the charges to trial, each copy certified by the trial counsel. . . the original subpoena, showing proof of service of a copy thereof; a certificate stating that the necessary witness fees and mileage have been duly tendered; and an affidavit of the trial counsel that the person being attached is a material witness in the case, that the person has willfully neglected or refused to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for the failure to appear.

Proposed R.C.M. 703(e)(2)(G) repeats this provision in slightly different terms.

The trial counsel preparing the warrant of attachment is to accompany the warrant with copies of the convening orders,[33] a copy of the charges,[34] a copy of the order of referral to trial,[35] the original subpoena sent to the civilian,[36] a "certificate" showing that the necessary witness fees and mileage have been tendered,[37] proof of service,[38] and an affidavit showing that the civilian being attached is a "material witness" who "has willfully neglected or refused to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for the failure to appear." [39]

Although questions remain concerning the meaning of materiality, the measure of time which must pass before the witness is liable to be attached, and what may be a valid excuse from appearance, these directions to the trial counsel suggest at least that attachment is appropriate upon a willful neglect to appear at trial at the time required or after the witness refuses to honor the subpoena, prior to the appearance date.

The form of the warrant is left wholly to the discretion of the trial counsel.[40] Execution of the warrant is to be effected "when practicable . . . through a civil officer of the United States." [41] The civil officer contemplated by the Manual is a United States marshal.[42] Failing service by a marshal, execution is by a military officer "designated for the purpose by the commander of the proper army area, naval district, air com-

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[33] MCM, 1969, para. 115d(3).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* Nowhere in the Manual is there a definition of "certificate." Presumably, it is more than an oral offer but less than an affidavit.

[38] MCM, 1969, para. 115(d)(3).

[39] *Id.* A Manual definition of "affidavit" is also lacking. As explained in text accompanying note 185 *infra*, the information supporting the attachment must be under oath or affirmation to comply with the Fourth Amendment.

[40] The Manual is silent on the form of a warrant of attachment although it provides a form for the military subpoena, which itself would not be harmed at all by inclusion of a notice provision concerning attachment for disobedience. *See* MCM, 1969, App. 17. Earlier versions of the Manual did provide a format for the warrant. See, *e.g.*, A Manual for Courts-Martial, U.S. Army (W.D. Doc. No. 1053), App. 20, at 655 (1921). At one time, a form was published by the Army for the purpose (A.G.O. Form 99). See A Manual for Courts-Martial (W.D. Doc. 1941), at 88 (1928). The proposed R.C.M. will provide a form for attachment at Appendix XX.

[41] MCM, 1969, para. 115d(3). The draft decision to Proposed R.C.M. 703(e)(2)(G) carries forward the preference for service by a "civilian officer of the United States."

[42] Analysis of Contents, Manual for Courts-Martial United States, 1969 Revised Edition, U.S. Dep't of Army, Pamphlet No. 27-2, at 23-2 (1970).

mand, or other appropriate command."[43] The Manual concedes that force may be necessary for the successful execution of the warrant," although no statute or other executive order expressly allows the use of force on or permits the deprivation of liberty of a civilian by military authority.[45]

The statutory authority for the warrant of attachment is Article 46, Uniform Code of Military Justice.[46] Article 46 provides for compulsory process similar to that of the federal criminal courts which runs "to any part of the United States, or the Territories, Commonwealths, and possessions."[47] Service of the warrant of attachment is therefore limited to

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[43] MCM, 1969, para. 115d(3). The draft discussion to Proposed R.C.M. 703(e)(2)(G) provides for alternative service through the commander of the military installation nearest the witness, thereby eliminating the ambiguity in the current rule which does not clearly indicate whether the commander to whom the process is to be sent is the commander at the court-martial situs or the commander where the witness is located. The change also places the responsibility in installation commanders rather than the ambiguous "area" commander in the present rule.

[44] Para. 115d(3) provides in pertinent part:

> In executing this process, it is lawful to use only so much force as may be necessary to bring the witness before the court. When it appears that the use of force may be required or when travel or other orders are necessary, appropriate application to the proper commander for assistance or for orders may be made by the officer who is to execute the process.

The draft discussion to Proposed R.C.M. 703(e)(2)(G) carries forward this provision in similar terms.

[45] Despite the introduction of several bills over a period of years, Congress has declined to enact legislation specifically giving military personnel arrest power over civilians. The most recent bill of this kind is S. 727, 97th Cong., 1st Sess. (1981) which would have authorized the Secretary of Defense "to inveat officers., ,of the Department of Defense . . . with the power to arrest individuals on military facilities and installations." Absent express authority to apprehend civilians, a power to apprehend has been inferred from Article 9, UCMJ and from 18 U.S.C. § 1382 (1976) which makes punishable the entry onto a military installation "after having been removed therefrom." United States v. Banks, 539 F.2d 14 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976). *See also* Dep't of Defense Directive No. 5200.8, Security of Military Installations and Resources, sec. C (July 29, 1980) (authorizing detention of civilians when a trespass on a military installation has been committed). Army Regulations also recognize the power of military personnel to apprehend relying upon the power of "citizen's arrest" where the substantive law of the state would authorize the arrest. Army Reg. No. 600-40, Personnel—General, Apprehension, Restraint, and Release to Civil Authorities, para 3a (4 Nov. 1971). Independent of the power to apprehend inferred from statute and any citizen's arrest power conferred by state law, Army policy recognizes the right of military police and Army civilian law enforcement authorities to apprehend based upon the inherent authority of the installation commander to maintain law and order on the installation. *E.g.*, DAJA-AL 1979/3255, 14 Sept. 1979. Regardless of the source of authority, courts have accepted that military authorities may apprehend and detain civilians when there is probable cause to believe that an offense has been committed. *E.g.*, United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980) (affirming conviction for interstate transport of stolen vehicle involving military arrest of the defendant and detention for some ten hours).

[46] 10 U.S.C. § 846 (1976).

[47] *Id.* In some contexts, Article 46 has been held to be coextensive with Fed. R. Crim. P. 17(b), United States v. Davison, 4 M.J. 702 (A.C.M.R. 1977).

the territory of the United States. Similarly, a witness who is attached cannot be taken out of United States territory.[48]

Whether the Manual authorization for warrants of attachment is a valid exercise of power under Article 46 depends on the nature of the attachment procedure and its history.

II. AUTHORITY FOR THE ATTACHMENT OF WITNESSES

Today, several states provide for warrants of attachment in statute.[49] The federal courts have no similar statutory authority although subpoena and contempt powers are granted the courts by the Federal Rules

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[48] In United States v. Bennett, 12 M.J. 463 (C.M.A. 1982), the Court of Military Appeals held that the subpoena power provided for in Article 46, UCMJ is territorial in scope and cannot be used to subpoena a civilian in the United States for a court-martial overseas.

[49] The following states provide statutorily for attachment or some *similar* procedure in judicial proceedings: Ala. Code § 12-21-182(a) (1975); Ark. Stat. *Ann.* §§ 28-514, 43-2004 (1979); Cal. Civ. Pro. Code §§ 1212-1216 (West 1972); Cal. Penal Code § 1331 (West 1972); Conn. Gen. Stat. Ann. § 52-143 (West 1977); Ga. Code Ann. § 38-801(f) (1981); Idaho Code Crim. Pro. Ann. art. 737 (1967); Me. Rev. Stat. Ann. tit. 16, § 102 (1964); Md. Cts. & Jud. Proc. Code Ann. § 9-201(b) (1980); Mass. Gen. Laws *Ann.* ch. 233, § 6 (West 1959); Mich. Comp. Laws Ann. § 767.34 (1968); Miss. Code Ann. § 13-3-103 (1972); Mo. Ann. Stat. § 491.150 (Vernon 1949); Neb. Rev. Stat. § 25-1230 (1943); Nev. Rev. Stat. § 50-205 (1979); N.H. Rev. Stat. Ann. § 516:7 (1974); N.Y. Civ. Prac. Law § 2308(a) (McKinney 1974); Ohio Rev. Code Ann. § 2317.21 (Page Supp. 1978); Okla. Stat. *Ann.* tit. 12, § 392 (West 1960); R.I. Gen. Laws § 9-17-7 (1969); Tex. Stat. Ann. arts. 24.11, 24.12 (Vernon 1966); Vt. Stat. *Ann.* tit. 12, § 1624 (1973); Wash Rev. Code Ann. § 5.56.070 (1963); W. Va. Code § 57-5-5 (1966); Wis. Stat. Ann. § 885.11(2) (West 1966); Wyo. Stat. § 1-12-107 (1977).

Most of the statutes refer specifically to attachment. A few refer to a power of arrest. The Connecticut, Maine, and Michigan statutes refer to a "capias" rather than to attachment. Capias is an even more archaic term meaning "that you take" and which is the general name for several types of writs which require the taking of the body of an accused or a witness into custody. More frequently, the term is used only in connection with the arrest of a defendant. *See* Black's Law Dictionary 261-62 (Rev. 4th ed. 1968). Several states that do not provide expressly for attachment do provide for ancillary matters related to attachment, thereby providing statutory recognition of the procedure. *See, e.g.*, Ill. Ann. Stat. ch. 38, § 155-2 (Smith-Hurd 1973); Ind. Code Ann. § 34-1-14-1 (Burns 1973). The majority of the state statutes combine authority to attach a witness to compel the testimony and to answer for the contempt to the court. Frequently, these statutes are complemented by other provisions which impose liability on the contumacious witness to compensate the party who called the witness for any damages incurred as a result of the refusal to appear or testify. Sometimes, a specific amount is set out in statute. These statutes trace back to the Statute of Elizabeth, 1562-63, 5 Eliz. I, ch. 9, § 12. *See* note 3 *supra;* 8 J. Wigmore, Evidence § 2910 n.17 (McNaughten rev. 1961). "This imposition of liability is wholly independent of the court's power to separately punish for contempt. In addition to attachment in judicial proceedings, state statutes frequently provide for attachment inadministrative proceedings. *See, e.g.*, Kan. Stat. Ann. §§ 65-1826, 66-150, 65-702 (1975). Interestingly, some states that do not provide for attachment in judicial proceedings generally do provide for it in state court-martial proceedings. *See, e.g.*, Colo. Rev. Stat. § 28-3-1011. Finally, attachment is implicitly recognized in the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Uniform Laws Ann., Master ed.,

of Criminal Procedure.[50] From time to time, the federal courts have noted a power implied in statute to take into custody material witnesses *before* a subpoena has issued to insure the witness' presence at trial.[51] The material witness power is, however, distinct from the attachment power to take into custody a witness *after* a subpoena has been issued and the witness has refused to attend.

There has been little comment on the extent of the attachment power.[52] There are likely several reasons for this. First, it appears that warrants of attachment, or, in the usage of some courts, bench warrants, are not frequently issued. Because attachment becomes appropriate only after it is clear that the witness will not attend the trial, the first time that it becomes appropriate to consider whether an attachment shall issue is at the trial itself. At that point, the court and the parties seldom have a desire to interrupt the proceedings to take up attachment. Further, since all a reluctant witness must do to avoid the attachment is to hide until the trial is over, its practicality is in doubt. For the prosecutor, the diversion of a court officer to *diligently* locate and seize the reluctant witness is costly in both time and money. For its part, the defense seldom has reason to insist on attachment of an unfriendly defense witness and, even more seldom, has reason to insist on the presence of a prosecution witness. Also, because the procedure entails a deprivation of liberty, there may be a natural reluctance to resort to it. The second reason for little comment on attachment is that when a warrant of attachment is issued successfully, it is executed immediately. The witness is brought before the court, testifies, and is released. Hence, the attached witness has no time to contest the procedure and the motivation to seek some sort of redress after release presumably diminishes once the witness has been freed. Additionally, the attachment procedure is so old that its use is unquestioned.

Vol. II. The Act, adopted by all states, provides for the honoring of an order from a foreign jurisdiction requiring a witness to be taken into custody. Whether these provisions contemplate custody solely under the authority of a material witness statute or consider attachment as well is unclear.

[50] Fed. R. Crim. P. 17.

[51] The power to arrest a material witness when there is reason to believe that the witness will not respond to a subpoena is not inherent in the power of compulsory process precisely because it does not follow the subpoena. The federal material witness statute was set out in 28 U.S.C. § 659 (1940). The statute was subsequently repealed. However, federal courts continue to exercise material witness power inferred from two surviving statutes that refer to material witnesses in specific terms. See 18 U.S.C. § 1329 (1976) (release of material witnesses); Fed. R. Crim. P. 46(b) (release from custody). All states have material witness statutes. See, genemlly, Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). See *also* United States v. Oliver, 683 F.2d 224 (7th *Cir.* 1982).

[52] The leading contemporary work makes almost no mention of attachment. *See* Western, The Compulsory Process *Clause,* 73 Mich.L.Rev. 73 (1974); Compulsory Process IZ, 74 Mich.L.Rev. 192 (1975). The same is true of Wigmore. See 8 J. Wigmore, Evidence § 2190 (McNaughten rev. 1961).

Warrants of attachment enforce subpoenas. Whether the subpoena has issued from a civil or criminal proceeding is irrelevant. Enforcement of subpoenas through attachment is not new. It existed in English practice for at least two hundred years before the founding of the United States.[53] The earliest reported attachment case in the federal courts is *United States v. Caldwell*.[54] In *Caldwell,* decided in 1795, the Supreme Court recognized that attachment was appropriate after a subpoena has been served and refused. In 1800, in *United States v. Cooper*,[55] the Court acknowledged that an attachment could issue against members of Congress:

> If, upon service of a subpoena, the members of Congress do not attend, a different question may arise; and it will then be time enough to decide ***whether an attachment ought, or ought not, to issue***.[56]

Several years later, a warrant of attachment was sought against President James Madison and several other officials of the Executive Branch in *United States v. Smith*.[57] Smith was charged with attempting to

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[53] Upon a failure to appear in response to a subpoena, contemporary English practice permits the issue of a notice requiring appearance. A warrant of arrest may issue upon a failure to comply with a notice to appear or, in the first instance, if there are no reasonable grounds to believe that the witness has a just excuse for failing to appear. **11** Halsbury's Laws of England **277** (4th ed. **1976).**

When an English court first issued a warrant of attachment is uncertain. One of the earliest reported cases is Batt v. Rookes, **21** Eng. Rep. **33** (Ch. **1577).** There it is reported that the plaintiff in a civil case "made oath for the serving of a subpoena upon the defendant, to testify on the behalf of the plaintiff at the Guildhall in London, who hath not there upon appeared. Therefore an attachment is awarded against him." Later cases have recognized the existence of the practice and its applicability not only in Chancery, but also in King's Bench and Common Pleas. Dolman v. Pritman, **21** Eng. Rep. **730** (Ch. **1670);** Wyat v. Wingford, **92** Eng. Rep. **491** (K.B. **1728);** Wakefield's Case, **95** Eng. Rep. **202** (K.B. **1736);** Smalt v. Whitmill, **93** Eng. Rep. **1020** (K.B. **1736);** Huffe v. Fowke, **94** Eng. Rep. **792** (K.B. **1740);** Stephenson v. Brookes, **94** Eng. Rep. **792** (K.B. **1740);** Chapman v. Pointon, **93** Eng. Rep. **1093** (K.B. **1741);** Bowles v. Johnson, **96** Eng. Rep. **19** (K.B. **1748);** *Stretch* v. Wheeler, **94 Eng.** Rep. **1021** (K.B. **1754);** Rex. v. Ring, **101** Eng. Rep. **1560** (K.B. **1800);** Horne v. Smith, **128** Eng. Rep. **935** (C.P. **1815);** Pearson v. Iles, **99** Eng. Rep. **352** (K.B. **1781). See** also United States v. Smith, **27** F. Cas. **1192, 1207-1208** (C.C.D. **N.Y. 1806) (No. 16,342)** (discussing English antecedents to American warrant of attachment in argument of counsel).

These cases indicate a historical reluctance of the British courts to issue attachments although the efficacy of the device was well accepted. In several of the cited cases, courts declined to attach, leaving parties to seek damages from the defaulting witness under **5 Eliz. 1,** c. **9, § 12. See** note **3** ***supra).*** Nevertheless, the attachment procedure appears to have achieved greater popularity with the passing years. Hence, in Pearson v. Iles, **99** Eng. Rep. **362 (K.B. 1781),** Lord Mansfield noted that actions for damages against defaulting witnesses were rare because the "preferable remedy" was to proceed by attachment.

[54] **2 U.S. (2** Dall.) **333 (1795).**

[55] **4 U.S. (4** Dall.) **340 (1800).**

[56] *Id.* (emphasis added).

[57] **27 F.** Cas. **1192 (C.C.D. N.Y. 1806) (No. 16,342).**

mount an expedition against Spain from New York. Although the defense had asserted that the President's testimony would prove that Madison had knowledge of and approved the plans for the expedition,[58] the motion for attachment was apparently made to delay the case.[59] The court denied the motion,[60] the case went to trial, and Smith was acquitted without the President's testimony.[61]

Just as no statute expressly authorizes the military warrant of attachment, there is no federal statute which expressly recognizes the attachment power in the federal courta. In *Smith,* the source of the power to attach was extensively argued by the parties.[62] The prosecution, wanting the case to proceed, had argued, based on the English precedents, that attachment is a remedy for contempt and not obtainable of right before or at trial:

> The proceeding by attachment against witnesses is undoubtedly known to the law; but such an attachment never issues of course. It is a summary and extraordinary proceeding, which is used by the court in ita discretion, to vindicate its justice and punish contempts against its authority.. . . When the attachment is issued, it is issued not for the purpose of bringing in the witness to testify, but in order to punish him for contempt.[63]

The defense had argued that the power to attach is inherent in the right to compulsory process and independent of the contempt power:

> [A]lthough in England the subject, when accused, may not have a right to compulsory process, yet in America the citizen has it secured to him by the highest authorities, the constitution and laws of congress: and I here claim the attachment as the right of my client.[64]

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[58] 27 F. Cas. at 1196.

[59] *Id.* at 1192.

[60] *Id.* at 1232-33. The two judge court was divided on the issue. Without passing on the efficacy of the attachment procedure, the court simply reported: "One of the judges is of the opinion, that the absent witnesses should be laid under a rule to show cause why an attachment should not be issued against them. The other judge is of the opinion, that neither an attachment in the first instance, nor a rule to show cause, ought to be granted."

[61] *Id.* at 1245. Smith was acquitted as was his alleged co-actor Ogden. *Id.* at 1246.

[62] *Id.* at 1205. United States v. Smith was a celebrated case of the time. The prosecutors in the case were Nathan Sanford, a leader in Tammany in New York and later a United States Senator, and Pierpont Edwards, a member of the Continental Congress and later a United States District Judge. Who Was Who in America (Hist. Vol. 1607-1896)(1963).

[63] 27 F. Cas. at 1205.

[64] *Id.* at 1216.

Specifically, the defense urged that the right to attach may be inferred from the Sixth Amendment to the Constitution [65] and two statutes, the first of which provides for nationwide service of federal subpoenas [66] and the second of which empowers the federal courts to issue writs in aid of their jurisdiction.[67] Although the court did not decide the issue, subsequent developments support the position that attachment is inherent in the right to compulsory process.

The year after *Smith,* Chief Justice Marshall said in the trial of Aaron Burr: [68]

> The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow necessarily from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied by means of rendering it effectual.[69]

Although Marshall was referring to the authority to issue a subpoena *duces tecum,* his comment appears to have been based on the attachment power since he cited *Smith* as support for his view.[70]

In 1833, in *Ex Parte Pleasants*,[71] the frequency of attachment as well as authority for the practice was the subject of comment:

> In our state courts there is no doubt of the existence of the power. We are in the daily habit of imposing fines, or attaching witnesses who refuse to obey the process of subpoena, and I do not see how courts of justice can perform the business before

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[65] *Id.* U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[66] 27 F. Cas. at 1216. The statute cited was the Judiciary Act of 1793, ch. 22, § 6, 1 Stat. 336 (1793) (current version in Fed. R. Crim. P. 17(e)), which provided that "subpoenas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district. . . .

[67] 27 F. Cas. at 1216. The statute noted was the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 (1789) (current version at 28 U.S.C. § 1651(a) (1976)). At the time, the "All-Writs Act" provided: "the . . . courts of the United States, shall have power to issue writs of *scire* facias, *habeas* corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. . . ."

[68] Coombs' Trial of Aaron Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

[69] Id at 32.

[70] *Id.*

[71] 19 F. Cas. 864 (C.C.D. D.C. 1833) (No. 11,225).

> them, without the exercise of this or some equivalent powers . . . .
>
> Before the establishment of the constitution, it was well known in every state of the Union what was the nature and character of the compulsory process by which the commands of the courts were enforced.
>
> The process of attachment was a well established process for that purpose . . . .[72]

In 1859, the Attorney General of the United States indorsed attachment as the remedy to bring a recalcitrant witness to court to testify.[73] Asked by the Secretary of the Interior whether a warrant was proper which was issued by a federal court in New York for the attachment of a witness in Michigan for a trial in New York, Attorney General Black responded:

> The second inquiry, is whether an attachment for failing to appear follows the subpoena. Upon this point it is unnecessary to add anything to the reasoning of Justice Nelson, who ordered the attachment which is pow the subject of controversy. . . . He maintained that the federal courts have the power to enforce their own process. This is certainly neither new or startling. The usual and universally recognized method of compelling obedience to a *subpoena ad testificandum* is by attachment. The power to issue it would seem to be inherent in the court by its very nature [citing *United States v. Hudson & Goodwin*, 7 Cranch. 21 (1812)][74]. . . . In Beebee's Case [2 Wall jr. 129] Jus-

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[72] *Id.* at 865. In *Pleasants*, the issue was whether an attachment issued in one district could be served in another. The court decided that it could not without express provision for it by Congress:

> . . . [W]hen the constitution vested congress with the power of esablishing courts, the 17th clause of the eighth section may fairly be understood as vesting them with power of authorizing those courts to issue attachments, or other process necessary to *carry* their orders into effect. . . . It was deemed necessary to give an express authority, by the [Judiciary] [A]ct of 1793, to the courts, to issue subpoenas into another district or state. The act did not follow up this grant, by authorizing attachments to run into any other state, in case of disobedience of the process of subpoena.

Id. This result was inconsistent with the understanding that attachment is inherent in the power of compulsory process, as recognized in United States v. Potter, 27 F. Cas. 602 (C.C.N.D. N.Y. 1858) (No. 16,075), which held: 'The power to issue an attachment for defaulting witnesses is incident to the power to serve a subpoena, in criminal cases, beyond the limits of the district; and in any other district of the Union." *Id.*

[73] 9 Op. Att'y Gen. 265 (1859).

[74] 7 U.S. (7 Cranch) 29 (1812).

> tice Grier, at Philadelphia, refused an attachment against a witness in New York for reasons which it is unnecessary to mention, but he appears to have entertained no doubt of his power to order the writ, for he said that if it appeared that there would be a failure of justice unless the attendance of the witnesses were enforced "the court would be bound to issue the compulsory process." [75]

In *Burry v. United States ex rel. Cunningham*,[76] the Supreme Court acknowledged attachment as the logical extention of the power of compulsory process. In *Burry,* the Senate had voted that a warrant of attachment issue for a witness called before it to testify concerning election fraud. The Supreme Court upheld the Senate's authority to attach the witness incident to its authority to investigate allegations of fraud in the election of its members:

> the authority to request the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance . . . does not admit of doubt."

Citing with approval the state attachment case of *Crosby v. Potts*,[78] the Court concluded that "since the law manifestly intends that the courts shall have adequate power to compel the performance of the responsible duties falling on those connected in any wise with the case, it may . . . cause a witness to be held in custody." [79] As one court has characterized these cases: "Thus, it was early recognized in the United States that the power of a court to enforce the attendance of witnesses by body attachment is available against all persons." [80] While mention of bench warrants and warrants of attachment occasionally appear in the cases, their legality is seldom discussed.[81] While an occasional case may ques-

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[75] 9 Op. Att'y Gen. at 266.
[76] 279 U.S. 597 (1929).
[77] *Id.* at 616.
[78] 8 Ga. App. 463, 468, 69 S.E. 582, 584 (1910).
[79] 279 U.S. at 618.
[80] United States v. Davenport, 312 F.2d 303, 307 (7th Cir.), *cert. denied,* 374 U.S. 841 (1963). Other early attachment cases include United States v. Montgomery, 26 F. Cas. 1296 (C.C.D. Pa. 1795) (No. 15,799); United States v. Schofield, 27 F. Cas. 976 (C.C.D. D.C. 1803) (No. 16,230); Sommerville v. French, 22 F. Cas. 795 (C.C.D.D.C. 1807) (No. 13,173); *Ex Parte* Humphrey, 12 F. Cas. 872 (C.C.S.D.N.Y. 1851) (No. 6,867); *Ex Parte* Judson, 14 F. Cas. 1 (C.C.S.D.N.Y. 1853) (No. 7,561).
[81] *E.g.*, Stallings v. Splain, 253 U.S. 339 (1920) (opinion by Justice Brandeis concluding without discussing the legality of its issue that a federal bench warrant from the District of Wyoming could be executed by a peace officer in the District of Columbia).

tion whether the power to arrest a witness can be inferred from the compulsory process power,[82] other cases continue to find the attachment power inherent in compulsory process.[83]

The military warrant of attachment has a shorter history than ita civilian counterpart. Congress initially considered whether to provide courta-martial with the power of compulsory process as early as 1779.[84] Nonetheless, during the early years of the nineteenth century, the federal government "appears to have relied upon the State authorities for the necessary process to compel the attendance of witnesses before military courts."[85] A model for a national system of compulsory process in courts-martial, however, existed in Great Britain where the Mutiny Act of 1800 provided that witnesses refusing to appear in response to a summons were "liable to be attached in the Court of Queen's Bench."[86] It was only during the Civil War, faced with a large military establishment and ita consequently increased legal business, that Congress for the first time authorized compulsory process for courts-martial.[87]

Although the 1863 statute did not explicitly authorize attachment, the power to attach was subsequently found to be inherent in the exercise of compulsory process. Five years after the compulsory process statute was enacted, a question concerning its enforceability was raised. Although the statute conferred the power to subpoena, no means for its execution was included in the statutory authorization. Acting Attorney General

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[82] *E.g.*, Pousson v. Superior Court, 165 Cal. App. 2d 750, 754, 332 P.2d 766 (1958), *cited* in Allison v. County of Ventura, 68 Cal. App. 3d 689, 701, 137 Cal. Rptr. 542, 549 (1977) ("Courts of law have no inherent power to arrest citizens or place them in jail.").

[83] *E.g.*, People v. Brinson, 12 Cal. Rptr. 625, 628 (Dist. Ct. App. 1961) (inferring authority to attach despite no reference in subpoena statute where California Constitution contains language similar to U.S. Const., amend. VI).

[84] Resolution of Nov. 16, 1779, 15 J. Continental Cong. 1272, 1277-78 (1909), *cited* in United States v. Bennett, 12 M.J. 463, 467 (C.M.A. 1982).

[85] Dig. Ops. JAG 490, n.2 (1880).

[86] *Id.* See Mutiny Act, 1800, 39 & 40 Geo. III, ch. 27, § 12.

[87] The Act of March 3, 1863, ch. 79, § 25, 12 Stat. 754, provided:

> Every judge advocate of a court-martial. . , hereinafter to be constituted, shall have the power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the state, territory, or district where such military courts shall be ordered to sit may lawfully issue.

This provision was subsequently codified as Revised Statutes § 1202 (1873-1874). The 1863 statute only applied to the Army. In 1890, the Attorney General advised the Secretary of the Navy that because "use of the expression 'military courts' [in the 1863 act] seems to limit the effect of the act to courts-martial in the Army.. . , It seems to be confined exclusively to the Army or land service." 19 Op. Att'y Gen. 501, 502 (1890). Compulsory process was thereafter authorized for the Navy in 1909. Act of February 16, 1909, ch. 131, § 11, 35 Stat. 621. Once it had compulsory process, the Navy also incorporated an attachment procedure. However, unlike the Army, the Navy vested authority in the court itself to issue the warrant and, moreover, required the consent of the Secretary of the Navy for ita issuance. See, *e.g.*, Naval Courts and Boards, para. 256, at 168 (1937).

Ashton wrote Secretary of War Schofield that the power to execute process was inherent in the authorizing statute.[88] This inherent power included the power to attach:

> Prior to the passage of this law, the attendance of civil witnesses before a court-martial could not be enforced. . . . The act. . . was passed to enable courts-martial to compel the attendance, as witnesses, of persons not subject to military law, in the same manner, and to the same extent, as other courts exercising criminal jurisdiction may and can. . . . The law expressly provides for the *issuing* of process in the nature of an attachment . . . . The express power is to issue a writ of attachment—a perfect, complete and effective writ.[89]

The express terms of the 1863 statute authorized the military courts "to issue the like process to compel witnesses to appear and testify" as the local courts at the situs of the court-martial. The 1868 Attorney General opinion affirmatively acknowledged that this power included the authority to attach. The authority to issue warrants of attachment appeared in Army general orders the same year.[90] Even without the general order, five persons were attached the previous year to appear before a military commission sitting in North Carolina.[91] From the beginning, it was assumed by The Judge Advocate General that the attachment power was coextensive with the subpoena power and extended nationwide.[92]

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[88] 12 Op. Att'y Gen. 501 (1868).

[89] *Id.* at 501-02 (emphasis supplied).

[90] Gen. Orders No. 93, Headquarters of the Army (Nov. 9, 1868), provided in pertinent part:

> The Attorney General of the United States having given his official opinion that the power conferred upon the judge advocate of a court martial or court of inquiry by the 25th section of the Act approved March 3, 1863, to issue the like process to compel the attendance of witnesses before such military court as is issued by the local courts of criminal jurisdiction, includes also the power to execute such process through some officer who shall be especially charged with ita execution: It is ordered, That judge advocates of military courts, who may hereafter issue such process to compel the attendance, as witnesses, of persons not in the military service, formally direct the same, by name, to some military officer, who shall be designated by the Department Commander as available for the purpose. And the nearest military commander will thereupon furnish a sufficient force for the execution of the process, whenever such force shall be actually required. It will be noted, however, that whereas a process of attachment can only be enforced as herein directed, the preliminary summons or subpoena may be served by any person whatsoever.

[91] J. Winthrop, Military Law and Precedents 202 n.46 (1886) (1920 reprint).

[92] Dig. Ops. JAG 490 (1880).

In 1895, the attachment procedure was incorporated into the Manual for Courts-Martial which was at that time a departmental regulation:

> In the case of . . . failure to appear, the judge advocate should attach to the record, referring to the same therein, the duplicate subpoena . . . then if the witness is a material and necessary one makes out a writ of attachment . . . against him.[93]

From 1863 to 1901, use of the attachment procedure was infrequent and, in the view of The Judge Advocate General, no case was presented in which the compulsory process authority was abused.[94] Each successive edition of the Manual for Courts-Martial carried over the attachment procedure in essentially the same language as originally written by Judge Advocate General Holt.[95]

When Congress undertook the revision of military law which became the Uniform Code of Military Justice, little attention was paid to the scope of the compulsory process power which, as written in Article of War 22,[96] had changed very little from the original statute of 1863. The major concern in Congress was access of the defense to compulsory process."[97] Article 46, the successor to Article of War 22 and Article for the Government of the Navy 35,[98] changed very little in the recodification. Attachment, along with the other particulars concerning process, were apparently subsumed in the drafters' conclusion that "it is considered appropriate to leave the mechanical details as to the issuance of process to regulation".[99]

When the 1951 Manual for Courts-Martial was promulgated by authority of the President, the attachment procedure was included. The terms describing it were virtually identical to the attachment provisions

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[93] A Manual for Courts-Martial and of Procedure Under Military Law, 33-34 (1895).
[94] Dig. Ops. JAG 700 n.1 (1901).
[95] Dig. Ops. JAG 490 n.1 (1880).
[96] The compulsory process provision became Article of War 22 in the recodification of the Articles of War enacted as part of the Army Appropriations Act of 1916. Act of August 29, 1916, ch. 418, § 3, 39 Stat. 650. Article of War 22 remained virtually unchanged in the subsequent recodifications and amendments to the Articles of War. *See* Act of June 4, 1920, ch. 227, ch. II, 41 Stat. 787; Selective Service Act of 1948, ch. 623, § 213, 62 Stat. 630.
[97] *See Hearings on H.R. 2498 Before a* Subcomm. *of the House* Comm. *on Armed Services* 81st Cong., 1st Sess. 1057, 1060 (1949).
[98] 10 U.S.C. § 846 (1976).
[99] H.R. Rep. 491, 81st Cong., 1st Sess. 24 (1949).

in the earlier Manuals beginning with the 1895 edition.[100] The Manual drafters did not explain whether or to what extent they critically considered the attachment procedure to be legal or wise.[101] With little substantial change, the 1951 provision was carried over into the 1969 revision of the Manual which remains the same through this writing.[102]

Since enactment of the Uniform Code of Military Justice, only one court has commented on the military warrant of attachment. In United States *v. Shibley*,[103] a civilian witness was indicted in United States district court for failure to appear as a witness before a Marine court of inquiry on the day called for by subpoena.[104] The court reported that the witness "not having appeared on that day a warrant of attachment was issued . . . and served on him. He was then taken before the court on that day."[105]

The central issue in Shibley was whether a naval court of inquiry had the same power to compel attendance as courts-martial. The court concluded that it did, at the same time refuting the claim that the power of process did not include the power to attach:

> If the only method of making this provision [authorizing the summoning of witnesses] effective were resort to prosecution

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[100] *See* Instructions for Courts-Martial including Summary Courts, Headquarters, Department of Dakota at 30-32 (2d ed. 1891); A Manual for Courts-Martial at 43-45 (Murray, 3d ed. 1893) [commercial edition]; A Manual for Courts-Martial at 33-34 (1895); A Manual for Courts-Martial and of Procedure Under Military Law at 32-33 (2d ed. 1898); A Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards and of other Procedure Under Military Law at 34-36 (rev. ed. 1901); A Manual for Courts-Martial, Courts of Inquiry and of other Procedure Under Military Law at 78, 80-82 (1917); A Manual for Courts-Martial, U.S. Army, para. 168 (1921); A Manual for Courts-Martial, para. 97b (1928); Manual for Courts-Martial, U.S. Army, para. 1056 (1949).

[101] The drafters of the 1951 Manual commented only briefly on attachment:

> Before issuing a warrant of attachment . . . to compel the attendance of a witness who willfully neglects or refuses to attend and testify before a court-martial, the trial counsel must first consult the convening authority or the court depending on whether the court has been convened. This confirms to the present Navy rule but is more stringent than the Army and Air Force rule which currently provides that the trial counsel "may" consult the court in such a case.
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> The warrant, in an appropriate case, will be issued and dispatched by the trial counsel rather than by the president of the court. The warrant will be accompanied by the listed documents.

Legal and Legislative Basis, Manual for Courts-Martial United States, 1951 at 101-102 (1951).

[102] *See* MCM, 1951, para. 115d(3). The only change in the 1951 provision when it was incorporated in the present Manual was the inclusion of a preference for service of the warrant of attachment by a civil officer of the United States. *See* note 41 *supm.*

[103] 112 F. Supp. 734 (S.D. Cal. 1953).

[104] *Id.* at 740.

[105] *Id.*

> under [Article 47],[106] the result would be ineffective and illusory. Punishment as an offense cannot compel disclosure to make an inquiry effective. And if boards of inquiry are to perform their functions . . ,, they can do so only if means exist to bring summarily recalcitrant witnesses before them. And the warrant of attachment traditionally provides such means.[107]

Reviewing the attachment power described in the Manual and the procedure by which warrants of attachments could issue, the court observed that "this interpretation is logical and necessary, if the power to compel attendance of witnesses is to be effective. More, it is an authoritative interpretation by the President and the military establishment, entitled to great weight." [108] Elsewhere, the court also observed that "of course, a warrant of attachment is nothing more than a method or 'procedure' to enforce the granted power to summon witnesses." [109]

United States v. Shibley thus approved the attachment procedure as an appropriate exercise of Presidential power within the statutory authority granted by Article 46 of the Uniform Code of Military Justice.[110]

The precedents demonstrate that military attachment, as a concept, is historically recognized and lawful. Whether the attachment procedure provided for in the Manual is a proper implementation of the concept is a separate question.

III. LEGALITY *AND* ADEQUACY OF THE EXISTING ATTACHMENT PROCEDURE

Although the attachment of a civilian witness should be unobjectionable, the procedure for accomplishing it, which has been virtually unchanged since 1863, is neither wholly legal nor adequate.

The military attachment procedure permits the trial counsel to decide, after consultation with the convening authority, military judge, or president of a special court-martial sitting without a judge, to issue the warrant. Based upon this warrant, a person not an accused, is seized and held in custody so long as necessary to bring him before the court to testify. That the issuance of the warrant is *ex parte* in respect to the witness is unobjectionable. On the other hand, designating the trial counsel as the officer who will make the discretionary decision to attach is both unsound and likely unconstitutional.

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[106] *See* note 9 *supra.*
[107] 112 F. Supp. at 743 n.19.
[108] *Id.* at 744.
[109] *Id.* at 745 n.29.
[110] 10 U.S.C. § 846 (1976).

A. LACK OF NOTICE AND HEARING TO THE WITNESS

The *ex parte* procedure is well suited to the purpose of the attachment procedure and is constitutional. Attachment becomes necessary only after a witness has refused to respond to a subpoena. In the best of circumstances, the location of the witness will remain unchanged after the refusal to respond so that the warrant of attachment can be served on him without difficulty. It seems reasonable, however, that in many cases witnesses will absent themselves if they become aware that they may be taken into custody for their refusal to obey the military subpoena. Consequently, affording a witness notice that attachment is being sought would be self-defeating.

Some of the early cases required a pre-attachment hearing for the witness to show cause why he or she should not be attached. In *United States v. Smith,*[111] the case in which an attachment was sought against President James Madison and several others in 1806, the prosecution opposed the defense motion for attachment, arguing:

> The court will never grant an attachment in the first instance. The first motion must be for a rule to show cause. (This was the course pursued in the cases of Hammond,[112] Daleson,[113] Stephenson,[114] Chapman,[115] Wyat,[116] Stretch[117]). I mention only the earliest cases. The case of Chaunt v. Smart, 1 Bos. & P. 477, in the common pleas, seta this point at rest. Here the court say [sic], "that in future the practice of this court should be conformable to that of the King's bench, and the rule should be to show cause why the attachment should not issue in all cases, except of nonpayment of costs on the prothonotary's allocatur."[118]

The defense rejoinder was that the English cases relied on by the prosecution were for the most part civil cases[119] and that delay to afford notice to the witness would be inconsistent with the accused's right to a speedy trial.[120] Nevertheless, the prosecution position persuaded one of

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[111] 27 F. Cas. 1192 (C.C.D. N.Y. 1806) (No. 16,342).
[112] Hammond v. Stewart, 93 Eng. Rep. 667 (K.B. 1722).
[113] Unrept'd in Eng. Rep. Decided in Exchequer, Mich., 10 Geo. I. See 27 F. Cas. at 1205.
[114] Stephenson v. Brookes, 94 Eng. Rep. 792 (K.B. 1740).
[115] Chapman v. Pointon, 93 Ehg. Rep. 1020 (K.B. 1741).
[116] Wyat v. Wingford, 92 Eng. Rep. (K.B. 1728).
[117] Stretch v. Wheeler, 94 Eng. Rep. 1021 (K.B 1754).
[118] 27 F. Cas. at 1208.
[119] *Id.* at 1224.
[120] *Id.* at 1217.

the two judges sitting on the case.[121] In *Ex Parte Pleasants*,[122] involving a conspiracy to assault the President, an attachment issued against a Richmond newspaper publisher only after the court required that there be a hearing to show cause and the witness failed to show that the warrant should not issue.[123]

In current practice, notice to the witness is not generally required.[124] Constitutionally, the *ex parte* procedure raises the question of whether the lack of notice and an opportunity to be heard denies the witness being attached due process under the Fifth Amendment.[125] Due process interests are implicated in the attachment procedure since it requires that a witness be deprived of his liberty. In *Application of Cochran*,[126] a district court concluded that due process rights were implicated where material witnesses are detained:

> Whether and to what extent the due process clause of the Fourteenth Amendment applies to the detention of material witnesses has not been considered by the Supreme Court of the United States. Nor am I aware of any case which has decided the issue. . . . However, cases dealing with sufficiently analogous situations leave no doubt that due process protections do attach whenever the state physically seizes a person and then commits him to complete custodial detention for an extended period of time.[127]

In the case of the material witness, like the attached witness, "the o b ject . . . is not custody, of course, but assurance that the witness will appear and testify."[128]

One older case considered whether unnoticed attachment offends due process and concluded that it does not. In *In Re Union Bunk of Brooklyn*,[129] a subpoena issued to the president of a bank to give evidence to bank examiners pursuant to a state statute vesting the examiners with subpoena power. The bank officer failed to appear and a justice of the New York State Supreme Court issued a warrant for his arrest based upon a statutory power to attach.[130] The officer sought through counsel

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[121] Id. at 1232-1233. *See* n.60 *supra*.
[122] 19 F. Cas. 864 (C.C.D.D.C. 1833) (No. 11,225).
[123] *Id. See also Ex Parte* Beebees, 3 F. Cas. 46 (C.C.D.Pa. 1851) (No. 1,220).
[124] *E.g.*, People v. Brinson, 12 Cal. Rptr. 625 (Dist. Ct. App. 1961) (*ex parte* hearing held on motion of defense for attachment).
[125] U.S. Const. amend. V provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."
[126] 434 F. Supp. 1207 (D. Neb. 1977).
[127] Id. at 1212.
[128] Id.
[129] 133 N.Y.S.62 (App. Div. 1911).
[130] Id. at 64.

to quash the warrant on the ground that the lack of notice deprived him of due process. The court rejected the attack against the attachment statute:

> Under ita provisions, no one assumes to finally determine the rights of the person subpoenaed, nor to provide punishment for this disobedience thereof. The statute does not authorize his commitment to any place of confinement, nor any further interference with this liberty than the temporary restraint necessary to compel his production before the person authorized to require his attendance. . . . The issuing of a summary attachment without notice to compel the attendance of a witness who has disobeyed a subpoena has long been exercised, and the right to do so seems not to have been questioned. There is a distinction between the temporary restraint necessary to bring a party before one authorized to conduct an examination, and the restraint which follows a final adjudication upon his rights. We think, therefore, that the statute authorized the issuing of the subpoena, and that the further provision authorizing the issuing of a warrant to compel the appearance of a witness duly subpoenaed before the officer issuing such subpoena is valid.[131]

The result in ***In Re Union Bank of Brooklyn*** remains valid today, although for slightly different reasons. In ***In Re Grand Jury Proceedings***,[132] a subpoenaed grand jury witness claimed a right to notice and a right to be heard before issuance of the subpoena. The court rejected the claim. Relying on ***Morrisey v. Brewer***,[133] which held that "[w]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss,'"[134] the court concluded that a subpoena is "not a 'grievous loss' of liberty" requiring notice or hearing prior to issue.[135] Upon a refusal of the witness to appear or testify, the hearing afforded incident to a contempt proceeding provides all the process due the witness.

Unlike the mere issue of a subpoena which is a deprivation of liberty only insofar as the witness must interrupt his or her daily affairs to go to the courthouse, attachment places the witness into custody. An analogous situation is where a witness has been taken into custody pur-

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[131] *Id.* at 71.
[132] 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).
[133] 408 U.S. 471 (1972) (right to parole prerevocation hearing).
[134] *Id.* at 481.
[135] 532 F.2d at 7-8.

suant to a material witness statute. Every state has a material witness statute [136] and the federal courts infer a power to arrest material witnesses from existing statutes.[137] Under most material witness statutes, a witness is typically seized without notice and brought before the court where he can seek to quash the warrant or have bail set. One challenge to a state material witness statute on due process grounds has been successful. In *Application of Cochran*,[138] two brothers were held as material witnesses under state law.[139] Their federal *habeas corpus* petition was granted. The court held that a witness who has been taken into custody must receive notice of the allegations on which the warrant was based and must be afforded a full evidentiary hearing with right to counsel [140] to determine the sufficiency of cause for holding him:

> It cannot be doubted that the Due Process Clause at least requires that formal notice be given to a person against whom the material witness statute is to be applied and that he be afforded a meaningful opportunity to be heard. These procedural safeguards are so fundamental to the concept of due process that their absence is almost certainly a fatal defect when physical liberty is at stake.[141]

Although the court decided that these due process safeguards are required, it was not held that these procedures must be made available *before* the witness is taken into custody.

Cochmn is only one case. But even accepting its rationale, it has only limited applicability to the attachment of witnesses. Attachment occurs only after a subpoena has been issued and service has been refused or the witness has clearly indicated that he or she will not appear. The material witness may be taken into custody before a subpoena has been issued. In *Cochran*, the court reasoned that greater protections are due because the initial conclusion that the witness will not respond to a subpoena may be incorrect. In attachment, there is less of a risk in that regard. In addition, the deprivation of liberty of the attached witness is less severe than that of the material witness. In the case of the material witness, "the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." [142] The attached witness should not be in custody any longer than it takes to get him or her to the courthouse.

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[136] Bacon v. United States, 449 F.2d 933, 939 (9th Cir. 1971).
[137] *See* note 51 *supra*.
[138] 434 F. Supp. 1207 (D. Neb. 1977).
[139] Neb. Rev. Stat. §§ 29-507, 29-508 (1943), *cited in* 434 F. Supp. at 1209.
[140] 434 F. Supp. at 1213.
[141] *Id.*
[142] *Id.*

In *Mason Furniture Corp. u. George* [143] the New Hampshire Supreme Court held that an attached witness is entitled to some due process protection. Nevertheless, the court found it sufficient that the witness be afforded the right to move for a hearing on the grounds for his attachment or for bail after being brought before the court without unreasonable delay.

In *Mathews v. Eldridge*,[144] the Supreme Court held that the process which is due in any situation depends upon the balancing of these factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the additional or substitute fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [145]

In attachment, the deprivation of liberty is for a limited time. Since it occurs only after an actual refusal to accept service of process or to testify, there is little risk of erroneous action. Additional preattachment safeguards would serve little purpose. Finally, the government's interest in bringing a recalcitrant witness expeditiously to an imminent trial or one already in progress and the danger.that notice of attachment to the witness may result in disappearance strongly tip the scale in favor of attachment without notice.

The validity of the attachment procedure rests on the speedy production of the witness before the court and his or her release upon testifying, To the extent that the existing military attachment procedure does not insure that these objectives are met, it is subject to abuse. That the nature of military criminal law may well require transcontinental travel of attached witnesses is all the more reason for the attachment procedure to be unambiguous in this regard. Consequently, the Manual requirement should be amended to require that, upon attachment, the witness be brought before the court-martial without unreasonable delay and be permitted to testify as soon thereafter as possible or be released by the court. If the witness immediately testifies or is released, the concerns expressed on behalf of the material witnesses in *Cochran* dissipate.

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[143] 116 N.H 451, 362 A.2d 188 (1976).
[144] 424 U.S. 319 (1976).
[145] *Id.* at 335.

Further, immediate release in the event that the witness cannot be permitted to testify within a reasonable time is necessary since, unlike the civilian judicial system, the military judge cannot set bail for the witness.

To bolster government defense of the attachment procedure when it is challenged, it would be helpful if the subpoena served on the witness included notice that disobedience to it may not only result in prosecution in federal district court, as the subpoena currently in use indicates, but that attachment may result as well. This would provide minimum notice to the witness and undercut any due process argument that might be made. At the same time, this general warning is not likely to cause the witness to disappear. With some minimal notice, the attachment becomes more defensible in the same manner that a summary notice advising that social security disability benefits were about to be terminated satisfied due process in ***Mathews v. Eldridge.***[146] The attachment would be bolstered still further if the witness is also instructed to inform the issuing authority if he cannot attend, together with an explanation of the inability. This would provide a record on which the military judge could decide if there is a sufficient excuse for nonattendance and would ease the government's burden to show the factual reason for nonattendance.

Without the benefit of a preattachment hearing and absent immediate release after attachment, the only remedy left to the witness who is attached or about to be attached is to file a petition for ***habeas corpus,*** an eventuality anticipated by the Manual.

A prisoner in the custody of the United States may file a petition for a writ of habeas corpus.'"[147] Specifically, one may file where he is "in custody for an act done or omitted in pursuance of, . . an order [or] process . . . of a court or judge of the United States."[148] Consequently, an attached witness would have standing to bring a ***habeas corpus*** petition. However, ***habeas corpus*** is an illusory remedy. The attached witness has no notice of the attachment before it occurs other than the subpoena which precedes it. Because the witness arguably remains in custody only for as long as it takes to bring him or her before the court-martial, there is little if any opportunity to file a ***habeas*** petition. Of course, given the expanding concept of custody in ***habeas corpus,*** it may be that the witness who receives a military subpoena and wishes to avoid it and subsequent attachment might be able to challenge the subpoena itself by ***habeas corpus.*** In ***Hensley v. Municipal Court,***[149] a convicted defendant

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[146] *Id.* at **324.**
[147] **28** U.S.C. § 2241(c)(1)-(2) **(1976).**
[148] *Id.*
[149] **411** U.S. **345 (1973).**

released on his own recognizance was deemed in custody and was therefore able to challenge his conviction by ***habeas corpus*** because, ***inter alia,*** "he cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice."[150] Consequently, the mere fact that the witness about to be attached is not yet in custody does not mean that there are no grounds for a ***habeas*** action. Some support for preattachment ***habeas*** relief is provided by Justice Marshall's dissent in ***United States v. Dionisio***.[151] The majority in ***Dionisio*** decided that a subpoena is not a seizure of a person for purposes of the Fourth Amendment. Justice Marshall concluded that an outstanding subpoena is a seizure:

> The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas. . . is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. . . . The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise. . . . It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as does an arrest. . . . But this difference seems inconsequential in comparison with the substantial stigma that . . . may result from a grand jury appearance. . . . Nor do I believe that the constitutional problems inherent in such government interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time.". . . . No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. . . . Of course, the Fourth Amendment does not bar **all** official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible, at least to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and ***testify.***[152]

If a subpoena could amount to a Fourth Amendment seizure in any respect, it would also arguably constitute custody for purposes of ***habeas***

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[150] *Id.* at 351.
[151] 410 U.S. 1 (1973).
[152] *Id.* at 43-45 (emphasis supplied).

corpus. Since the bail and recognizance procedures in federal court [153] are not available to court-martial witness, *habeas* or some other substitute may be the witness' only avenue to the federal courts. An alternative means of access may be by bringing suit for injunctive relief based on federal question jurisdiction [154] accompanied by a motion for temporary restraining order and preliminary injunction.[155] An inartful but temporarily effective attempt to enjoin a military subpoena occurred in 1979.[156] Whether a federal court should undertake to review a military subpoena has never been considered. Arguably, such review would be improper interference in pending military proceedings.[157]

B. THE BURDEN TO JUSTIFY ATTACHMENT AND AUTHORITY OF THE TRIAL COUNSEL TO ORDER ATTACHMENT

Attachment of a witness constitutes an arrest or seizure within the meaning of the Fourth Amendment.[158] Consequently, the decision to attach must be made by a neutral and detached magistrate based upon probable cause that attachment is necessary. The existing attachment procedure falls short in both respects.

Whether the issuance of a subpoena standing alone is a seizure was considered and rejected in *United States v. Dionisio.*[159] Twenty persons refused a grand jury request for voice exemplars which might have

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[153] Fed. R. Crim. P. 46.

[154] 28 U.S.C. § 1331 (Supp. IV 1980).

[155] Fed. R. Civ. P. 65.

[156] In 1979, a civilian witness, formerly an Army laboratory examiner at Fort Gordon, Georgia, refused to accept service of a military subpoena requiring his attendance at a court-martial convened by the commander of Fort Dix, New Jersey. "he witness sought and obtained a protective order from a United States District Court in Ohio against the Fort Dix subpoena, as well as subpoenas not yet served on him by several other courts-martial. *In re* David R. Wills, No. MS-1-79-85 (S.D. Ohio Jul. 16, 1979) (order granting protective order). Subsequently, on the motion of the United States, unopposed by the witness, the protective order was set aside. *In Re* David R. Wills, No. MS-1-79-85 (S.D. Ohio Sept. 11, 1979) (order setting aside protective order). Thereafter, on November 21, 1979, the witness refused to accept process and tender of the appropriate mileage and witness fees. See DAJA-CL 1980/4795, 12 May 1980. Eventually, the witness relented. Before his change of mind, however, the Army considered whether to issue a warrant of attachment. An alternative to the warrant of attachment considered at the time was to seek a warrant of arrest from a United States District Court. *Id.*

[157] *See generally* Schlesinger v. Councilman, 414 U.S. 1111 (1975).

[158] U.S. Const. amend. IV provides in pertinent park

> The right of the people to be secure in their persons. . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized.

[159] 410 U.S. 1 (1973).

identified one or more of them as suspects in a gambling investigation.[160] The district court concluded that the requirement to provide the exemplars did not violate the Fourth Amendment "because the grand jury subpoena did not itself violate the Fourth Amendment." [161] The Supreme Court agreed:

> It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. . . . The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than a civic obligation. For . . . "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." United States v. Doe (Shwartz) 457 F.2d at 898.[162]

Even if a subpoena does not trigger the Fourth Amendment, the physical attachment of a witness disobeying the subpoena must. The similar question was considered in *Bacon v. United States*,[163] the leading case concerning the federal material witness power, which held that the arrest of material witness is a seizure: "Under. . . the Fourth Amendment, the essential element is the physical restraint placed upon the person, not the purpose behind the restraint." [164]

Under the statutes from which the federal material witness power is inferred, "the judicial official must have probable cause to believe (1) 'that the testimony of a person is material' and (2) 'that it may become impracticable to secure his presence by subpoena.' These requirements are reasonable, and if they are met, an arrest warrant may issue." [165] *Bacon* consequently decided that the seizure must be based on probable cause.[166] Since attachment involves the same kind of seizure, a similar probable cause determination ought to be made.

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[160] *Id.* at 3.
[161] *Id.* at 4.
[162] *Id.* at 9-10.
[163] 449 F.2d 933 (9th Cir. 1971).
[164] *Id.* at 942.
[165] *Id.* at 943.
[166] *Id.* at 934.

In *United States v. Evans*,[167] a cabdriver challenged his arrest on traffic warrants issued on the certificate of a court clerk that he had failed to appear in court pursuant to prior summons served on him. The court decided that the blanket warrant signed by the traffic judge was invalid for lack of probable cause.[168] The holding was based on the court's conclusion that the traffic warrant was based on the underlying traffic offense and not the disobedience of the summons. The court took the occasion to comment on the power to compel appearance:

> The Government argues that these warrants were not based on the violations contained in the complaint, but on the failure to appear in court, and that the judge has probable cause to believe that Evans had not appeared, based on his clerk's affidavit. It is true that normally, when an accused person or a subpoenaed witness fails to appear in court, the judge will issue a bench warrant ordering that person arrested and brought before the court. ***Such warrants are clearly valid and based on probable cause*** and our holding today does not affect them in the least.[169]

The conclusion in *Evans* may be somewhat facile because it is by no means clear what specific facts must be supported by probable cause. There must be probable cause to believe several facts to support an attachment. A subpoena must have been served,[170] witness fees and mileage must have been tendered,[171] the witness must "willfully" neglect or

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[167] 574 F.2d 352 (6th Cir. 1978).

[168] Id. at 354.

[169] Id. at 355.

[170] MCM, 1969, para. 115d(3) states that the original subpoena should accompany the warrant, as does the draft discussion to Proposed R.C.M. 703(e)(2)(G). In United States v. Caldwell, 2 U.S. (2 Dall.) 333 (1795), the court ordered: 'let the attachment issue; but it *can* only be in the case, in which the subpoena has been actually served." See *also* State v. Johnson, 41 La. Ann. 574, 7 So. 670 (Sup. Ct. 1889); Myers v. State, 19 Ala. App. 98, 95 So. 331 (Ct. App. 1923). The agreement of the cases on this point makes attachment inappropriate where a witness has not been served, even if the witness has obviously avoided service.

"'Both MCM, 1969, para. 115d(3) and the draft discussion to Proposed R.C.M. 703(e)(2)(G) provide that the certificate showing tender should accompany the warrant. In 5 Eliz. 1, c. 9, § 6 (1562), witnesses were entitled to be paid "according to his counterance or calling, such reasonable sums of money for his costa and charges as having regard to the distance of the places is necessary to be allowed in that behalf." In Wakefield's Case, 95 Eng. Rep. 202 (K.B. 1736), attachment was denied for want of sufficient tender: "And it has been solemnly determined that you must not only have an affidavit, of tendering the shilling, but likewise of a tender of reasonable charges, *to* ground an attachment." In Fuller v. Prentice, 1H. B1.49, cited *in* United States v. Smith, 27 F. Cas. 1192, 1209 (C.C.D. N.Y. 1806) (No. 16,342), the court explained the reason for the tender requirement: "It might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the repayment of their necessary expenses; the whole of which, as well of their going to the place of trial, as of their return from it, and also during

refuse to appear at trial,[172] the witness must have no valid excuse for not appearing,[173] and the witness must be material.[174]

Whether the subpoena has been served and witness fee and mileage tendered are determined with relative ease based upon the return of the officer who served the subpoena. If the time for the witness' appearance has passed, it will be patently apparent that the witness has negected to appear. But whether the neglect has been willful will turn on whether the witness had a valid excuse for nonappearance. More frequently, an attachment will be sought before the actual appearance date and the attachment will turn on the tenor of the witness' refusal to appear. Whether the witness' speech or conduct amounted to refusal may be subject to dispute. Whether the witness has a valid excuse for not appearing is especially troubling since, unlike these other facts, this requires affirmative inquiry. Examples of valid excuses according to the older cases may be where the witness or a member of his or her family is ill, or the witness is aged, or where the subpoena was not served until the day of trial.[175]

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their necessary stay there, ought to be tendered to them at the time of serving the subpoena, otherwise an attachment would not lie." *See also* Smalt v. Whitmill, 93 Eng. Rep. 1020 (K.B. 1736) ("there ought to be a tender of reasonable charges"); Stephenson v. Brooks, 94 Eng. Rep. 792 (K.B. 1740)("five guineas were tendered Hall . . . but he being a fat unwieldy man, and not able to travel on horseback, insisted upon 10 guineas. . . to undertake the journey by coach"). In United States v. Smith, 27 F. Cas. 1192 (C.C.D. N.Y. 1806) (No. 16,342), the parties argued over whether the $20 and reasonable expenses paid to President Madison to come to New York were sufficient. Tender continues to be required today. *E.g.*, Kieffer v. Miller, 560 S.W.2d 431, 432 (Ct. Civ. App. Tex. 1977) (failure to tender in a civil case). *Cf.* United States v. Davenport, 312 F.2d 303 (7th Cir.), cert. *denied,* 374 U.S. 841 (1963)(deficient witness fee did not excuse disobedience of process).

[172] This may be inferred from a reading of MCM, 1969, para. 115d. *See* note 31 *supra.* The ambiguity in the current Manual persista in Proposed R.C.M. 703(e)(2)(G).

[173] MCM, 1969, para. 115d(3) states that an affidavit explaining that there is no valid excuse should accompany the warrant, as does the draft discussion to Proposed R.C.M. 703(e)(2)(G).

[174] MCM, 1969, para. 115d(3) states that the affidavit should also indicate the witness' materiality, as does the draft discussion to Proposed R.C.M. 703(e)(2)(G).

[175] "Where the witness is sick; where a member of his family is dangerously ill; where age or infirmity or any other reason which would render his compulsory absence from home dangerous to his health, or oppressive, the court will not compel his attendance, but will either postpone the cause, or order the deposition of the witness to be taken." *Ex* Parte Beebees, 3 F. Cas. 46 (C.C.D. Pa. 1851)(No. 1,220)(argued that economic hardship should excuse attendance). *See also* Stretch v. Wheeler, 94 Eng. Rep. 1021 (K.B. 1754)("very weak and infirm, 80 years old and afflicted with an asthma and dropsy"). *Cf.* United States v. Thompson, 319 F.2d 665 (2d Cir. 1963) (discussing illness as defense to contempt). Distance or the state of one's business affairs does not excuse attendance. Field v. United States, 193 F.2d 86 (2d Cir.), cert. *denied,* 342 U.S. 908 (1951). In Hammond v. Stewart, 93 Eng. Rep. 667 (K.B. 1722), attachment was refused because the subpoena was served the same day as trial "which the Court said was too short notice, and that witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon

Each of these elements should be affirmatively shown prior to the issuance of the attachment. As *United States v. Caldwell* [176] provided in 1795: "The practice must always be strict in the various stages of the business, before an attachment can be awarded; and all the documents upon which it is awarded must be filed with the court. . .".[177]

Whether the witness is material is determined independent of the circumstances surrounding the service of the subpoena or the witness' personal circumstances. Whether a party has the right to a witness is not a determination unique to the attachment. If entitled at the outset, the party remains entitled when the witness neglects or refuses to appear. Although the current Manual attachment provision only mentions materiality in connection with the issue of the warrant, it is apparent that an attachment should only issue for witnesses who are both material *and* necessary.[178] If this standard applies to attachment, as it does in other

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the Court may be as little prejudice to themselves as possible." *Compare* United States v. Mitchell, 11 M.J. 907 (A.C.M.R. 1981) (refusal to grant defense for witness because, *inter alia*, defense counsel was aware of witness' probable testimony for two months prior to trial).

[176] 2 U.S. (2 Dall.) 333 (1795).

[177] *Id.*

[178] Both MCM, 1969, para 115 and the case law suggest that materiality alone may be insufficient for an attachment to issue. The 1951 Manual in para. 137 provided an evidentiary definition of materiality. However, the definition was deleted in the current Manual when the Military Rules of Evidence were adopted. Exec. Order 12,233, 45 Fed. Reg. 58,503 (1980). *Cf.* Mil. R. Evid. 104. In the absence of a Manual definition, it is unclear when a witness becomes material. Further, para. 115a provides, with respect to witnesses generally, that the right to witnesses is contingent on their being "mated and necessary," Nevertheless, para. 115d(3) only requires that the trial counsel show the witness to be material. Proposed R.C.M. 703 does not entirely resolve the ambiguity. Although Proposed R.C.M. 703(b)(1) provides that the parties will be entitled to witnesses whose testimony would be "relevant and necessary," rather than merely "material" as MCM, 1969, para. 115(d)(1), now provides, that draft discussion to Proposed R.C.M. 703(e)(2)(G) repeats that the person issuing the attachment must be ready to show a federal court that the attached witness is "material." In the proposed rules there is no indication of what relationship, if any, is intended between the materiality that the attaching officer must be prepared to show and the relevance and necessity that prompted the original subpoena. Nevertheless, it appears that the "material and necessary" language should be read into para. 115d(3) and the proposed rule and the standards for issue of a subpoena should also control issue of a warrant of attachment.

Whether a witness is material and necessary must be determined from the definition given the phrase by the military courts. The Court of Military Appeals has held:

> Materiality alone does not establish entitlement to the presence of the witness at trial. . . . The Court has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. It has, however, identified some relevant factors, such as: the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony. The foregoing is not meant to be exhaustive nor can any one factor be

jurisdictions, unnecessary witnesses, albeit material, such as those whose testimony is cumulative, may not be attached.[179] Logically, if a party is entitled to a subpoena for a witness, the party should be equally entitled to an attachment. This should be unambiguously stated in the attachment procedure.

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identified as necessarily determinative of the issue. Rather, the matter must be left to the sound discretion of the person ruling on the request for the personal attendance of a witness.

United States v. Tangpuz, 5 M.J. 426,429 (C.M.A. 1978). See also United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); United States v. Credit, 8 M.J. 190 (C.M.A. 1980). *But cf.* United States v. Williams, 3 M.J. 239, 242 (C.M.A. 1977) ("witnesses must be furnished upon a showing that they are necessary to an adequate defense—that is, that they are material or relevant"). In United States v. Bennett, 12 M.J. 463 (C.M.A. 1982), Judge Cook may have introduced a new, stricter test. Observing that the trial court concluded that a witness' testimony would have been material and his presence at trial was therefore required, Judge Cook suggested that "[t]he word 'material' appears misused . . . the true test is essentiality. If a witness is essential for the presentation of the prosecution's case, he will be present or the case will fail. The defense has a similar right." *Id.* at 465 n.4. Citing his dictum in *Bennett*, Judge Cook in United States v. Cottle, 14 M.J. 260 (C.M.A. 1982), held that the defense was not entitled to witnesses who would have contradicted a prosecution witness' account: "Hence, the witnesses would not be essential as to those offenses to which Copeland [the prosecution witness] testified." *Id.* at 265. Based on *Cottle*, it appears that the Court of Military Appeals may have adopted a test of "essentiality" which would make it harder for the accused to claim that he has a constitutional right to a witness's appearance.

The civilian practice generally requires that a witness be material and necessary before the witness' appearance will be compelled. See, *e.g.*, J.A.A. v. A.D.A., 581 S.W.2d 889 (Mo. App. 1979); Hainesworth v. State, 9 Md. App. 31, 262 A.2d 328, cert. denied, 258 Md. 727 (1970); Kieffer v. Miller, 560 S.W.2d 431 (Ct. Civ. App. Tex. 1977); Lynn V. Commonwealth, 408 S.W.2d 639 (Ct. App. Ky. 1966), cert. denied, 386 U.S. 1012 (1967); Yager v. Commonwealth, 407 S.W.2d 413 (Ky. Ct. App. 1966), cert. denied, 385 U.S. 1030 (1967); Gottesleben v. Luckenbach, 231 P.2d 959 (Colo. 1951) (en *banc.*) See also Westen, *Compulsory* Process *II*, 74 Mich. L. Rev. 192, 198–234 (1975). In United States v. Valenzuela-Bernal, 73 L.Ed.2d 1193 (1982), the Supreme Court decided that the deportation of arguably material witnesses did not deprive the defendant of his right to compulsory process or his right to due process of law. The Court concluded that "[s]anctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 1206. *Cf.* Washington v. Texas, 388 U.S. 14, 17 (1967), cited in *id.* at 1202 (denial of compulsory process where testimony "would have been relevant and material, and . . . vital to the defense.") (emphasis supplied in the citing case). Although *Valenzuela-Bernal* provides a clue as to the Supreme Court's current thought concerning the standard for deciding compulsory process claims, it is not a definitive statement in light of Justice Rehnquist's qualification that "[i]n adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses with the United States." United States v. Valenzuela-Bernal, 73 L.Ed.2d 1193, 1206 n. 9 (1982).

[179] J.A.A. v. ADA, 581 S.W.2d 889, 896 (Mo. App. 1979); Hainesworth v. State, 9 Md. App. 31, 262 A.2d 328 (Ct. Spec. App. 1970); State v. Maxwell, 50 N.J. Super. 298, 302–03, 142 A.2d 108, 112–113 (1958); People v. Marseiler, 11 P. 503, 505 (Cal. 1886). Compare United States v. Credit, 8 M.J. 190 (C.M.A. 1980) (four character witnesses not necessary to case where, inter alia, cumulative).

In addition to these factors, some courts have imposed others before an attachment can issue, such as a showing that the witness can be located to be attached"' or that alternatives to in-court testimony, such as deposition, have been attempted.[181] Requiring at least the latter is consistent with the military case law concerning entitlement to witnesses.[182]

Because an attachment is a seizure or arrest, there must not only be probable cause to believe that each of the requisite factors are present, but all of the matters must be shown by affidavit.[183] Affidavits have been generally required in attachments.[184] The only question is what should be contained in the affidavit. Consistent with Fourth Amendment requirements, it is reasonable to require that all of the factors which make an attachment appropriate should be contained in it. Nevertheless, the Manual does not require proof of service of process nor tender of fees and mileage to be under oath.[185] This is a defect in the existing procedure. Moreover, the affidavit should not be prepared merely in anticipation of a *habeas corpus* petition as the existing Manual provision provides. Rather, the decision to attach should be based on the affidavit

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[180] *E.g.*, J.A.A. v. A.D.A., 581 S.W.2d 889, 896 (Mo. App. 1979); People v. Brinson, 12 Cal. Rptr. 625, 628 (Dist. Ct. App. 1961); State v. Crispino, 154 La. 1013, 98 So. 623 (1923); State v. Johnson, 41 La. Ann. 574, 7 So. 670 (La. 1889); People v. Marseiler, 11 P. 503 (Cal. 1886).

[181] *E.g.*, Kieffer v. Miller, 560 S.W.2d 431 (Tex. Civ. App. 1977) (attachment of doctor denied where case was pending for several years and no deposition was attempted). Of course, this requirement would make less sense in criminal cases because of the likelihood that the party against whom the witness is offered would oppose the taking of a deposition. *E.g.*, United States v. Smith, 27 F. Cas. 1192, 1218 (C.C.D.N.Y. 1806) (No. 16,342) ("For my own part, I declare, that except upon some very extraordinary occasion which I cannot now foresee, I never will consent to examine a witness under a commission in a criminal case, if his attendance on the trial can be forced.").

[182] *See* note 178 *supra.*

[183] Whether the witness is material is, under both the existing and proposed attachment procedure, should be established in the affidavit which accompanies the warrant of attachment. With respect to material witness warrants issued in connection with grand jury proceedings, it is sufficient that the materiality of testimony be shown by "a mere statement by a responsible official, such as the United States Attorney." Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971). Accord United States v. Oliver, 683 F.2d 224, 231 (7th Cir. 1982). Both cases concluded that requiring a factual showing would interfere with the secrecy of the grand jury. Bacon and Oliuer both limit their holdings on this point to the grand jury and expressly hold out the possibility of a different outcome where the warrant is issued in connection with trial. Bacon, 449 F.2d at 943; *Oliuer,* 683 F.2d at 231.

[184] *E.g.*, Wakefield's Case, 95 Eng. Rep. 202 (K.B. 1736) ("And it has been solemnly determined that you must not only have an affidavit . . . ."); United States v. Smith, 27 F. Cas. 1192, 1195 (C.C.D.N.Y. 1806) (No. 16,342) ("You must offer an affidavit, and must show in what respect the witnesses are material."); People v. Marseiler, 11 P. 503, 505 (Cal. Sup. Ct. 1886) ("It did not appear by affidavit, or any sworn statement, what was sought to be proved by these witnesses, or either of them. . . ."); People v. Brinson, 12 Cal. Rptr. 625 (Dist. Ct. App. 1961); Yager v. Commonwealth, 407 S.W.2d 413 (Ct. App. Ky. 1966), *cert. denied,* 385 U.S. 1030 (1967).

[185] MCM, 1969, para. 115d(3). *See also* draft discussion to Proposed R.C.M. 703(e)(2)(G).

which should precede the decision. The current procedure appears to admit to the possibility that the affidavit will be prepared after the decision to attach has been made.

The officer who orders the attachment should not be the trial counsel. Vesting this authority in the trial counsel violates the Fourth Amendment.

From the earliest times, authority to issue process, including the attachment, was vested in the trial judge advocate, not the court itself.[186] In 1880, The Judge Advocate General stated:

> [T]he authority being vested exclusively and independently in the judge advocate, cannot be exercised by the ***court.*** The attachment is thus not a writ or process of the ***court,*** but simply a compulsory instrumentality placed at the disposition of the judge advocate as the prosecuting official representing the United States.[187]

Reserving the authority to issue process to the trial counsel was consistent with the 1863 statute which first gave compulsory process power to the military and in express terms placed the responsibility for process in the trial judge advocate.[188] Nevertheless, Article 46 now states that trial and defense counsel and the court shall have equal opportunity to obtain witnesses.[189] Hence, keeping the power to issue the subpoena in the hands of the trial counsel is compelled not by statute, but by the Manual.[190]

Assuming that the issuance of the subpoena does not implicate the Fourth Amendment, as the Supreme Court has held,[191] leaving the subpoena power with the trial counsel is unobjectionable. With respect to attachment, however, the Fourth Amendment demands that responsibility for its issue vest in the court and not in the prosecutor.

In *Coolidge v. New Hampshire*,[192] the Supreme Court considered whether a state attorney general could, consistent with the Fourth

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[186] See Dig. Ops. JAG at 391 (3d ed. 1868). See *also* A Manual for Courts Martial and of Procedure Under Military Law at 32 (2d ed. 1898); Dig. Ops. JAG at 498 (1912).
[187] Dig. Ops. JAG at 489 (1880) (emphasis supplied).
[188] See note 87 *supra*.
[189] See note 7 *supra*.
[190] MCM, 1969, para. 115d(3). *See* note 20 *supra*.
[191] United States v. Dionisio, 410 U.S. 1, 9-10 (1973). *But cf. In Re* Detention of Harris, 51 U.S.L.W. 2346-2347 (Wash. Dec. 2, 1982) (deciding that summons for mental examination which could be followed by physical seizure for noncompliance must be the result of judicial finding rather than decision of mental health professional).
[192] 403 U.S. 443 (1971).

Amendment, issue a search warrant. In *Coolidge*, the New Hampshire Attorney General issued a search warrant acting as a justice of the peace as permitted by state statute.[193] The murder conviction which resulted in part from the search was reversed by the Court. The Court rejected the state's claim that the Attorney General was acting as a neutral and detached magistrate as the Fourth Amendment requires.[194] Concluding that "the determination of probable cause was made by the chief 'government enforcement agent' of the State—the Attorney General—who was actively in charge of the investigation and later was to be chief prosecutor at the trial,"[195] the Court established a per se rule of disqualification: "Prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations-the 'competitive enterprise' that must rightly engage their single-minded attention."[196]

Because the warrant of attachment results in the arrest of a witness rather, than the arrest of an accused who is the primary subject of the criminal investigation, is not a meaningful distinction. Where the witness is sought by the prosecution for its own case, the trial counsel's concern with obtaining a conviction may well result in issuing an attachment although the facts may not justify it. Even where the witness is sought by the defense, the trial counsel might act in disregard of the witness' interests to preclude an abatement of the proceeding for nonproduction of the witness or reversal if a conviction is obtained.

Further, it is irrelevant that *Coolidge* concerned a search warrant as opposed to a warrant for arrest or attachment. In *Shadwick v. City of Tampa*,[197] warrants of arrest for traffic offenses were issued by the clerk of the local court rather than by the court itself. The procedure was attacked on the ground that "warrant applications of whatever nature cannot be assured the discerning, independent review compelled by the Fourth Amendment when the review is performed by less than a judicial officer."[198] The Supreme Court applied the traditional standard that:

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[193] *Id.* at 447.

[194] The requirement for a neutral and detached magistrate is stated in Johnson v. United States, 333 U.S. 10, 13-14 (1948), *cited in* Coolidge v. New Hampshire, 403 US. 443, 449 (1971):

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or governmental enforcement agent.

[195] *Id.* at 450.

[196] *Id.*

[197] 407 U.S. 345 (1972).

[198] *Id.* at 347.

"[A]n issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest . . .".[199]

The Court concluded that a nonjudicial officer, such as a court clerk, could issue warrants resulting in arrest consistent with the standard. The Court made clear, however, that "[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."[200]

All of the state statutes providing for attachment place the responsibility for issuance of the warrant in the court itself.[201] The military procedure stands alone in vesting this responsibility in the trial counsel. Because attachment is a Fourth Amendment seizure and because the prosecutor is a law enforcement official such as the Supreme Court has specifically disapproved as a neutral and detached magistrate capable of issuing warrants, the procedure as it currently exists is inadequate.

One proposed change to the attachment procedure would require the trial counsel to obtain the concurrence of, rather than mere consultation with, the convening authority.[202] While the convening authority *may* be sufficiently neutral and detached to sustain a military warrant of attachment against attack,[203] it makes more sense to place this responsibility in the court itself. The court is in a better position to determine whether the witness is material and necessary than is the convening authority. Moreover, if the military judge acts on the warrant, there is a strong likelihood that he or she will be absolutely immune from any civil lawsuit brought by an attached witness, whereas the absolute immunity of the convening authority is less certain.[204] Finally, a civilian court reviewing the attachment, whether on ***habeas corpus*** or in a suit for civil dam-

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[199] *Id.* at 350.

[200] *Id.*

[201] *See* note 49 *supra.*

[202] Proposed R.C.M. 703(e)(2)(G).

[203] *See* United States v. Bunkley, 12 M.J. 240 (C.M.A. 1982); United States v. Kalscheuer, 11 M.J. 373 (C.M.A. 1982); United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[204] While both the military judge and the convening authority would likely be shielded against suit based on a common law tort, Barr v. Matteo, 360 U.S. 564 (1959), suit based on attachment would likely include a claim based on the Fourth Amendment. In Butz v. Ekonomou, 438 U.S. 478, 508-11 (1978), the Supreme Court affirmed that judges and prosecutors are absolutely immune against suits based on the violation of constitutional rights. *E.g.*, Brewer v. Blackwell, 692 F.2d 387, 393 n.8 (5th Cir. 1982) (signing a warrant of arrest is judicial act for which a justice of peace is shielded by absolute immunity even if he knows the affidavit to be false and acted maliciously in signing it). *Butt* also held out the possibility of immunity for others exercising adjudicatory functions. 438 U.S. at 514. However, there is no precedent which would indicate that a civilian court would find that the convening authority is such a person.

ages, is more likely to find the procedure unobjectionable where the warrant has been issued by a judicial officer rather than the quasi-judicial convening authority.[205]

Absent a change in the existing procedure, trial counsel can confirm the legality of an attachment by not only consulting the military judge and convening authority as to the advisability of issuing an attachment, but by also obtaining their active involvement in the decision to attach. Although the existing procedure does not provide for it, trial counsel should seek an order from the military judge or, at the very least, the convening authority, directing that an attachment issue. The trial counsel should insure that the military judge's order be supported by probable cause and based upon an affidavit describing not only the materiality of and necessity for the witness and the refusal or neglect to appear, but as to all of the matters underlying the attachment.

C. *EXECUTION OF THE WARRANT OF ATTACHMENT*

The Manual provides that execution of the warrant of attachment is to be affected "when practicable. . . through a civil officer of the United States."[206] Alternatively, service by a military officer is authorized.[207]

Who executes the attachment does not touch on the legality of the procedure as much as on the perception of the attachment by the civilian court which may review it. Martial law excesses are imagined when a civilian witness is seized on the order of a military court. The most obvious and aggravating symbol of this exercise of military power would be the execution of the warrant by uniformed members of the Armed Forces appearing at the witness' front door.

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[205] In United States v. Ezell, 6 M.J. 307, 317-18 (C.M.A. 1979), the Court of Military Appeals noted that the military commander's duties include authority to enforce the law, order prosecutions, maintain discipline, investigate crime, authorize searches and seizures, as well as train his command. The court continued: "These duties provide the basis for a persuasive argument against the notion that he may at the same time be neutral and detached as contemplated by the Fourth Amendment. Indeed, no official in the civilian community having similarly combined functions could qualify as a neutral and detached magistrate under Fourth Amendment jurisdiction." *Id.* at 318. While the Court of Military Appeals could overlook this fact in sustaining searches and apprehensions of soldiers, a civilian court is leas likely to do so in the case of attached civilians. *E.g.*, Saylor v. United States, 179 Ct. Cl. 151, 374 F.2d 894 (1967). But *cf.* Bowling v. United States, 552 F. Supp. 54, 59 (Cl. Ct. 1982); United States v. Banks, 539 F.2d 14 (9th Cir. 1976).

[206] MCM, 1969, para. 115d(3).

[207] *Id.* The draft discussion to Proposed R.C.M. 703(e)(2)(G) provides:

> A warrant of attachment should be executed by a civilian officer of the United States whenever possible. Warrants of attachment may also be forwarded to the commanders of military installations near the witness for their assistance in execution. . . .

From the time that the military attachment procedure was first recognized until 1969, service of a warrant of attachment was executed exclusively by military personnel.[208] However, in the 1969 revision of the Manual for Courts-Martial, the language concerning service through a civil officer was added for the first time. The change was apparently generated by the concern for the perception of what military execution would evoke rather than as a result of legal necessity:

> This procedure [use of a civil officer] is considered more satisfactory than having a military officer become involved in this manner with civilians, and it conforms with procedure prescribed in Article 47 for the prosecution of civilians in a United States district court for failure to obey a subpoena. Also, see 28 U.S.C. § 547(b) as to the duty of U.S. Marshals in this regard.[209]

The change also shifted the potential liability for wrongful attachment from the military officer to the civil officer.[210] Expressing a preference

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[208] *See* note 90 *supm.* In 1880, The Judge Advocate General stated:

> A judge advocate cannot properly direct an attachment to a U.S. Marshal or deputy marshal or other civil official . . . Some military officer or person should be designated by him or detailed for the purpose by superior authority.

Dig. Ops. JAG at 490 (1880).

[209] U.S. Dep't of Army Pamphlet 27-2, Analysis of Contents, Manual for Courts-Martial United States, 1969 Revised Edition, at 23-2 (1970).

[210] In 1886, a judge advocate attached a witness, brought him to the place of trial, and detained him in the guardhouse for one hour. The officer was subsequently indicted in United States district court for false imprisonment. The Judge Advocate General requested that the prosecution be discontinued. Dig. Ops. JAG 498 (1912). More recently, an Army judge advocate was sued by a witness who had been arrested by local police based upon the order of a federal magistrate which had been obtained by the judge advocate after the witness had allegedly failed to respond to a military subpoena. The witness is seeking $151,500 from the judge advocate personally. Simmons v. McCarthy, No. W-81-CA-117 (W.D. Tex. pending). *See* note 221 *infm.* Under any circumstances, service of process presents ample opportunity for confrontation. This is especially so where an attachment is concerned. Marshah expose themselves to individual liability on any number of theories when they serve process. However, where common law torts are pleaded, the marshal is immune from suit where the acts complained of were "performed in the course of the discharge of an official duty" even where the acts involve "an excess of zeal." Klein v. Robinson, 328 F. Supp. 417, 420 (E.D.N.Y. 1971). However, marshals are also being increasingly subjected to suits for alleged constitutional torts. *See, e.g.*, Gillespie v. Civiletti, 629 F.2d 637, 641-42 (9th Cir. 1980); Cline v. Herman, 601 F.2d 374, 375 n.2 (8th Cir. 1979); Fayerweather v. Bell, 447 F. Supp. 913, 916 (M.D. Pa. 1978). In these cases, marshals enjoyed only qualified immunity requiring them to show that they acted within the scope of their authority, reasonably, and in good faith. *See* Butz v. Ekonomou, 438 U.S. 478 (1978). The qualified immunity standard has recently changed. Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982). The new standard requires a showing that the questioned conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. While the person who executes the warrant may only be entitled to a qualified immunity, whoever issued the warrant, be it the trial counsel, military judge, or convening

for service by a civil officer and, by reference to federal statutes,[211] more specifically by a United States marshal, did not guarantee that a civil officer would assist the military in the service of its warrants of attachment. Although United States Marshals serve the process of the federal courts,[212] in 1980, the United States Marshals Service refused to acknowledge any obligation to serve a military warrant of attachment,[213] despite the fact that the Manual for Courts-Martial constitutes an executive order and historical precedent for the marshals to support courts-martial in the exercise of their jurisdiction exists.[214] The Marshals Service refused to accept responsibility for service of attachments on two grounds. First, "severe limitations on manpower and budget" did not, in the view of the Marshals Service, allow for what was seen as an additional responsibility not previously shouldered by marshals.[215] Second, the Service interpreted the statute under which marshals operate to limit their responsibility to assisting United States district courts and courts of appeals.[216] The Service explained that marshals have never served or executed the process or orders of any other executive agency and to do so for the Army would be inconsistent with this position.[217] The Marshals

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authority, should be entitled to absolute immunity. *See* note 204 *supra.* Recognizing that the person who executes a warrant of arrest may be the only person exposed to liability among the several government officials involved in issuing the warrant, the courts will more likely than not find immunity. *E.g.*, Arnsberg v. United States, 549 F. Supp. 55, 59-60 (D. Ore. 1982) (IRS agents immune where they arrested grand jury witness based on advice of Assistant U.S. Attorney despite failure to serve witness prior to arrest). Even if the person who executes the warrant is immune from suit, the witness may have a remedy against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976). *Id.*; Townsend v. Carmel, 494 F. Supp. 30, 36-7 (D.D.C. 1980). *Cf.* Norton v. United States, 581 F.2d 390 (4th Cir. 1978).

[211] 28 U.S.C. § 547(b) was superseded by 28 U.S.C. § 569(b) before the 1969 Manual became effective. Act of September 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 620. 28 U.S.C. § 569(b) (1976) provides that marshals "shall execute all lawful writs, process and orders issued under authority of the United States . . . and command all necessary assistance to execute their duties."

[212] The obligation of marshals to serve attachments issued by the federal courts has not been in question since United States v. Montgomery, 2 U.S. (2 Dall.) 339 (1795) in which the court held: "An attachment is the process of the court, regularly issuing for the administration of justice; and, therefore, must be served by the marshal."

[213] In connection with the case of David Wills, the former military laboratory examiner who initially declined to respond to a subpoena in 1979, *see* note 156 *supra,* issuance of a warrant of attachment was considered. The United States Marshals Service on 15 January 1980 decided that it would not execute a military attachment if one were issued in the case. *See* DAJA-CL 1980/5178, 10 June 1980.

[214] 28 U.S.C. § 70 (1976) which gives marshals the same powers as those of similar officials in the states originated in a statute which assigned marshals the responsibility to collect fines assessed by militia courts-martial. Act of February 28, 1795, ch. 36, 1 Stat. 425. *See also,* Act of July 9, 1861, c. 25, 12 Stat. 287.

[215] DAJA-CL 1980/5396, 14 July 1980.

[216] *Id.*

[217] *Id.*

Service position not only meant that marshals would not serve attachments, but, inconsistent with previous practice, also that marshals would not serve military subpoenas.[218]

Subsequently, the Department of Justice, prompted by the protest of the armed services, requested the Marshals Service to comply with military requests for assistance in the execution of warrants of attachment, while indicating the services should use alternative means where possible.[219]

The imprecision in the Manual language, requiring Marshal Service where "practicable," and the apparent hope of the Deputy Attorney General that attachments will be served by the military where possible, suggests that the language in the Manual should be sharpened to avoid bureaucratic infighting in the future. The Manual should direct in unambiguous terms that United States Marshals serve warrants of attachment issued within the judicial district in which the marshal is located. In addition to this directory language, the Manual should continue to provide for alternative service by military personnel, the choice between the alternatives to be wholly committed to the discretion of the officer issuing the warrant of attachment.

D. A NEW RULE FOR ATTACHMENT

The pending revision of the current Manual for Courts-Martial provides an opportunity to remedy some of the defects in the existing attachment procedure. The attachment rule which has already been proposed for the revision carries forward in different language the existing attachment procedure and continues the deficiencies of the current rule. Summarizing the points made previously, the following attachment rule is offered which would provide a defensible and practical procedure to be followed in these cases:

Neglect or refusal to appear.

The Military judge detailed to a general or special court-martial or the president of a special court-martial without a military judge may, in his or her discretion, on motion of either the

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[218] *Id.*

[219] On 22 October 1980, the General Counsel of the Department of Defense wrote the Deputy Attorney General, requesting that the Department of Justice honor military attachments. On 5 March 1981, the Deputy Attorney General informed the Director of the Marshals Service that marshals are "authorized, and obliged to serve the process of courts-martial, including warrants of attachment, upon civilians." He therefore asked that the Marshals Service make "every effort" to respond to a military request for service. However, he also stated that he was requesting the armed forces to use other means of service where possible. *See* DAJA-CL 1980/5396, 14 July 1980.

trial counsel or the accused, issue a warrant of attachment to compel the attendance of a witness to testify or to produce documents or other objects. A summary court-martial may not issue a warrant of attachment.

A warrant of attachment may issue only upon probable cause to believe that a named witness was actually served with a subpoena, that the subpoena was properly and lawfully issued under these rules, that witness fees and mileage were tendered to the witness in the correct amount, that the witness refused to appear or willfully neglected to appear at the time and place specified on the subpoena, that there is no adequate substitute for the personal appearance of the witness, and that no valid excuse can be reasonably found for the witness' failure to appear. These matters shall be attested to on oath or affirmation.

The documents in support of the warrant shall be attached to the warrant together with the charges and the orders convening the court and referring the charges to the court-martial.

A warrant of attachment shall be executed by a United States Marshal when, in the judgment of the officer issuing the warrant, such service will be convenient for the government. In the alternative, execution will be through a commissioned officer named in the warrant who shall be designated by the convening authority or the commander of a military organization or installation near the witness. Only such nondeadly force as may be necessary to bring the witness before the court may be used in the execution of the warrant.

A witness attached under this paragraph shall be brought before the officer who issued the warrant without delay and shall give his testimony as soon as practicable thereafter or he shall be released.

The proposed rule differs from the existing procedure in several respects. It removes the attachment authority from the trial counsel and makes clear that a summary court-martial, often a nonlawyer sitting alone, does not have authority to attach. It makes consultation with or the consent of the convening authority unnecessary. It clearly seta out the criteria for an attachment and requires that the criteria be considered before the attachment may issue. By placing responsibility to attach in the court and requiring that all of the criteria be contained in an affidavit which must demonstrate probable cause, the rule will comply with Fourth Amendment standards.

Additional safeguards for the witness are the admonition that only nondeadly force may be used in the attachment and that the attachment be executed either by a U.S. Marshal or a military officer, either of whom will presumably exercise greater restraint than might otherwise be the case.

Placing these matters in the rule itself, rather than in a discussion following the rule, makes clear that each provision is mandatory both on the authority issuing the attachment and personnel who may be serving the attachment.

E. THE ALTERNATIVE TO ATTACHMENT

Attachment is the best and surest remedy for the military to insure that the parties to a court-martial have the benefit of a subpoenaed witness' testimony. Less desirable alternatives are seeking an arrest warrant from a federal court or commencing a civil enforcement action in a district court.

The power of a federal court to order the arrest of witnesses disobedient to its process comes from at least two sources. First, just as the military power to attach is inherent in the statutory authority to issue compulsory process, the federal court has the same authority to attach based on Federal Rule of Criminal Procedure 17(e). In the alternative, a power to arrest witnesses in connection with criminal proceedings in which the United States is a party or has an interest has been inferred from 18 U.S.C. § 3149 (1976) and Federal Rule of Criminal Procedure 46(b).[220] On the theory that a court-martial is a criminal proceeding in which the United States is a party or has an interest, it could be argued that the district court could order the arrest of a court-martial witness. The validity of the argument seems to be questionable, however. An alternative argument which is likely also unavailing is that Article 47 of the Uniform Code of Military Justice [221] impliedly allows the federal court to arrest. Since disobedience of a military subpoena is also a crime prosecutable in district court, it makes sense that a lesser sanction must be included by implication in the statutory commitment to the district court to insure the effectiveness of military process. Yet, while the court could issue a warrant of arrest in aid of its jurisdiction during a pending prose-

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[220] *See* note 51 *supra.* See also United States v. Anfield, 539 F.2d 674, 677 (9th Cir. 1976); United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y. 1976).

[221] 10 U.S.C. § 847 (1976). In Simmons v. McCarthy, No. W-81-CA-117 (W.D. Tex. pending), an Army trial counsel, desiring to depose a civilian witness, allegedly sought and obtained an order of arrest from a federal magistrate relying on Article 47 after the witness allegedly failed to respond to a subpoena. The witness' subsequent arrest and temporary incarceration are the subject of the plaintiffs $151,500 suit against the trial counsel for false arrest, abuse of process, false imprisonment, and malicious prosecution.

cution, there is less reason to believe that a court could somehow act to avert a prosecution before it has begun.

On the other hand, a civil action brought against the witness in federal court to enforce the subpoena is a viable alternative. Seeking district court enforcement of a military subpoena would not be a novel concept. Before Congress gave the military authority to issue process binding on civilians, the Attorney General commented in 1859:

> The English law makes it incumbent on the civil judges, or courts, to issue subpoenas for the attendance of civilians as witnesses before a court-martial when application is made. It is to be wished that a similar law was in force in the United States requiring the judges of the Supreme, circuit, district and other courts of the United States to summon witnesses to attend a court-martial. . . under a subpoena. ***It would seem, however, that though this is not required of them by law, any United States judge may, at his discretion, issue such subpoena when applied to for the purpose. At least the writer has been informed, that in one case at least a United States judge did issue such subpoena.*** (O'Brien Military Law, 1850).[222]

In ***Senate Select Committee on Presidential Campaign Activities v. Nixon***,[223] the Senate Committee investigating abuses in the 1972 Presidential campaign related to the Watergate affair unsuccessfully sought enforcement of a subpoena in this manner. The Senate committee subpoenaed tape recordings of White House conversations which were in the custody of the President. The President refused to comply. Similar to the options available in courts-martial, the committee had the option of seeking a congressional contempt citation [224] or an attachment "via Congressional common-law powers which permit the Sergeant-at-Arms to forcibly secure attendance of the offending party." [225] Deciding that either course would be "inappropriate and unseemly," the Committee sued in federal district court for judgment declaring, ***inter alia,*** that the congressional subpoenas were valid and that the President could not refuse to comply.[226] In conjunction with the declaratory judgment, the committee also asked for a mandatory injunction in addition or in the alternative to mandamus.[227] The court dismissed the action for lack of jurisdiction. The committee asserted jurisdiction based on those provisions of federal law which provide jurisdiction over cases arising under the

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[222] 900p. Att'y Gen. 311, 312-13 (1859) (emphasis added).
[223] 366 F. Supp. 51 (D.D.C. 1973).
[224] *See* 2 U.S.C. § 192 (1976).
[225] 366 F. Supp. at 54.
[226] *Id.*
[227] *Id.*

laws of the United States [228] and for jurisdiction over actions commenced by the United States or any agency or officer thereof.[229] The court concluded that Congress is not an agency or officer which could sue under the appropriate statute and it does not have the authority to sue on behalf of the United States under the same statute. The court also found that federal question jurisdiction did not exist because the committee could not meet the requirement that the controversy amount to at least $10,000 as was required at that time under the statute.

Although Congress was unsuccessful in ***Senate Select Committee v. Nixon*** in enforcing ita subpoena on the grounds stated, there is authority that supports enforcement of federal agency subpoenas by federal courts on a similar theory. Although the jurisdictional predicates relied on by Congress, federal question jurisdiction and the power of the United States or any agency or officer thereof to sue, were insufficient in that *case,* they may be relied on to enforce a military subpoena because the monetary requirement for federal question jurisdiction has been abrogated and the United States can sue on behalf of the Army, which, being a federal agency unlike Congress, falls directly within the statute.

In ***United States v. Hill***,[230] the District of Columbia Circuit refused to enforce Department of Energy subpoenas, concluding that the Department of Energy Organization Act,[231] which provides for subpoena power, did not in express terms provide for district court jurisdiction over enforcement of subpoenas.[232] Nevertheless, the court concluded that the federal question jurisdiction statute and the statute giving the government power to sue would permit the exercise of jurisdiction:

> Although statutes creating administrative subpoena powers often contain provisions specifically authorizing judicial enforce-

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[228] 28 U.S.C. § 1331 (1976 & Supp. IV 1980) provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The Act of October 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721 eliminated the requirement in the predecessor statute that the controversy involve $10,000 exclusive of interests or costa in suite against the United States. Suits brought by the United States were still subject to the monetary limitation until Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, which eliminated the requirement entirely.

[229] 28 U.S.C. § 1345 (1976 & Supp. IV 1980) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

The statute was in the same form in 1973.

[230] 694 F.2d 258 (D.C. Cir. 1982).

[231] 42 U.S.C. § 7255 (Supp. IV 1980).

[232] 694 F.2d at 259.

> ment orders, the Judicial Code's general jurisdictional provisions, 28 U.S.C. §§ 1331, 1337(a), 1345 (1976 & Supp. IV 1980), render such specificity unnecessary. We have found no cases squarely holding that these provisions empower the district courts to enforce administrative subpoenas; nevertheless, we have no doubt that subpoena enforcement proceedings fall within the scope of one or all of these broad grants of subject-matter jurisdiction.[233]

The court concluded that each of the cited provisions would individually confer subpoena enforcement jurisdiction. Hence, the provision permitting suit by an agency or officer of the United States would allow enforcement independently:

> Unless legislation should expressly provide that jurisdiction of a district court is limited by the special jurisdiction provisions of an Act, the right of the United States to sue . . . is not affected. *The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies.*[234]

On this theory, a suit to prevent a witness from interfering with a pending court-martial and to support the military powers of compulsory process would also be appropriate. Observing that several cases have inferred that enforcement proceedings might be brought under these provisions,[235] *Hill* decided that there would be subject-matter jurisdiction

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[233] *Id.* at 267.

[234] Brennan v. Buckeye Industries, Inc., 374 F. Supp. 1350, 1353 (S.D. Ga. 1974), cited in 694 F.2d at 267 n.34 (emphasis added by the citing authority).

[235] 694 F.2d at 268 n.37. See United States v. Hankins, 581 F.2d 431, 438 n.11 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979) (IRS summons enforceable through 28 U.S.C. § 1345); NLRB v. Hanea Hosiery Div.-Hanes Corp., 384 F.2d 188, 191-92 (4th Cir. 1967), *cert.* denied, 390 U.S. 950 (1968) (finding 28 U.S.C. § 1337 as basis for enforcing NLRB subpoena); United States v. Lasco Indus. Div. of Phillips Indus., 531 F. Supp. 266 (N.D. Tex. 1981) (28 U.S.C. § 1345 would provide jurisdiction to enforce National Institute for Occupational Safety and Health Subpoena); United States v. Nanlo, Inc., 519 F. Supp. 723, 724-25 (D. Mass. 1981) (FTC order enforceable): NLRB v. British Auto Parts, Inc., 266 F. Supp. 368 (C.D. Cal. 1967), *aff'd*, 405 F.2d 1182, 1184 (9th Cir. 1968) (*per* curiam), cert. *denied sub* nom. Teledyne, Inc. v. NLRB, 394 US. 1012 (1969) (recognizing 28 U.S.C. § 1337 as basis for enforcement of NLRB subpoena); Federal Maritime Commission v. New York Terminal Conference, 262 F. Supp. 225 (S.D.N.Y. 1966), *aff'd*, 373 F.2d 424 (2d Cir. 1967) (28 U.S.C. § 1345 would provide jurisdiction to enforce commission subpoena).

Some courts have, based on this statutory authority, issued search warrants on behalf of federal agencies. United States v. Hill, 694 F.2d at 268, n.37 (D.C. Cir. 1982). See State Fair v. United States Consumer Prod. Safety Comm'n, 481 F. Supp. 1070, 1074 & n.6 (N.D. Tex. 1979) (§ 1345 provides jurisdiction to issue search warrant on behalf of CPSC); Marshall v. Weyerhaeuser Co., 456 F. Supp. 474, 477 (D.N.J. 1978) (§§ 1337 and 1345 provide jurisdiction to issue search warrant for Department of Labor). This may provide an

over enforcement actions. Given jurisdiction, an order to a reluctant witness to comply with a subpoena would be within the general equitable powers of the court.

Accepting that there are alternative means of enforcement does not mean that these are effective alternatives. The witness hopefully will respond to a federal court order. Yet, if the witness defies the federal court order, as he or she has already defied the military subpoena, the only remedy left to the federal court will be a contempt action. In that eventuality, the military is still left without the witness and is in essentially the same position it would have been had enforcement not been attempted and a prosecution under Article 47 of the Uniform Code of Military Justice been sought instead. Were an enforcement action brought in lieu of attachment, the military would be sacrificing speed and sure enforcement for delay and uncertainty, while having no assurance that success will result in the production of the witness.

Disconcertingly, the Court of Military Appeals itself may believe that federal court enforcement of military subpoenas is the only means of bringing a recalcitrant witness to court. In ***United States v. Bennett***,[236] the Court of Military Appeals decided that a civilian witness in the United States cannot be subpoenaed to appear in a court-martial convened and held outside of the United States. In deciding that a civilian could not be made to appear overseas, the court explained:

> Although the process of the court-martial would run to a citizen of the United States situated therein ***and, upon appearance before a Federal district court for enforcement of the subpoena,*** that court would have ***in personam*** jurisdiction over him, we doubt that such power would be sufficient to send the citizen beyond the jurisdiction of the Federal court, particularly to do acta in a foreign country.[237]

The emphasized language suggesta that the court may believe that a military subpoena can only be enforced by a United States district judge. In contrast to Judge Cook's aside in ***United States v. Bennett*** is the deliberate and considered view in ***United States v. Shibley***,[238] which considered and rejected the argument that the military warrant of attachment could only be enforced in the civil courts:

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alternative ground for seeking a warrant of arrest from the district court against the non-appearing witness.

[236] 12 M.J. 463 (C.M.A. 1982).

[237] *Id.* at 470.

[238] 112 F. Supp. 734 (S.D. Cal. 1953).

> The suggestion has been made that only civil courts can compel appearance. . . after a civilian witness' refusal. . . . This remedy, if it existed, would be equally visionary. It would tie the military tribunals to the civil courts contrary to the spirit of military law. More, there is not in the [Uniform Code of Military Justice] a provision similar to [other statutes unrelated to the military which require resort to federal judges to enforce agency subpoenas]. Its absence indicates that the means to compel attendance must exist in the court of inquiry itself. Otherwise, the courts are given the naked power to summon, but no power to use a **summary** method to compel attendance.[239]

Shibley's conclusion is logical and reasonable. To the extent that warrants of attachment issue in aid of compulsory process, there is no justification for requiring the courtrmartial to seek the assistance of the federal courts to enforce its process. Both as a matter of law and policy, attachment is the preferable course.

IV. CONCLUSION

A court can function only if it is able to bring witnesses before it to testify. In military practice, the absence of an available witness will cause the proceedings to abate. Although no case has ever considered whether a refusal to respond to a subpoena makes a witness unavailable so that trial can proceed without error in his or her absence, it is logical that, if the court has the means at its disposal to physically compel the attendance of the witness, the witness is available. Because the attachment procedure provides a means of bringing the reluctant witness to court, both trial and defense counsel should be aware of its existence and be prepared to resort to it in an appropriate case. Both have an interest in insuring that all favorable testimony is before the court. Further, the defense counsel may find advantage in pressing the government to attach in view of the practical difficulties that may ensue in obtaining and executing a warrant of attachment against a defense witness whose testimony would be relevant and necessary but who is also reluctant to appear. In either event attachment is the logical extension of compulsory process and a tool courts-martial should be prepared to use aggressively on behalf of the parties before it.

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[239] *Id.* at 143 n.19.

MILITARY APPEARANCE REQUIREMENTS AND FREE EXERCISE OF RELIGION

By Captain Thomas R. Folk*

I. INTRODUCTION

The tension between military requirements and religious conscience has been longstanding in America. A recent aspect of this tension that is of significant concern involves claims by servicemembers to exemptions from military appearance requirements based on the free exercise clause of the first amendment, United States Constitution.[1] Courts have just begun to struggle with the question of whether the military services must grant such exemptions to accommodate the religious practices of their uniformed members.

There have been five cases on the question to date. Two cases involve wear of beards by Orthodox Jewish Chaplains in the Air Force;[2] one case involves wear of a turban by a former Navy member of the Sikh religion;[3] and two cases involve wear of the yarmulke while in uniform by Air Force members who are Orthodox Jews.[4] These few cases have already raised three significant doctrinal problems.

The first problem involves the test applicable to the free exercise claims presented. The cases have applied three different tests: (1) a strict scrutiny test, (2) a rational basis test, and (3) a balancing test. These different tests may in part be the result of attempts to reconcile the apparent conflict between free exercise doctrine in cases such as

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The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of the Army or any other governmental agency.

[1] The first amendment, United States Constitution, provides in part "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[2] Kalinsky v. Secretary of Defense, Civ. No. 78-17 (D.D.C. June 25, 1979) (Flannery, J.); Geller v. Secretary of Defense, 423 F. Supp. 16 (D.D.C. 1976) (A. Robinson, J.).

[3] Sherwood v. Brown, 619 F.2d 47 (9th Cir.), cert. denied, 449 U.S. 919 (1980).

[4] Bitterman v. Secretary of Defense, 553 F. Supp. 719 (D.D.C. 1982), appeal docketed, No. 83-1177 (D.C. Cir. Feb. 15, 1983); Goldman v. Secretary of Defense, 29 Empl. Prac. Guide (CCH) 132,753 (D.D.C. April 26, 1982), appeal docketed, No. 82-1723 (D.C. Cir. June 29, 1982). An additional case is currently pending involving wear of a turban, beard, and unshorn hair by a member of the Sikh religion who wants to enlist in the Army. See Guru Sant Singh Khalsa v. Weinberger, Civ. No, 83-2309 (C.D. Cal. filed Apr. 13, 1983).

Sherbert v. Verner[5] and *Wisconsin v. Yoder*[6] and the doctrine of limited reviewability of military decisions.

Yet, this doctrinal confusion is somewhat surprising, given the close analogy provided by the history of the first amendment claims to conscientious objection. In particular, the Supreme Court, in two fairly recent cases, *Gillette v. United States*,[7] and *Johnson v. Robison*[8], applied an analysis to conscientious objection claims that reconciles this apparent conflict. Given the very similar context and similar competing interests involved, this analysis would appear equally applicable to first amendment claims to other exceptions from military requirements. Why the courts have ignored this analogy is a mystery.

A second doctrinal problem involves consideration of the potential impact that future claims to religious exceptions would have in determining the military interest in requiring adherence to uniform and appearance standards. Cases such as *Sherbert v. Verner* suggest that consideration by courts of the potential impact of future claims is not appropriate absent a strong showing by the government. Yet the Supreme Court's recent decision in *United States v. Lee*,[9] a case not considered in any of the five military appearance cases decided to date, seems to indicate otherwise. In *Lee* the Court denied a religion-based claim to exemption from taxes because of the adverse impact on the tax system that would result from the inability to make principled denials of similar, future claims. A similar rationale appears applicable to most military requirements, including uniform and appearance standards.

A third problem involves the weight to be given asserted military interests in uniformity and the role courts are to play in reviewing justifications for these interests. This problem is best illustrated by comparing *Goldman v. Secretary of Defense*,[10] in which the court held that an Air Force servicemember had a free exercise right to wear a yarmulke while in uniform, with *Bitterman v. Secretary of Defense,"* in which the court, based on the same evidence, held there was no such right. *Goldman* and *Bitterman* reached opposite results because the two courts differed on

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[5] 374 U.S. 398 (1963).
[6] 406 U.S. 205 (1972).
[7] 410 US. 437 (1971). The Court's decision in *Gillette* also included the companion case of Negre v. Larsen. The petitioner in *Gillette* was a conscientious objector who refused induction; the petitioner in *Negre* was a servicemember who sought discharge as a conscientious objector. This article refers to both cases collectively as Gillette v. United States.
[8] 415 U.S. 361 (1974).
[9] 455 US. 252 (1982).
[10] 29 Empl. Prac. Guide (CCH) ¶32,753 (D.D.C. April 26, 1982), *appeal docketed,* No. 82-1723 (D.C. Cir. June 29, 1982).
[11] 553 F. Supp. 719 (D.D.C. 1982), *appeal docketed,* No. 83-1177 (D.C. Cir. Feb. 15, 1983).

the questions of what weight should be given to the military interest in uniform standards for intangible or symbolic reasons (*e.g.*, for purposes of discipline, morale, esprit de corps and image) and what the proper judicial role was in reviewing military justifications for uniform standards.[12] The *Goldman* court's approach is particularly interesting because the court found that only on an "empirical study . . . or the like" could justify denial of a religious exception.[13]

This article considers the doctrinal problems raised by these recent cases involving claims to exemptions from military appearance standards based on the free exercise clause of the first amendment and how such claims should be evaluated under current first amendment doctrine. To accomplish this, the article first discusses historical background relevant to treatment of religion-based claims to exemptions from military requirements. Next, the article traces the Supreme Court's development of current free exercise doctrine, including recent conscientious objection cases and the Supreme Court's most recent significant free exercise case, ***United States v. Lee.*** Then the article considers practical problems that weigh against application of a "strict scrutiny" test to free exercise claims in the military. Next, the article examines the potential impact that the traditional judicial deference to internal military decisions should have on courts' evaluations of free exercise claims in the military context. Finally, the article evaluates recent cases considering claims to religion-based exemptions from military appearance standards.

II. HISTORICAL BACKGROUND

Throughout American history religious conscience has conflicted with military requirements in several areas. The foremost area, conscientious objection to military service, has a long history. Other areas of conflict involving religion-based objections to various military requirements, such as appearance standards, are more recent.[14]

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[12] *Compare id. with* Goldman v. Secretary of Defense, 29 Empl. Prac. Guide (CCH) ¶32,753 (D.D.C. April 26, 1982), *appeal docketed*, No. 82-1723 (D.C. Cir. June 29, 1982).

[13] 29 Empl. Prac. Guide (CCH) ¶32,753 (D.D.C. April 26, 1982), *appeal docketed*, No. 82-1723 (D.C. Cir. June 29, 1983).

[14] The first reported decision in which a military member sought an exemption in court from a military requirement based on first amendment, free exercise grounds is McCord v. Page, 124 F.2d 68 (5th Cir. 1941). In *McCord*, a military enlistee sought a writ of habeas corpus because he had developed religious scruples against saluting his superior officers and the U.S. flag. The first reported decision in which a military member sought an exemption in court from military uniform and appearance standards based on free exercise grounds is Geller v. Secretary of Defense, 423 F. Supp. 16 (D.D.C. 1976).

A. CONSCIENTIOUS OBJECTION

Examination of the historical treatment of conscientious objector claims provides a good starting point for considering the question of religion-based exemptions from other military requirements. This is so for two reasons. First, the basic constitutional analysis, the context, and the competing interests involved in the question of religious exemptions to appearance requirements, although not identical, are quite similar to those involved in the question of conscientious objection. Second, the conscientious objection question provides a rich history from which to derive an historical perspective.

In America, exemptions from combat service based on conscientious objection to participation in war are as old as compulsory military service itself.[15] Colonial law generally exempted from compulsory military service anyone who objected to participation as a matter of conscience.[16] Payment of a commutation fee or hiring of a substitute was generally required in lieu of such service.[17] This tradition continued during the American Revolution and thereafter.[18]

In 1789 James Madison offered as part of a series of proposed amendments to the United States Constitution provisions that guaranteed "freedom of conscience" and stated that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[19] Although the House of Representatives of the First Congress adopted these two provisions, the Senate deleted them without explanation.[20] Most authorities interpret the failure to include Madison's proposals in what was to become the Bill of Rights as indicating that the Constitution was not intended to afford a right to conscientious objection.[21]

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[15] *See* U.S. Selective Service System, Conscientious Objection, Special Monograph No. 11, ch. 3 (1950).

[16] *Id.* at 29. In early American history conscientious objectors were often imprisoned and subjected to heavy taxes or fines for support of military campaigns. *Id. See also* U.S. Selective Service System, A Background of Selective Service System, Special Monograph No. 1, at 34-67 (1947) (digesting colonial laws); L Schlissel, Conscience in America, 29-30 (1968).

[17] U.S. Selective Service System, *supm* note 15, at 29.

[18] *Id.* at 33-40.

[19] 1 Annals of Cong. 434 (McGales and Seaton, eds. 1834). *See also* Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 414-17 (1952).

[20] *See* Russell, *supm* note 19, at 416-17.

[21] *See, e.g.*, Conklin, *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo. L. J. 252, 270 (1963); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Gwmntee*, 80 Harv. L. Rev. 1381, 1412 (1967); Russell, *supm* note 19, at 436-38; U.S. Selective Service System, *supm* note 15, at 38. *But see* Freeman, *A Remonstrance for Conscience*, 106 U. Pa. L. Rev. 803, 806-13 (1958).

Conscientious objection next became a nationally prominent issue during the Civil War. When Congress enacted the first draft law in 1863,[22] it did not specifically provide exemptions for conscientious objectors despite several proposals to do so. This failure to exempt conscientious objectors was upsetting to religious groups with pacifist traditions, such as the Quakers. They lobbied extensively for an exception,[24] and in 1864 Congress explicitly excused from combatant duty persons "conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith [of their] religious denominations."[25] Persons so exempted could, while in military service, either perform hospital duty or care for freed slaves. In the alternative, they could avoid military service by paying $300 to the Secretary of War for the benefit of sick and wounded soldiers.[26]

The United States next resorted to compulsory military service in World War I. Once again various religious groups lobbied Congress to excuse conscientious objectors from military service.[27] Congress responded in the Selective Draft Act of 1917[28] by exempting persons from combatant service who belonged to "any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein."[29] As in the Civil War, this exemption applied only to combatant service, not military service.[30] Consequently, military authorities required individuals claiming conscientious objector status to report for duty at military camps, to wear the military uniform, and to be subject to military discipline.[31]

The Army experienced difficulty in getting conscientious objectors to cooperate in this program of noncombatant duty once they were induct-

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[22] Act of March 3, 1863, Ch. 75, 12 Stat. 731 (1863).

[23] *See* Cong. Globe, 37th Cong., 3d Sess. 994-95, 1261, 1291-92 (1863). *See also* E. Wright, Conscientious Objectors in the Civil War 61-71 (1931).

Section 13 of the Act did, however, allow drafted persons to avoid military service by furnishing an acceptable substitute or by paying the Secretary of War a commutation fee not exceeding $300. *See* Act of March 3, 1863, Ch. 75, § 13, 12 Stat. 731, 733 (1863).

[24] *See* E. Wright, supm note 23, at 65-83.

[25] Act of February 24, 1864, Ch. 13, § 17, 13 Stat. 6, 9 (1864).

[26] *Id.* Those refusing to perform noncombatant service or to pay the fee were disciplined. *See, e.g.*, Pringle, *The United States v. Pringle*, 3 Atl. Monthly 145-62 (February 1913), *reprinted in* L. Schlissel, *supra* note 16, at 102-12.

[27] *See, e.g.*, *Hearings on the Selective Service Act Before House Committee on Military Affairs*, 65th Cong., 1st Sess. (1917).

[28] Act of May 18, 1917, Ch. 15, 40 Stat. 76 (1917).

[29] *Id.* at § 4, 40 Stat. 78.

[30] Unlike the Civil War, however, draftees were prohibited from using substitutes or paying a commutation fee to avoid military service. *See* Act of May 18, 1917, Ch. 15, § 3, 40 Stat. 76, 78 (1917).

[31] *See* U.S. Selective Service System, *supra* note 15, at 49, 53-54.

ed. For example, some World War I conscientious objectors, notably Mennonites, refused to wear the military uniform, while other objectors refused to perform any military duties at all.[32] At first, camp commanders dealt with these refusals through courts-martial.[33] Eventually the War Department adopted a policy of making some accommodation for inducted conscientious objectors who did not wish to perform active military duties. On September 25, 1917, the War Department issued an order directing that Mennonites "be not forced to wear a uniform, as question of raiment is one of the tenets of their faith."[34] This was followed by another order on October 10, 1917, directing that conscientious objectors be segregated and handled with "tact and consideration."[35] Later, President Wilson issued an Executive Order[36] that expressed his policy on accommodating conscientious objectors inducted into military service. Finally in March 1918 the War Department began using recently enacted authority to furlough conscientious objectors from the Army into jobs in industry and agriculture.[37]

World War I marked the first time the Supreme Court considered whether there is a first amendment requirement to exempt conscientious objectors from military service. Previously, the Court had indicated in dicta that no such constitutional right existed.[38] Thus it was no surprise when in the *Selective Draft Law Cases*[39] the Court summarily rejected first amendment free exercise and establishment clause challenges to the limited conscientious objector exemptions in the Draft Act of 1917.

Conscientious objector claims fared no better between World War I and World War II. In *United States v. Schwimmer*[40] and *United States v. MacIntosh*,[41] the Supreme Court upheld denial of naturalized citizen-

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[32] *Id*. *See also* National Civil Liberties Bureau, Political Prisoners in Federal Military Prisons (1918), *reprinted in* L. Schlissel, *supm* note 16, at 150.

[33] U.S. War Department, Statement Concerning the Treatment of Conscientious Objectors in the Army, 8-9, 11, 25, 51-52 (June 18, 1919). *See* also L. Schlissel, supm note 16, at 131.

[34] U.S. War Department, *supm* note 33, at 17, 36.

[35] *Id*. at 17, 37.

[36] Executive Order 2823 (March 1917), subsequently published by the War Department as General Order Number 28. *See* U.S. War Department, supm note 33, at 18, 38-39.

[37] *Id*. at 19-23.

[38] *See* Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (Harlan, J.) (indicating that a person may be forced "without regard to . . . his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in ita defense.")

[39] 245 U.S. 366, 389-90 (1918).

[40] 279 U.S. 644 (1929), *rev'd on other grounds sub. nom.*, Girouard v. United States, 328 U.S. 61 (1946).

[41] 283 U.S. 605 (1931), *rev'd on other grounds sub. nom.*, Girouard v. United States, 328 U.S. 61 (1946).

ship to persons expressing reservations on conscientious grounds to bearing arms in defense of the United States. In *Madntosh* the Court observed

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . , The privilege of the . . . conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. That body may grant or withhold the exemption as it sees fit; and if it be withheld, the . . . conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect to the justice or morality of the particular war or war in general.[42]

Similarly, in *Hamilton v. Regents*,[43] the Supreme Court upheld a requirement that all male students at the University of California, Berkley, take a military science course against a claim that the requirement violated the religious beliefs of students conscientiously opposed to the study of war. The *Hamilton* decision is particularly interesting in that the program at issue operated in peacetime when there was no draft, and the Court placed heavy reliance on the voluntary nature of enrollment at the University.

The Supreme Court decision in the *Selective Draft Law Cases* and later opinions in *Schwimmer, MacIntosh*, and *Hamilton* made clear that there was no constitutional right to conscientious objection. Nonetheless, due to Congress's consideration of the views of various religious groups concerning conscientious objection," the Selective Training and Service Act of 1940,[45] exempted conscientious objectors from induction into combatant service if they had scruples against participation in war in any form grounded in "religious training and belief."[46] Also, because of problems experienced during World War I, Congress for the first time allowed those conscientious objectors with religious scruples against perfor-

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[42] 283 U.S. at 623.

[43] 293 U.S. 245 (1939). *See also* Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975); Spencer v. Bailey, 465 F.2d 797 (6th Cir. 1972) (discussing conscientious objection claims to mandatory ROTC in high schools).

[44] See U.S. Selective Service System, *supra* note 15, at 67-86.

[45] Act of September 16, 1940, Ch. 720, 54 Stat. 885 (1940).

[46] *Id.* at § 5(g), 54 Stat. at 889 (1940).

mance of military duties to perform work of national importance under civilian control as an alternative."[47] Conscientious objectors who declined induction or alternative service were subject to prosecution.[48] Courts uniformly rejected challenges to the alternative service requirement based on first amendment free exercise grounds.[49]

In 1945, the Supreme Court again indicated there was no first amendment right to conscientious objection. *In Re Summers*[50] upheld Illinois's refusal to admit an applicant to ita state bar who would not take an oath to support ita constitution. The applicant had religious objections to an Illinois constitutional provision that required bearing arms. In responding to the argument that federal law allowed exemption from military service for religious reasons, the Court noted that the exemption was "by grace" and could be repealed.[51]

Following World War 11, when Congress has resorted to the draft it basically has carried forward the scheme used for conscientious objection in the Selective Training and Service Act of 1940, although allowing deferments or greater flexibility for performance of alternate service.[52] Also, beginning in 1962, the Department of Defense adopted procedures for considering applications of servicemembers to transfer to noncombatant duty or for discharge based on conscientious objection. The Department of Defense procedures[53] incorporate the same standards used to consider preinduction claims under the selective service laws.

As was the case with the 1917 Draft Law and the Selective Training and Service Act of 1940, there have been first amendment challenges to the limitations on conscientious objection in the more recent selective service laws. Although the Supreme Court has broadly interpreted the statutory conscientious objector exemptions due to establishment clause

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[47] *Id. See* also U.S. Selective Service System, supra note 15, at 69. This service was required to be performed in Civilian Public Service Camps. *See* U.S. Selective Service System, *supra*, at 117, 181. *See also* L. Schlissel, *supra* note 16, at 215-16.

[48] U S. Selective Service System, supm note 15, at 253-70.

[49] *See, e.g.*, Roodenko v. United States, 147 F.2d 752 (10th Cir. 1944), *cert. denied*, 324 U.S. *860* (1945); Hopper v. United States, 142 F.2d 181, 186 (9th Cir. 1944); Rase v. United States, 129 F.2d 204, 210 (6th Cir. 1942).

[50] 325 U.S. 560 (1945).

[51] *Id.* at 572.

[52] Congress resorted to conscription from its enactment of the Selective Service Act of 1948, Act of June 24, 1948, Ch. 622, Pub. L. No. 756, 62 Stat. 604, until July 1, 1973. Current provisions regarding conscientious objection, which would be in effect were Congress to authorize the President to resume conscription, are at 50 U.S.C. app. § 456(j)(1976). The 1948 Act allowed deferment of conscientious objectors. The Universal Military Training and Service Act of 1951, 65 Stat. 75, 86 (1951), amended the 1948 Act to require performance of alternate civilian work.

[53] 32 C.F.R. Pt. 75 (1981).

concerns,[54] the courts have uniformly continued to reject challenges to compulsory military service based on a theory that there is a free exercise right to conscientious objector status.[55] In particular, the most recent Supreme Court case involving a first amendment claim to conscientious objection, *Gillette v. United States*,[56] held that the free exercise clause of the first amendment does not require exemption from military service of those conscientiously opposed to participation in particular wars. The *Gillette* opinion specifically noted previous cases such as *In Re Summers, MacIntosh*, and *Hamilton,* where the Court stated that the Constitution did not mandate any exemption from military service for conscientious objectors.[57]

B. EXEMPTIONS FROM OTHER MILITARY REQUIREMENTS

As far as other military requirements are concerned, American military practice generally has been not to make exemptions for individual servicemembers based on their religious beliefs. This policy derives from British practice, the basis for which the Duke of Wellington succinctly stated as follows: "If an officer or any other member of the army is to be allowed to get rid of the discharge of a disagreeable duty upon such a plea, there is an end of all discipline in the army."[58] Colonel William Winthrop, the leading commentator on American military law in the 19th Century, noted that a servicemember may not offer as a defense to a charge of disobedience of an order that the order contravened his religious scruples.[59] The various manuals for courts-martial [60] have repeated this provision, and it continues to be the law today for the military criminal justice system.[61] Accordingly, during World War I, military authorities felt no legal compunctions about court-martialing conscientious objectors who refused to perform duties or to wear the uniform;[62] however, for practical, humanitarian, and political reasons, they made

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[54] *See* Welsh v. United States, 398 U.S. 333 (1970); Seeger v. United States, 380 U.S. 163 (1965).

[55] *See, e.g.*, Hopkins v. Schlesinger, 515 F.2d 1224 (5th Cir. 1975); Nurnberg v. Froehlke, 489 F.2d 843 (2d Cir. 1973); DeWalt v. Commanding Officer, 476 F.2d 440 (5th Cir. 1973); Fleming v. United States, 344 F.2d 912 (10th Cir. 1965); Brown v. McNamara, 263 F. Supp. 686 (D.N.J. 1967), *aff'd* 386 F.2d 150 (3rd Cir.), *cert. denied,* 390 U.S. 1005 (1968).

[56] 401 U.S. 437 (1971).

[57] *Id.* at 461 n.23.

[58] W. Winthrop, Winthrop's Military Law and Precedents 576 n.34 (2d ed. 1920 reprint).

[59] *Id.* at 576-77.

[60] *See, e.g.*, U.S. Army, A Manual for Courts-Martial, para. 415 (War Dept. Doc. No. 1053, 1921); U.S. Army, A Manual for Courts-Martial, para. 1346 (War Dept. Doc. No. 194, 1928).

[61] *See* Manual for Courts-Martial, United States 1969 (Rev. ed), para. 169b.

[62] *See* U.S. War Department, *supm* note 33, at 8-9, 25, 51-52.

some accommodations to religious belief, including allowing exceptions to uniform requirements. More recently, military authorities have court-martialed military members who for religious reasons refused to salute the flag or their officers,[63] or to conform to uniform standards.[64]

One notable recent exception to the general military practice of not allowing religion-based exceptions to military requirements was the exception granted by the Army from 1958 until 1981 for members of the Sikh religion in the Army to wear beads, unshorn hair, turbans, and religious bracelets.[65] The Army granted this exception because at the time the Sikhs, a small minority in the United States, were the only religious group known to have absolute appearance requirements for their members. The Army ended the exception when it became evident that it might have to grant significant numbers of additional exceptions that would cause a detrimental impact on the Army's ability to perform its mission.[66]

III. DEVELOPMENT OF FREE EXERCISE DOCTRINE

Given the long historical reluctance of the government and the courts to recognize a right to conscientious objection, why is there now any question about a free exercise right to exemptions from military requirements? The answer lies in the Supreme Court's use in the 1963 landmark case of *Sherbert v. Verner*[67] and in subsequent cases[68] of a "strict scrutiny"[69] test to evaluate free exercise claims. Courts have been confused over whether *Sherbert's* "strict scrutiny" test should also be applied to the military context. To analyze whether the *Sherbert* test should apply in this context, it is necessary to look at how free exercise doctrine has

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[63] *See, e.g.*, United States v. Cupp, 14 C.M.R. 565 (A.F.B.R. 1957) (upholding court-martial conviction of Air Force member who disobeyed an order to salute his superior officer due to religious scruples); United States v. Morgan, 17 C.M.R. 584 (A.F.B.R. 1954) (upholding court-martial conviction of Air Force member who disobeyed an order to salute the flag due to religious scruples).

[64] *See, e.g.*, Sherwood v. Brown, 619 F.2d 47 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980) (denying collateral challenge to a court-martial conviction of a former Navy member who, for religious reasons, disobeyed an order to remove his turban).

[65] *See Army Times*, Sept. 7, 1981, at 27, col. 1. The policy was contained in Chapter 5, Army Regulation 600-20, from 1972 until rescinded on August 20, 1981.

Another exception is the limited one given servicemembers with religious scruples against immunizations. *See id.*

[66] *See Army Times*, *supra* note 65.

[67] 374 U.S. 398 (1963).

[68] Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[69] As used in this article "strict scrutiny" test means a test requiring the government to justify any significant burden on the free exercise of religion as the least restrictive means to achieve a compelling government interest. *See* L. Tribe, American Constitutional Law § 14-10 (1978).

evolved, giving particular emphasis to *Sherbert* and Supreme Court cases following it.

A. DEVELOPMENT PRIOR TO SHERBERT v. VERNER

Early Supreme Court opinions limited the protection of the free exercise clause of the first amendment to religious belief and did not extend it to conduct. The Supreme Court first made this distinction in *Reynolds v. United States* [70] in which it held that a statute making polygamy a crime did not violate the free exercise clause when applied to a Mormon. The Court observed:

> Laws are made for government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.
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> . . . .
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> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances.[71]

Reynolds remained the law for over sixty years until the Supreme Court's decision in *Cantwell v. Connecticut.*[72]

In *Cantwell* the Court reversed the convictions of Jehovah's Witnesses for soliciting religious contributions without a permit and for disturbing the peace. The Court's opinion noted that the free exercise clause of the first amendment:

> embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . . The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.[73]

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[70] 98 U.S. 145 (1878).
[71] 98 U.S. at 166-67.
[72] 310 U.S. 296 (1940). Several cases involving religious solicitation that predate *Cantwell* and that were decided on free speech grounds arguably foreshadowed the Court's approach in *Cantwell*. *See* L. Tribe, *supra* note 69.
[73] 310 U.S. at 303-04.

Although ***Cantwell*** eliminated the complete dichotomy between belief and conduct established by ***Reynolds,*** it offered little guidance regarding the appropriate judicial standards for determining under what circumstances the state may regulate religiously motivated conduct. During the next twenty years after ***Cantwell,*** the Court failed to articulate any single clear test for this.?'

B. SHERBERT v. VERNER AND ITS PROGENY

In 1963, the Supreme Court for the first time explicitly applied a "strict scrutiny" test to a free exercise claim to religious accommodation. ***Sherbert v. Verner*** involved a Seventh-Day Adventist who refused to work on Saturday and was fired. The State of South Carolina denied her subsequent application for unemployment benefits because of a statutory provision disqualifying workers who failed to accept suitable work when offered. The Supreme Court held that application of the statutory provision to the Seventh-Day Adventist's refusal to work on Saturdays violated her first amendment right to free exercise of religion.[75]

Justice Brennan, writing for the majority, considered whether some compelling state interest justified "the substantial infringement of appellant's First Amendment right." [76] The State of South Carolina asserted an interest in avoiding fraudulent claims by persons feigning religious objections to Saturday work. The State asserted that such fraudulent claims would dilute the State's unemployment compensation fund and hinder the ability of employers to schedule necessary Saturday work.[77] Justice Brennan noted that, even if these interests were valid, the state would have to show "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." [78]

The Court has applied the ***Sherbert*** rationale in two other major cases to find a free exercise right to exemption from a general regulatory program. In ***Wisconsin v. Yoder*** [79] the Court held that a state's compulsory public education law violated the free exercise clause of the first amendment when applied to children beyond the eighth grade in Old Order

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[74] ***See, e.g.***, Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws using a direct or indirect effects test); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding restrictions on religious solicitation by minors); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (no free exercise right for school children to refrain from saluting the flag).

[75] 374 U.S. at 403.

[76] *Id.* at 406.

[77] *Id.* at 407-08.

[78] *Id.* at 407.

[79] 406 U.S. 205 (1972).

Amish families for whom education within their community was central to their religion. Even though the Court acknowledged that compulsory public education furthered a compelling state interest, it applied a balancing test and found the free exercise rights of the Amish to outweigh this state interest.[80] The Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[81] More recently, in ***Thomas v. Review Board***[82] the Court, using the ***Sherbert*** test, found that denial of unemployment benefits violated the free exercise rights of a worker who quit his job because his religious beliefs forbade participation in armaments production. In ***Thomas,*** as in ***Sherbert,*** the Court found the state interests opposing religious exemptions not to be compelling when the state failed to show that a large enough number of people would claim exemptions to affect the state's interests seriously.[83]

If ***Sherbert, Yoder,*** and ***Thomas*** were strictly applied across the board to free exercise claims in the military, courts would necessarily focus on whether the government had a compelling interest in denying a particular claimant a religious exemption from a particular military requirement and whether denying the exemption was the least restrictive alternative to further this interest. Courts could not consider future ***hypo***thetical claims; instead, the government would have to prove that sufficient numbers of claims would be made to affect ita compelling interest seriously. Under this standard, it is unlikely that a court would uphold denial of an exemption to uniform or appearance requirements unless they furthered a health or safety interest directly applicable to the claimant.

C. SUPREME COURT DEPARTURE FROM SHERBERT ANALYSIS

The Supreme Court's most recent significant free exercise case, ***United States v. Lee***,[84] casts considerable doubt on how generally and how strictly the Supreme Court will continue to apply ***Sherbert.*** In ***Lee,*** the Court held that imposition of social security taxes on a member of the Old Order Amish religion who had religious scruples against acceptance of social security benefits and payment of social security taxes did not violate his first amendment right to free exercise of religion. The Court's opinion, citing ***Sherbert v. Verner*** and ***Wisconsin v. Yoder,*** noted that "the

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[80] *Id.* at 213-15, 221.
[81] *Id.* at 215.
[82] 450 U.S. 707 (1981).
[83] *Id.* at 730.
[84] 455 U.S. 252 (1982).

state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[85] Yet, the Court applied ***Sherbert's*** "strict scrutiny" test in name only. The Court did not require a showing by the government, as it did in ***Sherbert*** and ***Thomas v. Review Board,*** that a sufficiently large enough number of people would claim religion-based exemptions to seriously affect the government program at stake. Instead, it expressed concern that "[t]here is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act."[86] Accordingly, it found no first amendment, free exercise exemption from social security taxes because of "the broad public interest in maintaining a sound tax system . . . ."[87] In effect, the Court accepted the same rationale, protection of the public fisc from future hypothetical claims, as it rejected in ***Sherbert*** and *Thomas.*

Justice Stevens noted in his concurring opinion, "[I]f we confine the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case, the constitutional standard as formulated by the Court has not been met."[88] He expressed serious reservations about a constitutional standard for free exercise claims under which "the Government always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors."[89] Instead, Justice Stevens opined that "it is the objector who must shoulder the burden of demonstrating that there is an unique reason for allowing him a special exemption from a valid law of general applicability."[90] He believed that this was far more consistent with the results in Supreme Court opinions during the last hundred years than the "strict scrutiny" test.[91] Justice Stevens's reservations about a strict scrutiny test for free exercise claims were grounded not only on its inconsistency with earlier free exercise cases but also on concern that involvement by the government and courts in evaluating claims to religion-based exemptions conflicts with the values of the establishment clause.[92]

Apart from its most recent decision in ***United States v. Lee,*** the Supreme Court has also deviated significantly from its ***Sherbert*** "strict scrutiny" analysis in its two most recent cases dealing with conscientious objection, ***Gillette v. United States***[93] and ***Johnson v. Robison.***[94]

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[85] *Id.* at 257-58.
[86] *Id.* at 260.
[87] *Id.*
[88] *Id.* at 262.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 263 n.3.
[92] *Id.* at 263 n.2.
[93] 401 U.S. 437 (1971).
[94] 415 U.S. 361 (1974).

In *Gillette,* a case decided eight years after *Sherbert,* the Court considered, among other issues, whether "Congress interferes with free exercise of religion by conscripting persons who oppose a particular war on grounds of conscience and religion."[95] In considering this question, the Court cited *Sherbert v. Verner* and noted that some neutral regulatory laws with secular aims may be invalid under the free exercise clause "when the burden on First Amendment values is not justifiable in terms of the Government's valid aims;"[96] yet the Court did not cite *Sherbert* for the proposition that a strict scrutiny test should be applied. Rather the Court radically departed from its earlier analysis in *Sherbert.* The Court noted

> [T]he impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by. . .[selective conscientious objectors] are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.[97]

Hence the Court in *Gillette* did not require a showing of a "compelling government interest." To the *Gillette* Court, what it termed "substantial governmental interests" or "valid concerns"[98] of Congress were sufficient to justify any burden that military service placed on selective conscientious objectors' free exercise rights. The Government's interests that the *Gillette* Court viewed as substantial involved the difficulty in making fair determinations as to who would be entitled to selective conscientious objector status.[99] Also, unlike *Sherbert, Gillette* did not demand a showing by the government that its action was the "least restrictive alternative" to further the government's interests. To the *Gillette* Court, it was sufficient that the government's interests related directly to the burdens its regulatory scheme imposed on free exercise rights.[100]

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[95] 401 U.S. at 439.
[96] *Id.* at 462.
[97] *Id.*
[98] *Id.* at 460. *See also* Sheffer, *The Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem,* 9 Cap. U.L. Rev. 7, 24 (1979) (indicating *Gillette* did not follow *Sherbert's* test).
[99] *Id.* at 455-60.
[100] Indeed, the Court recognized that Congress rationally could have chosen to exempt those who object to particular wars had it wished to do so. *See id.* at 460.

Three years later in *Johnson v. Robison* [101] the Court held, *inter alia*, that a statute that denied veterans' education benefits to conscientious objectors who performed alternate service did not violate the conscientious objectors' rights to free exercise of religion. While citing *Sherbert* and *Wisconsin v. Yoder*, the Court followed *Gillette's* analysis.[102] The Court noted:

> the Act [conferring veterans' educational benefits] was enacted pursuant to Congress' Art. I, § 8, powers to advance the neutral secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life. [Conscientious objectors performing alternative service] . . . were not included in the class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes. Thus, in light of *Gillette*, the Government's substantial interest in raising and supporting armies, Art. I, § 8, is of a "kind and weight" clearly sufficient to sustain the challenged legislation, for the burden upon appellee's free exercise of religion—the denial of the economic value of veteran's benefits under the Act—is not nearly of the same order or magnitude as the infringement upon free exercise of religion suffered by petitioners in *Gillette*.[103]

As did *Gillette*, *Robison* departed from *Sherbert's* strict scrutiny test and required only what it termed a "substantial interest." Further the Court found the interest in raising and supporting armies sufficient to satisfy this requirement. Also, unlike *Sherbert*, *Robison* did not use a "least restrictive alternative" analysis. Instead, it held as sufficient that inclusion of conscientious objectors as beneficiaries of veterans' education benefits "would not rationally promote the Act's purposes." [104] Interestingly enough, the author of the majority opinion in *Robison* was Justice Brennan, who also wrote for the majority in *Sherbert*.

The Supreme Court's approach in *Gillette* and *Robison* clearly indicates that *Sherbert's* strict scrutiny analysis for free exercise claims does not apply to activities arising from Congress's power to raise and support armies. Instead of focusing on whether there is a compelling state interest in applying a general regulatory scheme and whether the government has employed the least restrictive alternative to further that interest, *Gillette* and *Robison* examine whether there is a "substantial gov-

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[101] 415 U.S. 361 (1974).
[102] *See id.* at 383-84.
[103] *Id.* at 384-85.
[104] *Id.* at 385.

ernment interest" that relates directly to the burden on free exercise rights being imposed. This is the test that logically and reasonably ought to apply to military appearance cases. As will be discussed in Part V of this article, adoption of this more deferential test in the military context also has strong support in case law dealing with the limited scope of judicial review appropriate for military activities.

IV. PRACTICAL PROBLEMS WITH APPLYING A STRICT SCRUTINY TEST IN THE MILITARY CONTEXT

Some serious practical considerations, as well as first amendment doctrinal considerations, support the appropriateness of a more deferential test than *Sherbert's* for evaluating free exercise claims in the military. These practical considerations involve how determinations are to be made regarding what specific accommodations are required in the military context and which individuals must be accommodated. In many ways, these considerations are similar to those examined by the Supreme Court in *Gillette v. United States* [105] and *United States v. Lee*.[106] This part of the article will focus in detail on these problems.

A. *DETERMINATION OF MILITARY REQUIREMENTS FOR WICH ACCOMMODATION IS REQUIRED*

Use by courts of a strict scrutiny test in the military context would result in both large scale judicial intrusion into military affairs and a great deal of uncertainty. This is so for three reasons. First, there are a large number of military requirements potentially subject to challenge under a strict scrutiny test. Second, *Sherbert's* analysis requires determination in each of these contexts where the military interests in particular requirements are sufficient to outweigh interests of individual servicemembers in obtaining religious exemptions from them. Third, a strict scrutiny test that, as in *Wisconsin v. Yoder*,[107] involves a balancing approach even against compelling government interests is inherently unpredictable in the military context.

It is not difficult to identify particular areas for which courts would soon have to make specific determinations. The recent appearance cases illustrate one area. Within this area claims might involve not only reli-

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[105] 401 U.S. 437 (1971).
[106] 455 U.S. 252.
[107] 406 U.S. 205 (1972).

gious headwear and beards but also wear of jewelry, unshorn hair, and religious robes.[108] Each of these would require a separate analysis.

Further, dress and appearance are just one kind of religious practice for which individuals might claim religious exemptions. An examination of some past claims in the military and in analagous contexts suggests that courts would have to make determinations regarding saluting of the flag or of officers,[109] time off to observe religious holidays or to attend religious services,[110] immunizations,[111] and provision of food to meet special dietary requirements.[112] It does not take a particularly fertile imagination to see other areas that individuals might see as conflicting with their religious beliefs, including military ceremonies, use of military titles and courtesies, marching, and use of weapons. Indeed, given the discipline and control to which persons in the military are subject and the heterogenous nature of American society, it is difficult to imagine any military practice that would not potentially be subject to challenge.[113]

Besides the problem under *Sherbert* of weighing the interests involved in individual cases, there is the enormously difficult task of evaluating the collective impact of granting exceptions, This problem is akin to the concern of the Supreme Court ,in *United States v. Lee* [114] that, once it recognized a free exercise right to exemption from social security taxes, no principled way existed to deny claims to religion-based exemptions from paying taxes in general.

The area of uniform standards gives a particularly interesting example of this problem. The military has an interest in using these standards as a symbolic means of instilling in soldiers discipline, pride, morale and esprit de corps. The question then becomes the following: If the govern-

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[108] *See, e.g.*, U.S. Dep't of Army, Pamphlet No. 165-13-1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains, 11-15, III-10, VII-3 (1980)(saffron robes, body covered from head to toe, wear of braided hair, impermissible for women to wear pants); U.S. Dep't of Army, Pamphlet No. 165-13, Religious Requirements and Practices of Certain Selected Groups: A Handbook for Chaplains, III-7, III-18, IV-14, VI-10 (1978)(turbans, beards, unshorn hair, jewelry, and ankle length clothing).

[109] *See, e.g.*, United States v. Cupp, 24 C.M.R. 565 (A.F.B.R. 1957); United States v. Morgan, 17 C.M.R. 584 (A.F.B.R. 1954).

[110] *Cf.* United States v. Burry, 36 C.M.R. 829 (C.G.B.M.R. 1966) (upholding court-martial of sabbatarian who refused to perform duties on Saturdays).

[111] *See, e.g.*, United States v. Chadwell, 36 C.M.R. 741 (N.B.M.R. 1965).

[112] *See* Comment, *Free Exercise* of *Religion in Prisons—The Right to Observe Dietary Laws*, 45 Fordham L. Rev. 92 (1976).

[113] *See* Foreman, *Religion, Conscience, and Military Discipline,* 52 Mil. L. Rev. 77 (1971). *See also* U.S. Dep't of Army, Pamphlet No. 165-13-1, *supra* note 108; U.S. Dep't of Army, Pamphlet No. 165-13, *supra* note 108 (detailing tenets of numerous religions that potentially conflict with military requirements).

[114] 455 U.S. 252 (1982).

ment interest is insufficient under *Sherbert's* strict scrutiny analysis to justify denial of a minor exemption to one individual, when, as more exemptions are granted, would it become sufficient to outweigh the interest of the next individual in receiving an exception? Once exemptions are required, it becomes extremely difficult to establish at what point further exceptions should not be granted because of the need to remain a uniformed force.

This practical problem also extends to other areas. Granting small numbers of individual exceptions to requirements may appear theoretically practical in organizations as large and diverse as the military departments. Yet, as the number of exceptions increases, it becomes more and more administratively burdensome for the military services to manage these exceptions. At some point, considerations of administrative need must predominate. The Supreme Court's decision in *Rostker v. Goldberg* [115] gives explicit recognition to this principle. *Rostker* essentially recognized that the administrative need for a potential pool of manpower available for combat service was sufficient to justify gender-based discrimination in registration for the selective service system. It would seem to follow that administrative necessity is a much weightier concern when it involves the potential availability of soldiers who have already been trained.

The practical problems in granting religion-based exceptions to military requirements reflect a doctrinal problem with *Sherbert's* strict scrutiny analysis. This problem bothered the dissent in *Sherbert*,[116] has bothered various commentators,[117] and bothered the Court in *United States v. Lee*.[118] The problem is that if courts insist that the government must grant some religion-based exceptions while simultaneously recognizing that at some point their collective impact is sufficient to justify denial of future exceptions, how is the granting of exceptions to be managed? It is difficult to articulate as a principled first amendment theory that religious belief is to be accommodated on a limited availability, first-come, first-served basis.[119] Also, who would determine when the collective impact of exceptions is sufficient to outweigh an individual's interests in obtaining a further exception? Would this be a role suitable for the judiciary?

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[115] 453 U.S. 57 (1981).
[116] *See* 374 U.S. at 420-21 n.2 (Harlan, J., dissenting).
[117] *See, e.g.*, Clark, Guidelines for the *Free Exercise Clause*, 83 Harv. L. Rev. 327, 332-34 (1969).
[118] *See* 455 U.S. at 260.
[119] See Clark, *supra* note 117.

These problems, implicitly recognized by the Court in *United States v. Lee* in the context of taxes, are every bit as real in the context of military requirements. They require a special analysis for free exercise claims in the military just as they did for taxes in *Lee*.

B. NUMBER OF POTENTIAL CLAIMANTS AND DETERMINATION OF ENTITLEMENT

A related problem involves the large number of servicemembers potentially eligible to claim a religion-based exemption to military requirements and the difficulties of determining which persons should be accommodated. The court's opinion in *Goldman v. Secretary of Defense* [120] gives a small indication of the potential problem regarding the range of individuals entitled to religious accommodation. The court noted:

> Members of the Jewish faith have no special claim to First Amendment protection on account of their religion and its dictates. . . . Once an exception is made for male members of the Jewish faith to wear yarmulkes, members of other faiths who wish to wear skull caps must be permitted to do so.[121]

In fact, the potential number of individuals entitled to exceptions is far greater than suggested by the *Goldman* court. A number of religious groups in America have tenets regarding their members' dress and appearance, and their tenets are not limited to wear of skullcaps. These religious groups include not only Orthodox Jews but also the Sikhs, Muslims, Satchidananda Ashram, the International Society for Krishna Consciousness, Native American Indians, and Rastafarians.[122] Further, under current free exercise jurisprudence, persons who are members of religious groups not having tenets regarding dress or appearance, and even persons with no traditional religious beliefs but with conscientious scruples regarding their dress and appearance, could conceivably claim exemptions.

That such a broad category of persons is potentially entitled to religion-based exemptions under the free exercise clause follows from the Supreme Court's decisions in *United States v. Seeger* [123], *Welsh v. Unit-*

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[120] 29 Empl. Prac. Guide (CCH) 132,753 (D.D.C. April 26, 1982), *appeal docketed*, No. 82-1723 (D.C.Cir. 1982).

[121] *Id.*

[122] *See* Department of the Army Pamphlet *No.* 165-13-1, *supm* note 108 (Satchidananda Ashram, Hanafi Muslim, Rastafarian); Department of the Army Pamphlet No. 165-13, *supm* note 108 (Muslims, Sikhs, Krishna Consciousness). *See also* Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (Sunni Muslim wear of beards and prayer hats); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (wear of long braided hair by native American Indian).

[123] 380 U.S. 163 (1965).

ed States,[124] *Thomas v. Review Board*,[125] and *United States v. Lee*.[126] In *Seeger* the Supreme Court held that the test for "religious training and belief' in section 6(j) of the Universal Military Training and Service Act was "whether a given belief that is sincere or meaninful occupies a place in the life of its possessor parallel to that fulfilled by the orthodox belief in God. . . ."[127] In *Welsh* the Court set forth an even broader interpretation of religion that included all "deeply held moral, ethical, or religious beliefs."[128] Although these cases involved construction of statutory language, the Court quite clearly gave this language a rather tortured construction to avoid violation of the establishment clause of the first amendment.[129] Commentators subsequently have urged that, based on these decisions, any deeply held belief or matter of conscience is now a religious belief entitled to protection under the free exercise clause.[130]

More recent Supreme Court cases dealing with free exercise claims reinforce this view of an extremely broad definition of religion for purposes of free exercise protection. In *Thomas v. Review Board* [131] the Supreme Court held that the refusal by a Jehovah's Witness to work at production of armaments based on his personal religious beliefs was protected by the free exercise clause even though it was not necessarily based on a tenet of his religion. The Court observed that "the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."[132] The Court further noted that "the narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that the petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."[133] Most recently in *United States v. Lee*,[134] the Court reemphasized the very limited role that the government may take in evaluating the importance to a claimant's religious beliefs of a claimed exception. The Court intimated that the only claims that may be rejected by the government

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[124] 398 U.S 333 (1970).
[125] 450 US .707 (1981).
[126] 455 U.S. 252 (1982).
[127] 380 U.S at 165-66.
[128] 398 U.S at 344.
[129] *See* Welsh v. United States, 398 U.S 333, 344-67 (1970) (Harlan, J., concurring). *See also* L. Tribe, *supra* note 69, at 832.
[130] *See, e.g.*, Clark, *supra* note 117, at 340-44; Riga, *Religion, Sincerity, and Free Exercise*, 25 Cath. Law. 246 (1980); Comments, *The History and Utility of the Supreme Court's Present Definition of Religion*, 26 Loy. L. Rev. 87, 94-113 (1980). Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1057, 1063-1083 (1978).
[131] 450 U.S. 707 (1981).
[132] 450 U.S. at 715-76.
[133] *Id.* at 716.
[134] 455 U.S. 252 (1982).

as nonreligious are those that are "bizarre" or "clearly nonreligious in motivation" [135]

With the Supreme Court's broad construction of what are religious beliefs entitled to free exercise protection, the focus of the military in determining to whom religious exemptions to military requirements should be granted would necessarily be the sincerity of the claimant. This is a difficult factual question to determine. As Justice Brennan noted in *Gillette,* "sincerity is a concept that can bear only so much adjudicative weight." [136] Further, probing into the sincerity of claimants would involve the government in the very kind of intrusion into personal belief that the Court in *Gillette u. United States* wished to avoid [137] and that Justice Stevens, in his concurrence in *United States v. Lee,* indicated was contrary to the values of the establishment clause.[138] Also, any administrative determination of insincerity presumably would be subject to judicial review. This would mean frequent involvement by the judiciary in military administrative determinations, just as courts were involved in the review of conscientious objector determinations during the Vietnam era.

Although determination of what beliefs are sincere and entitled to special treatment under the free exercise clause is a troublesome question generally, it is a particular problem in the military context. This is so because the very nature of military life places individuals in a situation in which they are constantly under the authority, discipline, and control of government officials and in which they may often be required to do things that are unpleasant or inconsistent with their own personal values. The incentive for insincere claims in the context of military requirements is thus far greater than in the context of *Sherbert, Yoder,* and *Thomas.* In view of the great incentive for insincere claims, the large numbers of persons in uniform, and the Supreme Court's broad approach toward what is religious for purposes of free exercise of religion, it is doubtful that administrative determinations of the sincerity of the religious beliefs of servicemembers claiming exemptions and judicial review of them would be manageable tasks. This is, therefore, another reason

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[135] *Id.* at 251 n.6. See also 450 U.S. at 715.

[136] 401 U.S at 457.

[137] *See* 401 U.S at 457, where the Court notes:

> At any rate, it is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious.

[138] 455 US .at 263 n.2.

why claims to religion-based exemptions in the military context require a different analysis than the *Sherbert* test.

V. FREE EXERCISE CLAIMS VERSUS THE TRADITIONAL DEFERENCE OF THE COURTS TOWARD INTERNAL MILITARY DECISIONS

Use of a lesser standard of review than strict scrutiny for military free exercise cases is also consistent with the deference courts traditionally give to military decision making. Courts have exhibited particular deference to internal military decisions dealing with military personnel.[139] Former Chief Justice Warren observed:

> So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited . . .
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> This "hands off" attitude has strong historical support, of course. . . . [I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel, The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.[140]

At the same time, developing jurisprudence indicates that "servicemen have all the protections of the Bill of Rights except such as are expressly or by necessary implication not applicable by reason of the peculiar circumstances of the military." [141] Courts generally have used three approaches to reconcile the conflicting principles of affording substantial deference to internal military affairs while extending constitutional protections to servicemembers.

The first has been to find some military decisions nonjusticable [142] or nonreviewable.[143] The Supreme Court has never formulated a clear test

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[139] *See genemlly* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975).

[140] Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 186-87 (1962).

[141] *See, e.g.*, United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960). *Cf.* Parker v. Levy, 417 U.S. 733, 758 (1974) ("while the members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission require a different application of these protections").

[142] *See, e.g.*, Gilligan v. Moran, 413 U.S. 1 (1973).

[143] See, *e.g.*, Reaves v. Ainsworth, 219 U.S. 296 (1911); Lindineau v. Alexander, 663 F.2d 68 (10th Cir. 1981); Schlanger v. United States, 586 F.2d 667 (9th Cir. 1978), cert. *denied*, 441 U.S. 943 (1979).

for this but rather has taken an ad hoc approach.[144] Still, lower courts, most notably the Fifth Circuit in *Mindes v. Seaman*,[145] have developed a method for analyzing when courts should review military decisions.[146] Arguably, a free exercise claim to exemption from military appearance standards would not be reviewable under this analysis."[147] Nonetheless since both the Supreme Court and all lower courts presented with free exercise claims in the military have reviewed them,[148] it seems likely that courts will continue to do so in the future.

The second approach courts have used to ensure proper deference to military interests has been to apply modified constitutional tests to various constitutional claims asserted in the military context. The Supreme Court did this in a number of cases in the 1970's to 1980's including the first amendment cases of Gillette *v.* United *States*,[149] Parker *v. Levy*,[150] and Brown *v. Glines*.[151] As indicated previously, in Gillette the Supreme Court applied a significantly different test to evaluate free exercise claims to conscientious objection. Parker u. Levy and Brown *v.* Glines, although free speech cases, are also significant because they are more recent and they are more explicit than Gillette in articulating why they

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[144] See Peck, supra note 139, at 57.

[145] 453 F.2d 197 (5th Cir. 1971).

[146] The Mindes court came to two conclusions based on a comprehensive review of case law on nonreviewability. The first was that "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." 453 F.2d at 201. The second conclusion was that not all such allegations were reviewable. Rather, courts must examine the substance of the allegation in light of the policy reasons behind nonreview of military matters by weighing the following four factors: (1) the nature and strength of the plaintiffs challenge to the military determination; (2) the potential injury to plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. Id. at 201-02. Many courts have adopted the *Mindes* test, *e.g.* Lindineau v. Alexander, 663 F.2d 68 (10th Cir. 1981); Wallace v. Chappel, 661 F.2d 729 (9th Cir. 1981), *cert. granted*, 51 U.S.L.W. 3339 (U.S. Nov. 1, 1982) (No. 82-167); however, the Supreme Court has neither accepted nor rejected the test.

[147] Forcing the military to grant exemptions to its appearance standards interferes with military functions and intrudes into an area of military expertise. On the other hand, the claim to an exemption involves an allegation of constitutional right, and refusal by a court to hear it could result in a servicemember either violating his religious scruples or being court-martialed.

[148] The Supreme Court decided a servicemember's conscientious objection claim in Gillette v. United States, 401 U.S. 437, 440-41 (1971). The claim was raised in Negre v. Larsen, which was decided with Gillette. **Also,** all the cases discussed in Part VI considered claims to exemptions on their merits. Only Bitterman v. Secretary of Defense, 553 F. Supp. 719, 722 (D.D.C. 1982), appeal docketed, No. 83-1177 (D.C. Cir. Feb. 15, 1983), explicitly considered the question of nonreviewability.

[149] 401 U.S. 437 (1971).

[150] 417 U.S. 733 (1974).

[151] 444 U.S. 348 (1980).

adopt a different approach to constitutional claims in the military context.

Parker involved, ***inter alia***, a first amendment free speech challenge to a court-martial conviction under Article **134** of the Uniform Code of Military Justice (the general article)[152] for publicly uttering statements with design to promote disloyalty and disaffection among troops destined for Vietnam. The Court sustained the court-martial conviction against a claim that it violated the first amendment because Article **134** was impermissibly overbroad. The Court noted that "[w]hile members of the military are not excluded from the protection granted by the first amendment, the different character of the military community and of the military mission require a different application of these protections."[153] Consequently, the ***Parker*** Court used a significantly different analysis for a first amendment overbreadth challenge in the military context than would have applied in the civilian context.[154]

Glines also made a significantly different application of first amendment rights to military members. The case involved challenges to Air Force regulations requiring servicemembers to obtain prior approval before circulating petitions on Air Force bases. In the civilian context such a prior restraint would clearly violate the first amendment;[155] yet, the ***Glines*** Court upheld the regulations. Significantly, the Court upheld the regulations because they "protect a substantial government interest unrelated to the suppression of free expression."[156] This standard applied by the Court differs radically from the test that would normally apply to a prior restraint on speech.[157] In justifying its approach, the Court, as it had in ***Parker,*** noted the military's role as a specialized and separate society and the need for loyalty, discipline, and morale to perform the military mission.[158]

These cases make clear that the Supreme Court will apply constitutional protections in a different way in the military context to take into account the different nature and special needs of the military. Also, the Supreme Court's application of a substantial government interest test to a free exercise claim to conscientious objection in the military indicates the Court would take a similarly deferential approach to other free exercise claims in the military context. The fact that more recently in ***Glines***

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[152] **10** U.S.C. § **934 (1976).**
[153] **417 U S.** at **758.**
[154] ***See Id.*** at **773-780** (Stewart, J., dissenting).
[155] ***See*** L. Tribe, ***supm*** note **69,** at §§ **12-31** to **12-33.**
[156] **444** US. at **353.**
[157] ***See*** L. Tribe, ***supm*** note **69,** at §§ **12-31** to **12-33.**
[158] **444 U.S.** at **354-58.**

the Court substituted a substantial government interest test for the much stricter test normally applicable to prior restraints on speech gives added support to this view.

A third approach courts have used to show deference towards military decisions is by according great weight to asserted military interests and by not closely reviewing the factual basis for these military interests. The reasons for this form of deference are grounded in part on constitutional text giving the legislative and executive branches responsibility for the armed forces and, in part, on a lack of expertise by the judiciary in this area.[159]

Recent Supreme Court cases are replete with references to the great weight the Court is willing to ascribe to military interests, particularly those implicating discipline. The Supreme Court has repeatedly echoed the theme that:

> The military is, "by necessity, a specialized society separate from civilian society." Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services "must insist upon a respect for duty and discipline without counterpart in civilian life."[160]

Besides the great deference the Court has given the military need for discipline, the Supreme Court also characteristically gives little examination to the asserted factual basis for military decisions. For example in *Rostker v. Goldberg*[161] the Court severely criticized a lower court for its overly vigorous scrutiny of the reasons Congress decided that only males should be required to register for potential compulsory military service. In *Glines* the Court accepted without question the government's assertion that allowing petitioning by servicemembers without prior approval would disrupt discipline. One commentator notes that historically the Supreme Court has not reviewed the factual bases for internal military decisions although the more recent trend has been for lower courts to do so.[162] Nonetheless even those courts doing this have used the narrowest possible standard of judicial review.[163]

Accordingly, in the context of free exercise claims to exemptions from appearance standards, under current Supreme Court precedent, courts

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[159] See, *e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).
[160] 444 U.S. at 354 (citations omitted).
[161] 453 U.S. 57 (1981).
[162] Peck, *supm* note 139, at 42, 47-48, 55-80.
[163] *Id.*

should give great weight to an asserted military interest in uniformity that includes discipline. Also, if they do so at all, courts should review the factual basis for this assertion using the most deferential of standards.

VI. RECENT CASES INVOLVING FREE EXERCISE CLAIMS TO EXEMPTIONS FROM MILITARY APPEARANCE STANDARDS

As noted in the introduction to this article, the five recent cases[164] that have considered claims by servicemembers to religious exemptions from military appearance standards have been both doctrinally confusing and inconsistent in their results. They have applied three different testa—strict scrutiny, rational basis, and balancing[165]—and have reached opposite results regarding whether there is a free exercise right to wear religious headwear while in uniform.[166] These cases have all failed to consider the close analogy that conscientious objection provides and have not considered *Gillette v. United States*.[167] Also, these cases were decided without the benefit of the Supreme Court's most recent significant free exercise decision—United *States u. Lee*.[168]

This part will evaluate the tests adopted in these recent cases and how they have been applied in light of what was previously discussed in Parts II through V of this article.

A. THE STRICT SCRUNITY TEST

1. Sherwood v. Brown

Sherwood v. Brown [169] is the first instance in which a court applied a strict scrutiny test to a claim to exemption from military appearance standards for religious reasons. In ***Sherwood*** the Ninth Circuit in a brief per curiam opinion used the same mode of analysis used by the Supreme Court in ***Sherbert v. Verner*** and ***Wisconsin v. Yoder*** to evaluate a claim that application of Navy uniform regulations to a Sikh's wear of a turban violated his first amendment right to free exercise of religion, The Navy had court-martialed the Sikh and discharged him from the Navy for wearing his turban in violation of Navy regulations.[170] The court of appeals affirmed the district court's decision granting summary judgment

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[164] See cases cited in notes 2-4 *supm*.
[165] *See* text accompanying notes 169-212 *infra*.
[166] *Id*.
[167] 401 U.S. 437 (1971).
[168] 455 U.S. 252 (1982).
[169] 619 F.2d 47 (9th Cir.), *cert. denied,* 449 U.S. 919 (1980).
[170] *Id*, at 48.

to the Navy because of findings that the Navy had a safety interest in not allowing wear of the turban. The court applied a strict scrutiny test, citing *Wisconsin v. Yoder,* but found that the Navy's safety interest was a compelling one and that no less restrictive alternative existed because all Navy personnel are subject to duties that implicate the safety rationale.[171]

Sherwood appears to have reached the correct result in view of the factual posture of the case[172] and the high weight courts traditionally give to safety as a compelling government interest.[173] Still, *Sherwood* is subject to criticism because the court automatically assumed without any analysis that a strict scrutiny test applied to the military context. Certainly, this aspect of the court's opinion is suspect, especially since in adopting a strict scrutiny test the court never considered the question of what general applicability the strict scrutiny test has to free exercise claims, the impact of *Gillette* or *Robison* on the test, the substantial body of caselaw indicating the limited scope of review appropriate for military decisions, or practical problems that adoption of a strict scrutiny test would create in the military context.

2. Bitterman v. Secretary of Defense

More recently, in *Bitterman v. Secretary of Defense*,[174] another court considered the question of whether a strict scrutiny test should be applied to free exercise claims in the military. The case involved a claim by Air Force Sergeant Murray Bitterman, an Orthodox Jew, to an exemption from Air Force regulations for wear of a yarmulke while in uniform. The court recognized that, on one hand, *Sherwood* applied a strict scrutiny test in the same context using *Wisconsin v. Yoder* as authority for this.[175] On the other hand, the court recognized that a substantial body of precedent indicated a limited scope of review for military decisions.[176] The court resolved this dilema of conflicting doctrine by adopting a strict scrutiny analysis but tempering this standard of review "by the substantial deference to be accorded military judgments as to the appropriate ways in which to further" the government's interest.[177] The court found that a compelling interest existed in applying Air Force uniform regulations to Sergeant Bitterman's wear of the yamulke and that there

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[171] *Id.*

[172] Sherwood's attorney in effect conceded that no less restrictive alternative existed for furthering the Navy's safety interest. *Id* n.2.

[173] *See* Giannella, *supm* note 21, at 1390-96.

[174] 553 F. Supp. 719 (D.D.C. 1982), *appeal docketed,* No. 83-1177 (D.C. Cir. Feb. 15, 1983).

[175] 553 F. Supp. at 723.

[176] *Id.*

[177] *Id.* at 723-24.

was no less restrictive alternative available to further the government's interest.[178] Accordingly, the court held that application of Air Force uniform requirements to wear of a yamulke by an Orthodox Jew did not violate his first amendment free exercise rights.

a. Uniformity as a Compelling Interest

One particularly interesting aspect of the *Bitterman* opinion is its willingness to accept as compelling the military interest in not sanctioning any deviation from its uniform regulations. The court's conclusion on this question differed markedly from that of the court in *Goldman v. Secretary of Defense*.[179] If viewed narrowly from the perspective of how courts traditionally have applied strict scrutiny analysis in the civilian context, the court's conclusion is difficult to understand.

Under strict scrutiny analysis, courts traditionally have recognized as compelling those government interests that directly further a goal of preventing tangible harm to society such as protecting public health and safety but not those government interests not directly related to preventing such tangible harm.[180] For example, as early as the second of the "Flag Salute Cases," *West Virginia State Board of Education v. Barnette*,[181] the Court viewed the government interest in instilling patriotism as insufficient justification to force a schoolchild to salute the flag.[182] In normal circumstances then, a government interest in uniformity for intangible, symbolic reasons would not appear to be compelling.

Yet, the *Bitterman* court faced a special context and used a different analysis. The court heard evidence presented by the Air Force that military uniform requirements promoted Air Force teamwork, motivation, discipline, esprit de corps, and image.[183] The Air Force presented testimony that these five factors were the major considerations in establishing and maintaining a combat-ready fighting force, that Air Force uniform regulations furthered all five factors, and that deviations from the uniform regulations tended to undermine achievement of these five factors. Air Force evidence included the opinion that "there is a direct correlation between mission performance and adherence to the dress re-

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[178] *Id.* at 723-26.

[179] 29 Empl. Prac. Guide (CCH) ¶32,753 (D.D.C. April 26, 1982), *appeal docketed*, No. 82-1723 (D.C. Cir. June 29, 1982).

[180] *See* L. Tribe, *supm* note 69, at 853; Giannella, *supm* note 21, at 1390-1416.

[181] 319 U.S. 624 (1943) (However, this case was decided on free speech rather than free exercise grounds).

[182] In a footnote the Court indicated that the same result would not hold true for a member of the armed forces. *See id.* at 642 n.19.

[183] Bitterman v. Secretary of Defense, 553 F. Supp. 719, 721 (D.D.C. 1982), *appeal docketed*, No. 83-1177 (D.C. Cir. Feb. 15, 1983).

quirement" and that, in allowing one deviation from its uniform requirements, the Air Force would find itself in the unmanageable positon of processing numerous requests for exemptions by followers of other religion. The court, based on the testimony presented by the Air Force, on its taking judicial notice of past military history, and on Supreme Court decisions stressing the need for discipline in the military, concluded that allowing departures from military appearance standards would detrimentally affect the "compelling government interest of maintaining an efficient Air Force." [185]

When viewed from the perspective of this evidence and Supreme Court precedent dealing with review of internal military decisions, the *Bitterman* court's conclusion that the Air Force had a compelling interest in enforcing its uniform regulation against Sergeant Bitterman is not only supportable but practically inevitable. At the very heart of Supreme Court precedent concerning the limited reviewability of internal military decisions is the notion that courts must defer to military expertise regarding the administering, training, and disciplining of the military. This notion would seem almost to require the *Bitterman* court to accept the Air Force evidence regarding the effect of granting uniform exemptions on military effectiveness unless it was palpably untrue. Under existing jurisprudence, it certainly was not within the province of the court to second-guess military judgment on the question without a strong factual basis for doing so. And, once the court accepted the Air Force's evidence linking uniform exemptions to morale and discipline, it was almost bound, under past Supreme Court decisions such as *Parker* v. *Levy* [186] and *Brown v. Glines* [187] to conclude that the Air Force's interest was a compelling one.

The Supreme Court's two most recent conscientious objector cases, *Gillette v. United States* [188] and *Johnson v. Robison* [189] also support the *Bitterman* court's conclusion that the government interest in uniform standards outweighed Sergeant Bitterman's interest in an exception. If the government interest in not allowing exemptions from compulsory military service outweighs the interest of the selective conscientious objector in not being forced to violate his conscience and fight in what he views to be an unjust war, how can the government's interest in having a disciplined and effective fighting force be outweighed by the interest of

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[184] 553 F. Supp. at 721-22.
[185] *Id.* at 724-26.
[186] 417 U.S. 733 (1974).
[187] 444 U.S. 348 (1980).
[188] 401 U.S. 437 (1971).
[189] 415 US. 361 (1974).

a volunteer member of the armed forces in wearing religious garb while in uniform? It cannot and be consistent with ***Gillette.***

b. Consideration of Future Potential Claims in the Court's Least Restrictive Alternative Analysis

A second interesting aspect of ***Bitterman*** is its analysis of whether application of Air Force uniform regulations to Sergeant Bitterman's wear of the yarmulke was the least restrictive alternative to further the government's interest. The court noted that in making this determination:

> [The] effect [of application of the Air Force uniform regulation] upon the religious practices of all Air Force personnel must be considered, not just its effect upon the wearing of a yarmulke by an Air Force Sergeant who is a member of the Orthodox Jewish Faith. When viewed from this perspective, it becomesclear that there is no less restrictive means to promote and maintain uniformity among Air Force personnel. . . than by across-the-board enforcement of [the Air Force uniform regulation].[190]

In essence, the court considered the effect that other, future potential requests for exemptions would have on the Air Force's interest in uniformity. This clearly would be impermissible under the analysis employed by the Supreme Court in ***Sherbert v. Verner***[191] and ***Thomas v. Review Board***.[192]

While the ***Bitterman*** court attempted to support its consideration of future potential requests for exemptions by citing ***Heffron v. International Society for Krishna Consciousness***,[193] the ***Heffron*** case is somewhat questionable authority for this proposition, since it was argued and decided before the Supreme Court soley on free speech grounds.[194] This distinction is important because cases such as ***Sherbert*** and ***Yoder*** seem to require greater government accommodation of religious conduct than of nonreligious expressive conduct. Under free speech doctrine, restrictions on expressive conduct as opposed to pure speech may be justified by an "important" or "substantial government interest."[195] Even restrictions on pure speech that relate to time, place, and manner may be justi-

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[190] Bitterman v. Secretary of Defense, 553 F. Supp. 719, 725 (D.D.C. 1982), appeal *docketed*, No. 83-1177 (D.C. Cir. Feb. 15, 1983).
[191] 374 U.S. 398 (1963).
[192] 450 US. 707 (1981).
[193] 452 U.S. 640 (1981).
[194] 452 U.S. at 652-53, 659 n.3.
[195] See, *e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968).

fied by a significant government interest.[196] In contrast, free exercise doctrine has not distinguished between speech and conduct or developed a separate analysis for time, place, and manner restrictions. Instead, it has applied a strict scrutiny analysis to all significant burdens the state places on free exercise of religion.

Nonetheless, the approach taken by the ***Bitterman*** court in analyzing whether the Air Force was using the least restrictive alternative to further the government's interest has strong support in ***United States v. Lee.***[197] The ***Bitterman*** court's point regarding future potential requests for religion-based exemptions from military appearance standards is the same as the Supreme Court's point in ***Lee*** regarding religion-based exemptions from taxes—once one begins allowing exemptions, no principled way remains to stop granting them and avoid impairment of the government interest at stake. Thus, although the ***Bitterman*** opinion may be criticized for failing to support its least restrictive alternative analysis with proper authority, its rationale is certainly consistent with the most recent Supreme Court precedent.

B. THE MODIFIED RATIONAL BASIS TEST

A second test that courts have used to evaluate claims for religion-based exemptions to appearance standards in the military context is the modified rational basis test applied by the Supreme Court in ***Kelly v. Johnson.***[198] Although ***Kelly v.*** Johnson involved a substantive due process challenge to police grooming regulations rather than a free exercise challenge, the U.S. Court of Appeals for the District of Columbia applied this test to a free exercise claim involving police appearance standards in ***Marshall v. District of Columbia.***[199] This same test was later adopted in ***Kalinsky v. Secretary of Defense***[200] to assess the claim of an Orthodox Jewish Chaplain in the Air Force Reserves that application of Air Force uniform and appearance standards to his wear of a beard violated his right to free exercise of religion. The ***Kalinsky*** court explicitly rejected application of the ***Sherbert v. Verner*** strict scrutiny test because:

> The application of the restrictive "compelling interest" test . . . would be inconsistent with the Supreme Court's recent pronouncement that because of the 'different' character of the military community," there may be restrictions upon first

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[196] *See, e.g.*, Virginia Pharmacy Board v. Virginia Citizens' Consumer Council, 425 U.S. 748, 771 (1976).
[197] 455 U.S. 252 (1982).
[198] 425 U.S. 238 (1976).
[199] 559 F.2d 726, 727-28 (1977), *aff'g* 392 F. Supp. 1012 (D.D.C. 1975).
[200] Civil Action No. 78-17 (D.D.C. June 25, 1979).

> amendment rights that are permissible within the military that would be constitutionally impermissible outside it. . . ." The court agrees . . . that it must uphold the no-beard rule if it finds that the regulation is rationally related to advancing a legitimate government objective. That standard was applied by the Supreme Court in *Kelly v. Johnson*, 425 U.S. 238 (1976), where the Court rejected a police officer's challenge to a hair-length regulation on the ground it violated his constitutional right to "liberty". . . . If, under *Kelly*, "[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designated to promote other aims within the cognizance of the State's police power," 425 U.S. at 247, the Court sees no basis for denying such a presumption of validity of like choices for military personel, who certainly are no less subject to "certain overriding demands of discipline and duty." *Burns v. Wilson*, 346 U.S. 137, 140 (1953), than members of a uniform police force.[201]

The *Kalinsky* court's adoption of the modified rational basis test, although certainly consistent with the basic notion of judicial deference to internal military decisions, is subject to criticism. The *Kalinsky* court failed to articulate a specific and convincing rationale for adopting the test it did. The case on which the court placed primary reliance for its adoption of a rational basis test was *Parker v. Levy*. Yet *Parker* did not really adopt a totally different first amendment test to apply to the military context. Rather, it applied an existing first amendment test to the military in a modified manner in order to take into account special military needs. This approach in *Parker* is more consistent with the doctrine that constitutional rights apply to military members unless military needs require otherwise. Further, the *Kalinsky* court did not consider that in a more analagous context—evaluation of conscientious objectors' free exercise claims—the Supreme Court did not use a rational basis test but rather a "substantial interest" test.

C. THE BALANCING TEST—GOLDMAN v. SECRETARY OF DEFENSE

The third test used has been a balancing test purportedly derived[202] from the Supreme Court case of *Rostker v. Goldberg*.[203] The court in

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[201] *Id.* slip op. at 16-18.

[202] *See* 29 Empl. Prac. Guide (CCH) 932,753 (D.D.C April 26, 1982), *appeal docketed*, No. 82-1723 (D.C. Cir. June 29, 1982).

[203] 453 U.S. 57 (1981).

Goldman v. Secretary of Defense used this test to consider a claim to a religion-based exemption for wear of the yarmulke while in uniform. The ***Goldman*** court considered substantially the same evidence as did the court in ***Bitterman.*** Nonetheless, ***Goldman*** held that application of Air Force uniform regulations to wear of the yarmulke violated the free exercise clause. In reaching this result, the court focused particularly on the "quality" of study and analysis supporting the ***Air*** Force's decision not to permit exceptions to its uniform and appearance requirements for religious reasons. The court noted that:

> deference can only be given to the decision maker regulating the military when its decision was a reasoned and deliberate one. Had the Air Force's decision to exclude a ***bona fide*** religious exception for yarmulkes. . . been the product of an empirical study, psychological study, or the like, it would be supportable. Conclusions . . . based . . . on the personal beliefs and assumptions of Air Force officials . . . are inadequate to withstand constitutional scrutiny. . . .
>
> Under the ***Rostker*** analysis, there was no evidence presented at trial sufficient to conclude that the military prohibition of yarmulkes in the interest of discipline overrides individual(s) interest in exercising their freedom of religion.[204]

The court also made its own findings that occasional exceptions to Air Force uniform requirementa for "specific, legitimate" reasons "will not adversely affect the ability of the Air Force to carry out its mission" and "may enhance the effectiveness of the Air Force by dissipating hostility over minor matters and thus contribute to a perception of the Air Force as a less rigid, more humane institution." [205]

The analysis used in the ***Goldman*** opinion is clearly based on a completely unwarranted interpretation of ***Rostker's*** rationale. Also, the approach has no firm basis in logic, in principles of administrative law, or in jurisprudence regarding reviewability of military decisions.

The ***Goldman*** court's requirement of "empirical study" to justify a military decision, rather than being a logical extension of ***Rostker*** seems to turn ***Rostker*** on its head. In ***Rostker*** the Supreme Court gave substantial deference to Congress's evaluation that only males should be required to register for potential conscription.[206] Congress's evaluation

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[204] **29 Empl. Prac.** Guide (CCH) 732,753 **(D.D.C. April 26, 1982),** *appeal docketed,* **No. 82-1723 (D.C.Cir. June 29,1982).**

[205] *Id.*

[206] 453 U.S. at 64-67, 82-83.

was based on precisely the same kind of evidence that the *Goldman* court rejected. The *Rostker* opinion made explicit reference to Congress's awareness of "the current thinking as to the place of women in the Armed Services," and the Court placed particular emphasis on Congress's determination, based on the opinions of uniformed and civilian military leaders given in testimony, that any future draft would be characterized by a need for combat troops.[207] There is no indication in the *Rostker* opinion or in the relevant legislative history that Congress relied on empirical or clinical studies in making its determinations.

Besides representing a rather bizarre interpretation of *Rostker,* the *Goldman* court's reasoning suffers from a major nonsequitur. The nonsequitur is that in the context of *Goldman* an "empirical study, psychological study, or the like" is reasoned and deliberate while a decision based on other evidence or judgment is not. Although the scientific method and empirical studies provide a useful means for evaluating most physical phenomena, their utility for evaluating and predicting human behavior is more questionable.[208] The utility of empirical studies becomes particularly questionable when the phenomena one wishes to study involve something as complex and with as many variables as human behavior and social dynamics in war. It would seem virtually impossible to undertake a definitive scientific study of the influence of exceptions to uniform standards on military combat effectiveness. Using studies that eliminated variables to simplify their scope would necessarily mean that any decision based on the empirical study would be as much a product of hypothesis, intuition, and inductive reasoning as a decision based on the experience and judgment of Air Force officers. *Goldman* would therefore appear to place an impossible burden on military officials in order to justify a decision not to make exceptions to uniform requirements for religious reasons if the court is insisting on a definitive study. If the study is to be less than definitive, then the requirement is virtually meaningless.

The *Goldman* court's approach toward the evidence in support of the Air Force's justification also is inconsistent with general jurisprudence regarding the basis required to justify administrative decisions. Commentators have recognized[209] that an agency may base some findings on its expertise without supporting evidence. In *FCC v. National Citizen's Committee for Broadcasting*[210] the Supreme Court used this rationale to reverse a court of appeals decision setting aside an FCC rule due to insufficient factual determinations. The Court noted that the FCC determina-

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[207] *Id.* at 16-78.
[208] *See, e.g.*, K. C Davis, 3 Administrative Law Treatise § 15.03 (2d ed.) 1980).
[209] *See id.* at §§ 14.28, 15.10.
[210] 436 U.S. 775 (1978).

tions "were primarily of a judgmental or predictive nature" and that therefore "complete factual support in the record for the commission's judgment or prediction is not possible or required."[211] The *Goldman* court contravened this approach by not only requiring factual support for what essentially was a judgmental or predictive determination but requiring a specific kind of factual support.

That the *Goldman* court failed to accept as adequate the evidence offered by the Air Force to justify its policy is all the more surprising given the approach that the Supreme Court and most lower courts have taken toward reviewability of factual determinations supporting military decisions. As indicated previously, one commentator notes that the Supreme Court historically has declined to review the factual bases for internal military decisions.[212] If reviewable at all, internal military decisions should be subject to the narrowest standard of review. The *Goldman* court took exactly the opposite approach, not only using a rigorous standard to question the validity of the factual basis of the Air Force's decision, but substituting its own judgment as well.

In addition to the preceding grounds, the *Goldman* opinion is subject to criticism for its failure to give any consideration to how cases such as *Gillette* or *Robison* should impact on what test is used for claims to religion-based exemptions in the military context or to any practical problems application of its balancing test would pose in considering other free exercise claims in the military.

VII. CONCLUSIONS

Evaluation of free exercise claims to exemptions from military requirements involves the always difficult task of accommodating the conflict between military need and religious conscience. Courts have begun struggling with the problem in recent cases in the context of free exercise claims to exemptions from military uniform and appearance standards. In considering these claims, the courts have applied differing doctrine and sometimes have reached different results. One source of confusion has been the apparent conflict between free exercise doctrine in cases such as *Sherbert v. Verner*[213] and *Wisconsin v. Yoder*[214] and the doctrine of limited reviewability of military decisions in cases such as *Parker u. Levy*[215] and *Brown v. Glines*.[216] Another source of the confu-

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[211] *Id.* at 814.
[212] Peck, *supm* note 139, at 42, 47-48, 55, 80.
[213] 374 U.S. 398 (1963).
[214] 406 U.S. 205 (1972).
[215] 417 U.S. 733 (1974).
[216] 444 US. 348 (1980).

sion stems from the question of what weight should be given to the military interest in uniformity for intangible or symbolic reasons such as discipline and morale.

Yet there should not be the confusion and conflicting results exhibited in recent cases. The lower courts are not writing on a blank slate in this area. Instead, there is the rich history of conscientious objector claims to draw on as well as recent Supreme Court cases such as ***Gillette v. United States*** [217] and ***Johnson v. Robison***.[218]

Gillette and ***Robison*** seem to indicate quite clearly that when military requirements clash with religious conscience the appropriate analysis applicable is not the strict scrutiny test used in ***Sherbert v. Verner*** and ***Wisconsin v. Yoder*** but rather the more deferential test used in ***Gillette.*** Under this test, a court should uphold a military requirement against a free exercise challenge when: **(1)** the requirement is secularly based and does not on its face discriminate against particular religions; **(2)** the requirement furthers a substantial government interest; and **(3)** granting an exemption to the requirement would directly undercut the reason for which the requirement is imposed.

Further, under the Supreme Court's most recent significant free exercise decision, ***United States v. Lee***,[219] as well as under ***Gillette,*** it is appropriate for courts, in determining whether the military interest in requiring adherence to uniform and appearance standards is substantial, to consider the problems that future claims to exemption would pose. Part IV of this article suggests that the problems generated both in determining what military requirements are subject to religious exemptions and which persons qualify for religious exemptions would be substantial.

Also, current Supreme Court precedent regarding the substantial deference owed to internal military decisions should impact on how courts evaluate government interests at stake in the area of uniform and appearance standards. This precedent suggests that if a military interest in discipline is implicated, courts should give the interest great weight. Further, this precedent suggests that courts should defer to the factual basis on which the asserted military interest is based rather than try to second-guess military expertise.

Finally, the history of conscientious objection claims in this country and the courts' consistent treatment of them suggests there would be a basic anamoly in recognizing a first amendment right to exemptions

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[217] 401 U.S. 437 (1971).
[218] 415 U.S. 361 (1974).
[219] 455 U.S. 252 (1982).

from military requirementa for members of a volunteer armed force while denying an exemption from compulsory military service to the conscientious objector with religious scruples against participation in war. Certainly the individual with deep religious scruples against participation in war has an interest in avoiding compulsory combatant service that is at least as great as the interest of a servicemember in not having religious practices burdened by military requirements. And certainly the military's interest in denying exemptions to internal disciplinary requirements is as great as the interest in not allowing exclusion of conscientious objectors from the pool of persons available for potential military service. It would seem to follow then that no recognition of a first amendment right to exemptions from military disciplinary requirementa can be made without implicitly repudiating the traditional approach in this country of leaving the issue of conscientious objection to the Congress and executive branches and without implicitly repudiating the Supreme Court's relatively recent decision in *Gillette*.

THE RULE OF PROPORTIONALITY AND PROTOCOL I IN CONVENTIONAL WARFARE

By Lieutenant Colonel William J. Fenrick*

I. INTRODUCTION

At the beginning of February 1945, American forces under the supreme command of General Douglas MacArthur were entering Manila, the capital of the Philippines, in the course of the campaign to drive the Japanese out of the islands. It soon became obvious that the Japanese intended to defend the city and American air and ground commanders persistently asked MacArthur for permission to use aerial bombardment to assist the ground forces. MacArthur refused permission, telling his air commander, General Kenny: "You would probably kill off the Japs all right, but there are several thousand Filipino civilians in there who would be killed too. The world would hold up ita hands in horror if we did anything like that."[1] The Japanese resisted tenaciously, causing heavy American casualties, and American ground commanders made frequent use of artillery bombardment to assist in clearing the city and to save the lives of their own troops. Organized Japanese resistance in Manila ceased on 3 March 1945. An estimated 16,000 Japanese soldiers died in the battle and American forces lost 1,000 killed and 5,000 wounded. Manila was devastated and the bodies of 100,000 Filipino civilians were found in the rubble, most of them killed in the exchange of fire between American and Japanese forces.[2] The Battle of Manila is a tragic example of the cost of war to innocent civilians and it forms a backdrop of reality to be viewed with the foregound of law when one at-

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The views expressed in this article are those of the author and do not necessarily reflect the opinion or the policy of the Canadian Forces, the Department of National Defence, or the government of Canada.

[1] 2 D. James, *The Years of MacArthur* 635 (1975).

[2] R. Smith, *Triumph in the Phillippines* 237-308 (account of the battle), 306-07 (casualty figures) (1963).

tempts to assess the meaning and effectiveness of the law of war in general and the rule of proportionality in particular. Except for the minority of Filipino civilians killed by Japanese atrocities, no one wanted these people to die or derived any military benefit from their death. It just happened.

The law of war or of armed conflict is concerned in part with the protection of basic human rights, particularly the elemental right to life. Until recently, the codified law of armed conflict, when it purported to protect human rights, focused almost exclusively upon the rights of individuals within the area of control of a potentially offending belligerent, such as prisoners of war, civilian internees, or the inhabitants of occupied territory.

In **1977,** the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts meeting in Geneva completed drafting two Protocols Additional to the Geneva Conventions of **12** August **1949.** Protocol I [3] is concerned with international armed conflicts and Protocol II with internal armed conflicts. Protocol I is particularly significant because it purports to regulate the conduct of belligerents while they are engaged in combat and, as such, it extends protection to noncombatants who are not within the area of control of potentially offending belligerents, for example, the residents of cities controlled by the other side to the conflict.

In any armed conflict people are injured or killed and property is damaged or destroyed. Protocol I, if it is to be capable of practical application, must recognize this fact while endeavouring to maximize the protection of the civilian population which is not directly engaged in the armed conflict. One of the ways in which Protocol I accommodates the needs of humanity with the practical inevitabilities of warfare is by acceptance of the possibility of collateral or incidental damage to civilian property and injury to civilian persons when military operations are directed against military objectives. The prime example of this accommodation process is the prohibition of "excessive" incidental losses to civilian persons and objects contained in Articles 51(5), 57(2), and 85(3)(b) and (c). The prohibition of "excessive" incidental losses accepts, by implication, the occasional unavoidability of incidental losses which are not "excessive." The purpose of this paper is to explore the meaning of "excessive" and of the rule of proportionality in the context of Protocol I. Attention will be focused on international armed conflicts which do not

[3] Protocol Additional to the Geneva Conventions of **12** August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), ***The Laws of Armed*** Conflict 551-618. (D. Schindler & J. Toman 2d ed. 1981).

involve the use of weapons of mass destruction: nuclear weapons and bacteriological or chemical weapons with substantially similar effects.'

Certain general concepts underlie the law of armed conflict and must be taken into account at all times but particularly when no specific rule governs a specific situation. The traditional approach relied on three primary concepts: military necessity, humanity, and chivalry. Military necessity is a concept whereby a belligerent is justified in applying compulsion and force of any kind to the extent necessary for the realization of the purpose of war, that is, the partial or complete submission of the enemy at the earliest possible moment with the least possible expenditure of lives, resources, and money. The concept presupposes that the force used can be and is being controlled, that the use of force is necessary to achieve as quickly as possible the partial or complete submission of the enemy, and that the amount of force used is no greater in effect on enemy personnel or property than needed to achieve his prompt submission. Military necessity is not a concept which can be considered in isolation. In particular, it does not justify violation of the laws of armed conflict as military necessity was a factor taken into account when the laws were drafted.[5]

Related to the concept of necessity and implicitly contained within it is the concept of humanity, which forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. This concept of humanity results in a specific prohibition against unnecessary suffering and a variety of more specific rules. The concept of humanity also confirms the basic immunity of civilian persons and property from being the objects of attack during armed conflict. This immunity of the civilian population does not

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[4] The question of the applicability of Protocol I to nuclear warfare is contentious and will not be addressed here. In the introduction to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, published by the International Committee of the Red Cross (ICRC) at Geneva in June 1973, the ICRC states: "Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach these problems."

[5] Military necessity is a particularly complex subject. The two most searching studies are probably O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 World Polity 109 (1957), and O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 World Polity 35 (1960). Other studies are Dunbar, *Military Necessity in War Crimes Trials*, 29 Brit. Y.I.L. 442 (1952), Downey, *The Law of War and Military Necessity*, 47 A.J.I.L. 251 (1953), and an unpublished study prepared by E. Rauch for the International Society of Military Law and Law of War, *The Concept of Military Necessity in the Context of the Law of War*. A useful collection of definitions is contained in Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, 90 Mil. L.Rev. 49, 54-58 (1980).

preclude unavoidable incidental civilian casualties which may occur during the course of lawful attacks against military objectives.[6]

The concept of chivalry is difficult to define and even more difficult to uphold as an underlying aspect of the law: the days of gentlemanly warfare, if they ever existed, are long since gone. The concept refers to the conduct of armed conflict in accordance with certain recognized formalities and courtesies. Its continued, though somewhat limited, vitality is exemplified by prohibitions against dishonorable or treacherous conduct and against the misuse of enemy uniforms or flags of truce.'

An alternative formulation of the basic concepts which may contribute to clarity is to disregard the concept of chivalry, continue reliance on military necessity as defined above, and replace the concept of humanity with the concept of the prohibition of unnecessary suffering which postulates that "all such kinds and degrees of violence as are not necessary for the overpowering of the opponent should not be permitted to the belligerent."[8] Another formulation, that espoused by Myres S. McDougal, relies on one primary concept, the minimum destruction of values, material, human or spiritual.[9]

Whether one chooses to adopt the three concept approach of military necessity, humanity, and chivalry, the two concept approach of military necessity and unnecessary suffering, or the single concept approach of the minimum destruction of values, there is a requirement for a subordinate rule to perform the balancing function between military and humanitarian requirements. This rule is the rule of proportionality. A military commander is not entitled to cause collateral injury to noncombatants or damage to civilian objects which is disproportionate to the military advantage derived from an operation. Unfortunately, it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances, largely because the comparison is between unlike quantities and values. It is difficult to

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[6] Gehring, *supra* note 5, at 53-55 contains a number of definitions used in national law of war manuals.

[7] 2 *Oppenheim's International Law* 227 (H Lauterpacht 7th ed. 1952), refers to "the principle of chivalry, which arose in the Middle Ages and introduced a certain amount of fairness in offence and defence, and a certain mutual respect.

[8] Gehring, *supra* note 5, at 52-53; **Parks,** *Conventional Aerial Bombing and the Law of War* 108 U.S.N.I.P. 98, 103 (1982). Current U.S. Army literature uses the term "unnecessary suffering" rather than "humanity" or "chivalry." *See* U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare 18 (July 1956).

[9] M. McDougal & F. Feliciano, *Law and Minimum World Public Order* 521-30 (1961).

assess the relative values of innocent human lives as opposed to capturing a particular military objective such as a hill.[10]

II. TREATY PROVISIONS AND MODEL RULES PRIOR TO PROTOCOL I

Although Protocol I contains the first reasonably explicit codification of the rule of proportionality, earlier treaties and related documents contain some provisions which are relevant to the subject. For example, Article 15 of the Lieber Instructions, promulgated for the Union Forces as General Order 100 during the American Civil War in 1863 and considered to be the first attempt to codify the laws of war, take cognizance of the rule:

> Art. 15. Military necessity admits of all direct destruction of life or limb of armed enemies, *and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; . . .*[11]

Following World War I, a set of Rules of Air Warfare were drafted by a commission or jurists at the Hague in 1922-23. These rules were never formally adopted by states but do indicate the reactions of jurists to the first major experience of aerial bombardment. Article 24 is concerned with aerial bombardment and two subparagraphs of that article are relevant to proportionality:

> (3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2)[military objectives] are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must a b stain from bombardment.
>
> (4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, and villages, dwellings or buildings is legitimate *provided there exists a reasonable presumption that the military concentration is sufficiently*

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[10] There is no comprehensive study of proportionality in a combat context. Two studies which provide some assistance are Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification* Cornell Int'l L.J. 134 (1976), and Kruger-Sprengel, *The Concept of Proportionality in the Context of the Law of War: Report to the Committee for the Protection of Human Life in Armed Conflict,* VIII Congress of the International Society for Military Law and the Law of War (Ankara 1979).

[11] Schindler & Toman, *supra* note 3, at 6.

> *important to justify such bombardment, having regard to the danger thus caused to the civilian population.*[12]

These provisions adopt a dual approach, imposing an absolute bar on attacks on populated areas outside the immediate area of operations of land forces, but relying on the rule of proportionality within that area.

The 1938 Resolution of the League of Nations Assembly concerning Protection of Civilian Population Against Bombing From the Air in Case of War also reflects some interwar thinking:

(1) The intentional bombing of civilian populations is illegal;

(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;

(3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence . . .[13]

The exact meaning of the third paragraph is unclear and it may contain either an absolute prohibition on civilian casualties or an approach rooted in proportionality.

Other than the documents quoted above, none of which would be legally binding in an international armed conflict, one must search very diligently and expand the scope of words beyond their natural meanings to find international agreements which contain a hint of an obligation to comply with the rule of proportionality at the beginning of World War II. One of the provisions of the St. Petersburg Declaration of 1868 states "[t]hat the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."[14] One might deduce from this rule an obligation to minimize civilian casualties. There are also provisions in the Hague Land Warfare Rules[15] and in the 1907 Hague Convention IX concerning Naval Bombardment[16] which have some slight relevance. The rule of proportionality was not, however, embodied either explicitly or implicitly in treaty law prior to World War II. It is considered, however, that the rule of proportionality is part of customary law as it is an essential device to balance military and humanitarian interests.

Very substantial civilian casualties were caused in World War II by aerial attacks in which it is obvious that little heed was paid to the rule

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[12] *Id.* at 150.
[13] *Id.* at 162.
[14] *Id.* at 96.
[15] *Id.* at 57-92.
[16] *Id.* at 723-29.

of proportionality. Nonetheless little effort appears to have been devoted in the immediate postwar years to the development of international conventions to regulate the actual conduct of hostilities. In 1956, the XIXth International Conference of the Red Cross, meeting in Delhi, adopted a set of Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. Although these draft rules were ignored at the time by governments, a number of the ideas contained in them were taken up again when Protocol I was negotiated. The rules which are most relevant to the proportionality question are contained in Articles 8 and 9:

> Art. 8. The person responsible for ordering or launching an attack shall first of all:
> (a) make sure that the objectives, or objectives to be attacked are military objectives within the meaning of the present rules, and are duly identified.
>
> When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population:
>
> (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population.
>
> ***He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated: . . .***
>
> Art. 9. All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, ***or that such losses or damage are at least reduced to a minimum.***
>
> In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.
>
> The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.[17]

[17] *Id.* 187-93.189-90.

Article 9 adopts the approach contained in the 1923 Draft Hague Air Warfare Rules whereby separate standards for civilian losses are adopted depending on whether or not the concentration of civilians is located in the vicinity of military or naval operations.

III. PROTOCOL I PROVISIONS AND ANALYSIS

Additional Protocol I establishes a set of rules to be applied in international armed conflicts. The expression "international armed conflict" is not defined in the Protocol or elsewhere, but it is considered that, at a minimum, Protocol I applies wherever regular armed forces engage the regular armed forces of a foreign state or enter the territory of a foreign state without permission. As an example, the aborted attempt by American forces to rescue diplomatic personnel held hostage in Iran would be an international armed conflict within the meaning of the Geneva Conventions and Protocol I. As a result of Article 1(4), Protocol I also includes within the meaning of international armed conflict, "armed conflicts in which peoples are fighting against racist regimes in the exercise of their right of self-determination."[18]

Part IV, section I of Protocol I is concerned with the protection of the civilian population and sets forth the standard for such protection in Articles 48 through 56. The process by which the standard is to be maintained is detailed in Article 57. As the provisions are interrelated, it is necessary to quote several of them together before commencing an analysis of their meaning.

Section I applies to all attacks from land, sea, or air against objectives on land.[19] The parties to the conflict are required to distinguish between the civilian population and combatants and between civilian o b jecta and military objectives and to direct their operations solely against military objectives.[20] "Attacks" are acts of violence directed against the adversary, whether in offense or defense.[21] Military objectives are combatants and

> In so far as objects are concerned, military objectives are lim ited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose

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[18] The proper meaning of Article 1(4) is by no means clear, but it does extend the normal scope of international conflict. Its acceptance was considered a political victory by national liberation movements because it gave some degree of international "recognition" to them and to the struggles in which they were engaged.

[19] Protocol I, Pt. IV., sec. I, at Art. 493).

[20] *Id.* at Art. 48.

[21] *Id.* at Art. 49(1).

total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[22]

Article 51 contains a number of specific rules requiring protection for the civilian population:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection of this Section, unless and for such time as they take a direct part in hostilities,

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

   (a) those which are not directed at a military objective;

   (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

   (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol: and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

   (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

   (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive

[22] *Id.* at Art. 52(2).

in relation to the concrete and direct military advantage anticipated.[23]

Article 57 establishes the procedures by which the standard set forth in Article 51 is to be accomplished. The relevant portions of this article state:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; . . .

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objec-

[23] *Id.* at Art. 51.

> tive to be selected shall be that attack on which may be expected to cause the least danger to civilian lives and to civilian objectives.[24]

The attacking force is not the only one with responsibilities towards the civilian population. Article 58 enjoins the parties, to the maximum extent feasible, to remove the civilian population from the vicinity of military objectives, to avoid locating military objectives within or near densely populated areas and to take other precautions to protect the civilian population.[25]

The articles quoted above present a number of interpretive difficulties where the proportionality issue is concerned. What is an "attack for the purpose of Article 51(5)(b) and 57(2) and (3), and does it differ from the "attack" defined in Article 49(1)? What is the meaning of "excessive" as used in Article 51(5)(b) and 57(2)? What is the standard for measuring "concrete and direct military advantage anticipated" in Articles 51(5)(b) and 57(2)? Who is required to take the precautionary measures specified in Article 57(2)(a)? What is the meaning of "feasible" in Article 57(2)(a)? Who is required to take the executive action required by Article 57(2)(b)?

The answers to the above questions will be sought utilizing the rules of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31(1) of the Vienna Convention specifies: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of ita object and purpose."[26] It is considered that the primary purpose of Protocol I is contained in this provision of the preamble: "Believing it necessary nevertheless to reaffirm and develope the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application."[27] This purpose is not furthered by the interpretation of specific rules in a way which provides ideal abstract protections for victims but is completely unworkable in the harsh reality of combat.

The first question posed was what is an "attack" for the purposes of Articles 51(5), 57(2), and 57(3), and does it differ from "attack" as defined in Article 49(1). Article 49(1) states: "'Attacks' mean acta of violence against the adversary, whether in offence or defence."[28] Considered in the abstract, this definition is broad enough to designate the

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[24] *Id.* at Art. 57.
[25] *Id.* at Art. 58.
[26] Entered into force January 27, 1980. *See* 63 Am. J. Int'l L. 875 (1969).
[27] Preamble, Protocol I.
[28] *Id.* at Art. 49(1).

act of a single soldier shooting a rifle as an attack. Within the context of Articles 51(5)(b) and 57(2), However, the act of a single soldier would not constitute an attack. These articles contain provisions indicating that certain persons are to gather and assess information in order to determine that the objectives to be attacked are legitimate military objectives and that civilian losses are unlikely to be excessive and, also to take feasible measures to avoid or minimize civilian losses. Such provisions presuppose that "attack" has a substantially narrower meaning than in Article 49(1). Near conclusive proof for this position is provided by Article 57(2)(a)(i) which clearly envisages "attack" as an action directed against several military objectives.[29] Neither further analysis of the language of the Protocol nor reference to the negotiating history has, however, been of much assistance in determining how far up the military organization chart one must advance before one can be responsible for an "attack" within the meaning of Articles 51 and 57. It is suggested that, at a minimum, because of the planning process clearly envisaged, it would normally be inappropriate and impractical to classify an operation below divisional or equivalent level as an "attack" for the purpose of these articles.

The second question posed was what is the meaning of "excessive" as used in Articles 51(5)(b) and 57(2). Since the quantities being measured, civilian losses and military advantage, are dissimilar, it is not possible to establish any reasonably exact proportionality equation between them. As attacks directed at the civilian population are already prohibited by Article 51(2), it is clear that attacks directed in theory against military objectives which cause such injury to civilians as to make it obvious that the attack was in fact directed against them would be "excessive", but how much higher the standard is to be drawn is unclear from the text of Protocol I itself.

A review of the negotiating history is of some assistance. In general, negotiation of the Protocol articles concerning proportionality involved the reconciliation of three conflicting viewpoints: explicit general recognition of proportionality as an essential component of any viable law purporting to regulate the conduct of hostilities, denial of any recognition of the legitimacy of proportionality on the basis that it was not a recognized rule of the law of war and that it was contrary to the humanitarian purpose of the Conference, and partial recognition of proportionality, that is, recognition of the inevitability of incidental loss within confined areas but prohibition of incidental loss beyond a certain radius from the military objective.

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[29] *Id.* at Art. 57(2)(a)(i).

The initial draft of Article 46 by the International Committee of the Red Cross, the precursor of Article 51 of the Protocol, stated in part:

> The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited. In particular it is forbidden:
>
> (a) ...
>
> (b) to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.[30]

In explaining the draft text, the ICRC representative indicated that

> [s]ub-paragraph 3(b) did not contain an exception to paragraph 1 but, as the word "incidental" showed, was intended to cover a different situation. The Red Cross agreed that only peace could guarantee effective protection for the civilian population within or near military objectives.
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> Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922-23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives.[31]

The Federal Republic of Germany,[32] Finland,[33] Canada,[34] Australia,[35] the United Kingdom,[36] France,[37] the United States,[38] and others spoke in support of the ICRC approach and favored explicit recognition of the

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[30] 3 *Protection of War Victims: Protocol I to the Geneva Conventions* 123 (H Levie ed. 1980).
[31] *Id.* at 126-27.
[32] *Id.* at 131.
[33] *Id.* at 133.
[34] *Id.* at 134.
[35] *Id.* at 139.
[36] *Id.* at 140.
[37] *Id.* at 141.
[38] *Id.* at 142.

rule of proportionality, usually for the reasons already put forth by the ICRC, The United States added, however, that the ICRC proposal was a codification of existing international law.

Romania submitted an amendment deleting Article 51(3)(b) of the ICRC draft in order to remove any reference to proportionality from the Protocol.[39] Several delegations spoke in support of the Romanian amendment. Syria could "not accept the theory of some kind of 'proportionality' between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter."[40] Hungary could not accept the ICRC draft, based on the rule of proportionality "which called for a comparison between things that were not comparable, and thus precluded objective judgment"[41] and further:

> Mr. Herczegh [Hungary] said the debate had shown that opinion in the Committee was divided on the principle of proportionality set out in subparagraph 3(b). His own view was that a rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilian victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it.
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> Subparagraph 3(b) established a link between civilian losses and military advantage, but the latter was hard to define even if the words "direct and substantial" were added. The ICRC did not refer to the matter, and that was certainly due to no mere oversight but to the fact that the authors of the Commentary had been unable to be specific. Military advantages were based on unpredictable strategical considerations which evolved much more quickly than humanitarian law. He doubted whether it was really necessary to introduce such an ambiguous rule, which might well change the very nature of humanitarian law. Although it was true that the Conference was laying down regulations for soldiers, which must be realistic, it must not take the military view as the point of departure. His delegation was therefore in favour of strengthening the protection accord-

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■ *Id.* at 123-24,136.
[40] *Id.* at 127.
[41] *Id.* at 128.

> ing to the civilian population without mentioning the rule of proportionality.[42]

Sweden put forward an intermediate formulation in an attempt to resolve the dispute:

> It is forbidden to launch attacks even upon a military objective, when such attacks may be expected to entail losses among civilian population or cause the destruction of civilian objects beyond the immediate vicinity of the military objective or, to cause such losses or such destruction within the immediate vicinity of the military objective, to an extent disproportionate to the direct and substantial military advantage anticipated.'*

The Swedish suggestion was not discussed at any length in recorded meetings.

Resolution of the proportionality issue in Article 51 was deferred pending resolution of the same issue in the context of what became Article 57, the article concerned with attack precautions. Essentially the same arguments were put forward in discussion on that article. Although there is no explicit indication of the rationale in the record, a working group proposed an alternative formulation substituting "excessive" for "disproportionate" in the relevant portions of what were to become Articles 51 and 57. This proposal won the support of the appropriate committee, and subsequently of the Conference." Romania, obviously considering that the shift from 'disproportionate' to 'excessive' was a change in words but not in substance, continued to protest:

> His delegation had abstained in the vote of Article 50 [now 57] and had voted against paragraph 2(a)(iii) and 2(b), which embodied the "rule of proportionality" that his delegation had always opposed. Article 50 [now 57] introduced into humanitarian law a concept which was contrary not only to humanitarian principles but to the general principles of international law. It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider advantage to be more important than the incidental losses. The principle of proportionality was therefore a subjective principle

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[42] *Id.* at 143-44.
[43] *Id.* at 130.
[44] *Id.* at 324-32.

> which could give rise to serious violations. Accidental losses among civilians must be reduced to a minimum through scrupulous application of the Geneva Conventions. All precautionary measures must be taken to protect the civilian population before embarking on an attack. In no circumstances should legal provisions give parties the right to dispose of human lives among the civilian population of the adversary. Modern international law prohibited aggression and only wars of defence against aggression were permitted. The rule of proportionality was therefore against the principles of international law.[45]

Although it is not considered to shed much light on the meaning of 'excessive,' it is interesting to note some of the figures of speech put forward by the proponents of a proportionality rule while the issue was still in doubt. Canada observed "a reference to proportionality was necessary. *An* absolute prohibition would result in a very difficult situation, for instance when there was a single civilian near a major military objective whose presence might deter an attack."[46] The United Kingdom stated that "it was difficult to visualize an attacker who would not carry out an assault upon an entrenched adversary because of the presence of one or two civilians."[47] Considered in context, this statement merely indicated that some civilian casualties were inevitable regardless of how strict the standard might purport to be and they should not be considered as examples of the maximum limit of the proportionality equation.

In summary, the negotiating history indicates that the term "disproportionate" was proposed initially but, as it was strongly challenged by several countries because of its subjectivity, "disproportionate" was replaced by the term "excessive."The record does not indicate the reason for the change but it is probable that it was a face-saving device for Romania and her supporters. Certainly, Romania argued that the change or words did not change the concept and that "excessive"was as subjective a standard as "disproportionate." It is clear that an attack directed in theory against military objectives but in fact against civilians or civilian objects would be excessive but a determination of how much higher the standard can be drawn depends on an assessment of state practice, past, present, and future.

The third interpretive issue involves determining the standard for measuring "concrete and direct military advantage anticipated" in Articles 51(5)(b) and 57(2). As the analysis conducted earlier of the meaning of "attack" in the same articles concluded that "attack" envisages action

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[45] *Id.* at 327-28.
[46] *Id.* at 134.
[47] *Id.* at 140.

against several military objectives, it is unlikely that the standard for measuring "concrete and direct military advantage anticipated" is the military benefit derived from an attack on a single military objective. The negotiating history is of some assistance as several NATO members made statements in substantially identical format explaining their votes on this topic and there were no objections to these formulations.[48] The statement made by Canada is an adequate representative of these statements: "The references in Articles 46 [now 51] and 50 [now 57] to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack.[49]" Unfortunately, although these statements indicate the standard applies to military operations of a relatively broad scope, they do not indicate how the boundaries are to be set geographically or chronologically so that a determination of military advantage can be made. An an example, if aerial bombardment is considered, the degree of military advantage derived from operations will obviously vary depending on whether one focuses on the results of a day's operations, a week's, a campaign's, or a war's operations. Similarly, one side of the equation will vary depending on whether one considers military advantage to be the advantage derived from bombarding one particular military objective, all objectives of a similar type, or all objectives in general. If military benefit is assessed on too broad a basis, for example, the military benefit derived from the World War II strategic bombing offensive against Germany as compared to the total losses suffered by the enemy civilian population as a result of that campaign, then it may well be extremely difficult to apply the proportionality equation until the war has ended.

The fourth question is who is required to take the precautionary measures specified in Article 57(2)(a). The subparagraph imposes an obligation upon "those who plan or decide upon an attack." "he text itself implies that the individuals involved are not merely carrying out orders issued from a higher level, but have a degree of independent authority to decide whether or not an attack is to be carried out and to assess various ways to accomplish their purpose. The negotiating record also indicates that responsibility is to be placed at a relatively high level of the command structure.

In introducing the article, the ICRC representative indicated "As to the level of command to which the provisions . . . were addressed, . . . it considered it was for the parties concerned to make it more precise, in terms of the organization of their armed forces and of the kind of troops

[48] *Id.* at 165, 169, 171, 331-37.
[49] *Id.* at 169.

engaged."[50] Notwithstanding this deliberate flexibility, some delegations remained concerned. Switzerland stated: "That ambiguous wording might well place a burden or responsibility on junior military personnel which ought normally to be borne by those of higher rank. The obligations set out in Article 50 [now 57] could concern the high commands-only the higher grades of the military hierarchy."[51] The Austrian representative stated:

> His delegation considered that the precautions envisaged could only be taken at a higher level of military command, in other words by the high command. Junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of proportionality during an attack. The position was even more complicated for those who were defending their own territory against an invading force. As a general rule it was the invading force which imposed ita methods of warfare upon the defending force. That further complicated the task of junior military personnel, who had to take those requirements into account in all circumstances.[52]

It is not clear from the Article or the negotiating record at which command level responsibility for precautionary measures is to be imposed. It appears, however, that a command level which possesses a substantial degree of discretion concerning the methods by which medium term objectives are to be attained and also a formalized planning process would be required to take the precautionary measures specified in Article 57(2)(a). Determining the proper level requires a good faith assessment of particular national military command structures. It is considered unlikely, however, that the proper level will be below a divisional or equivalent headquarters.

The fifth question is what is the meaning of "feasible" in Article 57(2)(a). As one of the presumed purposes of Protocol I is to provide workable rules which actually can provide further protection for victims of war, it is considered that "feasible" in Article 57(2)(a) means "practicable or practically possible." In the negotiating record, the Federal Republic of Germany, Italy, and the United States all made explanations of vote to clarify the meaning of this term.[53] The United States' formulation is representative:

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[50] *Id.* at 314-15.
[51] *Id.* at 332.
[52] *Id.* at 333.
[53] *Id.* at 334-45,337.

> It is the understanding of the United States Government that the word "feasible" when used in draft Protocol I, for example in Articles 50 [now 57] and 51 [now 58], refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.[54]

India also made an explanation of vote on this issue:

> The Indian delegation voted in favour of this article on the clear understanding that it will apply in accordance with the limits of capability, practical possibility and feasibility of each Party to the conflict. As the capability of Parties to a conflict to make distinction will depend upon the means and methods available to each Party generally or in particular situations, this article does not require a Party to undertake to do something which is not within its means or methods or ita capability. In its practical application, a Party would be required to do whatever is practical and possible.[55]

The United States and the Federal Republic of Germany also made the following explanation of vote: "Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time."[56] This may appear to be a statement of the obvious but, considered together with the concept of feasibility, it establishes that individual culpability, if any exists, must be assessed on the basis of the facts as they appeared to the commander at the time of an attack and not on the basis of hindsight.

The sixth and final question is who is required to take action to cancel or suspend an attack under certain circumstances as required by Article 57(2)(b). It is considered that this provision refers to a broader category of persons including those higher in the chain of command and, possibly, those subordinates with a sufficient knowledge of all aspects of the attack to determine that excessive incidental losses will probably be incurred. It is probable that senior authorities will have to determine on a national basis who, below the level of those who decide upon an attack, will have authority to cancel or suspend attacks. Certainly, delegating such authority to private soldiers would be most unwise as they would not have sufficient information, time, or skill to make the necessary determination. Similarly, as a general rule, although air crewmembers are

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[54] *Id.* at 331.
[55] *Id.* at 334.
[56] *Id.* at 334,336.

much better educated and possess more relevant knowledge than private soldiers when conducting individual missions, they still must and must be entitled to rely upon the information provided to them by their superiors. It is probable, however, that relatively stringent rules of engagement will be necessary when the aircrew is attempting to determine whether or not to attack fixed targets of opportunity if the terms of Article 57 are to be observed.

Part V, Section II, of Protocol I is entitled "Repression of Breaches of the Conventions and of This Protocol" and contains a number of sanctioning provisions.

Article 85 lists grave breaches, the major offenses against the Protocol. The relevant portions of the article are:

> 1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of the Protocol . . . .
>
> . . . .
>
> 3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
>
> (a) making the civilian population or individual civilians the object of attack;
>
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects as defined in Article 57, paragraph 2(a)(iii);
>
> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such will cause excessive loss of life, injury to civilian or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii); . . .

The commission of grave breaches subjects the alleged offender to a degree of universal jurisdiction. The details concerning such jurisdiction will not be discussed here. It should be noted, however, that all parties are obligated to suppress other breaches of the Protocol and such suppression may involve disciplinary or criminal action being taken by their own state against persons allegedly violating provisions of the Protocol. The grave breaches listed in Article 85(3) must be committed willfully

and they must cause death or serious injury to body or health. Article 85(3)(c) refers implicitly to Article 56(1) which prohibits attacks on installations containing dangerous forces if such attacks may cause the release of such forces and, consequently, "severe" losses among the civilian population. On the reasonable assumption that the grave breach provision in Article 85(3)(c) does not impose a more stringent standard than that imposed by Article 56(1), one may conclude that "excessive" as used in Articles 57 and 85 must mean as much as or more than "severe".

Article 57(2)(a) required "those who plan or decide upon an attack" to take certain precautionary measures while Article 85(3)(b) imposes grave breach liability on those who knowingly "launch an indiscriminate attack." It is considered that persons who launch an attack are those in a position of command and not staff personnel who are engaged in the planning process, although planners might assume a degree of responsibility through complicity in the offenses of their superiors.

The negotiating record does not indicate the reason for using "launch" in the indiscriminate attack provisions of that article while using "plan or decide" in Article 57. The initial ICRC draft of Article 57 did use the expression "launch"[57] but it was deleted, apparently as a result of a British suggestion that "launch", considered in context, focused unduly on the initial stages of an indiscriminate attack.[58] This would appear to confirm that the "grave breach" provisions of Article 85 are intended to condemn the actions of those commanders who knowingly order an indiscriminate attack and not the individual personnel who actually execute the attack.

A summary of the content of the rule of proportionality as contained in Protocol I, without considering judicial decisions or state practice, indicates the following main features. Parties are prohibited from making indiscriminate attacks by Articles 51(4) and (5). Such attacks include those which may be expected to cause excessive incidental civilian losses in relation to the military advantage anticipated. "Attack" for the purpose of the proportionality rule would normally envisage military operations directed against several military objectives. "Excessive" is a subjective term which, at a minimum, means as much or more than severe. Attacks directed in theory against legitimate military objectives but in fact directed against civilians or civilian objects are clearly prohibited. Assessment of the stringency of the prohibition requires a review of factors outside of treaty law such as state practice. "Military advantage anticipated from an attack" refers to the advantage anticipated from the at-

[57] *Id.* at 309.
[58] *Id.* at 317.

tack considered as a whole and not only from isolated or particular parts of an attack. This definition does not clarify the chronological or geographical scale involved.

Article 57(2)(a) imposes an obligation upon "those who plan or decide upon an attack" to take certain precautionary measures. This obligation presupposes that the measures are to be taken by a command level which possesses a formalized planning process and a substantial degree of discretion concerning the methods by which medium term objectives are to be attained. It is unlikely that the proper level would normally be below a divisional or equivalent level of headquarters. The precautions required by Article 57(2)(a) must be "feasible" and, in context, "feasible" means "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations." Any subsequent evaluation of conduct must focus on circumstances as they appeared to decision makers at the time, rather than against an absolute standard. Article 57(2)(a) imposes an o b ligation on a broader category of persons to cancel or suspend an attack under certain circumstances. This category includes those who plan or decide upon an attack and those higher in the chain of command. The applicability of the obligation to those lower in the chain of command is debatable and essentially a matter of national decision.

Articles 85(3)(b) and (c) designate the willful launching of indiscriminate attacks affecting the civilian population in the knowledge that such attacks will cause excessive civilian losses as grave breaches. The violator will be subject to a degree of universal jurisdiction if the attacks do in fact cause death or serious personal injury. The grave breach provision applies to the commander who orders the attack and not to subordinates who carry out the order.

IV. JUDICIAL OR ARBITRAL DECISIONS

National and international judicial or arbitral decisions which might clarify the rule of proportionality and assist in determining its meaning within the context of Protocol I are relatively sparse, particularly if cases involving reprisals are disregarded. The rules of international law relating to combat have rarely been made the basis of war crime trial proceedings. For example, other than trials arising out of reprisal incidents, no such trials directly relevant to the proportionality issue are reported in the most comprehensive set of war crimes reports, the fifteen volume *Law Reports of Trials of War Criminals* published for the United Nations War Crimes Commission following the Second World War.[59] In-

[59] 15 *Law Reports of Trials of War Criminals* (LRTWC), 109-12.

deed, the Commission did not even purport to recognize the existence of a law governing aerial bombardment,[60] perhaps because the Allied Powers were the major practitioners of the *art*. The Japanese held a number of trials of American airmen during the war for alleged violations of the law of aerial warfare but these constitute debatable precedents.[61]

The most useful proceeding is the *Shimoda* case in which Japanese plaintiffs who had been injured by the atomic bombings of Nagasaki and Hiroshima sued the Japanese government in lieu of the United States government for injuries caused by the bombings which they alleged were illegal. The Japanese government in its defense argued that the bombings were not illegal and placed particular stress on the argument that, although many noncombatants were killed or injured by the bombing, the bombings were a major factor in bringing about the Japanese surrender and, therefore, prevented many more casualties on both sides in the conflict. The Tokyo District Court found for the defendants on other grounds but it did decide that the atomic bombings were themselves illegal. In so doing, it ignored the defense argument that the contribution of the bombings to bringing about the end of the war should be taken into account and focused exclusively on whether or not there were sufficient military objectives in Hiroshima or Nagasaki to justify the incidental non combatant casualties:

> During World War II, aerial bombardment was once made on the whole place where military objectives were concentrated, because it was impossible to confirm an individual military objective and attack it where munitions factories and military installations were concentrated in comparatively narrow places, and where defensive installations against air raids were very strong and solid; and there is an opinion regarding this as legal. Such aerial bombardment is called the aerial bombardment of an objective zone, and we cannot say that there is no room for regarding it as legal, even if it passes the bounds of the principle of military objective, since the proportion of the destruction of non-military objective is small in comparison with the large military interests and necessity. However, the legal principle of the aerial bombardment of an objective zone cannot apply to the city of Hiroshima and the city of Nagasaki, since it is clear that both cities could not be said to be places where such military objectives concentrate.[62]

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[60] *Sawada*, (1946) 5 LRTWC 1, *Isayama*, (1946) 5 LRTWC 60, and *Hisakasu*, (1946) 5 LRTWC 66. The LRTWC reports concern war crimes trials of Japanese for their earlier participation in trials of American airmen for violations of the Japanese "Enemy Airmen's Act."

[61] *History of the United Nations War Crimes Commission* 492 (London, 1948).

[62] 8 Jap. Ann. Int'l L. 212, 240 (1964).

Siege operations against a major city provide one example of ground force operations which might violate the role of proportionality. The legality of directing fire at the civilian population during a siege was discussed in the judgment of the United States Military Tribunal at Nuremberg in the *High Command Trial* concerning the responsibility of Field Marshall von Leeb:

> Leningrad was encircled and besieged. Its defenders and the civilian population were in great straits and it was feared the population would undertake to flee through the German Lines. Orders were issued to use artillery to 'prevent any such attempt at the greatest possible distance from our own lines by opening fire as early as possible, so that the infantry, if possible, is spared shooting on civilians.' We find this was known to and approved by von Leeb. Was it an unlawful order?
>
> "A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavour by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them back, so as to hasten the surrender. (Hyde, Vol. 3, Sec. 656, pp. 1802-1803)"
>
> We might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attaches on this charge.[63]

In the particular circumstances of siege warfare, it would appear to have been legitimate to direct fire at the civilian population in order to keep them within the besieged area. No question of proportionality will thereby arise. As attacks directed against the civilian population are prohibited by Article 51 of Protocol I, such attacks would no longer be permissible. The quotation noted above may, however, indicate why it is so difficult to find cases discussing the application of the rule of proportionality in combat.

An extract from an analysis of the same decision might assist in determining the potential liability of personnel ordered to carry out attacks which are subsequently determined to be indiscriminate:

> The Tribunal held that "in view of the uncertainty of International Law as to" the question of the "use of prisoners of war in

[63] *The German High Command Trial*, 12 LRTWC 1, 84 (1948) (citation omitted).

> the construction of fortifications," "orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face but a matter which a field commander had the right to assume were properly determined by the legal authorities upon higher levels." The Tribunal did not declare that such orders would in no possible circumstances be illegal but simply that they were not obviously illegal, and it would appear that the Tribunal here applied a special rule as to superior orders which differs from the general rule in that the orders in question, being not obviously illegal, would constitute a complete defence and not simply a circumstance which may be argued in mitigation of punishment.[64]

It is probable that, in all but the most blatant cases of indiscriminate attack, subordinates would be entitled to assume that their superiors had carried out the attack precautions specified in Article **57** of Protocol I and, as a result, they could not be held personally liable for any violations which occured as a result of superior orders.

The decision in the ***Hostages Trial*** provides some guidance concerning the need for liability to be determined on the basis of the state of facts as they appear at the time to a military commander:

> The Hague Regulations prohibited "The destruction of seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war." Article 23(g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destructions of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23(g). We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty

[64] *Id.* at *98.*

> of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the 'scorched earth' policy in Finnmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty of this portion of the charge.[65]

Judicial decisions concerning the doctrine of reprisals involve some consideration of proportionality, as proportionality is one of the component parts of that doctrine. In 1928, a Special Arbitral Tribunal of Germany and Portugal considered the extent of German responsibility for damage to Portugal arising out of the *Naulilaa Incident*. At the beginning of World War I, while Portugal was still neutral, Germany sent a force into Portugese African territory as a reprisal for an incident in which a German official and two of his officers were killed. The tribunal found that the original killing was due to a misunderstanding and did not justify reprisal action. It did, however, make a few observations concerning the need for proportionality. After discussing some of the requirements for a valid reprisal, it commented:

> This definition does not require that the reprisals should be proportional to the offence. On this point, authors, unanimous until a few years ago, began to be divided in their opinions. The majority regard a certain proportion between the offence and the reprisals as a necessary condition for the legitimacy of the latter. Other authors, among the most modern, no longer require this condition. In so far as international law in the making as a result of the experiences of the last war is concerned, it certainly tends to restrict the notion of legitimate reprisals and to prohibit any excess. . . Even if it is admitted that international law only requires relative approximation of the reprisals to the offence, reprisals out of all proportion to the act that inspired them ought certainly to be considered as excessive and illegal."

A number of the post-World War II war crimes trials involved the killing of hostages in reprisal for the killing of German soldiers. These cases

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[65] *The Hostages Trial*, 8 LRTWC 34, 69 (1948).

[66] *The Naulilaa Incident, International Law Through the Cases* 679, 680-81 (L. Green 4th ed. 1978).

were concerned more with the fundamental question of whether or not the killing of hostages could ever be justified, but the tribunals did pay some attention to proportionality. In its judgment in *The Hostages* Case, the tribunal held:

> An order, directory or mandatory, which fixes a ratio for the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful . . . The reprisals taken under the authority of this order were clearly excessive. The shooting of 100 innocent persons for each German soldier killed at Topola, for instance, cannot be justified on any theory by the record. An order to shoot 100 persons for each German soldier killed under such circumstances is not only excessive but wholly unwarranted.[67]

A number of cases also arose out of the Ardeatine Cave massacre of 335 Italians in reprisal for the killing of 33 German policemen. In this incident, an order was issued by Hitler's Headquarters to shoot ten Italians for every German policeman killed. In these particular cases, as no written judgments were rendered and as five more Italians were killed than the order required, it is not possible to determine whether findings of guilty were rendered because the ten to one ratio was considered excessive or because five extra persons were killed.[68]

V. STATE PRACTICE

Prior to the development of aircraft and aerial bombardment, the means of warfare available to belligerents were relatively limited and, as a result, except in the cases of sieges or naval shore bombardment, opportunities to violate the rule of proportionality were relatively rare. Belligerents could direct their military forces against military objectives such as enemy forces, or against the civilian population. It was not a simple task to direct them against enemy forces and, at the same time, to cause substantial incidental civilian casualties unless both combatant and noncombatants were besieged together in a confined area or unless warships struck at the coastline in areas where military objectives and the civilian population were situated together and time did not permit evacuation of the civilian population.

It is not possible to provide a comprehensive review of state practice concerning the rule of proportionality in armed conflict within the limited confines of this article. Furthermore, unfortunately, except for

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[67] *The Hostages Trial*, 8 LRTWC at 65.

[68] *Trial of Geneml von Mackensen and Geneml Maelzer*, 8 LRTWC 1 (1945); *Trial of Albert Kesselring*, 8 LRTWC 9 (1947).

some studies of the atomic bombings of Hiroshima and Nagasaki and of the conventional bombing campaigns in the Vietnam conflict, there appears to be a want of any studies reviewing the application of the rule of proportionality to particular battles or campaigns. An effort will, however, be made to review a number of examples which may assist in clarifying the rule.

In 1856, Canton was bombarded by Royal Navy warships following a dispute between British and Chinese authorities concerning the custody of the crew of a British vessel. The bombardment was directed at Chinese public buildings by several British warships and was unopposed. The amount of incidental damage caused to the civilian population is uncertain, but would appear to have been substantial. The incident is significant as the Chinese cause was subsequently taken up by the opposition in the British Parliament and, following a long and emotional debate, Lord Palmerston's government was overthrown on a vote of confidence. Government spokesmen, in defending their actions, argued that

> [t]here was, in fact, no indiscriminate bombardment, that [the Chinese] complaint of widespread slaughter and destruction was unsubstantiated, and that, on the contrary, the bombardment had been definitely restricted in scope and conducted with all the humanity possible. It was no part of the Government's case that if the kind of bombardment which its critics alleged had really taken place it would have been legitimate. The line of defence adopted implied, indeed, the acceptance of the view that it would have been illegitimate.[69]

Serious efforts were made in the early stages of World War II to restrict enemy civilian casualties during strategic bombing operations. On the whole, however, little heed was paid to the rule of proportionality during the various strategic bombing campaigns unless the potential civilian casualties were the inhabitants of occupied territories.[70] There are a variety of reasons for this blindness toward the rule or proportionality ranging from the current state of technology to the general trend towards total war and an ever-expanding concept of military objectives. Correspondence between Churchill and Roosevelt concerning civilian casualties in France caused by the pre-D-Day allied bombing offensive in-

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[69] J. Spaight, *Air Power and the Cities* 51-52 (1930). The second chapter of this book provides details concerning 13 nineteenth and early twentieth century incidents in which warships bombarded cities.

[70] 3 C. Webster & N. Frankland, *The Strategic Air Offensive Against Germany* 95-119 (1961) (four volume set). *See also* F. Sallagar, *The Road to Total War* 85-133 (1969); Schaffer, *American Military Ethics in World War II: The Bombing of German Civilians* 67 J. Am. History 318 (1980).

dicates the subject was sensitive when the potential casualties were friendly civilians:

> Prime Minister to President Roosevelt
>
> The War Cabinet have been much concerned during the last three weeks about the number of Frenchmen killed in the raids on the railway centres in France . . . .
>
> **(2)** When this project was first put forward a loss of eighty thousand French civilian casualties, including injured, say twenty thousand killed, was mentioned. The War Cabinet could not view this figure without grave dismay on account of the apparently ruthless use of the Air Forces, particularly of the Royal Air Force, on whom the brunt of this kind of work necessarily falls, and the reproaches that would be made upon the inaccuracy of night bombing. The results of the first, say, three sevenths of the bombing, have however shown that the casualties to French civil life are very much less than was expected by the commanders . . . .
>
> **(3)** I am satisfied that all possible care will be taken to minimise this slaughter of friendly civilian life. Nevertheless, the War Cabinet share my apprehensions of the bad effect which will be produced upon the French civilian population by these slaughters, all taking place so long before "Overlord" D-Day.
>
> **(4)** The Cabinet ask me to invite you to consider the matter from the highest political standpoint and to give us your opinion as a matter between Governments. It must be remembered, on the one hand, that this slaughter is among a friendly people who have committed no crime against us, and not among the German foe, with **all** their record of cruelty and ruthlessness. On the other hand we naturally feel the hazardous nature of Operation "Overlord" and are in deadly earnest about making it a success . . . .

> President Roosevelt to Prime Minister 11 Apr. **44**
>
> I share fully with you your distress at the loss of life among the French population incident to our air preparation for "Overlord."
>
> I share also with you a satisfaction that every possible care is being and will be taken to minimise civilian casualties. No possibility of alleviating adverse French opinion should be over-

> looked, always provided that there is no reduction of our effectiveness against the enemy at this crucial time.
>
> However regrettable the attendant loss of civilian lives is, I am not prepared to impose from this distance any restriction on military action by the responsible commanders that in their opinion might militate against the success of "Overlord" or cause additional loss of life to our Allied forces of invasion.[71]

The battle to recapture Manila from the Japanese in 1945 is a particularly painful example of an attempt to minimize civilian casualties which went wrong for reasons beyond the control of the attacking force. Once American forces were committed to recapture the Philippines, it was necessary for them to retake Manila. General Yamashita, the Japanese commander in the Philippines ordered his troops to evacuate the city on the approach of American forces because he did not have sufficient forces to defend it and did not have enough food to feed the civilian population of one million. A subordinate Japanese commander disregarded Yamashita's orders and directed his troops to fight to the death to defend the city. In the course of the battle, American forces surrounded the city and closed in towards its center. The Japanese would not surrender. Initially, American commanders imposed severe restrictions on the use of artillery but, as American casualties mounted, many restrictions were lifted. The American official history described the situation:

> The losses had manifestly been too heavy for the gains achieved. If the city were to be secured without the destruction of the 37th and the 1st Cavalry Divisions, no further effort could be made to save the buildings; everything holding up progress would be pounded, although artillery fire would not be directed against structures such as churches and hospitals that were known to contain civilians. Even this last restriction would not always be effective for often it could not be learned until too late that a specific building held civilians. The lifting of the restrictions on support fires would result in turning much of southern Manila into a shambles; but there was no help for that if the city were to be secured in a reasonable length of time and with reasonable losses.[72]

At one stage in the battle, concerned about mounting casualties, American commanders once again requested General MacArthur for permission to use dive-bombing and napalm strikes against Japanese

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[71] W. Churchill, *Closing The Ring* (Vol. 5, The Second World War) 529–30 (1951).
[72] Ross Smith, *supm* note 2,264.

trapped in the Intramuros area of Manila. MacArthur refused to lift his ban:

> The use of air attacks on a part of a city occupied by a friendly and allied population is unthinkable. The inaccuracy of this type of bombardment would result beyond question in the death of thousands of innocent civilians. It is not believed moreover that this would appreciably lower our own casualty rate although it would unquestionably hasten the conclusion of the operations. For this reason I do not approve the use of air bombardment on the Intramuros District.[73]

On some few occasions, the Japanese did release civilians who were welcomed into American lines.[74] Generally, the Japanese had ignored the presence of the civilians or used them as hostages. As the Japanese situation became more hopeless, they began committing atrocities against the civilians. By the end of the battle, heavy American casualties had been incurred, virtually all of the Japanese force was dead, and six Filipino civilians were dead for every soldier who had been killed. A review of the facts clearly indicates that American forces and their commanders did not conduct an indiscriminate attack causing excessive civilian casualties within the meaning of Protocol I. It was necessary to take the city. It was impossible to predict the horrifying toll of civilian lives before the attack began. Indeed, the Japanese had been ordered to withdraw from the city, but the orders had been disregarded. Serious efforts were made to minimize civilian casualties and American lives were lost because of targeting restrictions.[75] It is always possible to argue after the event that if American commanders had been prepared to take more risks with the lives of their troops, more Filipino lives would have been saved; this argument ignores many of the realities of combat. Objectively speaking, excessive civilian casualties occurred during the battle for Manila, but it would be unrealistic and quite unfair to impute legal or even moral responsibility for this to the American commanders who directed the recapture of the city.

The decision to use atomic weapons against Hiroshima and Nagasaki is worthy of note. If the decision is assessed purely within the context of whether or not there was sufficient military objectives in Hiroshima and Nagaski to justify their immolation by atomic weapons, one arrives very quickly at the opinion reached by the court in *Shimoda*, that is, that the bombings were obviously disproportionate. From a different perspective, the judgment is more difficult to justify. In July and August 1945,

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[73] *Id.* at 294.
[74] *Id.* at 299.
[75] *Id.* at 237-308.

the Allied Powers had just defeated Germany and were trying to bring about the defeat of Japan and the end of an extremely costly war. There was little indication that Japan was prepared to surrender without further action being taken against it. The alternatives available to Allied decision makers and to President Truman in particular were starvation of Japan by naval blockade which could well have involved the deaths of many more civilians than were lost through the atomic bombings; invasion which would have caused several hundred thousand allied casualties and probably a much larger number of Japanese casualties, both civilian and military; and dropping the atomic bombs which caused, depending on the estimate, between 226,000 and 566,000 Japanese casualties.[76] If the proportionality equation is to be drawn between the innocent civilian casualties at Hiroshima and Nagasaki and the enormous casualties, many of them civilian, which would be caused by attempting to end the war in other ways, it is less clear that the losses were disproportionate.

Two excellent recent studies of bombing operations in the Vietnam War discuss the application of the rule of proportionality in the course of analyzing American compliance with the law of war in aerial operations. These studies are particularly valuable because their legal analysis is firmly rooted in the history of the events being reviewed. In one study,[77] the author discussed the bombing campaign over North Vietnam from 1965 to 1968 and concluded that the United States was hampered to the point of ineffectiveness by politically-motivated targeting restrictions which went far beyond those required by the law of war:

> It was on this point that the Johnson administration made one of the more egregious errors of Rolling Thunder. It selected the hortatory admonishment to minimize civilian casualties as the campaign standard, rather than the law of war prohibition of excessive collateral civilian casualties. Although other reasons were cited on occasion, the buffer zones around Hanoi and Haiphong were placed there primarily to reduce to an absolute minimum civilian casualties among the enemy population. In practice, the criterion for White House selection of targets slipped farther from approving only those targets that would minimize civilian casualties to one of authorizing attacks against only such targets as would result in a minimum of civiliancasualties . . . .
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> . . . it chose to slide the standard to an increasingly stringent level, i.e., excessive minimize minimum, to the extent that it

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[76] Paust, *The Nuclear Decision in World War 11—Truman's Ending and Avoidance of War*, 8 Int'l Law 160, 173 (1974).

[77] Parks, *Rolling Thunder and the Law of War*, 22 Air U. Rev. 2 (Jan.-Feb. 82).

> became the basis for target denial; and when a target was approved for attack, minimization of civilian casualties remained the paramount criterion, to the substantial disregard of the security of the attacking forces and the accomplishment of the mission in as efficient a manner as possible. While such humanitarianism is laudable, it ignored not only the law of war but fundamental concepts of warfare.[78]

In a more recent article, the United States Air Force bombing campaign against North Vietnam in 1972 and 1973 is reviewed and assessed as both militarily effective and in compliance with the law of war, particularly the rule of proportionality. In this view, the proper standard of excessive collateral civilian casualties enjoys a high threshold, "condemning only collateral civilian casualties so excessive as to be tantamount to the intentional attack of the civilian population, or to the total disregard of the safety of the civilian population."[79] Whether or not one agrees with this standard, a very convincing argument is advanced that this campaign provided an example of an effective military operation which was conducted in compliance with the law of war and which could meet a much more stringent proportionality requirement than the one therein outlined. It has been suggested by other writers that the so-called Christmas Bombing part of the campaign was illegal because the attacks were primarily for political purposes, although they were directed at military objectives.[80] As virtually all military activities have an ultimate political purpose, this criticism is considered invalid.

Since the end of World War II, there have been a large number of so-called reprisals involving recourse to armed force, particularly in the Middle East.[81] Serious questions have been raised concerning the legality of the use of force in reprisal in a "peacetime" context.[82] Further, within the context of Protocol I, proportionality involves an attempt to assess the relative weights of civilian losses versus military advantages. Where reprisals are concerned, the equation is between total losses arising from the prior illegality and total losses resulting from the action in reprisal. When the reprisals take place in "peacetime," it is possible to have a true proportionality equation measuring like with like as the losses on both sides may involve both military and civilian casualties. One analysis of proportionality in the context of Israeli-Arab actions suggests that, if

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[78] *Id. at* 17.
[79] Parks, *Linebacker and the Law of War*, Air U. *Rev.*, *Jan.-Feb.* 1983, *at* 2.
[80] H. DeSaussure & *R. Glasser, Air Warfare—Christmas 1972* in *Law and Responsibility in Warfare* 119-39 (P Trooboff ed. 1975).
[81] Bowett, *Reprisals Involving Recourse to Armed Force*, *66* Am *J. Int'l L.* (1972).
[82] I. Brownlie, *International Law and the Use of Force By States* 264-80 (1963).

noncombatant deaths are caused during a reprisal action, the responsibility for them may be lessened on the assumptions that noncombatants are not consciously used as a means to achieve even a legal end and that armed forces engaged in a reprisal action have taken risks to minimize civilian casualties.[83] The concept of risk taking may also be relevant in a Protocol I context.

A summary of the impact of judicial decisions and state practice on the rule of proportionality contained in Protocol I indicates the following features. Other than the Shimoda decision, which was concerned with nuclear warfare and which may have taken an unduly narrow view of the military benefit derived from the attack, there are no judicial decisions which consider the proportionality equation between military benefit and civilian loss resulting from an attack. Dicta in the *High Command* case provide some support for the argument that subordinates ordered to carry out an attack are entitled to assume that their superiors have carried out the necessary appraisals and that the attack is lawful. Some language in the Hostages case supports the argument that culpability must be assessed on the basis of the facts as they were known to an accused and not on the basis of an abuse of hindsight. Judicial decisions concerning the legitimacy of certain belligerent reprisals are of little or no assistance because they tend to focus on aspects of reprisals other than proportionality.

A review of state practice provides little instruction. It is only within the last century that weapons have been developed which can be directed simultaneously at military objectives and civilians except in unusual circumstances such as sieges. By and large, the essential detailed historical research has not been done. It is submitted that, after the opening stages, the aerial bombardment campaign of World War II was carried on without reference to the rule of proportionality except when the targets were located in occupied territory. It appears that, when bombing was conducted over enemy territory, exclusive attention was paid to the military objective which at times was defined so broadly as to include entire cities. Civilian casualties in enemy territory were either not considered at all or looked on as part of the legitimate military benefit derived from the attack, or viewed as a real but illegitimate benefit.

The correspondence between Churchill and Roosevelt concerning aerial bombardment in France before D-Day indicates it was possible, even with the technical means available at the time, to make reasonable forecasts of civilian casualties likely to result from a series of attacks and to

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[83] Levenfeld, ***Israel's Counter—Feduyeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law***, 21 Colum. J. Transnat'l L. 1, 39-45 (1982).

take steps to reduce those casualties. On the other hand, the brief account of the battle for Manila indicates that on some tragic occasions enormous civilian losses will be incurred without any intentional violation of the rule of proportionality. The discussion of the atomic bombings of Hiroshima and Nagasaki indicates that, in some cases, an assessment of whether or not the rule of proportionality has been violated depends on the scale which is used to measure military advantage.

Although the American bombing campaigns over North Vietnam have merely been discussed briefly, the literature indicates that it is quite possible, with the technical means currently available, to conduct a lawful aerial bombing campaign which is well within any reasonable definition of the rule of proportionality, although it is debatable whether or not the standard can be applied on a target-by-target basis.

Neither the judicial decisions nor the examples discussed provide clear guidelines for determining whether or not civilian losses are excessive in a particular case or for determining the standard of military advantage against which they are to be measured. All, however, stress the importance of taking into account all relevant factors surrounding an incident and the actual state of knowledge of the commander who must attain a military objective and who knows that some soldiers under his or her command will die before the goal is reached.

VI. CONCLUSION

Prior to the conclusion of Protocol I, there was no binding treaty provision applicable in armed conflict which explicitly or implicitly required the application of the rule of proportionality in combat. Moreover, there was some debate concerning whether or not the rule of proportionality was a customary rule of law applicable in armed conflicts. This debate is pointless as, whether or not proportionality is formally embodied in customary law, it is a logically necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict. The reconciliation requirement is widely recognized.

An enormous amount of research into contemporary military history, particularly the process whereby the selection of which objectives are to be attacked and which are to be spared is necessary before an assessment can be made of when and how the rule of proportionality has been applied in the past. A few preliminary observations can be made. It is unlikely that useful precedents predating the twentieth century will be found unless they involved sieges or naval shore bombardments. Commanders and political figures involved in the World War II strategic bombing campaign do not appear to have paid much heed to the rule of

proportionality when operations were directed against objectives in enemy territory. They did heed the rule in operations against occupied territory, but, even in these operations, evidence is not readily available concerning how acceptable or unacceptable civilian losses were defined. Some well researched work has been done on the Vietnam War and it appears clear that the United States air forces and their political masters paid considerable attention to civilian casualty estimates. Even in this case, it would be useful to know about the factors taken into account in the proportionality equation and the relative weights assigned to them.

Further work must also be done before it is possible to state firm conclusions concerning the scale on which military advantage is to be weighed both temporally and geographically. To date, determination of the scale by authors appears to be a matter of subjective preference; or the atomic bombings were legal because they helped bring World War II to an end, but illegal because the military objectives in the bombed cities were insignificant compared to the civilian losses incurred.

The content of the rule of proportionality as contained in Protocol I remains largely subjective even when judicial decisions and the present knowledge of state practice are conpidered. *An* attack which may be expected to cause excessive incidental civilian losses in relation to the military advantage anticipated is prohibited. Such an attack would normally involve military operations directed against several objectives. "Excessive" is a subjective term, the meaning of which must be further clarified through review of past and future state practice and agreed understandings. Attacks, which in theory are directed against legitimate military objectives, but, in fact, are directed against civilians are clearly prohibited. The geographical and temporal scales for determining military advantage are also unclear.

One might conclude from the preceding paragraphs that inclusion of the rule of proportionality in Protocol I is of debatable humanitarian benefit and might even be harmful. This conclusion would be wrong. From a military standpoint, the rule of proportionality is useful as an acknowledgment of the unfortunate inevitability of incidental civilian casualties in war. Rules of engagement which would prohibit incidental civilian casualties would prove unworkable in time of war. Rules of attack which ignore the issue would, at best, have an implied proportionality rule read into them in combat and, at worst, lead commanders to believe that incidental civilian casualties could be ignored. Finally, rules into which an extensive objective proportionality standard has been incorporated might well be too inflexible to be applied in the myriad circumstances of combat.

The proportionality rule as incorporated in Articles 51 and 57 of Protocol I may well result in a substantial humanitarian benefit if Protocol I is applied in good faith. Planning staffs, presumably at or above the divisional level, will be required to take all feasible measures to assess probable incidental civilian losses during an attack. Commanders and planners will be required to determine the relative weights of military advantage and civilian losses to determine if losses are excessive. "Excessive" is undefined and probably undefinable but frequent practice in deciding on the issue will probably result in the development of a "reasonable officer" view of the standard.

One might hypothesize, perhaps mythologize, a Second World War in which the rules of Protocol I were applied. The city of Dresden was bombed in February 1945 by the United States Air Force and the Royal Air Force. The city did contain some military objectives and these were damaged. Civilian losses are unclear, but it appears at least 25,000 people were killed and 30,000 injured. The decision to bomb the city has been widely pilloried. Indeed, Churchill, who enthusiastically encouraged the bomber offensive, felt considerable revulsion about this particular attack.[84] Would the attack decision have been the same if, before the attack decision was made, the military commander received a draft operations order from his planning staff including a provision stating: "The military advantage we expect to derive from this attack is _____, the probable civilian losses are _____, your direction is requested concerning whether or not the probable civilian losses are 'excessive.'"

[84] Webster & Frankland, *supra* note 60, vol. 3 at 112-117.

JUDICIAL REVIEW OF PROMOTIONS IN THE MILITARY

By Captain L. Neal Ellis, Jr.*

While former members of the "brown shoe" Army are still likely to tell glowing stories about the Army that once was, they are not as likely to speak in such favorable terms about the promotion system that once was. In those days, before climbing the next rung on the ladder, an officer had to wait until a vacancy opened. But, when a billet in a higher grade opened, the most senior officer filled it. Consequently, those more able but less senior officers had no opportunity to compete for advancement; older, less competent officers were rewarded for their patience. Those who lacked the patience to wait interminable years until another vacancy appeared left the service for other professions.

Recognizing that the loss of talented officers impaired its ability to wage war and defend the country, the military instituted a promotion system that took into account both seniority and merit. The former system had several virtues; it was completely predictable, simple to implement, and required little administration. The new system forced the military to exercise discretion and to make fine judgments about the qualifications of its officers.

The former system had at least one other virtue. Because officers were not "passed over" for promotion, there were few judicial challenges to promotion decisions. It is equally probable that any officer denied a promotion would not have thought seriously about suing the government over his misfortune. On the other hand, the new system has engendered such an avalanche of litigation that the military may have wondered whether merit promotions are worth the trouble. In today's litigious society, officers suffer far fewer inhibitions about suing their commanders than their predecessors. Disgruntled officers who perceive even the slightest error in their personnel records have not hesitated to bring suit against the government. To be sure, there have been a substantial number of cases in which the officer's only complaint was that his or her commanding officer should have rated his or her performance "outstanding" rather than "superior."

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The change to a merit promotion system cannot be blamed entirely for the deluge. After every major conflict, the services have been required to separate officers in order to meet strength levels. To retain only the best qualified officers, the services relied on the promotion system to weed out those officers with adequate, but less sparkling, records. At the same time, rating officers were cautioned not to inflate their evaluations and to render honest appraisals of their subordinates' performance. Not a few officers may have believed that their separations for want of promotion came as a result of unfair treatment by a system which depends on the objectivity of the rating officer. But the judiciary must also accept some measure of responsibility for the recent inundation of the courts by unhappy officers. The courts have in fact unintentionally encouraged the officer in the military, as they have in other professions, to contest promotion decisions.

The purpose of this article is to trace changes in the judicial review of challenges to military promotion decisions, to analyze present standards of review, and to suggest that less judicial interference is warranted.

I. THE PROMOTION FRAMEWORK

Article II, section 2 of the United States Constitution makes the President the Commander in Chief of the Army and Navy.[1] Article I, section 8 vests Congress with the power to make rules for the government and regulation of the armed forces.[2] Both the legislative and executive branches have exercised their authority and prescribed an elaborate statutory and regulatory framework for the promotion, retention, and separation of military personnel. Since the Army's promotion procedures are not atypical of the other services, the Army's system is described in this section.

With the strong support of General Eisenhower and the Army staff, Congress passed the Officer Personnel Act of 1947,[3] which abandoned seniority-based promotions in favor of a merit promotion system. The services welcomed the new system which sought to improve the overall caliber of the officer corps by requiring that each officer affirmatively be selected for promotion to the next higher grade.[4] In order to carry out the selection procedure, the Act called for the periodic convening of promotion selection boards to consider all officers eligible for promotion with certain lengths of service. The congressional scheme provided not

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[1] U.S. Const. art. II, § 2.

[2] *Id.* at art. I, § 8.

[3] *See* H.R. Rep. No. 640, 80th Cong., *1st* Seas. 3 (1947); Ford, *Officer Selection Boards and Due Process of Law*, *70* Mil. L. Rev. 137 (1975).

[4] *See* Hardison v. Alexander, 655 F.2d 1281, 1284 (D.C. Cir. 1981); Doyle v. United States, 599 F.2d 984, 989 (Ct. C1. 19979).

only an incentive for younger officers to stay in the service with the expectation of continued and steady advancement, but also a means to purge nonproductive officers from the ranks. "At the heart of this merit promotion system, and crucial to its effective functioning," was the requirement that officers twice passed over for promotion be discharged from the service.[5]

The Defense Officer Personnel Management Act (DOPMA) was enacted by Congress in 1980 in an effort to provide uniform laws for promotion procedures for officers in the separate services.[6] Pursuant to Section 611(a) of Title 10 of the United States Code, the service secretary is authorized to consider officers for promotion to the next higher permanent grade "whenever the needs of the service require." Although DOPMA continued the "up or out" system under the Officer Personnel Act of 1947, the secretaries were authorized to retain twice passed-over officers in the grade of captain and above until retirement.'

For those serving on active duty, the opportunity for early promotion under DOPMA created added incentive to excel.[8] Officers considered for promotions are divided into the promotion zone, above the zone, and below the zone. The zone in ,which an officer is placed depends on the length of time served in his present grade. Officers below the zone have spent less time in grade than those in the promotion zone. Officers above the zone are those previously passed over for promotion. The Army views those officers selected from the promotion zone as sufficient to meet its immediate requirements for officers in the higher grade. On the other hand, below the zone selections are designed to identify and promote exceptional officers ahead of their contemporaries.[9]

Selection board proceedings are secret.[10] An officer has no right to appear before the board but may correspond with the board on any matter

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[5] Hardison v. Alexander, 655 F.2d 1281, 1284 (D.C. Cir. 1981).

[6] See 10 U.S.C. § 611-18 (Supp. V 1981); H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 3, reprinted in [1980] U.S. Code Cong. & Ad. News 6333.

[7] 10 U.S.C. § 631, 632 (Supp. V 1981); Dep't of Army, Reg. No. 624-100, Promotions-Promotion of Officers on Active Duty, para. 2-14 (1 May 1982) [hereinafter cited as AR 624-1001. Regular Army officers who have failed of selection to the grades of captain, major or lieutenant colonel may be discharged or selectively continued on active duty pursuant to *id.* at para. 2-15. The separation of reserve officers who fail to be selected for promotion is governed by *id.*, chapter 3. The House Committee on Armed Services indicated its "strong desire that [officers in the grade of major and above] be continued to 20 years of service as a matter of course." *See* H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 5, reprinted *in* [1980] U.S. Code Cong. & Ad. News 6336.

[8] 10 U.S.C. § 616(b) (Supp. V 1981).

[9] *See AR* 624-100, para. 2-13; Doyle v. United States, 599 F.2d 984, 989 (Ct. C1.1979).

[10] *AR* 624-100, para. 2-5f.

deemed important to a proper consideration of his or her file.[11] The selection board follows a letter of instruction issued by the Secretary of the Army which sets the maximum number of officers to be recommended and the percentage of officers from the zones to be selected.[12] Pursuant to the letter of instruction the board may then select officers under either the "fully qualified" or "best qualified" methods.[13] The "fully qualified" method is used when the maximum number of officers to be selected equals the number of officers in or below the promotion zone." An officer is considered fully qualified for promotion to the next higher grade if he or she is qualified professionally and morally, has demonstrated integrity, and is able to perform the duties expected of an officer in the next higher grade. The "best qualified" method is used when the board must recommend fewer than the total number of officers to be considered for promotion.[15]

Ordinarily, each officer's file is reviewed independently by each member of the board who assigns a numerical rating to the file. Relying upon the "whole man" concept, the board may consider breadth of experience, overseas tours, education, professional competence, combat achievements, awards, decorations and leadership.[16] But the most critical item in any officer's file is the officer efficiency report.[17] Those officers with the highest numerical ratings within the guidelines established by the secretary are recommended for promotion by the board.[18] The selection

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[11] 10 U.S.C. § 614(b) (Supp. V 1981); Doyle v. United States, 599 F.2d 984,990 (Ct. Cl. 1979). See genemlly Ford, Officer Selection *Boards and Due Process of Law,* 70 Mil. L. Rev. 137,148-51(1975).

[12] 10 U.S.C. § 616(b) (Supp. V 1981)provides that:

> The Secretary of the military department concerned shall establish the number of officers such a selection board may recommend for promotion from among officers being considered from below the promotion zone in any competitive category. Such number may not exceed the number equal to 10 percent of the maximum number of officers that the board is authorized to recommend for promotion in such competitive category, except that the Secretary of Defense may authorize a greater number, not to exceed 15percent of the total number of officers that the board is authorized to recommend for promotion, if the Secretary of Defense determines that the needs of the service so require. If the number determined under this subsection is less than one, the board may recommend one such officer. The number of officers recommended for promotion from below the promotion zone does not increase the maximum number of officers which the board is authorized under section 615 of this title [10 U.S.C. § 615] to recommend for promotion.

[13] 10 U.S.C. § 615 (Supp. V 1981); *AR* 624-100, para. 2-8; Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979);Doyle v. United States, 599 F.2d 984,990 (Ct. C1.1979).

[14] *AR* 624-100, para. 2-8a(3)(a).

[15] *Id.* at para. 2-8a(3)(b).

[16] See 1980 U.S. Code Cong. & Ad. News 6351.

[17] Skinner v. United States, 594 F.2d 824, 831 n.4 (Ct. Cl. 1979); Horn v. Schlesinger, 514 F.2d 549,550(8th Cir. 1975).

[18] Doyle v. United States, 599 F.2d 984,990(Ct. Cl. 1979).

board may not recommend an officer for promotion unless a majority of the members of the board recommend the promotion and find the officer to be "fully qualified." [19] Selection board determinations are only recommendations to the service secretary who in turn makes recommendations to the President. The President then appoints all officers subject to Senate confirmation.[20]

An officer who is passed over but who believes that administrative error may have been committed has at least two avenues of relief within the Army. If it is believed that the efficiency reports considered by the board contained erroneous information, the officer may appeal pursuant to Army regulation.[21] Claims of substantive error are forwarded to the Army Special Review Board (SRB). If the SRB finds that the officer's record was materially in error at the time it was considered by the selection board, then the file may be referred to a Special Selection Board for additional promotion consideration.[22] The Special Selection Board operates under the same letter of instruction issued to the original selection board. The officer's record is compared against a sampling of the records of those officers of the same competitive category who were recommended by the original board and records of those officers who were not recommended.[23] If the Special Selection Board's recommendation is favorable, then the officer's record is corrected to reflect selection by the original board.[24]

An aggrieved officer may also seek relief from the Army Board for Correction of Military Records (ABCMR). Established pursuant to section 1552 of Title 10, United States Code, the ABCMR is charged with the duty to change any military record in order to correct error or remove injustice, Viewed as the administrative remedy of last resort, the Board is vested with broad powers to change military records and award full reinstatement and back pay.[25] The vast majority of courts have held

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[19] 10 U.S.C. § 616(c) (Supp. V 1981).

[20] *Id.* at §§ 616, 618(b)(1); AR 624-100, para. 2-5e; Skinner v. United States, 594 F.2d 824, 831 n.4 (Ct. Cl. 1979).

[21] Dep't of Army Reg. No. 623-105, Officer Evaluation Reporting System (15 November 1981).

[22] 10 U.S.C. § 628 (Supp. V 1981); AR 624-100, para. 5-2.

[23] 10 U.S.C. § 628(a)(2) (Supp. V 1981).

[24] *Id.* at § 628(d)(1).

[25] Sanders v. United States, 594 F.2d 804, 812 (Ct. Cl. 1979); Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974); Knehans v. Callaway, 403 F. Supp. 290, 294 (D. D.C. 1975). The court in *Sanders* concluded that the correction boards have not only the power but a duty to afford servicemen proper relief. 594 F.2d at 812. See also Doyle v. United States, 599 F.2d 984, 990 (Ct. Cl. 1979). Where a correction board declines to correct an "injustice" as distinguished from a "legal error," there is now some dispute as to whether a court may entertain the aggrieved serviceman's claims. Compare Grieg v. United States, 640 F.2d 1261, 1266 (Ct. Cl. 1981) (court may not correct a "simple injustice") *with* Hary v. United States, 618 F.2d 704, n.3 (Ct. Cl. 1980) (court may consider an injustice if claimant has sought relief from the correction board).

that the remedy before the ABCMR must be exhausted before seeking judicial relief.[26]

II. THE TRADITIONAL STANDARD OF REVIEW OF PROMOTIONS IN THE MILITARY

When the time came for Second Lieutenant Winslow Hart Reaves' promotion to first lieutenant in 1904, the governing statute, "An Act to Provide for the Examination of Certain Officers of the Army, and to Regulate Promotions Therein," enacted by Congress in 1890, provided for an examination by a board of officers.[27] Pursuant to the Act, the President was authorized to prescribe a system of examination for all officers below the rank of major to determine their fitness for promotion. Any officer failing to pass the examination and declared unfit for promotion forfeited the promotion to the next junior officer.[28] While serving in the Philippines, Lieutenant Reaves at the same time received orders "for promotion before a board of examination."[29] Predictably, Lieutenant Reaves broke down completely before the board and failed the examination. On subsequent reexaminations, he fared no better and was eventually discharged. Rather than seeking reinstatement and promotion, Lieutenant Reaves then filed a petition in federal court praying for placement on the retired list and challenging the board of examination's determinations. When the case came before the Supreme Court for review, styled as *Reaves v. Ainsworth*,[30] the justices registered surprise that an officer should even seek relief outside military administrative channels. In an opinion that set the tone for the future, Justice McKenna wrote:

> The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army.[31]

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[26] Stewart v. United States, 611 F.2d 1356, 1361 (Ct. Cl. 1979); Knehans v. Alexander, 566 F.2d 312, 315 (D.C. Cir. 1977); Horn v. Schlesinger, 514 F.2d 549, 551 (8th Cir. 1975); Hadley v. Secretary of the Army, 479 F.Supp. 189, 194 (D.D.C. 1979); MacKay v. Hoffman, 403 F.Supp. 467, 471 (D.D.C. 1975). *See generally* Glosser & Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 Am. U.L. Rev. 391 (1973).

[27] 26 Stat. 562, ch. 1241, U.S.Comp. Stat. 1901, at 849.

[28] *Id.* at § 3.

[29] Reaves v. Ainsworth, 219 U.S. 296, 299 (1911).

[30] *Id.*

[31] *Id.* at 306.

The *Reuues* Court could not discern any congressional intent in the Act of 1890 to permit officers to carry their grievances concerning promotion qualifications over the head of the President and into the courts. The existence of such a right in the Court's view, even if it had been declared, would have constituted both an "embarrassment" and "detriment" to the service.[32]

Reaves was only one in a long series of cases narrowly limiting judicial review of military decisions. As early as 1840, the Supreme Court had confined judicial review of habeas corpus petitions by military prisoners to the single inquiry of whether the court-martial had jurisdiction over the person and the offense.[33] The Court had demonstrated equal reluctance to interfere with military administrative decisions.[34]

The rule eschewing judicial review of military decisions has been described by courts and commentators as the "doctrine of nonreviewability."[35] The rule is best exemplified by a frequently cited passage from *Orloff v. Willoughby*,[36] a challenge by an officer to a duty assignment. Justice Jackson wrote that "judges are not given the task of running the [armed forces] . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[37]

Like most judicial efforts to formulate bright line rules, the doctrine of nonreviewability has been riddled with exceptions.[38] The United States Court of Appeals for the Fifth Circuit, for example, has adopted a balancing test which permits judicial review if the plaintiff alleges a meritorious constitutional violation or failure to comply with applicable statutes or regulatory procedures.[39] Other courts have not hesitated to

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[32] *Id.* at 306.

[33] *See, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1957); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Decatur v. Padding, 39 U.S. (14 Pet.) 497 (1840). *Compare* Burns v. Wilson, 346 U.S. 137 (1953); Ashe v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

[34] Orloff v. Willoughby, 345 U.S. 83 (1953); Arnheiter v. Ignatius, 292 F. Supp. 911, 917 (N.D. Cal. 1968). *See generally* Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 Duke L.J. 41; Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale L.J. 33 (1973); Meador, *Judicial Determinations of Military Status*, 72 Yale L.J. 1293 (1963); Peck, *Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 Va. L. Rev. 483 (1969); Suter, *Judicial Review of Military Administrative Discharges*, 6 Hous. L. Rev. 55 (1968).

[35] Arnheiter v. Ignatius, 292 F. Supp. 911, 917 (N.D. Cal. 1968).

[36] 345 U.S. 83 (1953).

[37] *Id.* at 93-94.

[38] *See generally* Peck, *Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 Mil. L. Rev. 1 (1975).

[39] Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971). *See also* Dowler v. Schlesinger, 384 F. Supp. 39, 42 (D. Md. 1974).

review military actions which have allegedly contravened statutes or regulations.[40] But even in those cases alleging failure to adhere to statutes or regulation, the courts have held that military adininistrative decisions are cloaked with a strong but rebuttable presumption that military officers discharge their duties correctly, lawfully, and in good faith."

Whatever the nature of the asserted exception to the nonreviewability rule, the courts have agreed that judicial deference "is at its highest when the military, pursuant to its own regulations, effects personnel changes through the promotion or discharge process."[42] The underlying logic of these cases has been repeatedly and forcefully emphasized by the courts. Strong policies, including the constitutional principle of separation of powers, prevent judges from intervening in military personnel decisions. Judgments relating to promotion or assignment require the exercise of professional military expertise and discretion.[43] Promotion in the military necessarily leads to greater responsibility and control over the lives of service members. At the highest levels of command, an erroneous promotion decision could endanger the very security of the country. These decisions have therefore been left to those officers trusted with the duty to identify those subordinates who have demonstrated leadership abilities and a capacity for advanced responsibilities. Consequently, the courts have recognized that any judicial attempt to interfere with promotion decisions would be fraught with practical difficulties."

In light of these principles, officers like Lieutenant Reaves who challenged promotion decisions in the courts met formidable resistance. The vast majority of courts refused to entertain challenges to promotion decisions so long as the procedures used by the services did not contravene applicable statutes and regulations.[45] Other courts declined to hear such challenges in the absence of proof that the decision was arbitrary **or**

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[40] Harmon v. Brucker, 355 U.S. 579, 581-82 (1958); Hodges v. Callaway, 499 F.2d 417, 419 n.2 (5th Cir. 1974); Knehana v. Callaway, 403 F. Supp. 290, 293 (D.D.C. 1975).

[41] Greig v. United States, 640 F.2d 1261, 1267 (Ct. Cl. 1981); Sanders v. United States, 594 F.2d 804, 813 (Ct. C1. 1979).

[42] Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979); Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972).

[43] Brenner v. United States, 202 Ct. Cl. 678, 693-94 (1973), *cert. denied*, 419 US. 831 (1974); Coughlin v. Alexander, 446 F. Supp. 1024, 1026 (D. D.C. 1978).

[44] Horn v. Schlesinger, 514 F.2d 549, 551 (8th Cir. 1975); Arnheiter v. Ignatius, 292 F. Supp. 911, 921 (N.D. Cal. 1968).

"*See, e.g.*, Payson v. Franke, 282 F.2d 851 (D.C. Cir. 1960); Dowler v. Schlesinger, 384 F. Supp. 39, 42 (D. Md. 1974); Arnheiter v. Ignatius, 292 F. Supp. 911, 921 (N.D. Cal. 1968).

capricious.[46] The services were at one time so confident of success when these cases reached the courts that the Navy once urged that a "junior officer, no more than a young executive in private business, has any right to complain if his career depends on hearsay and gossip."[47]

Even constitutional due process claims were summarily rejected. Because the services depended on an "up or out" promotion system, officers had no claim to continued employment and, consequently, no property interest sufficient to trigger the protections of the due process clause.[48] There was no constitutional right to be promoted or retained in the service.[49]

Although the judiciary was generally sympathetic to the plight of the service member, who, having invested substantial time in a military career, was separated because of promotion pass overs, the courts were hamstrung by the nonreviewability rule forbidding any interference in the discretionary area of promotions. The Court of Claims' treatment of the challenge in ***Boyd v. United States*** [50] characterized the understanding but deferential disposition of promotion challenges. Boyd, an Air Force officer, had achieved a "7-2" rating or an overall evaluation of "excellent . . . seldom equaled" and promotion potential of "performing well in present grade . . . should be considered for promotion along with contemporaries." Remarkably, Boyd challenged the rating on grounds that it was inconsistent with the rater's narrative comments and letters of evaluation. Judge Bennett, writing for the court, observed:

> The fact that plaintiff has been passed over signifies no disrespect to him. His military record appears, from all the papers before us, to have been exemplary in every respect. Numerous worthy and qualified officers are passed over annually and never reach the top in their profession. They may be qualified but—in the judgment of the Secretary and the selection board vested with discretionary authority to make the promotions—

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[46] *See* Dilley v. Alexander, 603 F.2d 914,920 (D.C. Cir. 1979); Bergen v. United States, 562 F.2d 1197 (Ct. Cl. 1977); Nolen v. Rumsfeld, 535 F.2d 888 (5th Cir. 1976); Norman v. United States, 392 F.2d 255 (Ct. Cl. 1968); Coughlin v. Alexander, 446 F. Supp. 1024, 1026 (D. D.C. 1978).

[47] Weiss v. United States, 408 F.2d 416,419 (Ct. C1.1969).

[48] Pauls v. Secretary of the Air Force, 457 F.2d 294, 297 (1st Cir. 1972); Lane v. Secretary of the Army, 504 F. Supp. 39, 42 (D. Md. 1980). It is well settled that an officer or enlisted man has no contractual relationship with the government; his status is created entirely by statute. Bell v. United States, 366 U.S. 391 (1961); Sanders v. United States, 594 F.2d 804, 809 n. 9 (Ct. Cl. 1979); Norman v. United States, 392 F.2d 255, 259 (Ct. Cl. 1968); Dowler v. Schlesinger, 384 F. Supp. 39, 43 (D. Md. 1974).

[49] VanderMolen v. Stetson, 571 F.2d 617,627 (D.C. Cir. 1977); Abruzzo v. United States, 513 F.2d 608,611 (Ct. Cl. 1975); Viles v. Claytor, 481 F. Supp. 465,470 (D. D.C. 1979); Coughlin v. Alexander, 446 F. Supp. 1024,1026 (D. D.C. 1978).

[50] 207 Ct. Cl. 1 (1975).

> may not be the best qualified of those available for the limited number of positions. The same problem can be said to confront other ambitious professional people. There are fewer rungs as one climbs toward the top of the achievement ladder. Not only are manpower requirements a factor but appropriations also sometimes have a bearing on availability of opportunities in the Government service. We have not been shown here that any officer with a record comparable to plaintiffs was promoted ahead of him . . .[51]

Identical views were voiced by the court in *Brenner v. United States*.[52] Brenner was the paradigm officer caught in the wrong place at the wrong time. While serving as the weapons officer on board the U.S.S. Luce, Brenner and his ship narrowly averted a nuclear catastrophe when a nuclear missile dropped onto the deck. An investigation later concluded that the mishap was not his fault. When Brenner was not selected for promotion, he suspected that the incident had played some role in the selection board's decision and sought judicial relief. But the court refused to intervene, saying:

> The reluctance of the judiciary to review the promotion actions of selection boards is rooted not only in the court's incurable lack of knowledge of the total grist which the boards sift, but also in a preference not to meddle with the internal workings of the military.
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> . . . .
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> The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualification of all of the officers considered . . .[53]

Judge Nichols wrote a separate concurring opinion in *Brenner* that praised the services' merit selection system and compared it favorably to both private industry and the seniority system. In Judge Nichols' view, under the seniority system, "all one needed to make admiral was a sound stomach, and a talent for staying out of jail." In marked contrast to

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[51] *Id.* at 12.
[52] 202 Ct. C1.678 (1973), *cert. denied*, 419 U.S. 831 (1974).
[53] 202 Ct. Cl. at 692-94.

private industry "where mere whim and caprice—or raw financial power—may decide who gets the six figure salary, and who gets the axe," the services' selection boards are "impartial, institutionalized and regular," Taking special note of the grave responsibility assigned to commanders, Judge Nichols voiced the concern of every enlisted service member that he or she should not have to serve a commander "who owed his rank and position to the fact his Selection Board was not allowed to consider anything but a sanitized official file." [54]

By the mid-19708, however, there were perceptible shifts in the judiciary's handling of promotion challenges. Due to the winding down of the war in Viet Nam and the resultant reduction in force levels, officers found themselves competing for increasingly fewer promotion vacancies. Perhaps as a result of perceived callousness by the services, the courta assumed a more active role in review of the promotion process. While paying lip service to the Supreme Court's admonition in *Orloff v. Willoughby* that "judges are not given the task of running [the armed forces]," [55] the courts began to play a not insubstantial role in promotability determinations. Subtle but progressive changes in the standards of review permitted the courts to reverse the services' exercise of promotion discretion.

III. THE CHANGING STANDARD OF REVIEW

By the late 1970s, many of the leading challenges to the promotion system had reached the court of appeals level. In 1979, the District of Columbia Circuit and Court of Claims issued decisions in four major cases which marked a new era of judicial intervention in the promotion system. In *Sunders v. United States* [56] and *Skinner v. United States* [57] plaintiff officers claimed that the record considered by the selection board was defective. In *Dilley u. Alexander* [58] and *Doyle v. United States,* [59] the plaintiffs argued that the selection boards themselves were fatally defective. Reversing the services' determinations in each case, the decisions in *Sunders, Skinner, Dilley,* and *Doyle* reflect a judicial policy to subject promotions to far greater scrutiny than existed in the past. At least part of the motive for such intrusion appeared in the dicta underlying each of the decisions. The courts took frequent note of the importance of the officer efficiency report (OER) to the officer's career. But notwithstanding the singular importance of the OER, the courta o b

[54] *Id.* at 694-98.
[55] 345 U S. 83, 93-94 (1953).
[56] 594 F.2d 804 (Ct. Cl. 1979).
[57] 594 F.2d 824 (Ct. C1.1979).
[58] 603 F.2d 914 (D.C. Cir. 1979).
[59] 599 F.2d 984 (Ct. C1.1979).

served that OERs are sometimes the subject of "bureaucratic bungling." [60] During the 1970s, selection boards were conducted as "lotteries," according to at least one court, despite the obvious adverse consequences for passed over officers.[61] In short, the courts may have refused to stand aside when it appeared that officers' careers were jeopardized by insensitive handling and deficiencies in the selection system.

The decisions in ***Sanders, Skinner, Dilley,*** and ***Doyle,*** and their progeny provide a framework for treatment of the two broad categories of promotion challenges: alleged errors in the record considered by the board and alleged defects in the board and its procedures. Each broad category of error and the cataclysmic changes in the standard of review are addressed below.

A. DEFECTIVE RECORDS

Prior to ***Sanders*** and ***Skinner,*** the leading decisions on the effect of selection board consideration of defective personnel files were ***Weiss v. United States***,[62] ***Yee v. United States***,[63] and ***Knehuns v. Callaway***.[64] In **Weiss,** a Navy lieutenant commander was discharged upon a selection board's finding of unsatisfactory performance of duty. Weiss had an unblemished record until he was investigated for alleged participation in improper currency transactions while stationed at Subic Bay. A letter of reprimand and unsatisfactory fitness report were inserted in his personnel file as a result of the investigation. After the selection board met and recommended Weiss' separation, the Board for Correction of Naval Records (BCNR) granted Weiss' request for removal of the letter of reprimand and adverse report from his file. Weiss' hopes for retention were dashed, however, when the Secretary of the Navy overruled the BCNR's findings. Weiss then turned to the Court of Claims and found a favorable forum for his arguments. Construing section 5706 of Title 10, United States Code, which provides for furnishing the "records" of all eligible officers to the selection boards, the court concluded that Congress intended that any record furnished to the board should be complete and not misleading. Since Weiss had not had an opportunity to rebut the negative material in his file before the convening of the selection board, the court ruled that Weiss' file was neither "substantially complete," nor did it "fairly portray" his record. Weiss' discharge was revoked, and he was awarded backpay.[65]

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[60] Skinner v. United States, 594 F.2d at 828.
[61] Sanders v. United States, 594 F.2d at 821.
[62] 408 F.2d 416 (Ct. Cl. 1969).
[63] 512 F.2d 1383 (Ct. Cl. 1975).
[64] 403 F. Supp. 290 (D.D.C. 1975), *aff'd,* 566 F.2d 312 (D.C. Cir. 1977).
[65] Weiss v. United States, 408 F.2d at 419.

Six years later, the Court of Claims again had occasion to review claims that a record reviewed by the selection board was defective. In Yee [66], an Air Force officer had been discharged in 1965 for temporary physical disability. After a five year hiatus, Yee returned to active service but, because an unexplained five year gap appeared in his file, he was passed over for promotion. The Air Force had failed either to place an adequate explanation for the gap in his file or to withhold his name from the selection board until sufficient time had elapsed for Yee to accumulate efficiency reports. Relying upon the "fair portrayal'' standard prescribed in Weiss, the court concluded that Yee had been denied fair and just consideration for proniotion, voided his pass overs, and directed that the Secretary of the Air Force place an adequate explanation for the five year gap in Yee's selection folder. Although the Air Force Board for Correction of Military Records had found that there was sufficient information in the file to make a judgment about Yee's promotability, the court ignored this finding, labeled the Air Force's determination arbitrary and capricious, and usurped the service's selection role.[67]

In both Weiss and Yee, the courts' conclusions that the file reviewed by the selection board did not fairly portray the officer led automatically to relief and voiding of the pass overs. Chief Judge Jones of the District Court for the District of Columbia steered a different tack in *Knehans v.* Callaway." There was no dispute that Knehans' personnel file was defective when presented to two consecutive selection boards. The file had contained an invalid negative OER and omitted several letters of commendation. Instead of automatically voiding the pass overs, however, the court focused on whether the two nonselection decisions were caused by the negative OER. Other efficiency reports in Knehans' file placed him on the same level of ability as his peers and, earlier in his career, Knehans had received a negative report. Although Knehans' record was "very good," it was not outstanding. In the court'sjudgment, the file, even as defectively constituted, still fairly portrayed Knehans' record. The court could not therefore say that "inclusion of the negative OER necessarily caused the non-promotion decisions".[69] Relief was denied.

The court's handling of Knehans' grievances was not only reasonable, it was perhaps the only means fair to both service and the officer. Any other treatment of error in the personnel file could produce windfalls for

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[66] Yee v. United States, 512 F.2d at 1386.
[67] *Id.* at 1388-89.
[68] Knehans v. Callaway, 403 F. Supp. 290 (D.D.C. 1975), *aff'd,* 566 F.2d 312 (D.C. Cir. 1977).
[69] 403 F. Supp. at 296.

officers seeking to postpone separation. Under the ***Knehuns*** rule, aggrieved officers would not be entitled to automatic reversal of separation and nonselections unless there was some link between the error and the service's decision not to promote.

In 1979, two landmark cases which reached the merits of the fair portrayal and *Knehans* standards were decided by the Court of Claims. These two cases which signalled the court's total departure from any limited standard of review were ***Skinner*** and ***Sanders.*** In ***Skinner,*** a regular Air Force officer was twice nonselected for promotion to the permanent grade of major and separated. Skinner complained that he had received two efficiency reports which rated him "8/3" out of a possible "9/4." Under the Air Force system, "8/3" connotes "Outstanding. Almost never equaled"—"Demonstrates capability for increased responsibility. Consider advancement ahead of contemporaries." [70]

Skinner claimed that he was entitled to the maximum 914 rating, but that his raters were dissuaded from giving him a 9/4 because a superior in the chain of command had purportedly informed the rating officers that a 9/4 would not be approved. After setting forth the text of the applicable regulation, the court failed to specify how the regulation had been violated, except to note that the "purpose" of the regulation had been thwarted. Without considering the fact that the 8/3 rating was an "outstanding" rating and did not constitute adverse commentary, the court concluded that Skinner's "military career was thus ruined through no fault of his own, but because of improper command influence and bureaucratic bungling." [71] Without considering further the fact that Skinner failed to be promoted in his "permanent" grade, the court held that Skinner had been denied his statutory right to "fair and equitable" treatment.[72] Judge Bennett wrote:

> Plaintiff was not rated on the merits of his performance as an officer of the United States Air Force. He had a legal right to be so graded on a "fair and equitable" basis and to have his proper rating considered by selection boards. 10 U.S.C. §§ 3442(c), 8442(c). Defendant's failure to follow the statutes and its published procedures is reversible for legal error where those procedures are required and their violation is substantial and prejudicial.'*

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[70] 594 F.2d *at* 827 n.1.
[71] *Id.* at 828.
[72] *See* 10 U.S.C. §§ 3442(c), 8442(c) (1976), *cited at* 594 F.2d *at* 828.
[73] *Id.*

While citing Weiss and Yee, Judge Bennett ignored the rule announced in those cases that relief depends on whether the records considered by the selection boards "fairly portrayed" the officer. There was, of course, an unstated reason for the omission. Had the court compared Skinner's "8/3" rating with his actual performance, it would have been difficult even for Judge Bennett to hold that the "8/3" rating inaccurately portrayed the officer and that Skinner had been prejudiced. The "8/3" rating connoted outstanding performance of duty under Air Force regulations.

The facta in Sunders were simple, but ita holding had even greater implications for review of promotions than ita companion case Skinner. Sanders had waited four years until after he had been passed over for promotion to the temporary rank of major to seek removal of four efficiency reports from his file. Although the Air Force Board for Correction of Military Records had removed the OERs, it refused to void Sanders' discharge and pass overs on the grounds that Sanders would not have been selected even in the absence of error. Ostensibly reaffirming the arbitrary and capricious standard of review, the en banc court in reality gutted the traditional standard of review. In defense of Sanders' claim, the Air Force urged that the court should consider whether the alleged defect actually *caused* Sanders' nonselections. Unless Sanders could demonstrate that, "but for" the error he would have been selected, relief should be denied; so the ***Air*** Force argued. The court could not agree that the burden should be on the plaintiff, especially when the **Air** Force was responsible for Sanders' predicament in the first instance. Unfortunately, the Air Force had no evidence whatever that Sanders would not otherwise have been selected. While it did not completely rule out a harmless error defense, the court could not tolerate any deviation from the regulations governing preparation of efficiency reports and held that "[i]f a particular officer's OER has not been so prepared and that defect could have resulted in his nonselection for promotion followed by discharge, this is legal and factual error and an injustice to the officer as well."[74] The court in Sunders made its own independent evaluation of Sanders' file and came to the conclusion that "there was no other evidence to which his nonpromotion could seemingly be attributed."[75] Sanders' educational background, combat experience, and active duty assignments were all described by the court in laudatory terms. The court found, based upon the whole-man selection criteria and Sanders' position close to the promotion cutoff, that prejudicial error had been committed. Anticipating that its handling of Sanders' claim might be considered in-

[74] 594 F.2d at 814.
[75] *Id.* at 815.

trusive, the court accused the services of attempting to force it into an unwanted role. Perhaps as an effort to fend off a race to the courthouse, the court denied that it had become "a super selection board."[76]

Sanders and *Skinner* made it abundantly clear that at least the Court of Claims would not rely upon an agency's characterization of an officer's records as complete and accurate. Indeed, the court had subjected plaintiff officers' records to a probing and independent judicial review to determine whether the record "fairly portrayed" the officers' career. The *Sanders* court had attempted to reconcile *Knehans* by describing the District of Columbia Circuit's action as a comprehensive review of the documents comprising Major Knehans' efficiency file. According to the Court of Claims, the *Knehuns* had court denied relief because the court was "unable to conclude that plaintiffs record was so outstanding that the decision by the Correction Board could be termed arbitrary, capricious, or without a rational basis."[77]

The result in *Skinner,* moreover, indicated that even nonprejudicial information in an officer's file could lead to pass over invalidation. The efficiency report involved in *Skinner* had described the plaintiff as an "outstanding" officer but failed to give him the maximum rating. Even assuming that the Air Force had committed legal error by failing to follow its own regulations in preparing the report, the court expressly held that not all legal error compels relief.[78] *Skinner* was, therefore, the paradigm case for invocation of the harmless error rule. Judge Bennett, writing for the court in *Skinner,* could not say that the record did not fairly portray Skinner's performance. The *Skinner* result therefore portended precisely the same judicial intrusion in subjective military decision making which the court cited as a reason for rejecting the government's "but for" test.

After three years and a plethora of promotion challenges, the unfortunate aftermath of *Skinner* and *Sanders* can now be reported. First, the reports are now replete with cases in which passed over officers have apparently combed their selection folders to uncover even the most trivial defect which may lead the court to believe that the file did not fairly portray their service.[79] Second, although the courts could have permitted

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[76] *Id.* at 816. Judge Nichols wrote a concurring opinion in *Sanders* in which he questioned the court's assumption of jurisdiction over alleged "injustices." In Judge Nichols' view demands on correction boards to rectify injustices may constitute moral claims which the judiciary should decline to pass on. Judge Nichols also opined that harmlessness of a legal error might be shown by subsequent selection board determinations. *Id.* at 821-23.

[77] *Id.* at 815.

[78] *Id.* at 811, 818.

[79] *See* Gruendyke v. United States, 639 F.2d 745, 746 (Ct. Cl. 1981) (allegations that an "absolutely superior" rating had been improperly downgraded to "outstanding" and that an

the services to demonstrate that an alleged error did not affect the nonselection decision, the courts instead preferred to ignore the standard set by *Knehans* and automatically reversed the services' determinations. Third, because most officers challenging defective records like Sanders and Skinner wait until some adverse personnel action is about to befall them, the services are denied any opportunity to prevent or correct errors before the selection board acta on a defective file. Under the regulations, each officer is furnished a copy of each efficiency report as it is submitted. They are also afforded the opportunity to review their selection folders. But in virtually every reported case, the aggrieved officer has either procrastinated or purposely avoided seeking administrative relief to correct the record until after the selection board has passed him or her over for promotion. Instead of invoking the doctrine of estoppel or waiver against these tardy claims, the courts have welcomed them.[80] Fourth, and perhaps the most troublesome, development is the courts' purposeful ignorance of any service finding that, notwithstanding the alleged error, the file still fairly portrayed the officer's record.

The plaintiff in *Riley v. United States* [81] waited four years to challenge two efficiency reports. After he had been nonselected for promotion to major, Riley petitioned the Air Force Officer Personnel Records Review Board to excise the OERs which carried an overall evaluation of "very fine" and recommended that he should be promoted along with his contemporaries. Ironically, Riley contended that the OERs were unjust and not truly representative of his performance, The contested OERs were removed from Riley's file, but the Air Force refused to void his pass overs because in the service's opinion the removal of the OERs "did not significantly improve his record to the degree" that he would have been

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"outstanding" rating did not accurately reflect plaintiffs performance); Hary v. United States, 618 F.2d 704, 707, 708 (Ct. Cl. 1980) (allegations that ratings were inaccurate because the ratings were designed to show progressive improvement without regard to actual performance and allegations that rater expressed dislike for the plaintiff on a single occasion at a bar); Stewart v. United States, 611 F.2d 1356 (Ct. Cl. 1979) (allegations that raters early in officer's intentionally downgraded ratings to show job progression); Savio v. United States, 213 Ct. Cl. 737 (1977) (allegations of rater's slight personal attention to the plaintiff's performance, words of caution received from superiors on inflation of numerical ratings, and failure to include pertinent information); Tanaka v. United States, 210 Ct. Cl. 712 (1976) (allegations that rater would now change his opinion and rate plaintiff higher); Hadley v. Secretary of the Army, 479 F. Supp. 189 (D.D.C. 1979) (suit for wrongful promotion).

[80] Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982) (challenge to OER rendered in 1968); Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980) (challenge to OER rendered in 1964); Riley v. United States, 608 F.2d 441, 441 (Ct. Cl. 1979) (denying laches defense where officer waited four and five years after reports were rendered). *But see* Grieg v. United States, 640 F.2d 1261, 1268 (Ct. Cl. 1981) (passage of eleven years weighs heavily against efforts to overcome OER).

[81] 608 F.2d 441 (Ct. Cl. 1979).

promoted by the selection board.[82] The court ignored the board's finding and conducted its own appraisal of Riley's service. Judge Bennett, writing for the Court of Claims, observed that the extracted OERs "were lower than the immediately preceding and all following OERs and his average ratings and disturbed the picture of steady advancement and increased competence and efficiency which his records otherwise demonstrated."[83] The court found that legal error had been committed warranting the voiding of Riley's pass overs.

The Fifth Circuit reached a similar result in *Johnson v. Reed*.[84] When Major Johnson "washed out" out of a training program, the Air Force inserted a training report in his file which reflected that:

> Major Russell G. Johnson has failed to complete this training due to lack of Instructor Adaptability/Flying Deficiency. His attitude toward the program has been excellent. His military bearing and behavior create a very favorable impression. He has been released from this course for reassignment.[85]

Johnson attributed his subsequent promotion pass overs to the training report. Although the Air Force deleted part of the report from Johnson's file at his request, it declined to void his pass overs because in the service's view the corrected training report did not enhance the folder to such an extent that he should be afforded additional selection opportunities. Conceding that military expertise and discretion might be involved, the court nevertheless entertained Johnson's challenge and refused to apply the doctrine of nonreviewability. On review of Johnson's contentions, the Fifth Circuit adopted a different view of the impact of the training report. Although no Air Force administrator had testified that the statements were harmful, the court opined that the report had to have been prejudicial because it had "declare[d] that he cannot fly a plane."[86] Judge Rubin wrote a short but vigorous dissent. Displaying much of the frustration that the services must have felt, Judge Rubin observed:

> I find it easy to say that reasonable persons might conclude that the Air Force Board was wrong, but I cannot agree that they were so aberrant in decision or had so far departed from reason in their result as thus to stigmatize what they did. The Board may have erred but there was method in its approach and neither madness nor caprice in its decision.

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[82] *Id.* at 443.
[83] *Id.*
[84] 609 F.2d 784 (5th Cir. 1980).
[85] *Id.* at 787.
[86] *Id.* at 792.

> The majority opinion, therefore, adopts what I agree is a correct standard, and even if it has been erroneously applied here, the result is no great tear in the fabric of the law. My brethren reinstate an officer who appears to have been a good one. But in essence application of what purports to be an arbitrary-or-capricious standard in this manner puts the district courts (and us, on review) in the position of evaluation the basis for promoting or passing over officers. We do not belong there; we lack the necessary expertise and we surely lack constitutional or statutory warrant.[87]

After *Sunders* and *Skinner* and their progeny, it is fair to say that the arbitrary and capricious standard of review no longer imposed any restraint on the courts' entertaining of promotion challenges. To be sure, *Sanders* and *Skinner* presented an open invitation to litigious officers to contest their evaluations in the courts. Many officers accepted the invitation.

B. DEFECTS IN SELECTION BOARD PROCEEDINGS

While new standards of review were emerging in the context of challenges to promotion decisions based on defective files, a parallel trend was developing in the context of challenges to defects in the proceeding of selection boards. In the mid-19708, it was discovered that many of the Army's selection boards which had considered officers on active duty for promotion in their temporary grades had failed to include reserve officers as selection board members. Section 266 of Title 10, United States Code, unequivocally mandated that "[e]ach board convened for . . . promotion [or] involuntarily release from active duty . . . of Reserves shall include *an* appropriate number of Reserves . . ." [88] Section 266 had been enacted as part of the Reserve Act, also known as "the Reserve bill of rights." [89] The Act was intended "to correct existing defects in policies and practices relating to the Reserve and the individual members there-

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[87] Id. at 793.

[88] In its full text, 10 U.S.C § 266 (1976) provided that:

> (a) Each board convened for the appointment, promotion, demotion, involuntary release from active duty, discahrge, or retirement of Reserves shall include an appropriate number of Reserves, as prescribed by the Secretary concerned under standards and policies prescribed by the Secretary of Defense.

The Defense Officer Personnel Management Act changed § 266 to permit the Secretary to determine the exact number of Reserves "in his discretion." *See* also 10 U.S.C § 612(a)(3). Army Regulation 624-100, paragraph 2-5b provides that "when an other than Regular Army officer is being considered at least one member of the board will be an other than Regular Army officer."

[89] 98 Cong. Rec. 9017 (1952) (remarks of Rep. VanZandt).

of." [90] In order to carry out the Act, the Secretary of Defense promulgated Department of Defense Instruction No. 1205.4 which provided that selection boards shall include "to the fullest practicable extent, a fair and adequate representation" of Reserve members. Thus, the Army's failure to appoint any reserve officers as selection board members violated both the statute and regulation.

The error had potentially catastrophic consequences for the Army. Thousands of officers had been selected for promotion by allegedly defective boards. Concomitantly, thousands of officers had been nonselected by the same boards and many Reserve officers had been released from active duty because they had been twice passed over for promotion to the next higher temporary grade. By 1976, over 1,300 officers had applied for relief to the Army Board for Correction of Military Records. Finding that, contrary to statute and regulation, the contested boards had failed to include reserve officers, the ABCMR recommended that new boards with the appropriate number of reserve officers be convened to reconsider all primary zone officers, using records reconstituted to appear exactly as they had appeared before the original selection boards.[91] Following the ABCMR's recommendation, the Secretary of the Army ordered the convening of the reconstituted boards. As a result of "Operation Relook," many officers who were originally nonselected were selected by the reconstituted boards. Those officers were afforded complete relief by the ABCMR and returned to active duty. "here were others, however, who were again nonselected by the reconstituted boards. As to these officers, the ABCMR found:

> That the applicants' records having been reconstituted in the manner prescribed by the Secretary and having been reviewed

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[90] S. Rep. No. 1795, 82d Cong., 2d Sess. 2 (1952).

[91] The ABCMR found that:

> [W]hile it appears that the Department may not have complied with the intent [of section 266] to have an appropriate number of Reserve Component members on the . . . 1975 promotion boards when considering Reserve officers, the written depositions of the selection board members indicate that an individual's component had little or no bearing in their consideration and selection of an officer for promotion. Further it appears from a review of the entire matter that any decision or other action by the Department to omit Reserve Officers from promotion selection boards was not done in an arbitrary and capricious manner or with malicious intent to harm or prejudice the applicants' promotion changes as Reservist~. . . [I]n viewing the situation in the most favorable light of the applicants, it is apparent the absence of Reservists from the . . . 1975 selection board may have deprived them of consideration in the manner intended;. . . although the applicants have not shown that they have been harmed because there was no Reserve officer on the board, the failure to have a Reserve officer as a member or the selection board raises some doubt as to whether the applicants were accorded proper consideration for promotion under the . . . 1975 promotion criterion.

See Dilley v. Alexander, 603 F.2d 914, 918-19 (D.C. Cir. 1979).

> by properly reconstituted. . . promotion boards under the primary zone of the . . . 1975 criteria, it is reasonable to presume that had they been considered by properly constituted boards, they would not have been selected for promotion at the time concerned under the "best qualified" method.
>
> That the applicants' nonselections for temporary promotion to the next higher grade tended to support the evidence heretofore submitted (a) that an individual's component had little or no bearing in their consideration and selection for promotion, and (b) that any decision or other action by the Department to omit Reserve officers from promotion selection boards was not done in an arbitrary or capricious manner or with malicious intent to harm or prejudice the applicants' promotion changes as Reservists.[92]

Not satisfied with the ABCMR result, many officers then sought judicial relief. They contended, citing ***Henderson v. United States***[93] and ***Ricker v. United States***,[94] that the composition error rendered the boards fatally defective and without jurisdiction ***ab initio*** to make promotion determinations. The Army replied, relying in part upon ***Knehans,*** that, by virtue of their nonselections by the reconstituted boards, plaintiffs had failed to show any prejudice and that the lack of reserve membership on the original boards constituted harmless procedural error. The federal district courts having jurisdiction over the plaintiffs' claim agreed with the Army. They held that plaintiffs had failed to carry their burden of showing that the composition error "necessarily [led] to a non-promotion decision."[95] The administrative remedy afforded by the Army was in the courts' view both reasonable and appropriate in light of the circumstances.[96]

On Appeal, however, the Army's arguments achieved mixed results. The Fifth Circuit, in ***Jones v. Alexander***[97] affirmed the district court's ruling and observed that "[t]o find the 1975 board's actions void ***ab initio*** would unduly impinge on the discretion granted the Secretary to make personnel decisions."[98] Although the failure to include reserve officers

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[92] *Id.* at 918.

[93] 175 Ct. Cl. 690 (1966), *cert. denied,* 386 U.S. 1016 (1967).

[94] 396 F.2d 454 (Ct. C1. 1968).

[95] Fuller v. Alexander, 440 F. Supp. 380, 382 (D.D.C. 1977); Whitehead v. Alexander, 439 F. Supp. 910 (D.D.C. 1977); Dilley v. Alexander, 440 F. Supp. 375 (D.D.C. 1977); Jones v. Alexander, No. 77-10-Col (M.D. Ga., May 20, 1977).

[96] *Id.*

[97] 609 F.2d 778 (5th Cir. 1980).

[98] *Id.* at 783. The *court* did not address the issue whether the composition error was harmless because in the court's view harmless error is never an issue unless it is first proved that the Secretary acted arbitrarily or capriciously. *Id.* at 783-84 n.7.

as members of selection boards had violated both statute and regulation, the secretary had broad discretion to fashion a remedy for the affected officers. The Fifth Circuit could not say that the secretary had acted arbitrarily or capriciously when he exercised his authority to reconstitute the original selection boards. To the contrary, the remedy provided by the secretary "was an entirely reasonable attempt to mirror the statute's requirements in a fair manner.[99]

The District of Columbia Circuit reached a different result using the same analytical tools in *Dilley v. Alexander*.[100] In an opinion written by Judge MacKinnon, the court agreed with the Army's position that the boards were not jurisdictionally defective. In contrast to court-martial proceedings, selection boards are nonpenal administrative actions and have no power to promote directly, but only power to recommend. To characterize the board's actions as void *ab initio* would produce an untenable situation for the Army because thousands of officers had received favorable recommendations from the allegedly defective boards and were in fact serving in higher grades. But the court could not condone the Army's violation of a statute intended to prevent discrimination against reserves, Nor could the panel accept the Army's view that its relook boards could conclusively determine that the original boards were not biased against reserves. The relevant statute "prescribes a procedural entitlement that no subsequent factual finding by the Army can diminish.[101] Notwithstanding the relook boards' "misguided charter," the procedural defect could have been repaired had the Army successfully placed the plaintiffs in the same position as they were before the original boards. But the court found that the original setting was not completely reconstituted by the relook boards. During the relook board proceedings, the aggrieved officers were "deprived" of the opportunity to compete for those promotion vacancies which were assigned to officers from the secondary zone by the original boards. The court then directed reinstatement of the affected officers.[102]

A third group of officers affected by the composition error proceeded in the Court of Claims. In *Doyle v. United States*,[103] the court categor-

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[99] *Id.*

[100] 603 F.2d 914 (D.C. Cir. 1979).

[101] *Id.* at 924.

[102] The Fifth Circuit was able to reconcile its decision in Jones v. Alexander with Dilley v. Alexander by pointing out that Jones made no allegation that the Army had failed to properly reconstitute the original boards. *See* 609 F.2d at 781.

Interestingly, on rehearing of its decision in *Dilley*, the D.C. Circuit decided that it had held the original boards voidab *initio* insofar as recommendations relating to the claimants were concerned. The legal authority for the distinction drawn between the two groups was not explained. 627 F.2d at 411.

[103] 699 F.2d 984 (Ct. Cl. 1979).

ically rejected the Army's harmless error theory. Relying upon its decisions in *Ricker v. United States* [104] and *Henderson v. United States*,[105] the court held that the composition error "was not merely technical, formal, or trivial, but serious, substantial, and directly related to the purpose and functioning of selection boards." [106] Therefore, the doctrine of harmless error had no place, The majority of the court distinguished between application of the harmless error doctrine to violations of substantive rights and to violations of fair procedure or process.[107] Because the statute was intended to protect against both conscious and unconscious bias against reserves, a violation of this procedural right could not be found harmless by the Army's "after the fact" determination that the absence of reserve membership had no influence on the results of the original boards. Refusing to accept the Army's contention that the relook boards were "evidence" that the defect in the original boards was harmless procedural error, the court instead viewed the relook boards as an administrative remedy to correct an admitted mistake. On the other hand, since the secretary has the power to correct or remedy a legal error, the relook boards could be relied on by the Army as valid selection board considerations for purposes of pass overs and involuntary release from active duty. The court granted the plaintiffs constructive credit for service between the date of their separations and the date of the ABCMR's action upon the recommendations of the relook boards.[108] Having been either twice passed over or entitled to retirement, no officers were restored to active duty.

Chief Judge Friedman dissented on the grounds that harmless error could be applied to the composition defect. He wrote that:

> The error in the present case is statutory, not constitutional. The selection board proceedings are not adjudicatory or accusatory, but evaluational. The error, although serious, was not so far-reaching and did not involve such a departure from basic precepts of fairness as to dictate against even considering whether it substantially prejudiced the plaintiffs. There is no

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[104] 396 F.2d 454 (Ct. C1.1968).

[105] 175 Ct. Cl. 690 (1966), *cert. denied,* 386 U.S. 1016 (1967).

[106] 599 F.2d at 994.

[107] The Army placed primary reliance upon the Supreme Court's decision in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 471 (1977), where a school board's decision not to rehire a teacher was based in part upon the teacher's exercise of his constitutional right to free speech. The Court held that the teacher was not entitled to remedial action unless there was a direct causal connection between the employment decision and the teacher's exercise of first amendment rights. The Court of Claims in Doyle, 599 F.2d at 995, opined that there are differences between procedural and substantive guarantees such that harmless error might apply to some violations of the latter but ought to apply automatically to the former.

[108] *Id.* at 1004.

> reason why we should refuse to examine whether the original selection boards probably would have reached the same result with respect to the plaintiffs if they had had Reserve members.[109]

The chief differences between the dissent and the majority were both conceptual and fundamental. In Judge Friedman's opinion, the doctrine of harmless error deals with probabilities, not certainties. The majority had rejected the Army's harmless error argument because the Army could not conclusively demonstrate through its relook boards that the composition defect did not cause the original nonselection. Judge Friedman correctly observed that the majority's view would eviscerate the doctrine of harmless error because "[i]t can never be stated with certainty that an error made no difference in the tribunal's decision,"[110]

After the *Jones*, *Dilley*, and *Doyle* trilogy of relook cases, officers in other services began to raise similar challenges to selection board proceedings. In *Stewart u. United States,"'* an Air Force officer claimed that a twenty-five member selection board which included only one reserve officer violated section 266. The Air Force responded that one reserve member was "an appropriate number" within the meaning of the statute because only one reserve officer was available that met the Air Force criteria for membership on selection boards. Characterizing the Air Force criteria as "an informal, unpublished, secret Air Force policy," the Court of Claims found legal error but withheld judgment. Showing unusual deference, the court refrained from automatically voiding the board because the Air Force Board for Correction of Military Records had not yet spoken on the issue. Returning the case to the service for "a chance to correct [its] own errors," the court suggested that the record could be expanded by additional facts and also added that "[q]ualifications and availability of Reserve members for selection boards are, in the first instance at least, best left to the sound discretion of the military."'

Less than two years later, the court exhibited no such reluctance to pass on the service's effort to rectify a composition defect. In *Evenson v. United States*,[113] an Army major claimed that Standby Advisory Boards (STAB) violated regulations prohibiting overlapping membership on consecutive selection boards. Apparently, Evenson's file had been referred for STAB consideration after the Army removed two inaccurate OERS from his file. The STAB members had just considered his file

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[109] *Id.* at 1005.
[110] *Id.* at 1008.
[111] 611 F.2d 1356 (Ct.Cl. 1979).
[112] *Id.* at 1361.
[113] 654 F.2d 68 (Ct.Cl. 1981).

while sitting as a regular selection board. On each consideration, Evenson was passed over. In the Court of Claims, the Army's cause was not helped by an opinion by the Army's Judge Advocate General that consecutive considerations by the same board members denied the officers their right to two good pass overs before separation. The court quickly dismissed the Army's contention that the STABs were not selection boards and only harmless determinations. Instead, the court ruled that the STABs were in the *Doyle* class of full-scale boards which undertake the same exhaustive reevaluation as a regular selection board. Since the defect went to the board's composition, rather than to the contents of the officer's file, the court automatically voided the pass overs. The Army was, in short, afforded no administrative opportunity to address the question of the harmlessness of the procedural error.'[114]

It is fair to state that, the context of challenges to the regularity of the selection boards themselves, a split of authority exists. At least two courts of appeals have concluded that procedural irregularities do not render the boards fatally defective and void *ab initio.* The Court of Claims has, however, rigidly applied its rule that the harmless error doctrine has no place when the defect alleged is a substantial procedural error. If the alleged defect relates to the composition of the selection board, the aggrieved officer can be assured that the Court of Claims will intercede to protect his rights.

IV. THE ROLE OF CAUSATION AND HARMLESS ERROR IN PROMOTION LITIGATION

In the context of challenges to promotion decisions based on defects in the records considered by selection boards, there was, as noted above, a substantial divergence of opinion on the role of harmless error. In the Court of Claims, relief was automatically granted if the complaining officer could demonstrate that the record including defective material did not fairly portray his service. On the other hand, in the District of Columbia Circuit, an officer was not entitled to judicial relief unless it could be shown that the negative material actually caused or contributed to the nonselection decisions. A similar divergence of opinion separated

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[114] See *also* Horn v. United States, 671 F.2d 1328 (Ct. C1.1982) (following *Evenson* and holding that illegal composition of a STAB was so fundamentally defective that its recommendations against promotion should be voided). The rulings in Evenson and *Horn* are particularly noteworthy because prior to those decisions the courts had viewed standby advisory board decisions as mere acts of administrative grace. See, *e.g.*, Knehans v. Alexander, 566 F.2d at 315. It must have come as a surprise to the services when the Court of Claims elevated the STAB to the status of a regular selection board.

the courts on the role of causation and harmless error where plaintiffs alleged that the selection boards themselves were procedurally irregular. Under these circumstances, it is hard to believe that officers separated from the service because of promotion pass overs would not have been attracted by the prospect of favorable judicial action in certain forums to forestall the termination of their careers.

Perhaps as a result of the "crowded parade" of cases brought by officers, the most affected court has adjusted its standard of review.[115] In a series of recent cases, the Court of Claims rejected its automatic voiding rule and adopted a causation standard not unlike the standard first espoused in the *Knehuns* case. In *Hary v. United States*,[116] the court announced a two-part test for challenges based on defects in the selection folder. In order to warrant judicial relief, an officer must show that "there was a material legal error or an injustice in the proceedings of the correction board, or other entity within the military department, which led to the adverse action against him" and that "there is an adequate nexus or link between the error or injustice and [the pass over and nonselection for promotion]."' The plaintiff must not only show administrative error, but also, go further and "either make a showing that the defect substantially affected the decision to separate him or relieve him from active duty, or at least he must set forth enough material to impel the court to direct a further inquiry into the nexus between the error or injustice and the adverse action.[118] On the issue of nexus, the critical inquiry is whether the record before the selection board including defective or erroneous materials still fairly portrayed the officer's career. The nexus question may be further subdivided into two separate inquiries:

> First, does the presence of the defective OERs in plaintiffs record make that record appear worse than it would absent those OERs, *so* that in that sense he was prejudiced by the OERs? Second, was plaintiffs comparative position before the selection boards such that, even assuming that there was some prejudice associated with the defective OERs, it was unlikely that he would have been promoted in any event.? [119]

When evaluating these questions, the court may consider a comparison of the officer's average rating score with and without the defective

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[115] Hary v. United States, 618 F.2d 704, 705 (Ct. C1.1980).

[116] *Id.*

[117] *Id.* at 706. See *also* Gruendyke v. United States, 639 F.2d 745, 747 (Ct. C1.1981).

[118] 618 F.2d at 707. The court also said that the showing is not sufficient when the evidence fails to establish the presence of "factors adversely affecting the ratings which had no business being in the rating process," where there is no clear violation of a specific objective requirement of statute or regulation, or when there is no misstatement of a significant hard fact. *Id.* at 708.

[119] *Id.* at 710.

OERs. The court may also consider the number of points plaintiff was below the cutoff point, the number of officers with the same score and the number of officers between the plaintiff and the cutoff point. In *Hury* even though the plaintiff was the fourth person from the cutoff on one occasion and the eighth person from the cutoff on another, the court concluded that it was quite unlikely he would have failed to be promoted even if the defective reports had not been in his folder.[120]

The Court of Claims expanded on its holding in *Hury* in the case of *Engels v. United States*.[121] On each of the issues the court allocated burdens of proof and indicated when the burden shifts:

> On the former problem—the existence of the error—the burdens of going forward and of persuasion lie squarely with the claimant. . . . *On* the second step—the causal nexus—we have said broadly, that the plaintiff must show nexus in the sense "that the defect substantially affected the decision to separate him or relieve him from active duty, or at least he must set forth enough material to impel the court to direct a further inquiry into the nexus * * *" . . . . What we meant, more precisely, is that plaintiff, tu prevail, must make at least a prima facie showing of a substantial connection between the error and the passover. But the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's prima facie case, there was no substantial nexus or connection. The reasons for this division of end-burden are twofold. First, when nexus is considered, plaintiff has already established the existence of the Government's error; second, the defendant, with its far greater knowledge of the facts, statistics, and operations of the promotion selections process, is in much better position to produce evidence and materials showing the lack of adequate nexus in spite of the claimant's prima facie case. Both grounds combine to place on the defendant the ultimate risk that the court remains unconvinced that the proven error can be deemed harmless, insubstantial in effect, or unimportant. *As* the court said in *Sanders*, "the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place." [122]

After *Hury* and *Engels*, it became clear that consideration of the nexus issue would force the court to examine the plaintiff officer's promotability in detail. Those determinations had, of course, been reserved by the

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[120] *Id.*
[121] 678 F.2d 173 (Ct. C1.1982).
[122] *Id.* at 175–76.

nonreviewability doctrine to the services. Thus, in the absence of deference by the court to the service's administrative determination of nexus and causation, it appeared that at least the Court of Claims would be intimately involved in an area once left to the sole discretion of the military. A review of the courts decisions leads to the conclusion that it is virtually impossible to predict when the court shall choose to defer to the service's judgment. The court's willingness to honor the service's conclusions on causation has been erratic at best. In ***Guy v. United States***,[123] the court rejected the Air Force Chief of Staff's opinion that an Air Force officer had not been harmed by the absence of the favorable efficiency report from his file. Instead, the court observed that the error was not harmless because plaintiff ranked only .5 of a point below the cutoff.'**Apparantly, the nexus question, in the court's view, boiled down to a simple comparison of numbers. That the service's judgment may have been based upon the officer's entire record carried little if any weight. Similarly, in the ***Engels*** case, the court declined to abide by the Air Force's causation findings. Because the Air Force had imposed a heavier burden of proof on the claimant than legally permitted, the court refrained from applying its rule that the correction board's "determination of the issue of nexus will stand if it is supported by substantial evidence and nonarbitrary." [125] In ***Grieg v. United States***,[126] the trial judge had ignored the correction board's finding that the efficiency report in question constituted a "valid appraisal" of the plaintiffs performance of duty during the rating period. Because the trial judge had instead viewed the case as one in which he could undertake his own evaluation of the plaintiffs performance, the Court of Claims held that the trial judge had applied an improper standard of review. The correction board's conclusion that an efficiency report fairly portrayed the officer's service "is entitled to finality unless arbitrary, or capricious, or unsupported by the evidence." [127] Unless the court's review is so limited, an officer could turn the service's evaluation system into a farce by litigating the evaluation and introducing self-serving evidence from friends and family. The court recognized that "lilt is the rater's view that counts in the end, absent legal error." [128] Even if legal error is shown, an officer is not entitled to relief unless there is a "clear nexus between the [defective] OER and plaintiff s serious possibility of promotion.'' [129]

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[123] 608 F.2d 867,874 (Ct.C1.1979).
[124] *Id.*
[125] 678 F.2d at 177.
[126] 640 F.2d 1261 (Ct. Cl. 1981).
[127] *Id.* at 1268.
[128] *Id.* at 1269.
[129] *Id.*

These recent cases reflect a careful retreat from the court's aggressive review of promotion cases in the 1970s. When new standards of review opened the courts to litigation of efficiency reports and selection board proceedings, opportunistic officers were quick to take advantage. But the deluge of cases apparently forced the courts to reassess their position. With liberalized standards of review, they had become "super correction boards" undertaking independent evaluations of promotability. While precluding windfall recoveries, the developing standards of review still permit an inordinate amount of judicial interference in a field once reserved to the absolute discretion of the military.

V. CONCLUSION

The controversy arising out of the courts' assumption of broad authority to review promotions in the military might well be considered a small part of the larger debate over the role of the judiciary in a constitutional society. The framers assigned the duty to command and the duty to make rules for the armed services to the executive and legislative branches. That the task of identifying our country's military leaders should be left to the sound discretion of the coordinate branches of government has long been recognized by the courts. To be sure, the Supreme Court decided long ago in *Reaves v. Ainsworth* [180] that the very security of the nation depended on the integrity of the promotion system. Thus, when the courts, relying upon their constitutional responsibility of judicial review, interfere with promotability or retention determinations, they overstep the line.

Surely, isolated instances of judicial intrusion may have no impact on the services' ability to perform their vital mission. But wholesale subjection of officers' claims to probing and independent review must in the long run impair the military's evaluation of its own personnel. We can only speculate as to how many commanders may have refrained from rendering complete and candid evaluations of their subordinates for fear that they would find themselves defendants in a lawsuit.

Fortunately, the pendulum again appears to be swinging. The courts have apparently recognized that, while they are charged with the duty to consider allegations of legal error, they cannot automatically afford relief for any alleged defect in records or selection board procedures. Those errors may have had no impact whatsoever on the selection decision. To grant relief in such cases would amount to a reversal of the service's determination on retention or promotion of the officer. To ensure that windfalls do not occur, the courts have imposed a burden on the plaintiff to demonstrate some nexus between the error and the promotion deci-

[180] 219 U.S. 296 (1911).

sion. The services are then permitted and required to offer evidence on the causation question.

If there is my area in which the courts should continue their retrograde movement, it should be in the review of the nexus issue. The courts should require the correction boards to make findings on at least two issues. First, if the officer alleges a defect in his or her record, the correction board should, based upon the entire record, make a determination whether the file still fairly portrayed the officer's career. Second, the correction board should make a determination whether it is likely or unlikely that the officer would have been promoted in any event. By an examination of the officer's proximity to a cutoff or a comparison of his or her file in relation to other candidates who were selected and nonselected, the services should be in a position to make a judgment of the claimant's promotability even in the absence of the error. To be sure, only the services can make such fine judgments about the relative merits of each officer's promotability. "herefore, the courts should pay due, if not total, deference to the services' findings on these issues. Only if the services' conclusions are truly arbitrary and capricious should the judiciary intervene. In the event that the services have failed to make the required findings, the court should simply remand with instructions that the findings be made. There are, in short, considerably less intrusive means of assuring the regularity of the promotion process. If the courts do not retreat from the progressive standards of review established in the 1970's, the services shall remain in the trenches while litigious officers continue to storm the battlements in an effort to stave off separation.

BOOK REVIEWS:

THE YAMISHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY*

Richard L. Lael, ***The Yamashita Precedent: War Crimes and Command Responsibility.*** Wilmington, Delaware: Scholarly Resources, Inc., **1982.** Pages: xii, **165.** Price: **$19.95.** Appendix, bibliography, index. Publisher's address: Scholarly Resources, Inc., **104** Green **Hill** Avenue, Wilmington, Delaware **19805.**

Reviewed by Captain Ross W. Bmnstetter.*

The reviewed work explores the subject of commanders' responsibility for war crimes committed by their subordinates. The author examines United States policy in this regard as it developed from **1942** to the present.

When Japan fully committed itself to war with the United States and the United Kingdom, it struck coordinated and devastating blows against the strongest allied positions within its strategic reach. **On** December **7, 1941,** even before the first enemy warplanes appeared in the skies over Pearl Harbor, elements of the Japanese Army, commanded by Lieutenant General Tomoyuki Yamashita, had invaded the Malay peninsula and begun the battle for the British fortress Singapore. Seventy-three days later, Lieutenant General Sir Arthur Percival surrendered the city and his **130,000** troops to Japanese forces numbering less than **60,000. This** victory gained Yamashita an international reputation **as** the "Tiger of Malaya."

Just over three years later, the tide of war had turned against Japan and the battlewise Yamashita was chosen to halt, in the Philippines, the inexorable advance of American military might before Japan could come within reach of American land forces. **So** it was that, when, in January **1945,** American armies under General of the Army Douglas MacArthur stormed ashore on the island of Luzon, they were opposed by desperate

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

"Judge Advocate General's **Corps,** United **States** Army. Currently assigned to the Office of the Staff Judge Advocate, I **Corps** and Fort Lewis, **Washington.** Formerly completed 31st Judge Advocate Graduate **Course,** 1982-83; assigned to Headquarters, 8th U.S. Army, 1980-82; Trial Counsel, Legal Assistance Officer, 1st Cavalry Division, Fort Hood, Texas, 1978-80; Field Artillery Platoon Leader, 4th Infantry Division **(Mechanized),** Fort Carson, Colorado, 1973-75. J.D., Pepperdine University, 1978; B.A., California State University, Fullerton, 1970. Member of the **bar** of the state of **Minneaota.**

Japanese Army and Navy units commanded by General Yamashita. Yamashita had no realistic hope of defeating superior American air, land, and naval power. His goal was to detain American forces in the Phillipines as long as possible, thus delaying concerted attack upon Japan. Yamashita was largely successful in this endeavor, but, during the ensuing months of bitter struggle, Japanese soldiers and naval personnel committed tens of thousands of horrifying atrocities. These crimes were committed by individuals and by units supervised by officers and noncommissioned officers under orders from their military superiors. Many of these brutal acts were perpetrated with deliberation and design over entire provinces; many grew from the hopeless rage of men confronted with their own imminent, inescapeable deaths. There was no credible direct evidence that Yamashita knew, at the time, the terrible cost to noncombatants of his unyielding resistance. In September 1945, after Japan had surrendered, Yamashita, obedient to his emperor, led the remnants of his army down from the mountains of Baguio and gave up his sword to a startled American officer.

Within five weeks, Yamashita had been arraigned before a United States military commission appointed by authority delegated from his adversary, General MacArthur. Three weeks after arraignment, the trial began based upon the novel legal premise that a commander could be held criminally responsible for the war crimes of his subordinates even in the absence of direct evidence of participation, acquiescence, or knowledge of the activities. The prosecution's theory advanced the first day of trial was that the atrocities "were so notorious and flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to [Yamashita]."

The senior defense counsel, however, urged:

> [Yamashita] is not charged with having done something or having failed to do something, but solely with having been something. For the gravamen of the charge is that [he] was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.

With these opening volleys, the legal battle was joined on a field far different from the chivalrous contest of courts-martial. The military commission admitted evidence which would not have been permitted in courts bound by the common law tradition. Such evidence included multiple hearsay and even one American "propaganda" film. When the defense sought civilian review of the proceedings, the general officer who appointed the commission dodged service of process from the Phillipine

Supreme Court. The defense was denied earnestly sought delays and the commission sped toward conclusion of ita hearings with what some insisted was unfair haste. Just over a month after the trial had begun, the commission found General Yamashita guilty and sentenced him to death. The verdict was announced on December 7, 1945, four years after America had been drawn into the maelstrom of war and the Japanese 'Tiger" had been loosed on the Malay peninsula. The verdict of the commission was appealed to the United States Supreme Court, where the decision was upheld by a majority of the Court without reaching the merits of the case. The legal debate engendered by Yamashita's trial and subsequent execution was not lessened by the decision of the Supreme Court and has little diminished over the decades since. Popular books on the subject have decried the trial and its result and heaped acrimonious blame upon General MacArthur.

The unique and valuable contribution of the reviewed work is its balanced portrayal of General MacArthur's actions in light of historical precedent. General MacArthur's actions in directing appointment of a military commission and giving it radical powers are shown by the author to be the logical result of decisions made by other American policy makers. The author asserts that the Yamashita commission was incorrect concerning the Japanese general's responsibility for the war crimes committed by persons under his command, but concludes: "Had [MacArthur] really been 'out to get' Yamashita he could easily have adopted a much more. . .arbitrary set of rules [for the commission] . . . . His power to do so had been affirmed by the Secretary of War, the Joint Chiefs of Staff, the Judge Advocate General, Congress, the President, and the U.S. Supreme Court."

The book provides a thoroughly researched history of the formulation of United States' and Allied' war crimes prosecution policy during and after World War II. There is also a brief review of the "Hostage" and "High Command" trials conducted at Nuremburg.

The trial and acquittal of Captain Ernest Medina on charges relating to war crimes committed by Lieutenant William Calley in Vietnam is the most recent trial examined. The author asserts that the standard applied in the case of Captain Medina was very different from that used in the General Yamashita's case. The theory in *Yamashita* was that the crimes had been so flagrant that they must have been known to Yamashita, and the General was convicted on that basis. In *Medina*, the military judge instructed the panel that actual knowledge on the part of the commander was a prerequisite to criminal culpability; presence without knowledge would not suffice, nor would the commander-subordinate relationship by itself permit the inference that the commander should have known.' Captain Medina was acquitted.

The author concludes that the *Yamashita* standard was too harsh, but that the *Medina* criteria was too lenient. Professor Lael offers the position of the "Hostage" court as an appropriate standard:

> By arguing that a commanding officer normally must be shown to have ordered, aided, or abetted the commission of war crimes they emphasized the pursuit of those officers who knowingly failed to perform their duty rather than those who may merely have held prestigious positions in the army of the defeated foe. However, by also asserting that an officer could be held responsible for crimes committed by his subordinates if no exceptional circumstances existed, which could adequately explain his failure to prevent violations within his area of command or to avert a recurrence, those justices additionally provided leaders incentive to control their men.

The author considers this a desirable modification of the *Yamashita* precedent which, if adopted, would impose a reasonable "should have known" standard and serve notice that command personnel who "choose not to enforce energetically the law of war . . . do so at their own peril."

The book is organized in seven chapters. The first chapter is a brief discussion of the war in the Philippines in 1944 and 1945. Chapters Two and Three trace the development of United States war crimes policy in Europe and the Far East. In Chapters Four and Five, the author turns to General Yamashita, his trial, and appeals. Chapter Six deals with changes in the judicial concept of command responsibility since early 1945. The author's conclusions concerning an appropriate standard of command responsibility are presented in Chapter Seven. The reviewed work offers a brief appendix with excerpts from legal authorities applicable in 1944-45. An excellent bibliography is provided. The index is thorough and useful. Footnotes are meticulous and appear at the bottom of each relevant page.

The author, Richard L. Lael, is a professor at Westminister College.

The Yamashita Precedent: War Crimes and Command Responsibility is a valuable addition to the books and materials concerning prosecution of war crimes. It is a useful reference work for military law libraries and should become a frequently cited text on the subject of command responsibility for war crimes.

QUESTIONING TECHNIQUES AND TACTICS*

Jeffrey L. Kestler, *Questioning Techniques and Tactics.* Colorado Springs, Colorado: McGraw-Hill Book Company, 1982. Pages: xxxi, 416. Price: $65.00. Index, table of cases, lists of cites to authorities, rules and statutes, and codes of professional ethics. Publisher's address: Shepards/McGraw-Hill, P.O. Box 1235, Colorado Springs, Colorado 80901.

Reviewed by Major Peter K. Solecki, USMC. **

There is no dearth of material in the legal literature on the art of examining a witness. Legal periodicals regularly run articles containing tips for the practitioner and continuing legal education seminars on trial techniques rightfully devote much time to the subject. The lawyers who have never seen Irving Younger's film, 'The Ten Commandments of Cross-Examination," can probably be counted on the fingers of one hand. These sources share a number of characteristics. First, most of them are very brief. Second, they tend to be rehashes of the same few concepts. Third, and most important, the topic is usually discussed in broad terms, with emphasis on questionipg styles and methods. It is because of this approach that I describe the subject of such literature as the art of examining a witness. Mr. Kestler's aim is to transform that art into a science.

In the introduction to his book, Mr. Kestler states that his intent was to create a systematic approach to a subject on which nothing really new had been written for decades. He has succeeded. *Questioning Techniques and Tactics* goes beyond the sweeping prohibitions and platitudes that are common to the field, and instead presents not only very specific suggestions to cover almost every conceivable questioning situation, but also the reasons behind the suggestions. Yet, in constructing his questioning system, Mr. Kestler has avoided what is perhaps the greatest potential pitfall of such an effort, unreasonable focus on witness examination as the sole concern affecting the outcome of a case. He has not permitted involvement with his subject to distort his sense of reality. Mr. Kestler knows that questioning technique can never make up for an attorney's failure to be intimately familiar with the facts and law of the case. In fact, he stresses that the object is always to settle a case, if pos-

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

**Instructor, Naval Justice School, Newport, Rhode Island, 1981 to present. Formerly Trial Attorney and Review Officer, Legal Services Center, Marine Corps Air Station, Kaneohe Bay, Hawaii. J.D., Georgetown University Law Center, 1978 B.S., United States Naval Academy, 1972. Member of the bar of the District of Columbia.

sible, without going to trial. That advice will not be as applicable to criminal practice, which is our main concern in the military, but it is indicative of Mr. Kestler's well-balanced approach to his subject. That said, Mr. Kestler obviously recognizes the great impact examination of witnesses has on the trial process, In the military, that importance is reflected in the emphasis trial advocacy teaching has received in our service military justice schools. Who among us, as well, when observing a trial, does not judge the performance of the attorneys in large measure by how well they handle themselves with witnesses? More telling still, who among us does not *so* judge his or her own performance?

For the majority of us who do not possess any special "gift" as a great advocate, Mr. Kestler's book provides great solace. In place of the usual anecdote and dire warning of the doom that awaits if one violates one of the given prohibitions, the book's stress is entirely positive. Mr. Kestler recognizes and applies a well-tested management principle, that of the self-fulfilling prophesy. If one does not believe oneself capable of being a good litigator, then one will not be a good litigator. Mr. Kestler's book, in great detail, provides specific suggestions that can be studied and applied, and will, if followed, make an attorney a better litigator.

The work begins with an introductory chapter on questioning strategy. It contains all the information likely to be found in the typical book or article on questioning, though some of the suggestions do not sound very typical, based as they are on Mr. Kestler's aggressive approach. For the most part, the remainder of the book breaks new ground. Following the introduction are chapters on witness control, psychological aspects of questioning strategy, specific questioning tactics, handling particular witness types, handling witnesses who assert the Fifth Amendment, depositions, handling the opposing counsel, and total witness preparation. The final chapter of the book, written by Catherine Helms, addresses the particular problems and opportunities of female litigators. Its insights and specific hints should prove valuable to both men and women lawyers.

The book was published as part of the Shepards/McGraw Hill Trial Practice Series and is intended to be used as a school text. It is far from the Socratic, case-filled law school text with which we are all familiar. *Questioning Techniques and Tactics* is a very valuable teaching tool. A number of Mr. Kestler's techniques have been incorporated into trial advocacy classes at the Naval Justice School. The book is recommended, however, for any litigator who wishes to improve his or her questioning technique, and that should include all of us. Its smooth style and readability make it easy and quick to digest.

The approach Mr. Kestler takes toward the questioning of witnesses is a hard and aggressive one, Witness examination is rightfully presented as a contest of wills, where the witness has the initial advantage of holding the information which the attorney must elicit. It is a battle to be won or lost, and perhaps a battle crucial to the outcome of the "war" that is the case. Military attorneys will especially be interested to note the number of references in Mr. Kestler's work to military situations and literature, from Sun Tzu to Clausewitz. Positive attitude, drive, and a healthy aggression, backed up by a thorough knowledge of the law and facts, are the keys to success in witness examination, While tactics, strategems, and "tricks" are detailed throughout the book, Mr. Kestler never loses sight of professional and ethical considerations. He liberally cites the codes of professional responsibility. As an adjunct law professor, Mr. Kestler appears to be well aware of the oft downplayed problem in trial advocacy teaching of attempting to delineate between vigorous advocacy and unethical conduct. His stress on professionalism serves his subject well and is indicative of his well-rounded approach.

Most important, of course, is the meat of Mr. Kestler's book, the specific suggestions offered. If current advocacy literature offers tidbits of advice, Mr. Kestler's book is a feast that will satisfy any litigator's appetite. As an example of Mr. Kestler's attention to detail, before discussing the approach to take when eliciting eye-witness testimony, he states some important medical facts about how memories are stored in the brain and later recalled. The right cerebral cortex, which is the repository for visual memories of people and places, is the storehouse of irrational factors such as emotion and creativity. Consequently, the richest information can be retrieved by using a free association technique which allows the witness to re-experience the events. Such thoroughness is evident throughout the book. Judging from the terminology and concepts presented throughout his book, Mr. Kestler obviously did research in the areas of management, psychology, group dynamics, linguistics, and military tactics. He addresses not merely the types of questions that should or should not be asked, but also tone of voice, facial expression, body language, positioning, posturing, and even attitude. Such detail could conceivably lead to a mechanical, unimaginative application of rules. Mr. Kestler recognizes this and counters it with a significant amount of cross-referencing throughout the book, so that the reader never loses sight of the broader governing concepts. Also, the text, while stressing specifics, often presents a large number of alternate approaches that may be taken to reach the same goal. For example, Mr. Kestler offers at least ten different methods of approaching the witness who claims not to be able to recall significant events. He recognizes that various readers will have different limitations and continually offers

stylistic adaptations that can be used as necessary to reflect personal strengths and weaknesses.

Mr. Kestler also never loses sight of the fact that the ability to react to the unexpected is essential to the litigation. While the conventional wisdom is that only on television can one expect Perry Mason-like success, Mr. Kestler states that only by believing that you are capable of such success will you ever obtain it. At the same time, though, he continually reminds the reader that, while preparing for success, one must always have a course of action prepared in the event of a failure, from a lost objection to an unexpected dagger from a witness. Whether you believe in yourself or not, you cannot win them all.

One feature of the book that will be of great assistance to the reader, in addition to the liberal internal cross-references discussed earlier, is the extensive index and list of tables. Mr. Kestler includes lists of cited cases, rules and statutes, codes of professional responsibility, and authorities to facilitate further research. The book also comes equipped for pocket-part additions which are scheduled to be periodically issued.

The care with which Mr. Kestler has integrated the various details of his book is its greatest strength. No matter how vast the number of detailed suggestions, their use to the litigator is limited without a conceptual framework through which they can be mentally organized, recalled, and quickly applied in practice. Mr. Kestler provides the framework as well as the detail. While one can turn to virtually any page and find a specific suggestion about some aspect of questioning, the reader is struck on completing the book by the manner in which the work holds together as an entity rather than being merely a cook-book compendium of "how-to" information. This coherence keeps what could have been merely an academic exercise a work for great practical significance.

Mr. Kestler, a former Marine *Corps* judge advocate, acquired much of his litigation experience in courts-martial. While his book gives many examples from civil litigation, the vast majority of the suggestions are directly relevant to the military judge advocate in criminal practice. Robert Frost said: "A jury consists of twelve persons chosen to decide who has the better lawyer." The principles so well and clearly laid out in Mr. Kestler's book will, if followed, make one a more effective trial attorney, a "better lawyer." The book is strongly recommended as an invaluable source and reference for all litigators.

GUNNING FOR JUSTICE*

Gerry Spence and Anthony Polk, ***Gunning for Justice.*** Garden City, N.Y.: Doubleday & Company, Inc., 1982. Pages: **470.** Price: **$17.95.** Publisher's address: Doubleday & Company, Inc., Garden City, N.Y. 11530.

Reviewed by Captain Stephen J. Kaczynski**

The country lawyer has been the epitome of traditional America—the unpretentious champion of the downtrodden who brings to the courtroom all the simple virtues and plain common sense of the ordinary citizen and who somehow prevails against the sharp-tongued, foppish mouthpiece of the wealthy, the privileged, and the corporate giant. Abe Lincoln was one. Senator Sam Ervin claimed to be one. In ***Gunning for Justice,*** Gerry Spence lays claim to that mantle.

Born, bred, and educated in Wyoming, Gerry Spence portrays his family, his childhood, and his profligate adolescence for the reader. Jarred by the suicide of his mother, Mr. Spence straightened up, finished first in his law school class, then, in the first of many professional contradictions, failed the Wyoming bar examination. He eventually passed and became a genuine small town attorney and was elected part-time county attorney. As his trial prowess developed, Mr. Spence was hired on by major insurance companies to do their bidding. With this career development, Gerry Spence considered himself "the little hometown lawyer who had made it." Made it, that is, until he came upon a hobbled victim who had been denied justice due to the trial abilities of Gerry Spence, yet who harbored no malice against the attorney who had just been doing his job. Thence began a metamorphasis out of which Gerry Spence, country lawyer and advocate for the little man, emerged.

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

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In his book, Mr. Spence recounts many of his most notable cases. In the Silkwood case, he took on the nuclear power industry, and won. In the Bonnie case, he took on the pharmaceutical industry over the manufacture of an untested pregnancy test pill which caused birth defects, and extracted a large settlement. In the Cantrell case, he took on a grand jury, *Newsweek* magazine, "60 Minutes", and wrung from the jury an acquittal of a man who killed another because he could see murder in the other man's eyes. Finally, in the Hopkinson case, Gerry Spence, criminal defense counsel, turned special prosecutor in order to bring to justice a man who had ordered the killing of Spence's dear friend and, from prison, the torture death of the key government witness. It was in that case that Mr. Spence, who described himself as an opponent of capital punishment, in his greatest professional contradiction, delivered perhaps the most eloquent argument for the death penalty ever rendered; that the jury should sentence the defendant to death in their own self-defense and for their own survival.

Attorneys who read this book seeking instruction in the law or the finer points of evidence will be disappointed. Improper questions, improper argument, irrelevant testimony, and injection of personal animosity against opposing counsel abound. Those, however, who want to understand the background, motivations, thought processes, and ideals of a self-styled "hunter" in the courtroom will find ***Gunning for Justice*** enthralling reading.

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